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

586 N.W.2d 452

Filed November 20, 1998. No. S-97-491.

1. **Judgments: Appeal and Error.** In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict, and they will not be set aside on appeal unless they are clearly wrong.
2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
3. **Public Officers and Employees: Pensions.** Retirement benefits paid to government employees are not a gratuity but are deferred compensation.
4. **Jurisdiction: States: Courts.** The states have concurrent jurisdiction with federal courts to entertain actions under 42 U.S.C. § 1983 (1994).
5. **Contracts: Statutes.** Generally, statutes in existence at the time of execution of a contract become part of the contract as if set forth therein.
6. **Proof: Trial: Appeal and Error.** All matters expressly or by necessary implication adjudicated by the Nebraska Supreme Court become the law of the case on remand, and they will not be considered again unless it is shown that the facts presented at the trial on remand are materially and substantially different from the facts presented in the first instance.
7. **Constitutional Law: Public Officers and Employees: Pensions: Legislature.** A public employee's constitutionally protected right to his or her pension plan vests upon the employee's acceptance and commencement of employment, subject to reasonable or equitable changes by the Legislature.
8. **Contracts: Pensions: Words and Phrases.** "Vesting" refers to a contractual right to and interest in a pension that may be upheld at law.
9. **Constitutional Law: Contracts: Proof.** Pursuant to the Contract Clause of the U.S. Constitution, not every change constitutes an impairment. The change must take something away and not work to the parties' benefit. Absent such a showing there is no proof of any impairment.
10. **Presumptions.** Everyone is presumed to know the law.
11. **Constitutional Law: Due Process.** Substantive due process requires a determination whether a right in which a plaintiff has a legitimate property interest is at issue and, if it is, whether that right was unconstitutionally taken from the plaintiff.
12. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
13. **Equal Protection.** A finding of an equal protection violation cannot be founded upon theoretical possibilities.
14. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the plaintiff has demonstrated that he or she was treated differently than others similarly situated. Absent this threshold showing, the plaintiff lacks a viable equal protection claim.

15. **Equal Protection: Statutes.** When a fundamental right or suspect classification is not implicated in an equal protection challenge, a legislative act is viewed as a valid exercise of state power if the act is rationally related to a legitimate governmental purpose.
16. **Constitutional Law: Equal Protection.** The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.

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

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.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

The plaintiffs, Dennis R. Bauers, Thomas L. Scharbach, Jerry Peterson, James E. Johnson, David C. Bowlin, and Roger L. Carmichael, commenced this action against the defendant, City of Lincoln (City), claiming variously that the City improperly offset payments from a disability pension plan by amounts paid as a result of workers' compensation awards, and seeking lump-sum returns of their pension contributions.

This is the second appearance of this case in this court. We examined the timeliness of the plaintiffs' filing of their claims against the City in *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994) (*Bauers I*). In *Bauers I*, we held that the plaintiffs were barred from asserting their claims for the return of their entire contributions under Neb. Rev. Stat. § 15-840 (Reissue 1991) but that certain claims under 42 U.S.C. § 1983 (1994) were viable. In *Bauers I*, we remanded the cause to the district court to allow the plaintiffs to present the trial court with evidence pertaining to the merits of their claims filed pursuant to 42 U.S.C. § 1983. After remand, the trial court found that the plaintiffs had failed to meet their burden of proof of alleged constitutional violations committed by the City, and the court dismissed the plaintiffs' claims. We affirm.

## FACTS

A detailed statement of facts pertaining to each of the plaintiffs individually is set forth in *Bauers I*. Briefly summarized, the plaintiffs were employed as firefighters working for the City for some portion of the period 1966 through 1989. All were required during their employment to contribute approximately 7 percent of their gross pay from each pay period to a pension fund administered by the City. Each of the plaintiffs retired from his employment as a firefighter before the age of 55 because of injury or a physical disability which reasonably prevented continued performance as a firefighter. The plaintiffs were placed on the City's roll of firefighters receiving disability pensions. Johnson, Peterson, Bowlin, and Carmichael also received workers' compensation benefits for the injuries which led to their disability retirement. None of the plaintiffs was offered, in lieu of continuing disability pension payments, a lump-sum return of his wages contributed to the pension fund with accrued interest.

The plaintiffs filed administrative claims with the City on October 17, 1990. Bauers and Scharbach demanded the return of their wage contributions to the City's pension fund with accrued interest. Johnson, Peterson, Bowlin, and Carmichael likewise sought the return of their pension fund contributions with interest, and they also sought reimbursement for the amounts withheld or offset from their respective disability pension payments as a result of workers' compensation awards which each had received.

The City denied all of the relief requested in the plaintiffs' administrative claims. Thereafter, each of the plaintiffs filed an action in the district court, seeking the relief specified above on the basis of § 15-840 and 42 U.S.C. § 1983. Section 15-840 provides generally:

> 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. . . . 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 . . . .

The trial court dismissed the plaintiffs' claims, holding that they were filed beyond the applicable statutes of limitation. On appeal, we found in *Bauers I* that although the plaintiffs' claims under § 15-840 for the return of their entire employee contributions were time barred, the plaintiffs' claims asserted under 42 U.S.C. § 1983 were not time barred, and we remanded the matter to the trial court for trial on these claims only.

The case was tried to the district court on November 20, 1996. At trial, each of the plaintiffs testified that the City never gave him a written contract containing all of the terms of employment, including a description of pension options. The plaintiffs admitted that when they were placed on the roll of pensioned disabled firefighters, they belonged to a union of firefighter employees. On behalf of its members, the union's representatives bargained with the City to determine specific terms of the firefighters' employment contract. John Cripe, an employee of the City's personnel department who served as the City's pension administrator, testified that the only written contract relative to these proceedings is the one which the City negotiated with the firefighters' union. Cripe testified that the City did not execute employment contracts with individual firefighters. Cripe also testified that the pension options available to the plaintiffs and other firefighters which were defined by Nebraska statutes and Lincoln municipal ordinances were not expressly described in the contract between the City and the firefighters' union.

The trial evidence showed that disability pension benefits were paid to the plaintiffs by the City from accounts designated "Fund 76" and "Fund 77." These accounts were segregated from all of the City's other accounts. Funds 76 and 77 were composed of mandatory employee contributions; annual contributions by the City, the amount of which was determined by an independent actuary; and accrued interest, all of which was continuously invested and reinvested for further growth. Cripe testified that both disability pensions and regular retirement pensions are paid from these accounts.

Bauers and Scharbach did not receive workers' compensation benefits for the injuries or ailments which culminated in their early retirement. Johnson, Peterson, Bowlin, and Carmichael received workers' compensation payments pursuant to Neb. Rev. Stat. § 48-101 et seq. (Reissue 1988) in addition to the disability pension payments. An amount equivalent to some or all of the workers' compensation payments received by Johnson, Peterson, Bowlin, and Carmichael, respectively, was offset from the disability pension payments which each received.

Workers' compensation benefits were paid by the City to Johnson, Peterson, Bowlin, and Carmichael from Fund 88, a segregated, separately maintained account within the City's total operating budget set aside exclusively for such payments. The City was, for purposes of paying workers' compensation benefits, self-insured. Fund 88 comprised taxes and other monies derived from the City's general budget. Cripe testified at trial that funds from the pension and workers' compensation funds were not commingled.

At trial, the parties stipulated that Neb. Rev. Stat. § 15-1001 et seq. (Reissue 1983) governed the terms and conditions of the plaintiffs' pensions and provided terms and conditions for pensions and disability benefits for firefighters and police officers. Many of these statutes were repealed in 1987. The parties stipulated that amendments to the Lincoln Municipal Code effectively replaced those statutes governing pensions and disability benefits for Lincoln firefighters and police officers and that these municipal ordinances took effect on May 11, 1987. The specific terms of the statutes and ordinances at issue and as relevant are set forth in our analysis of them.

The plaintiffs claimed at trial that the City's failure to offer each of them all of the pension options offered to retiring firefighters who were not disabled, including the option of receiving their contributions to the pension fund in a lump sum with accrued interest, violated the plaintiffs' constitutional rights to due process and equal protection. Johnson, Peterson, Bowlin, and Carmichael also claimed that the City effected an unconstitutional taking when the City offset their disability pension payments by amounts which the City had paid them as workers' compensation, as well as impairing their right to contract.

In a 14-page order filed March 3, 1997, in each of the plaintiffs' cases, the trial court denied the plaintiffs' claims generally on the basis of failure of proof. The plaintiffs appeal.

## ASSIGNMENTS OF ERROR

Johnson, Peterson, Bowlin, and Carmichael assign as error the trial court's finding that they suffered no unconstitutional due process and contract violations in the City's offset of pension benefits by the amount of workers' compensation payments. The plaintiffs all claim that the trial court erred in failing to find unconstitutional due process and equal protection violations in the City's failure to offer the plaintiffs the opportunity to withdraw their pension fund contributions in a lump sum with accrued interest.

## STANDARD OF REVIEW

In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict, and they will not be set aside on appeal unless they are clearly wrong. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision of the trial court. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). When passing upon the constitutionality of a statute, an appellate court begins with the presumption of validity, and the burden of demonstrating a constitutional defect rests with the challenger. *Id.*

## ANALYSIS

Nebraska law recognizes that pensions received by government employees are a form of deferred compensation. *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). " 'For the civil service employees, the price of the pension plan, whether specifically discussed or not, is part of the total wage package negotiated when salary raises are determined. Pensions are bargained as an integral part of the wage-and-fringe benefit calculus.' " *Id.* at 898, 320 N.W.2d at 914, citing with approval *Kleinfeldt v. New York City Emp. Ret. Sys.*, 73 Misc. 2d 310, 341 N.Y.S.2d 784 (1973). The trial court

was a proper forum for the plaintiffs to present their constitutional claims regarding their pensions, pursuant to 42 U.S.C. § 1983, for the states have concurrent jurisdiction with the federal courts to entertain such actions. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

At trial, the parties stipulated to the introduction of photocopies of §§ 15-1006, 15-1007.03 through 15-1009, and 15-1013.02. These statutes were part of a collection of Nebraska statutes pertaining to pensions for firefighters and police officers, many of which were in effect from at least 1975 until 1987, when they were repealed. The source notation included at the end of the text of each of these statutes suggests that many of these statutes were amended at least once between 1975 and 1987. However, the parties submitted no evidence of versions of these statutes which predated that set forth in the copies accepted into evidence at trial.

Section 15-1006, a copy of which was in evidence, generally provided that in case of total and permanent disability, a firefighter's regular salary was discontinued and the firefighter was instead paid a pension which was computed using a base benefit rate determined as a percentage ranging from 15 to 50 percent of the firefighter's salary prior to his or her disability.

Section 15-1008, a copy of which was in evidence, stated that benefits which a disabled firefighter was entitled to receive according to Nebraska's then Workmen's Compensation Act, § 48-101 et seq., would be paid in full to him or her, "but all amounts paid by the city or its insurer under said act . . . shall be considered as payments on account of such salary or pension and shall be credited thereon." § 15-1008.

With respect to firefighters who retired voluntarily or involuntarily for reasons other than death or disability, § 15-1013.02, which was also in evidence, provided the schedule of pension benefit options as follows: (1) A firefighter with less than 10 years of service would receive the lump-sum return of his or her accumulated contributions with regular interest to the date of termination. (2) If the firefighter had 10 years or more of service but had not yet reached the age of 50, he or she could opt to take (a) a deferred annuity to commence at age 55 on a regular basis or at age 50 on an actuarially equivalent basis or (b)

a lump-sum return of contributions and accrued interest, plus a reduced paid-up deferred annuity equal to the amount of the deferred annuity which would otherwise commence at age 55. The reduced annuity received by the firefighter with this option would be reduced by an amount equivalent to the lump-sum return of employee contributions and accrued interest. (3) If a firefighter had 10 years or more of service and was at least 50 years old, he or she could opt to receive a deferred annuity to commence at age 55 on a regular basis. If a firefighter selected this option, he or she was not eligible to receive a return of employee contributions and interest in a lump sum separately from the annuity.

At trial, the parties also stipulated to the introduction of selected portions of the Lincoln Municipal Code, including Lincoln Mun. Code §§ 2.64.010 through 2.64.013 and 2.64.018 through 2.64.026. These ordinances became effective on May 11, 1987. There is no dispute that the statutes and ordinances relative to the issues in this case are substantially alike.

Statutes which are in effect at the time a contract is made are as much a part of the contract as if they were set forth therein. *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986); *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984). In *Bauers I*, the firefighters agreed, and this court found, that the Lincoln ordinances in evidence were substantially the same as the state statutes and that any difference between the statutes and the ordinances was immaterial to the resolution of this case. That finding governs this appeal, for it is now the law of the case, which will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented in the first instance, a showing which has not been made in the case sub judice. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

*Workers' Compensation Offset: Interference With Contractual Rights Claim.*

On appeal, Johnson, Peterson, Bowlin, and Carmichael claim that their constitutionally protected contractual rights have been abridged because the City offset their disability pension benefit

payments by the amount of some or all of the workers' compensation benefits which each received. A public employee's constitutionally protected right to his or her pension as an incident of employment vests upon the employee's acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature. *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995). "'"Vesting in a legal sense . . . refers to a contractual right to and interest in a pension that may be upheld at law."'" *Id.* at 967, 531 N.W.2d at 550. U.S. Const. art. I, § 10, provides, inter alia, that the state may not pass laws impairing the obligation of contracts. Nebraska public employees have reasonable expectations with regard to their pension rights which are protected by the law of contracts, since public pensions are considered as deferred compensation. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

Our analysis of this contract-impairment and offset claim necessitates a three-pronged inquiry: first, whether there has, in fact, been an impairment of the plaintiffs' contracts; second, if an impairment does exist, whether the City's actions *substantially* impaired the contractual relationship; and third, if so, whether the impairment caused by the City is nonetheless a permissible, legitimate exercise of the City's sovereign powers. See *Calabro v. City of Omaha, supra*. See, also, *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). As discussed below, we agree with the trial court that there was no impairment of the plaintiffs' contracts regarding the offset of pension payments by workers' compensation benefits.

In *Halpin*, a retired member of the Nebraska State Patrol challenged a revised calculation formula used to determine pension income, claiming that the new formula wrongfully impaired and decreased his vested contractual pension rights. This court found that the calculation formula used when Halpin's pension rights vested was the subject of express oral promises to Halpin and other employees and that the formula had been used by the Nebraska State Patrol on a longstanding basis. On the facts in *Halpin*, we found that the revised calculation formula which decreased the employees' pension benefits

substantially impaired their contractual rights and that the new calculation was therefore inapplicable to them. See, also, *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990).

Essential elements common to *Halpin* and *Omer* are evidence supporting the employees' claims that a valuable benefit was promised to them by their employer, the employees' reliance on that promise, that the benefit was subsequently taken from the employees as a result of a unilateral employer decision, and that the employees were afforded no other benefit to replace that which was taken from them. Without such proof, it is doubtful that a claim of unconstitutional contract impairment could succeed. A contractual right cannot be founded solely on an employee's hope or expectation, as opposed to consideration which truly exists and which has been offered by the employer to the employee. "[W]hat is protected is the settled or reasonable expectation of the employee, not the contract as might be written by the courts." *Miller v. City of Omaha*, 253 Neb. 798, 808, 573 N.W.2d 121, 128 (1998).

*Miller* was decided after the case at bar was tried and decided in the district court. Factually, *Miller* addressed contract claims much like those raised by Johnson, Peterson, Bowlin, and Carmichael in the case at bar. Gary E. Miller, a former city government employee, sought declaratory judgment to determine to what extent, if any, disability pension benefits paid to him could be offset by workers' compensation benefits and Social Security he received which were related to the same injury which resulted in his disability. In *Miller*, there was evidence that city ordinances pertaining to pension benefits changed after Miller's contractual pension rights vested in 1964. This court held that the mere occurrence of change did not determine whether Miller's constitutional contractual rights were impaired, for

> [t]he Contract Clause of the federal Constitution does not prohibit changes in the contract. . . . Rather, *the issue is whether Miller has been made worse off* by the 1972 ordinance, and it is Miller's burden to prove that his situation is worse than that which existed when his rights were created.

(Emphasis supplied.) 253 Neb. at 807, 573 N.W.2d at 128, relying on *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41

(1986). See *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

In *Miller, supra*, we held that amendments to city ordinances passed after Miller's pension rights vested effected a change in Miller's pension benefits, but that the change did not impair Miller's rights. We nevertheless reversed the trial court's summary judgment order favoring the employer in order to allow Miller to prove his claim of reliance upon his employer's promises and practices, including the effect, if any, of the employer's commingling of workers' compensation and pension benefit funds, a practice which was disapproved of in *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980) (holding that funds for payment of pension and workers' compensation benefits should not be commingled and that no employee contribution may be used to fund workers' compensation benefits). In *Miller*, we emphasized that the holding in *Novotny* was limited to determining that workers could not be compelled to pay for their own workers' compensation benefits, nor could other benefits be considered in paying workers' compensation benefits.

With the principles of *Novotny*, *Caruso*, *Calabro*, and *Miller* in mind, we turn to the impairment-of-contract and offset claim asserted by Johnson, Peterson, Bowlin, and Carmichael in the case at bar. Each received workers' compensation benefits for the job-related injuries which ultimately rendered him permanently disabled, and amounts were set off from his disability pension payments in an amount equivalent to some or all of the workers' compensation payments which he received. For the sake of completeness, we note that it is uncontroverted that Fund 88, the account maintained by the City from which workers' compensation payments were made to Johnson, Peterson, Bowlin, and Carmichael, contained no contributions by the plaintiffs or City employees, consistent with *Novotny, supra*.

The record shows that Johnson commenced employment with the City in 1975, Peterson in 1977, Carmichael in 1978, and Bowlin in 1981. The pension rights of Johnson, Peterson, Bowlin, and Carmichael became vested on the day upon which each accepted his employment with the City and commenced work. See *Calabro, supra*. The dimensions of the rights vested

in each of the plaintiffs were determined by the pension plan as it existed at the time each accepted and commenced his employment. See *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

As noted above, at trial the parties stipulated to the introduction into evidence of §§ 15-1006, 15-1007.03 through 15-1009, and 15-1013.02, all of which were later repealed, and portions of the Lincoln Municipal Code which replaced these state statutes for purposes of the issues in the instant case. The statutes and code were received in evidence.

Section 15-1008 specifically stated that disability pension payments received by a firefighter may be reduced by an amount representing a credit for workers' compensation payments received by the firefighter. Indeed, according to § 15-1008:

> 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, as herein provided, and in addition benefits under the Workmen's Compensation Act.* All Workmen's Compensation Act benefits shall be payable in full to such firefighter or police officer or his or her dependents as provided in said act, but *all amounts paid by the city or its insurer under said act to any disabled firefighter or police officer entitled to receive a salary or pension during such disability . . . shall be considered as payments on account of such salary or pension and shall be credited thereon.* The remaining balance of such pension or salary, if any, shall be payable as otherwise provided by this act.

(Emphasis supplied.) Lincoln Mun. Code § 2.64.018, which became effective May 11, 1987, contains equivalent provisions.

It has been observed: "[N]ot every change constitutes an impairment under the federal Constitution. The change must *take something away* and not work to the parties' benefit. . . . Absent such a showing, there is no proof of any 'impairment.'" (Emphasis in original.) *Caruso v. City of Omaha*, 222 Neb. 257, 260, 383 N.W.2d 41, 44 (1986). At trial and on appeal, the plaintiffs did not claim that they received less than the full measure of workers' compensation benefits awarded to them. Johnson, Peterson, Bowlin, and Carmichael offered no policy,

ordinance, statute, or other evidence which contradicted the terms of § 15-1008. Although the terms of § 15-1008 were in place at the time of initial employment, each testified that he was generally unaware of the setoff provisions in § 15-1008 and Lincoln Mun. Code § 2.64.018 until the credits were actually applied against his disability pension payments. The plaintiffs introduced neither evidence that applicable laws or City policies were amended nor evidence that such were amended to the plaintiffs' detriment after each of the plaintiffs' contractual rights had vested.

The gravamen of the impairment-of-contract and offset claim asserted by Johnson, Peterson, Bowlin, and Carmichael is that they were simply unaware that when each firefighter's contractual pension rights vested, Nebraska statutes defining and governing those rights provided that "no firefighter or police officer shall be entitled during any period of disability to receive in full both his or her pension or salary, as herein provided, and in addition benefits under the Workmen's Compensation Act." § 15-1008. Everyone is presumed to know the law. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244 (1994); *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). We cannot agree with the plaintiffs that their lack of knowledge of these state statutes and the comparable city ordinances which replaced them amounted to an impairment by the City of the plaintiffs' contractual rights.

We observe that at the time that Johnson, Peterson, Bowlin, and Carmichael applied for their respective disability pensions and workers' compensation benefits, each was a member of the firefighters union which negotiated with the City on behalf of the firefighters regarding the terms, conditions, and benefits of the firefighters' employment. Johnson, Peterson, and Carmichael were also individually represented by counsel. Further, in the execution of documents pursuant to his workers' compensation award, Carmichael expressly acknowledged that he knew that his pension benefits could be subject to a setoff for the workers' compensation benefits which he received.

Johnson, Peterson, Bowlin, and Carmichael failed to present the trial court with evidence that the City unconstitutionally impaired their vested pension rights by crediting the amounts of

the workers' compensation benefits against the disability pension benefits received by each of the plaintiffs. No change occurred in city or state policies, practices, or laws which diminished the contractual pension benefits of Johnson, Peterson, Bowlin, and Carmichael.

The plaintiffs failed to meet their evidentiary burden to prove that the City unconstitutionally impaired their rights to contract. See *Caruso, supra*. Therefore, we affirm the trial court's order dismissing the constitutional impairment-of-contract and offset claim asserted by Johnson, Peterson, Bowlin, and Carmichael.

*Lump-Sum Return of Contributions: Due Process Claims.*

The plaintiffs allege that the City wrongly denied them due process rights to which they were entitled by virtue of the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, § 3. The firefighters claim that the City, by failing to offer disabled firefighters the option of receiving their employee contributions in a lump sum with accrued interest and reduced annuity pension benefits, unconstitutionally deprived the plaintiffs of rights to which they were entitled.

On appeal, the plaintiffs do not distinguish whether the due process rights which they claim were denied them are procedural or substantive in nature. Substantive due process requires a determination whether a right in which the plaintiff has a legitimate property interest is at issue and, if it is, whether that right was unconstitutionally taken from the plaintiff. See, e.g., *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41 (1986). Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996), citing with approval *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). See, also, *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998).

The trial court's order dismissing the plaintiffs' due process claims analyzed them as a substantive due process complaint, a characterization with which we agree. It is beyond dispute that

the plaintiffs possessed a vested property interest in receiving pension funds from the City. See, *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998); *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995). The issue in the trial court, and on appeal, is whether the plaintiffs proved that the City unconstitutionally deprived them of those vested rights, thereby denying them the beneficial ownership and exercise of those rights. Like the constitutional impairment-of-contract claim analyzed above, claims of unconstitutional due process deprivation cannot succeed in the absence of trial evidence showing that the City improperly took the plaintiffs' vested rights away from them. See *Caruso, supra.*

Sections 15-1006, 15-1007.03 through 15-1009, and 15-1013.02 and the Lincoln municipal ordinances which replaced them clearly and consistently provided that firefighters receiving disability pensions were not within the category of firefighters eligible to receive lump-sum returns of their employee contributions to the pension fund. Simply, the plaintiffs, while recipients of disability pensions, never possessed the right of a lump-sum return of contributions made to the pension fund. It was therefore impossible for the City to take away a right which the plaintiffs did not possess. This fact alone defeats the plaintiffs' due process claims. See *Caruso, supra.*

We further observe that the trial court correctly noted that without exception, the plaintiffs received disability pension benefits from the City which far exceeded each of their contributions to the pension fund plus accrued interest on those contributions. The trial court found that Bauers contributed $38,782.13 in employee contributions and accrued interest; by the time of trial, he had received disability pension benefits of approximately $129,752.25. Scharbach's total pension contribution plus accrued interest totaled $45,014.93 at the time he was retired on disability status in 1988. He died prior to trial, and his widow continued to collect his pension benefits which, at the time of trial, cumulatively totaled approximately $95,218.02. Peterson contributed $10,855.17 in wage deductions and accrued interest, and he had received $124,775 in disability benefits by the time of trial. Johnson's wage contributions totaled $31,366.86, and he had received $115,496.40 in

benefits before the trial. Bowlin worked for the City for 13 months before he was placed on permanent disability status, and he had contributed $5,678.49 to the pension fund. He had received monthly disability benefits which, at the time of trial, amounted to roughly $127,046.04 and which continued to be paid to him monthly. Carmichael contributed $12,761 in wage deductions to the City employee pension before he was placed on disability status. By the time of trial, he had received $125,092.13. We also note that the record shows that each of the plaintiffs obtained other employment soon after he was declared permanently disabled from firefighting and that all were continuously engaged in full-time employment after they ceased employment as firefighters for the City.

Cripe, the City's pension plan administrator, testified that disabled firefighters received their disability pensions every month from the date of the declaration of disability until the pensioner's death, regardless of the amount of the firefighter's contribution to the pension fund during his or her active employment. According to Cripe, if a disabled firefighter died before he or she had received disability pension benefits in an amount at least equal to the firefighter's wage contributions plus accrued interest, the City would return to the firefighter's estate all unpaid employee contributions, plus accrued interest, in a lump-sum payment. Cripe also testified that surviving spouses of deceased disabled firefighters receive the firefighter's disability pension benefits until the spouse dies and that dependent children are entitled to receive their deceased parent's disability pension benefits until they reach the age of 19.

We are unpersuaded by the plaintiffs' claims that notwithstanding the statutes and ordinances which they admit defined their disability pension benefits, they were nonetheless unconstitutionally deprived of a property right by being unable to exercise the *option* to receive their employee contributions in a lump sum with accrued interest and a reduced pension benefit. None of the plaintiffs testified that he would have exercised this option had it been offered to him or that it would have yielded him greater or more meaningful pension benefits. We agree with the trial court that the plaintiffs in the instant case produced no evidence which showed that the City unconstitution-

ally deprived them of any vested right. Constitutional deprivations are not founded upon speculation, or mere possibilities. *Walker v. Nelson*, 863 F. Supp. 1059 (D. Neb. 1994), *aff'd* 70 F.3d 1276 (8th Cir. 1995). As we stated in *Caruso v. City of Omaha*, 222 Neb. 257, 261, 383 N.W.2d 41, 44 (1986):

> While *Halpin* [*v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982),] stands for the proposition that pensions are not gratuities and are matters of contract, it does not stand for the proposition that a public employee is entitled to the best pension the public employee might desire.

We affirm the trial court's order dismissing the plaintiffs' due process claims.

*Lump-Sum Return of Contributions: Equal Protection Claims.*

The plaintiffs' final claim on appeal is that the City wrongfully denied them equal protection of laws in violation of U.S. Const. amend. XIV by the City's failure to offer the plaintiffs the option to receive a lump-sum return of their wage contributions to the pension fund, plus accrued interest. The plaintiffs do not allege a violation of Neb. Const. art. III, § 18. See, e.g., *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992). Thus, we limit ourselves to the plaintiffs' federal equal protection claim.

The initial inquiry in an equal protection analysis focuses on whether the plaintiff has demonstrated that he or she was treated differently than others similarly situated. If that showing is not made, there is no viable equal protection claim. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

The plaintiffs claim in essence that they were unequally treated because certain retiring nondisabled firefighters could receive a lump-sum return of contributions, whereas the plaintiffs, who are disabled firefighters, could not. A review of the statutes and ordinances shows that as to disabled firefighters, none could receive a lump-sum payout, and as to nondisabled retiring firefighters, certain categories of nondisabled retiring firefighters could receive a lump-sum payment while other nondisabled retiring firefighters could not receive a lump-sum

payment. See §§ 15-1006 and 15-1013.02. In essence, the plaintiffs, who are disabled firefighters, claim they were similarly situated but treated differently than certain nondisabled firefighters who were eligible to receive a lump-sum payment. The trial court found it "questionable" whether the plaintiffs were similarly situated to other firefighters generally, and to the category of nondisabled firefighters who were eligible to receive a lump-sum payment in particular. We agree with the trial court's observation that disabled and nondisabled firefighters are not similarly situated. See *Atkins, supra.*

To the extent that the plaintiffs could be said arguendo to be similarly situated to nondisabled retiring firefighters, there is a rational reason demonstrated by the record in this case for treating disabled and nondisabled firefighters differently, and, therefore, the failure to offer disabled firefighters a lump-sum payout does not offend the equal protection clause.

It is well settled that when a fundamental right or suspect classification is not implicated in an equal protection challenge, a legislative act is viewed as a valid exercise of state power if the act is rationally related to a legitimate governmental purpose. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). See, also, *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41 (1986), citing *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979). The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, and it " 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [government's] objective.' " *Atkins*, 250 Neb. at 321, 549 N.W.2d at 163, quoting *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

A review of the record, including but not limited to Cripe's testimony, shows that the pension contributions from the disabled and nondisabled firefighters were in effect treated separately for accounting purposes because the risk to the City of long-term pension payments to a disabled firefighter was greater than the risk of long-term payments to a nondisabled firefighter. The evidence shows that there is a higher risk to the City of performing the obligation to make pension payments which will

exceed employee contributions as to the pool of disabled firefighters than there is as to the pool of nondisabled retiring firefighters. There is a rational basis to allow the option for a lump-sum return of the contributions of a retiring nondisabled firefighter exiting the pension system and to not allow an option for lump-sum return of employee contributions to a firefighter who is retiring due to disability and who will typically be receiving pension payments for a length of time exceeding the term of active employment and in an amount exceeding the amount of his or her contributions to the pension fund. The trial evidence proved that there was a rational relationship that supported the City's differing treatment of the categories of disabled and nondisabled pensioned firefighters, and the plaintiffs' evidence did not overcome the presumption of the validity of the statutes and ordinances in question. See *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

We also agree with the trial court's finding that no equal protection claim is implied or proved by the fact that since 1992, the City now has the technological and actuarial means to provide a retiring firefighter with an analysis projecting the total amount of benefits which he or she may receive from the City depending on the pension options available to the firefighter. Relying on *Walker v. Nelson*, 863 F. Supp. 1059 (D. Neb. 1994), and *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41 (1986), the trial court found this claim meritless, for "[t]o hold otherwise would require the Court to find an equal protection violation every time an advancement in technology is adopted which improves the situation of current employees over that which past employees enjoyed." The availability of the more sophisticated reports does not alter the underlying entitlement to the vested rights reflected in the reports. This claim was without merit, and the trial court properly so found. We affirm the trial court's order dismissing the plaintiffs' equal protection claims.

## CONCLUSION

The trial court's order dismissing the plaintiffs' constitutional claims against the City for impairment-of-contract, due process, and equal protection violations is affirmed in all respects.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. ASA T. CARTER, APPELLANT.

586 N.W.2d 818

Filed November 20, 1998. No. S-97-1148.

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. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Trial: Rules of Evidence: Expert Witnesses.** A trial court faced with an offer of DNA evidence must decide preliminarily, outside the presence of the jury, on the basis of the evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields; (2) whether the DNA testing used in the case under consideration is generally accepted by the relevant scientific communities; (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly; (4) whether the tests conducted properly followed the method; (5) whether the DNA analysis evidence is more probative than prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995); and (6) whether statistical probability evidence interpreting the analysis results is more probative than prejudicial.
4. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.
5. **Evidence.** Preliminary questions concerning the admissibility of evidence shall be determined by the judge.
6. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 1995), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence of appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, sufficient to support a finding that the matter in question is what its proponent claims.
7. **Blood, Breath, and Urine Tests: Evidence: Proof.** The authenticity of a body fluid sample must be unequivocally established before its admission into evidence, as an elementary safeguard of a defendant's rights.
8. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
9. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
10. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
11. **Rules of Evidence: Witnesses.** Pursuant to Neb. Evid. R. 804(1)(e), Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1995), unavailability as a witness includes situations in which the declarant is absent from the hearing and the proponent of his or her state-

ment has been unable to procure his or her attendance by process or other reasonable means.

12. **Trial: Witnesses: Proof.** It is within the discretion of the trial court to determine whether the unavailability of a witness has been shown.
13. **Rules of Evidence: Hearsay: Witnesses: Proof.** The proponent of a hearsay statement seeking admission under Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1995), bears the burden of showing that the witness is unavailable and that a diligent, good faith effort was made to locate and produce the declarant.
14. **Constitutional Law: Rules of Evidence: Hearsay.** When a hearsay declarant is unavailable to testify at trial, the declarant's out-of-court statements may be admitted without violating the Confrontation Clause, so long as those statements bear sufficient indicia of reliability.
15. **Constitutional Law: Hearsay: Presumptions.** No independent inquiry into reliability is required under the Confrontation Clause when an out-of-court statement falls within a firmly rooted hearsay exception. Such exceptions are presumptively reliable and trustworthy, and inferring reliability of hearsay statements which fall within them will not violate a defendant's confrontation rights.
16. **Constitutional Law: Rules of Evidence: Hearsay.** Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995), is a firmly rooted hearsay exception, and testimony properly admitted thereunder does not violate the Confrontation Clause.
17. **Rules of Evidence: Witnesses: Testimony: Hearsay.** Subject to the provisions of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), testimony given as a witness at another hearing of the same or a different proceeding, against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered, is not excluded by the hearsay rule if the declarant is unavailable as a witness, pursuant to Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1995).
18. **Rules of Evidence.** Pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), 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.
19. **Rules of Evidence: Words and Phrases.** "Unfair prejudice," as used in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), means an undue tendency to suggest a decision on an improper basis.
20. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith.
21. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of other acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

22. ____: ____: ____. Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion.
23. **Rules of Evidence: Words and Phrases.** Pursuant to Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
24. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
25. **Sexual Assault: Testimony: Other Acts.** In prosecutions for crimes of a sexual nature, testimony regarding similar prior sexual conduct of the defendant has independent relevance.
26. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.

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

Thomas C. Riley, Douglas County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and IRWIN, Chief Judge, and INBODY, Judge.

MCCORMACK, J.

Appellant, Asa T. Carter, was convicted of first degree murder for causing the death of a 9-year-old girl during the perpetration of a sexual assault upon her. This was Carter's third trial for the crime, his first conviction having been overturned by this court in *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), and his second trial having resulted in a mistrial.

## I. BACKGROUND

On October 19, 1990, the victim spent the night at the apartment of Carter and his then wife, Gwelder Carter. Gwelder was a childhood friend of the victim's mother and was considered to

be the victim's godmother. Gwelder's prior testimony at Carter's first trial, which was admitted in this case as an exception to the hearsay rule under Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995), is the source of most of the details surrounding the victim's death.

The victim arrived at Carter's apartment in the early evening of October 19, 1990. Throughout the evening and the early morning hours of October 20, Carter and two friends, Lanny Hicks and David Harpster, periodically came and went from the apartment. During this time, Gwelder and the victim stayed in the bedroom and had little or no contact with Carter or his friends. Hicks and Harpster left the apartment around 4 a.m. on October 20.

At approximately 4:15 a.m., Carter came into the bedroom and got into bed with Gwelder. The victim was asleep at the foot of the bed. Carter appeared to have been drinking alcohol, and he soon became sexually aroused. He indicated to Gwelder that he wanted to have sexual relations with her and then stated that he wanted to have sexual relations with the victim. He told Gwelder that if she loved him or cared anything about him, she would let him have sexual relations with the victim.

Upon hearing this, Gwelder panicked and left the apartment, leaving Carter and the victim alone in the bedroom. When she left, the victim was asleep and wearing a blue nightgown. When Gwelder returned 40 to 45 minutes later, Carter was standing in the bedroom doorway. He told Gwelder that he "didn't mess with her." Upon hearing this, Gwelder entered the bedroom and found the victim lying naked on the bed, limp, and with no pulse. When confronted by Gwelder, Carter told her "to stick by his side," and threatened that "if he [went] down," she would go down with him. Carter also told Gwelder that "the same thing could happen to [her]" if she testified against him.

Gwelder again left the apartment for a short time, returning just as Carter was carrying the now-clothed body of the victim out of the apartment. Carter was gone from the apartment for a short time and returned without the victim's body. Gwelder then watched as he placed the sheets from the bed into the bathtub, where some other laundry items were soaking. Shortly thereafter, Carter left the apartment.

About 15 minutes later, Gwelder called the victim's mother and told her that her daughter was missing. The victim's mother contacted the Omaha Police Division, and a search for the victim was initiated. Shortly thereafter, Gwelder received a telephone call from Carter asking her to meet him at a friend's house.

The friend, Margaret Williams, testified that Carter arrived at her house about 8 a.m. The story he gave Williams was that he and Gwelder had been in a fight in the early morning hours and that he had left and spent the remainder of the night in a nearby park. While Carter initially appeared normal to Williams, he became extremely nervous when someone he did not recognize knocked on her door and implored her not to open the door. At some point, Carter made a telephone call to Gwelder, telling her to meet him at Williams' residence.

When Gwelder arrived around 10 a.m., Williams heard her say to Carter, "But, Asa, you know you were wrong, though." Carter and Gwelder talked quietly for 5 to 10 more minutes, then left Williams' residence and walked to University Hospital to visit Carter's father. On the way to the hospital, Carter again threatened Gwelder.

At the hospital, Carter called the Omaha Police Division to determine if he was wanted for child stealing. Police officer Kevin Cunningham went to the hospital, spoke with Carter, and informed him that no warrant for his arrest had been issued. Cunningham left the hospital but shortly thereafter received word that the victim's body had been found behind Carter's apartment. He returned to the hospital and arrested Carter on suspicion of murder.

An autopsy on the victim's body revealed that she had been subjected to vaginal and anal penetration shortly before her death. The autopsy further indicated that the most likely cause of death was asphyxiation, due to compression of the chest which prevented the victim from breathing. Dr. Jerry Wilson Jones, the pathologist who conducted the autopsy, testified that his examination detected the presence of sperm in the victim's anus. He concluded that the penetration and asphyxiation occurred concurrently, with the asphyxiation being caused by

the weight of the perpetrator's body compressing the victim beneath him.

The State performed DNA testing on semen and blood found on the victim's body and clothing and on reference samples of blood obtained from Carter, Hicks, Harpster, and the victim. The results of this testing positively excluded Hicks and Harpster as sources of the semen found on the victim. Carter could not be excluded as the source, as his genetic markers were consistent with those obtained from the semen.

The DNA testing determined six genetic markers. The frequency of any particular combination of these six genetic markers within the American population can be determined by referencing established databases of genetic characteristics. In this way, it was determined that the combination of markers common to both Carter and the semen found on the victim occurs in approximately 1 in 15,000 Caucasian-Americans, 1 in 1,200 African-Americans, and 1 in 5,500 Mexican-Americans.

Following the suppression of statements made by Carter to Omaha police, Carter was tried and convicted of first degree murder and sentenced to life imprisonment. This court overturned that conviction, and a second trial was held, which ended in a mistrial. Carter was brought to trial a third time, which resulted in his present conviction and life sentence. Carter timely appealed.

## II. ASSIGNMENTS OF ERROR

Carter assigns that the trial court erred in (1) admitting testimony concerning DNA testing and its results, (2) admitting testimony concerning two anal swabs and tests done thereon, (3) finding Gwelder to be unavailable as a witness and admitting into evidence her testimony from a previous trial, (4) admitting testimony regarding Carter's involvement in the sale of illegal drugs and firearms, and (5) admitting the testimony of Carter's half-sister and two daughters.

## III. STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evi-

dence. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998); *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997). The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Kirksey*, *supra*; *State v. Allen*, *supra*; *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

## IV. ANALYSIS

### 1. DNA Evidence

As his first assignment of error, Carter argues that the DNA testing performed by Forensic Science Associates (FSA) on various items of physical evidence did not satisfy the *Frye-Houser* test for establishing the reliability and admissibility of DNA testing procedures.

The *Frye-Houser* test incorporates the principle, enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that novel scientific evidence must be generally accepted in the relevant scientific community to be admissible as evidence. This so-called *Frye* test has long been the standard in Nebraska courts for recognizing new scientific techniques. See, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949). *Frye* remained the primary test in Nebraska even after the federal courts adopted a new standard under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

In *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), this court recognized the powerful influence that DNA evidence can have on the fact-finding process and expanded the *Frye* test to ensure maximum reliability with regard to DNA evidence.

The *Frye-Houser* test instructs a trial court faced with an offer of DNA evidence to decide preliminarily, outside the presence of the jury, on the basis of the evidence before it (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields; (2) whether the DNA testing used in the case under consideration is generally accepted by the relevant

scientific communities; (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly; (4) whether the tests conducted properly followed the method; (5) whether the DNA analysis evidence is more probative than prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995); and (6) whether statistical probability evidence interpreting the analysis results is more probative than prejudicial. *State v. Jackson, ante* p. 68, 582 N.W.2d 317 (1998); *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Carter, supra*; *State v. Houser, supra.*

When we overturned Carter's first conviction based on improperly admitted DNA evidence, our decision was based on the lack of acceptance in the relevant scientific community of the statistical analysis used to interpret the DNA test results. We stated at the time:

> [B]ecause we determine that FSA's statistical evidence and analysis were flawed and base our decision to reverse on that determination, we can assume without deciding that the methodology and procedure employed by FSA in arriving at a preliminary match were performed by an expert in the field, that the testing done was generally accepted in the scientific community, and that proper protocol was followed, thereby meeting the standards of the *Frye* test.

*State v. Carter*, 246 Neb. at 977, 524 N.W.2d at 780. Because we did not analyze the testing procedure itself in *Carter*, that case is not instructive or controlling as to this assignment of error. Applying the *Frye-Houser* test to the DNA testing performed in this case, we conclude that the evidence was properly admitted.

Jennifer Mihalovich of FSA; Dr. Ranajit Chakraborty, Allan King Professor of Biological Sciences and Biometry at the University of Texas, Houston; and Dr. James Wisecarver of the University of Nebraska Medical Center testified at the *Frye* hearing and at trial regarding the DNA testing methods and procedures used in this case. Carter does not question, nor do we, that these witnesses are experts in the relevant scientific field.

Mihalovich, who performed the testing procedures at FSA, testified as to the testing methods performed at FSA, the proto-

cols that FSA maintained regarding how these methods should be employed, and the actual procedures she used to accomplish the DNA testing.

According to Mihalovich's testimony, FSA analyzed the evidence submitted to it using the polymerase chain reaction (PCR) method of DNA analysis. The PCR method involves the copying or amplification of a short section of a strand of DNA, and it allows tests to be performed on very small quantities of genetic material. In this method, the DNA is extracted from a sample of cellular material such as blood or sperm cells. Then, depending on which genetic markers are being tested for, a particular location or set of locations on the strand of DNA is isolated and copied over and over until a sufficient quantity exists for testing.

FSA used two variations of this technique in this case. The first identifies the genetic marker known as DQ Alpha. The second, known as polymarker testing, identifies five genetic markers for any particular sample. The five genetic markers identified in polymarker testing are called LDLR, GYPA, HBGG, D7S8, and GC. Each of these markers consists of two alleles, one of which a person obtains from his or her father and the other from his or her mother. With the DQ Alpha marker, these alleles are identified as numbers separated by a comma. Thus, a person might have a DQ Alpha marker of 2,3 or 1.1,4. Polymarker traits are notated the same way but using letters, so a person might have an LDLR marker of A,B or a D7S8 marker of B,B.

Performed in combination, these two tests identify six genetic markers. Each human being has these six markers, and the markers are the same in every cell that comes from a particular human. Thus, if any one of these markers identified from an unknown sample varies from the same marker identified from a known person, that person cannot be the source of the sample.

Looking only at the DQ Alpha markers, Hicks and Harpster were positively excluded from being possible donors of the semen found on the body and clothing of the victim. Hicks' DQ Alpha type was 1.1,3, and Harpster's was 2,3. Carter's DQ Alpha type was 4.1,4.1, as was that of the semen recovered

from the victim. Thus the DQ Alpha test showed that Carter could have been the source of the semen, but that neither Harpster nor Hicks could have been.

Similarly, the polymarker testing did not exclude Carter as the source of the semen. Both sources showed identical polymarker traits: LDLR type A,B; GYPA type A,B; HBGG type A,A; D7S8 type A,A; and GC type B,B.

All three of the expert witnesses in this case testified that the DQ Alpha and polymarker testing used in this case, performed using the PCR process, is generally accepted in the relevant scientific community.

This brings us to the heart of Carter's argument, which is that FSA's protocols for performing the tests could not be ascertained sufficiently to determine their reliability or to determine if the actual testing procedures used in this case conformed to the protocols.

Mihalovich testified in detail about FSA's laboratory protocols. She stated that FSA's protocols were comparable to those of laboratories operated by Cellmark, the FBI, the California Department of Justice, and the Serological Research Institute. Furthermore, FSA's protocols were substantially the same as those which came with the DQ Alpha and polymarker test kits. Minor differences included the number of amplification cycles and the use of a particular method of fluid removal from the hybridization and typing trays. Mihalovich, as well as Chakraborty and Wisecarver, testified that these variations from the test kit protocols were inconsequential and would in no way affect the reliability or accuracy of the testing.

Carter argues that because FSA's protocols are not collected in one written instrument, the actual test procedures used cannot be compared against that instrument to show compliance with the protocols. We find this argument to be without merit. As Carter concedes in his brief, the actual steps taken by FSA in this case are known. All three experts testified that those steps were in substantial compliance with both FSA's partially written protocols and the scientific community's general protocol for DQ Alpha and polymarker PCR testing, and that the steps actually taken would provide a reliable result.

Based on this testimony, we conclude that there was no error in the trial court's finding that FSA's procedures produce reliable results if properly performed and that those procedures were followed in this case. This finding satisfies the third and fourth prongs of the *Frye-Houser* test.

In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Because Carter gives no argument as to why this evidence was more prejudicial than probative, we decline to address that issue.

Finally, we reach the question whether the statistical analysis of the test results was more probative than prejudicial. This was the ground on which we overturned Carter's first conviction.

At the time of *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), there was an ongoing debate in the scientific community regarding the accuracy of statistical data against which DNA test results were compared. Of particular concern was the effect of racial subgrouping on the databases used in the statistical analysis. It was believed at the time, by a large portion of the scientific community, that geographically isolated groups might distance themselves genetically from the national average that was reflected in the databases. This debate precluded us from finding general acceptance of these procedures in the relevant scientific community.

That debate is now over, and the opinion of the relevant scientific community is that population genetics, the process of compiling databases of genetic statistics regarding various racial groups for comparison with DNA test results, is generally accepted. See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). All three of the State's DNA experts testified as to the acceptance of the procedure.

This court recognized the advances in this area in *State v. Freeman, supra*. In *Freeman*, we stated that "[t]o the extent that *Carter* is based on an outdated level of acceptance of this evidence by the relevant scientific community, it is overruled." *Id.* at 413, 571 N.W.2d at 293. We find that the uncontradicted tes-

timony of the expert witnesses, taken in light of the *Freeman* decision, establishes that the statistical analysis used in this case meets the standard of general acceptance in the relevant scientific community.

Because the trial court properly found that the DNA evidence offered in this case met the *Frye-Houser* test, that evidence was properly admitted and this assignment of error is without merit.

### 2. Authenticity of Physical Evidence

Included in the physical evidence obtained at the autopsy of the victim were two anal swabs containing blood and semen. It is undisputed that one of these swabs, marked "EV53," was turned over to the Omaha Police Division for testing. This swab can be traced as going from the Omaha Police Division to the Nebraska State Patrol Criminalistics Laboratory, back to Omaha authorities, to Life Codes Laboratory for unsuccessful RFLP DNA testing, back to Omaha authorities, and finally to FSA, the forensic laboratory that conducted PCR DNA testing in this case.

Jones, who performed the autopsy on the victim, used the second swab to prepare a slide for his own analysis, but its fate after that point is less clear. Jones testified that he usually takes two evidence swabs from a particular site, turning one over to police and using the second for his own analysis. He further testified that he often discards these second swabs, but that he sometimes forwards them to the police after he has examined them. He could not recall the exact disposition of the second swab in this case. It is undisputed that a second swab, also marked "EV53," was submitted to Life Codes Laboratory by the Omaha Police Division upon Life Codes Laboratory's request for further evidence. From that time forward, both swabs traveled back to Omaha and eventually to FSA.

The first swab did not contain enough genetic material for PCR testing, and FSA performed no tests upon it. The second contained sperm cells and epithelial cells in sufficient quantity for PCR testing. Epithelial cells are cells found lining such human orifices as the mouth, vagina, or rectum. PCR testing was performed on these cells, and the results did not exclude Carter as the source of the sperm cells or the victim as the

source of the epithelial cells. Harpster and Hicks were excluded as sources of any of the cells.

Testimony and evidence regarding the results of this testing were admitted over Carter's foundational objection. Carter argues in his second assignment of error that the origin and chain of custody of the second swab were unknown and therefore that neither it nor any evidence flowing from it could be admitted.

Preliminary questions concerning the admissibility of evidence shall be determined by the judge. Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995). Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1995), states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Listed as an example of acceptable authentication is "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(2)(d).

This court has further stated that the authenticity of a bodily fluid sample must be unequivocally established before its admission into evidence, as an elementary safeguard of a defendant's rights. See, *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985); *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970).

Carter argues that the origin of the questioned anal swab is unclear, citing *Priest v. McConnell, supra*, as a factually similar case. In *Priest*, an automobile accident had resulted in the death of two people, Larry Priest and Linda Lister. Priest's estate sued the alleged driver of the vehicle in which Priest had been riding. The physical evidence sought to be admitted was a urine sample allegedly taken from Priest.

The record in *Priest v. McConnell, supra*, revealed that a Dr. Campbell recalled taking blood samples from the bodies of Priest and Lister at the mortuary but did not remember taking urine samples. He did not remember to whom he passed the blood samples for handling, but stated they were usually given to the sheriff or the mortician. The sheriff testified that he took blood and urine samples to his office, but he could not recall

who had given him the Priest samples. Relying on these facts, this court stated that there was no evidence of the origin of the urine sample and, therefore, insufficient foundation for the admission of chemical analysis results from tests done on it.

Ample evidence exists in the present case that the physical evidence in question, the second anal swab, came from the body of the victim. Unlike in *Priest v. McConnell, supra*, where no witness could testify that a urine sample had been taken, Jones testified in this case that as a matter of standard procedure, he took at least two anal swabs from the victim's body. Jones also testified that there was semen on both swabs and that he either discarded the second swab or forwarded it to the Omaha Police Division with the rest of the evidence obtained at the autopsy.

The record further reveals that the Omaha Police Division was in possession of two anal swabs, both of which were forwarded to Life Codes Laboratory and eventually made their way to FSA. The questioned swab contained both epithelial cells and sperm cells, which is consistent with Jones' testimony regarding his observations of the second swab he took.

Finally, FSA's analysis of the cellular material found on the swab is consistent with the swab coming from the autopsy: epithelial cells with genetic markers identical to the victim's and sperm cells with genetic markers identical to those of the semen taken from the victim's clothing.

The trial court, in overruling Carter's motion in limine to exclude this evidence, found "virtually no doubt that the specimens came from the decedent." We agree, and we find that under the facts of this case, the origin of both anal swabs was the autopsy performed on the victim by Jones.

Carter also argues that a proper chain of custody for the questioned swab was not shown. Jones testified that he either discarded the swab or turned it over to the Omaha Police Division. Given those two possibilities and the fact that the Omaha Police Division did have the second swab in its possession, the only reasonable inference is that Jones forwarded the questioned swab to the Omaha Police Division. Once the swab was turned over to the police, the rule is well established that proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foun-

dation to permit its introduction into evidence. *State v. Smith*, 238 Neb. 111, 469 N.W.2d 146 (1991); *State v. Langer*, 192 Neb. 525, 222 N.W.2d 820 (1974).

In light of the less than complete record on the origin and chain of custody of the second swab, we further note that the second swab and the tests done thereon constitute cumulative evidence, the admission of which would be harmless even if erroneous. The swab evidence tended to show both that a sexual assault had been perpetrated upon the victim and the identity of the perpetrator. That the victim had been sexually assaulted was established through the testimony of Jones, who found at the autopsy that the victim had been penetrated both vaginally and anally. Jones also testified that there was semen present in the victim's anus. As for identity, DNA testing was performed on semen obtained both from the swab and from the victim's clothing, and both semen sources yielded identical DNA test results. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Smith*, *supra*. We determine that in this case, sufficient foundation was shown for the admission of the tests done on the second anal swab.

### 3. Gwelder's Prior Testimony

The trial court allowed the prior trial testimony of Gwelder to be read into evidence under rule 804. Carter assigns as error that the trial court erred in finding that Gwelder was unavailable and that the admission of Gwelder's testimony from Carter's earlier trial violated the Confrontation Clauses of the U.S. and Nebraska Constitutions. We will address each of these arguments in turn.

#### (a) Gwelder's Unavailability

Unavailability as a witness includes situations in which the declarant is absent from the hearing and the proponent of her statement has been unable to procure her attendance by process

or other reasonable means. Rule 804(1)(e). It is within the discretion of the trial court to determine whether the unavailability of a witness has been shown. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988). The proponent of a hearsay statement seeking admission under rule 804 bears the burden of showing that the witness is unavailable and that diligence was used to locate and produce the declarant. *State v. Jordan, supra.* A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial. *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987).

The trial court found that the prosecution had met its burden of showing good faith and diligence in attempting to produce Gwelder, and that she was unavailable under rule 804(1)(e).

The State called two witnesses to establish the steps that had been taken to procure Gwelder's attendance at trial. Neill Everitt, of the Douglas County Attorney's office's victim/witness unit, and Sgt. Dave Points, of the Omaha Police Division's fugitive task force, testified at the hearing to determine unavailability.

Everitt testified that his office had successfully served a subpoena on Gwelder prior to Carter's second trial in March 1997. At that time, service had been made at an address on Binney Street in Omaha, Nebraska. Everitt was aware of another address used by Gwelder, this one on 52d Street in Omaha and believed to be the residence of Gwelder's mother. Over the summer following the March mistrial, Everitt and other members of his office made efforts to keep track of Gwelder by periodically driving by these two addresses. Based on observations of vehicles associated with Gwelder at these two addresses, Everitt believed that Gwelder was still living at one or both addresses.

Everitt testified that active attempts to locate Gwelder for trial began in August 1997. A praecipe for subpoena for Gwelder, compelling her attendance at Douglas County District Court on September 5, was filed on August 19. Everitt testified that he picked up the subpoena from the clerk of the district court and began efforts to serve Gwelder.

Everitt stated that he made contact with persons living at both the 52d Street and the Binney Street addresses and left at each address his card and instructions that Gwelder contact him regarding the upcoming trial. Everitt testified that he had been to both addresses about three times and that Al Martinez, another member of his office, had been to both addresses at least three times. Everitt also testified that on three occasions, either he or Martinez had "sat on" the Binney Street address, keeping the house under surveillance and waiting for Gwelder to appear. Additionally, Martinez attempted to locate Gwelder at two other Omaha addresses associated with a James Sanders. Everitt believed that Gwelder may have been married to Sanders by this time, based on automobile registration records.

At some point during this process, persons living at the Binney Street address informed Martinez that they believed Gwelder had left town. With the trial date rapidly approaching, Everitt contacted the Omaha Police Division for help in locating Gwelder.

Points testified that he was assigned to assist in this matter on August 27, 1997. Everitt updated Points on the efforts that had been made to date, and Points began searching for Gwelder. A records check by Points gave no indication of Gwelder's location. On August 28, Points and State Trooper Craig Loveland visited the Binney Street address and spoke to an Alice Sanders, Sanders' sister. She was uncooperative at first but eventually told Points that Gwelder was in Arkansas.

Points contacted Arkansas authorities and learned that Sanders had applied for an Arkansas driver's license on June 13, 1997. Points obtained an address for Sanders in West Helena, Arkansas, and contacted the West Helena Police Department. The police informed him that Gwelder had also applied for a driver's license in June, listing the same address as Sanders.

Points then contacted the Douglas County District Court to obtain a court order compelling Gwelder's return to Nebraska. The court relayed a request for this order to the Phillips County Court in Arkansas, and the order was issued and delivered to the West Helena Police Department on August 29, 1997. The West Helena Police Department began searching for Gwelder.

Points made arrangements to travel to Arkansas and retrieve Gwelder, but when he contacted the West Helena Police Department on September 1, 1997, he was informed that Gwelder could not be located at the address on her driver's license. The police had spoken to another sister of Sanders' at the address, who according to them was uncooperative and hostile. She told them that she had last seen Sanders about a week before.

The hearing to determine Gwelder's unavailability was held on September 3, 1997. Points testified that at that time, Arkansas authorities had located a vehicle registered to Sanders and were keeping it under surveillance. The trial judge found that the State had shown a good faith, diligent effort to locate Gwelder and declared her to be unavailable, contingent on her not being located during the trial. Neither Carter nor the State requested a continuance at this time, but Carter did object to the ruling.

Examining this record, we find that the trial court did not abuse its discretion in finding good faith and due diligence in the State's attempts to procure Gwelder's attendance at trial.

While it is true that the State could have begun its efforts earlier, we note that it had no reason to believe that Gwelder had left the jurisdiction. Gwelder had testified at Carter's first trial. The record does not reveal whether she appeared at his second trial before it was declared a mistrial, but it does show that she was subpoenaed. There is no indication that she was uncooperative at that time. Finally, the observation by Everitt of Gwelder's known addresses gave him reason to believe that she remained in the jurisdiction and would be easy to locate when necessary.

On these facts, we cannot say that the trial court abused its discretion in this matter. The record indicates a good faith, diligent effort on the part of the State to produce Gwelder, and under these circumstances, the trial court did not abuse its discretion in finding Gwelder to be unavailable.

(b) Carter's Right to Confrontation

Carter further argues that the admission of Gwelder's prior testimony violated his rights under the Confrontation Clauses of the U.S. and Nebraska Constitutions.

When a hearsay declarant is unavailable to testify at trial, the declarant's out-of-court statements may be admitted without violating the Confrontation Clause, so long as those statements bear sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987). The Confrontation Clause does not require an independent inquiry into reliability when the out-of-court statements fall within a firmly rooted hearsay exception. *Id.* Firmly rooted exceptions are presumptively reliable and trustworthy; therefore, inferring reliability of hearsay statements which fall within such an exception will not violate a defendant's confrontation rights. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993), *cert. denied* 512 U.S. 1235, 114 S. Ct. 2738, 129 L. Ed. 2d 859 (1994).

Fed. R. Evid. 804(b)(1), the federal equivalent of rule 804(2)(a), is a firmly rooted hearsay exception. *Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); *U.S. v. Lombard*, 72 F.3d 170 (1st Cir. 1995); *U.S. v. Kelly*, 892 F.2d 255 (3d Cir. 1989), *cert. denied* 497 U.S. 1006, 110 S. Ct. 3243, 111 L. Ed. 2d 754 (1990). Therefore, testimony properly admitted under either federal rule 804(b)(1) or Nebraska rule 804(2)(a) does not violate the Confrontation Clause. See *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997).

The question therefore becomes whether Gwelder's testimony was properly admitted under Nebraska rule 804, which states in relevant part:

> (2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (a) Testimony given as a witness at another hearing of the same or a different proceeding . . . against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Working through the requirements of the rule, we find that Gwelder's testimony was properly admitted.

Testimony admitted under rule 804(2) must, as a preliminary matter, satisfy rule 403. Rule 403 states that "[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." Gwelder's testimony is clearly probative. Indeed, her testimony is the only source of knowledge of the events that took place in the Carter apartment leading up to the time of the victim's death and thereafter.

"Unfair prejudice," as used in rule 403, means an undue tendency to suggest a decision on an improper basis. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). There is nothing in the record of Gwelder's testimony to indicate that it might have encouraged an improper basis for the jury's decision, nor does the testimony implicate any of rule 403's other negative factors. Accordingly, we find that her testimony satisfies rule 403.

There is no question that Gwelder's testimony satisfies the remainder of rule 804(2)(a). Gwelder was unavailable, her testimony was given as a witness, under oath, at a prior proceeding of this same case. Carter was given the opportunity to, and in fact did, cross-examine Gwelder at the prior trial. Carter had the same motives and interests in the prior trial as in this one, and, as noted by the trial judge, cross-examined Gwelder exhaustively.

Gwelder's prior trial testimony was properly admitted under rule 804(2)(a), and there is therefore no violation of the Confrontation Clause. Accordingly, Carter's third assignment of error is without merit.

### 4. Prior Misconduct

#### (a) Carter's Involvement in Sale of Guns and Marijuana

As his fourth assignment of error, Carter argues that statements elicited by the State from Harpster and Hicks were inadmissible evidence of Carter's bad character.

Harpster's prior testimony from Carter's first trial was read into evidence due to Harpster's death prior to trial. In the course

of establishing that Harpster and Hicks had been present at Carter's apartment on the day and evening preceding the death, the State initiated the following line of questioning:

> Q: [Prosecutor:] And, again, what was your reason for going there?
>
> A: [Harpster:] We had some marijuana and —
>
> [Defense counsel:] I'm going to object. I think you've already sustained this objection, Judge —
>
> The Court: The —
>
> [Defense counsel:] — on 404 and 403 grounds.
>
> The Court: It was sustained on different grounds earlier. The objection will be overruled.
>
> Q: . . . What was your purpose in going there?
>
> A: We had some marijuana and had some guns for sale and we was seeing if he could help us sell them.

No further mention of this subject was elicited from Harpster by either the State or Carter.

Similarly, Hicks testified at trial:

> Q: [Prosecutor:] And why did you go to that particular location at that time in the morning?
>
> A: [Hicks:] We went by there because we had some guns for sale and some marijuana and —
>
> [Defense counsel:] I'm going to object and move to strike on 404 and 403 grounds, Your Honor, irrelevant.
>
> THE COURT: Overruled.
>
> Q: . . . You had some marijuana and some guns for sale?
>
> A: Yes.
>
> Q: And why were you going to his place then?
>
> A: Mr. Harpster and Mr. Carter had a conversation earlier about the guns and the marijuana, and that's another reason why we stopped by.

This was the only reference to this subject in Hicks' testimony.

The State, in its closing argument, referred to the testimony of both witnesses:

> You heard the testimony of Harpster and Hicks. Both parties tell you through their testimony — Mr. Harpster is unavailable because he's dead — there's prior testimony that they went to this particular apartment of Asa Carter's, they had befriended him and they had some talk about

> guns and dope with Asa and that they stayed there for a portion of time.

No objection was made by Carter at this time.

We determine that the admission of this testimony was erroneous. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). An appellate court reviews the admission of other acts under rule 404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Freeman, supra*; *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995).

Our first step in any rule 404(2) analysis is determining relevance, and in this instance that determination is dispositive. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401.

Carter was charged with causing a death during the perpetration of a sexual assault. The testimony elicited from Harpster and Hicks regarding Carter's involvement in the sale of guns and marijuana does not bear on any fact of consequence to Carter's guilt or innocence of the crime charged. This is true regardless of the purpose the State may have had in eliciting the testimony. Because the testimony did not make any fact of consequence more or less probable, the trial court abused its discretion in admitting the testimony over Carter's objection.

While we find that this testimony should not have been admitted, we also find that its admission was harmless. Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

The State presented overwhelming evidence against Carter in this case. Gwelder testified that when she left Carter and the victim alone, he was sexually aroused and had stated his intention to sexually assault the victim. When she returned some 40 minutes later, the victim was dead, asphyxiated during the perpetration of a sexual assault. Carter proceeded to dispose of the body, destroy evidence, and threaten Gwelder if she did not cover up for him. In addition to Gwelder's testimony, DNA evidence conclusively excluded the two other males who might have had contact with the victim the night of her death from being sources of the semen found on her clothes and body. Those same tests did not exclude Carter.

Criminal behavior on the part of Carter was established in the properly admitted evidence of prior sexual assaults by Carter upon L.C., Carter's daughter, when she was between the ages of 6 and 8, and assaults upon A.C., also Carter's daughter, when she was 6 years old. The evidence that Carter may have been involved with Harpster and Hicks in the sale of guns or marijuana is less prejudicial than the evidence of sexual assaults by Carter on his own daughters when they were 6 and 8 years of age. We find that the admission of the testimony of Harpster and Hicks, although erroneous, was cumulative to the properly admitted evidence of the sexual assaults by Carter on his two young daughters. Because the erroneously admitted evidence of other acts (sale of guns and marijuana) was merely cumulative on the credibility of Carter's innocence, we conclude that the admission of the testimony of Harpster and Hicks was harmless beyond a reasonable doubt, and thus, Carter's fourth assignment of error is without merit.

(b) Prior Sexual Assaults

Carter's final assignment of error is that the trial court erred in allowing his half-sister, An.C., and two of his daughters, A.C. and L.C., to testify regarding his sexual assaults on them when they were small children.

An.C. testified that in 1979 or 1980, when she was 6 or 7 years old, Carter would babysit her at his house. On several occasions when she spent the night, Carter sexually assaulted her vaginally. She also testified that he assaulted her orally and anally on at least one occasion. According to her, these assaults occurred only when she spent the night at his house. The assaults stopped when she was 10 or 11 years old.

Carter's daughter L.C. testified that she had been placed in a foster home at the age of 7 or 8. She testified that Carter had sexual intercourse with her more than once when she was between 6 and 8 years old and that she lived at home with Carter at that time.

The prior trial testimony of Carter's daughter A.C., who was unavailable, was read into evidence by the State. A.C. testified that when she was 6 years old, she too was placed in a foster home because Carter sexually assaulted her. She stated that Carter would say, "I love you. You're my favorite child," when he wanted to have sex with her. These assaults occurred either in her bedroom or in the bedroom of her grandmother's house.

Carter properly objected prior to each witness' testimony, and a limiting instruction was requested and given prior to each witness' testimony and again as part of the jury instructions.

Carter assigns as error that the above testimony violates rules 403 and 404 in that it was impermissible character evidence and was more prejudicial than probative. Because we addressed and resolved this issue in favor of admissibility at a prior stage of this proceeding, the law-of-the-case doctrine precludes the necessity of discussing it again.

Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998);

*Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998); *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

This court expressly ruled on the admissibility of L.C.'s and A.C.'s testimony in *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). The matter is therefore settled for purposes of this litigation, and we decline Carter's invitation to revisit it.

We did not expressly rule on the question of the admissibility of An.C.'s testimony in *Carter, supra*, because it was not assigned as error. However, the similarities between the testimony of An.C. and the testimony of A.C. and L.C. are so substantial as to require a like result.

Our analysis under rules 403 and 404, as detailed in the discussion of the testimony of Hicks and Harpster, requires a determination of relevancy and proper purpose, along with a balancing of probative value against prejudicial potential in light of limiting instructions given by the trial court. There are no differences between the testimony of An.C. and that of A.C. and L.C. sufficient to change the outcome of the analysis or to take the issue of admissibility out of the law-of-the-case doctrine in this instance.

Because this crime was sexual in nature, the testimony of all three women about Carter's similar sexual conduct toward them had independent relevance. See, *State v. Carter, supra*; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992).

As for proper purpose, the following excerpt from *State v. Carter*, 246 Neb. at 965, 524 N.W.2d at 773, applies equally to the testimony of An.C., A.C., and L.C.:

> The evidence in this case shows enough similarities for purposes of identity. Moreover, the evidence shows [Carter] was motivated in each instance to choose a victim that was of a very young and vulnerable age, and one with whom he had a familial or family-like relationship. The combination of these factors placed [Carter] in a position in which he could both control and manipulate his victims. Therefore, the evidence is also relevant for the purpose of showing [Carter's] motive. For these reasons, the trial court did not abuse its discretion in finding the evidence was for a proper purpose.

With regard to prejudice, the following jury instruction was given at the close of this trial:

> During this trial I told you that certain evidence was received for a limited purpose. Specifically, I refer to the testimony of [An.C., L.C., and A.C.] regarding alleged sexual assaults.
>
> Evidence of other crimes, wrongs, or acts should not be considered as proof of [Carter's] character or his propensity to act in conformity with the allegations contained in this testimony. It was admitted solely for the purpose of demonstrating motive, opportunity, intent, preparation, plan and identity. You must consider that evidence only for those limited purposes and for no other.
>
> The State of Nebraska is still required to prove beyond a reasonable doubt that [Carter] committed the offense with which he is charged on the date alleged in the Information filed by the State.

A similar admonition was given by the court immediately prior to the testimony of each of the three witnesses.

The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *Carpenter v. Cullan, supra*; *Talle v. Nebraska Dept. of Soc. Servs., supra*; *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). We find that the question of the admissibility of An.C.'s testimony is substantially similar to that regarding the testimony of A.C. and L.C. such as to implicate the law-of-the-case doctrine.

Carter has not shown any facts different from those presented at the first trial that might require a reexamination of this issue. If anything, the limiting instruction in this trial gave Carter greater protection than that given in *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), by forbidding the use of this testimony to show his character.

We find, therefore, that our decision in *Carter, supra*, conclusively established the admissibility of the testimony of these three witnesses under the law-of-the-case doctrine. Accordingly, Carter's final assignment of error is without merit.

## V. CONCLUSION

Having examined each of Carter's assignments of error and determined each of them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

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COMMUNITY FIRST STATE BANK, A NEBRASKA CORPORATION, FORMERLY KNOWN AS THE ABBOTT BANK, APPELLANT, V. HOWARD P. OLSEN, JR., AND SIMMONS, OLSEN, EDIGER & SELZER, P.C., APPELLEES.

587 N.W.2d 364

Filed December 4, 1998. No. S-97-478.

1. **Summary Judgment.** Summary judgment is proper 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Malpractice: Attorney and Client: Public Policy.** A claim for legal malpractice cannot be assigned, because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship.
4. **Malpractice: Claims: Actions.** The granting of the proceeds of a cause of action and the right to prosecute it constitutes an assignment of the cause of action for purposes of the rule against the assignment of malpractice claims.
5. **Malpractice: Words and Phrases.** Any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice.
6. **Venue: Actions.** Pursuant to Neb. Rev. Stat. § 25-410 (Reissue 1995), any civil action may be transferred to the district court of any county in the state for the convenience of the parties and witnesses or in the interest of justice.
7. **Venue: Appeal and Error.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.
8. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Scotts Bluff County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Terence P. Boyle, of Boyle Partnership, P.C., and Patrick M. Flood, of Hotz & Weaver, for appellant.

William R. Johnson and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

This is an action for attorney malpractice and breach of fiduciary duty, arising from events surrounding the operation of The Abbott Bank (Bank) in Alliance, Nebraska. The Bank was sold to Community First Bankshares, Inc. (CFB), and became Community First State Bank (CFSB), the appellant in the present action. The appellees, Howard P. Olsen, Jr. (Olsen), and Simmons, Olsen, Ediger & Selzer (Firm), represented the Bank. The trial court granted summary judgment for Olsen and the Firm on the grounds that CFSB was not the real party in interest to bring this suit or, in the alternative, that malpractice claims are not assignable as a matter of law. We reverse, and remand for further proceedings.

## BACKGROUND

Until its sale to CFB, the Bank was owned by Abbott Bank Group, Inc. (ABGI). James E. Abbott was the majority shareholder in ABGI, which in turn owned 99 percent of the Bank's stock. Abbott was also the Bank's chairman of the board from January 1987 until its sale.

In 1993, Olsen was a Nebraska attorney practicing in Scottsbluff, Nebraska, with the Firm. Both Olsen and the Firm are defendants in this suit. There is no indication in the record that either Olsen or the Firm had any contact with the Bank prior to December 1993.

In December 1993, Olsen met with Richard Chapin, the president and a director of the Bank, and three other bank officers

(collectively officers). The officers were concerned about certain practices of their employer and consulted Olsen for advice on how to report these practices to banking regulators and what the consequences of such action might be.

At Chapin's request, Olsen helped to arrange and attended a meeting in January 1994 between the officers and representatives of the Nebraska Department of Banking and Finance (Banking Department). Representatives of the Federal Deposit Insurance Corporation (FDIC) participated in this meeting via telephone. The meeting centered on possible legal violations by the Bank involving the role of Richard L. Gordon in the Bank's management.

Gordon, a Nebraska attorney, had been general counsel for the Bank since 1987. Gordon was never elected or appointed an officer or director of the Bank, nor was he licensed by the state to serve as an executive officer. Nevertheless, the officers were concerned that Gordon was actually serving as an executive officer of the bank by virtue of the powers invested in him by Abbott. If true, this would constitute a violation of Nebraska law and banking regulations.

As a result of the January 1994 meeting, the Banking Department and the FDIC initiated investigations of the Bank. On March 10, 1994, the Banking Department issued an emergency order prohibiting termination of the Bank's current officers and directors. On March 11, a second emergency order was issued, ordering the Bank to cease and desist from allowing Gordon to act as an executive officer of the Bank or to manage, control, direct, or otherwise interfere with any aspect of the ongoing business of the Bank, and ordering Gordon to cease such activity.

The Bank's executive committee then voted to appoint Olsen and the Firm as general counsel, replacing Gordon and his firm. This decision was ratified by the boards of directors of the Bank and ABGI.

Regulatory hearings commenced, and the hearing officer submitted his recommendations to the director of the Banking Department. These recommendations generally exonerated Gordon and the Bank from any wrongdoing. The Bank and the Banking Department submitted exceptions to the recommenda-

tions. Olsen, as general counsel for the Bank, submitted the Bank's exceptions at the direction of the Bank's executive committee.

In December 1994, the director of the Banking Department issued his findings of fact, conclusions of law, and order. The director rejected many of the hearing officer's recommendations and concluded that Gordon had indeed been acting as an executive officer and that the Bank had allowed him to do so. The director ordered the March 11 emergency order to remain in effect and divided costs equally between Gordon, the Bank, Abbott, and the Banking Department. No party appealed the director's findings, conclusions, or order.

In May 1995, ABGI merged with CFB pursuant to a merger agreement. Prior to the merger, Abbott, acting as chairman of the board, executed and delivered to himself a document titled "Assignment," which purported to give Abbott the right to any recoveries from this suit against Olsen, as well as the right to prosecute the action.

The parties to this suit stipulated that "[CFSB], formerly known as [the Bank], has no right, title or interest to any proceeds or recoveries that may result from the above-captioned cause of action." In his affidavit, Gary Knutson, senior vice president of CFB and a director of CFSB, states that "[a]side from this litigation, CFB has no intention and will not separately bring an action against the defendants in this case for the claims alleged in the Petition herein." In his affidavit, Stanley E. Foss, chairman and chief executive officer of CFSB, states that "[a]side from this litigation, Community First State Bank has no intention and will not separately bring an action against the defendants in this case for the claims alleged in the Petition herein."

In July 1995, the Bank filed suit against Olsen and the Firm in Douglas County, alleging claims for attorney malpractice and breach of fiduciary duty. The amended petition, titled in the name of CFSB, added further factual allegations and exhibits and again stated claims for attorney malpractice and breach of fiduciary duty. The amended petition alleged that Olsen, in his capacity as counsel for the Bank, and the Firm took unauthor-

ized positions inimical to the best interests of the Bank; violated their duty of confidentiality; failed to disclose conflicts of interest; and acted as informants against the Bank.

Olsen and the Firm's answer denied the merits of the claim and raised as a defense that CFSB was not the real party in interest because of the assignment to Abbott.

Olsen and the Firm moved for summary judgment. The trial court sustained Olsen and the Firm's motion for summary judgment, finding (1) that there is no genuine issue of material fact; (2) that as a matter of law, CFSB is not the real party in interest to bring this action; and (3) that notwithstanding CFSB's standing as the real party in interest, the action for legal malpractice is as a matter of law not assignable. CFSB timely appealed.

## ASSIGNMENTS OF ERROR

CFSB assigns that the trial court erred in (1) ruling that CFSB was not the real party in interest, (2) finding that the Bank's assignment to Abbott violated this court's rule against the assignment of attorney malpractice claims, (3) dismissing CFSB's suit rather than voiding the assignment and allowing the suit to proceed, (4) dismissing the separate claim for breach of fiduciary duty, and (5) sustaining Olsen and the Firm's motion for a change of venue.

## STANDARD OF REVIEW

Summary judgment is proper 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. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998); *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

## ANALYSIS

### EFFECT OF ASSIGNMENT

The first step in analyzing the propriety of summary judgment in this case is to determine what effect, if any, the purported assignment of the malpractice claims to Abbott has on the suit.

The document in question is titled "Assignment," and is reproduced here in its entirety:

> FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, THE ABBOTT BANK ("TAB") does hereby agree to assign to JAMES E. ABBOTT ("Abbott") all right, title, and interest to any proceeds or recoveries from a cause of action captioned The Abbott Bank v. Howard Olsen, et al. filed in the District Court for Douglas County, Nebraska (the "Action"). Abbott agrees to bring and prosecute the Action solely for the benefit of and on behalf of TAB or the shareholders of Abbott Bank Group, Inc., on May 10, 1995. Abbott agrees to receive and to hold any proceeds and recoveries from the Action as a fiduciary, for distribution to said shareholders pro rata in accordance with their respective interests in the Merger Consideration provided for in the Agreement and Plan of Merger, dated as of November, [sic] 28, 1994, between Abbott Bank Group, Inc. and Community First Bankshares, Inc.
>
> Abbott agrees to indemnify and hold TAB harmless against any and all losses, claims, damages or liabilities to which it may become subject to [sic] as a result of or in connection with the Action, including any claim or counterclaim against TAB, and to reimburse TAB for any legal or other expenses incurred in connection therewith.

This assignment was dated May 10, 1995, and signed by Abbott as chairman of the Bank and as assignee.

A claim for legal malpractice cannot be assigned, because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship. *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). We find that because this document grants both the proceeds of this action and the right to prosecute it, it is an assign-

ment of the cause of action. To hold otherwise would undermine the same public policy rationale upon which we decided *Earth Science Labs. v. Adkins & Wondra, P.C., supra.*

As an assignment of a cause of action for malpractice, this document violates public policy and the rule enunciated in *Earth Science Labs. v. Adkins & Wondra, P.C., supra.* Therefore, we hold that the document is void in its entirety. The question remains, however, as to what effect this holding has on the trial court's granting of summary judgment.

Although in *Earth Science Labs. v. Adkins & Wondra, P.C., supra,* we affirmed the trial court's dismissal of the claim, we cannot do so in this case. In *Earth Science Labs.*, the claim belonged to Sorber Chemical, Inc., and the invalid assignment was to Earth Science Laboratories, Inc. Earth Science had brought the suit under its own name after acquiring Sorber's assets at a bankruptcy sale. When the assignment was found to be invalid, Earth Science ceased to be the proper plaintiff. The petition could not be corrected by amendment because Sorber no longer existed to prosecute the claim.

In the present case, it is clear that suit was brought in the name of CFSB, the real party in interest. CFSB allowed this suit in its name under the erroneous legal impression that the assignment to Abbott was valid. Although the affidavits of Knutson and Foss seem to indicate that CFSB has no interest at all in suing Olsen and the Firm, the phrase in these affidavits "aside from this litigation" creates a fact question as to whether CFSB has an interest in pursuing the present litigation.

Because of this question as to CFSB's intention to proceed with the lawsuit, we reverse the trial court's dismissal of this action and remand the cause for such further action as CFSB may wish to take.

## Fiduciary Duty Claim

CFSB assigns as error that its claim for breach of fiduciary duty was dismissed along with its claim for malpractice. This court has held that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice. *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). Although *Olsen v. Richards, supra*, interpreted Neb. Rev. Stat. § 25-222 (Reissue 1995),

which sets the statute of limitations for professional negligence claims, we see no reason why claims for breach of fiduciary duties should not be similarly classified for purposes of the rule against assigning malpractice claims.

## CHANGE OF VENUE

CFSB's final assignment of error is that the trial court erred in sustaining Olsen and the Firm's motion for change of venue. Any civil action may be transferred to the district court of any county in the state "[f]or the convenience of the parties and witnesses or in the interest of justice . . . ." Neb. Rev. Stat. § 25-410 (Reissue 1995). Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Wilson v. Misko, supra*; *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993). Reviewing the affidavits filed in relation to this motion, it cannot be said that the judge's choice to grant the motion is untenable or has unfairly deprived CFSB of a substantial right or just result. Therefore, the trial court acted within its discretion in granting Olsen and the Firm's motion for change of venue.

Because we find that the trial court acted within its discretion in sustaining the motion under § 25-410, we need not address whether venue was initially proper under Neb. Rev. Stat. § 25-403.01 (Reissue 1995).

## CONCLUSION

The cause of action in this case belongs to and must be prosecuted by CFSB. Dismissal of this suit was improper, and therefore the judgment is reversed and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# PAUL COBB AND VICKI COBB, DOING BUSINESS AS WINEGLASS RANCH, APPELLANTS AND CROSS-APPELLEES, V. SURE CROP CHEMICAL CO. AND SIMPLOT, INC., DIVISIONS OF J.R. SIMPLOT CO., APPELLEES AND CROSS-APPELLANTS.

587 N.W.2d 355

Filed December 4, 1998. No. S-97-512.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be adduced from such facts, but does not accept conclusions of the pleader.
2. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
3. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
4. ____: ____. In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
5. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a general demurrer that is not followed by a judgment of dismissal terminating the litigation does not constitute a reviewable final order.
6. **Demurrer.** Where a demurrer is sustained as to one cause of action in a case which has multiple causes of action, the case still pends until dismissed.
7. **Demurrer: Pleadings.** If the petition, liberally construed, states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
8. **Uniform Commercial Code: Contracts: Warranty.** Pursuant to Neb. U.C.C. § 2-315 (Reissue 1992), implied warranties are imposed upon goods when and only when they become the subject of a contract for their sale.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
10. **Jury Instructions: Pleadings.** A party is not entitled to a jury instruction on a theory of the case not presented by the pleadings.
11. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
12. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellants.

Jeffrey A. Silver for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This case arises out of a jury trial in which both parties asserted breach of contract actions. The jury found against both parties as to their respective claims. Appellants and cross-appellees Paul Cobb and Vicki Cobb, doing business as Wineglass Ranch (the Cobbs), ask this court to reverse the district court's judgment on grounds that the district court improperly instructed the jury and improperly sustained a demurrer to their operative petition's second cause of action. Appellees and cross-appellants Sure Crop Chemical Co. and Simplot, Inc., divisions of J.R. Simplot Co. (collectively Sure Crop), ask this court to reverse the district court's dismissal of their motion for directed verdict on their counterclaim. We affirm the district court's judgment in all respects.

## BACKGROUND

The Cobbs operate a ranch southeast of Minatare, Nebraska. In the spring of 1994, the Cobbs decided to plant 25 acres of alfalfa to provide feed for the cattle they raise. Paul Cobb (Cobb) talked with local area farmers about using preemergent herbicides, and most suggested the use of Eptam. The local state cooperative extension office also recommended Eptam. In late May 1994, Cobb met with Donald E. Dillman, who sells herbicides and incorporates them into the soil, to discuss incorporating a herbicide into a field where Cobb planned to plant alfalfa. Dillman does business under the name "Sure Crop" and is a salesperson for Simplot, Inc.

Cobb and Dillman gave contradictory accounts of their conversations which formed the oral contract now at issue. Cobb testified that he drove to Dillman's place of business and asked Dillman about applying Eptam on Cobb's 25-acre field as a preemergent. Cobb said Dillman told him he would have to disk the ground twice and then, after the application, disk the soil

again as soon as possible. Cobb said that in the first week of June 1994, he called Dillman, stating that he had prepared the ground. Cobb said he recalled having no other conversations prior to Dillman's application of the herbicide.

Dillman, on the other hand, testified that at a cafe in Minatare he and Cobb first discussed establishing an alfalfa crop. Dillman said Cobb told him he wanted to use Eptam. Dillman said he and Cobb drove to the field where Cobb planned to plant the alfalfa. Standing at the edge of the field, Dillman said he observed corn stalks and other residue in the field, and he then told Cobb that Cobb could not use Eptam because Eptam required simultaneous incorporation and the stalks and residue would plug up his incorporator. Dillman said he then suggested the application of the herbicide Treflan E.C. instead of Eptam. He said he suggested Treflan E.C. because it controls the same weeds as Eptam, except for nightshade, yet Treflan E.C. has a longer incorporation time that would permit Cobb to incorporate the chemical by disking after Dillman had applied it. Dillman said he asked Cobb if the field contained nightshade and said Cobb indicated it did not. Dillman admitted that he did not closely inspect the field to determine what types of weeds were growing. Dillman said Cobb orally agreed to use Treflan E.C. Dillman said he told Cobb that he would need to disk the ground twice in a cross pattern after the Treflan E.C. was applied.

Cobb did not deny such conversations occurred, but testified that he did not recall going out to his field with Dillman, discussing the incorporation problem with Eptam, or having any conversation with Dillman in which Treflan E.C. was discussed.

On June 7, 1994, Dillman applied Treflan E.C. to the Cobbs' field. Cobb disked the ground once and about 2 days later, planted alfalfa in the field. Cobb said he first discovered that Treflan E.C. had been applied when he reviewed Dillman's bill in July.

Weeds outgrew the alfalfa, and by August 1994, the weeds were 2½ to 3 feet tall throughout the field. In some parts of the field, no alfalfa grew. Although he expected 1 to 1½ tons of alfalfa that year, Cobb claimed the entire 1994 crop was a loss.

Over the course of the winter, Cobb repeatedly told Dillman that he would pay Dillman's bill. He did not.

Cobb testified that in 1995 and 1996, he harvested between 2 and 2½ tons less of alfalfa than he expected and attempted to sell it as "green chop," but it was worthless because it was too weedy.

The Cobbs filed the instant action against Sure Crop in November 1995. Their amended operative petition, filed in February 1997, asserted two causes of action for money damages. In the first cause of action, the Cobbs alleged that they had entered into a contract with Sure Crop to apply Eptam on the 25-acre field for the purpose of controlling weeds, but Sure Crop applied Treflan E.C., and that such action caused the destruction of alfalfa because the Treflan E.C. did not control the weeds. In the second cause of action, the Cobbs allege that they had entered into a contract with Sure Crop to apply Eptam, that Dillman inspected the field prior to application, and that weeds were visible for identification. The Cobbs allege that they relied on the expertise of Dillman to determine if Eptam would control the weeds visible in their field; that Dillman had a duty to make a proper inspection of the field; that Dillman chose and applied Treflan E.C.; that Treflan E.C., by its own label, is unfit for use on seedling alfalfa; and that the application of Treflan E.C. destroyed the alfalfa by not controlling the weeds. Sure Crop counterclaimed for money damages, alleging that the Cobbs requested that Treflan E.C. be applied, that Sure Crop did so, and that the Cobbs did not pay the bill for the contracted goods and services.

Sure Crop moved for summary judgment, which the district court denied. Sure Crop then demurred, stating that the Cobbs' second cause of action failed to state facts upon which relief could be granted. On March 14, 1997, the trial court sustained the demurrer on those grounds, stating that the Cobbs' second cause of action was duplicative of the first. The court gave the Cobbs leave to amend their petition, but the Cobbs did not amend.

At trial, a nonscientific sampling of weeds growing in the Cobbs' alfalfa field in the fall of 1995 was introduced into evidence. Emery W. Nelson, a former University of Nebraska pest

coordinator and author of the "Nebraska Weed Book," testified for the Cobbs that many of the weeds listed would have competed for moisture and sunlight with the alfalfa. Nelson said that of the 10 weeds sampled, Treflan E.C. would control only 1 of them. However, he also said Eptam would be equally ineffective against the weeds sampled. Sure Crop's witness Robert G. Wilson, a University of Nebraska agronomy professor, also testified that both Treflan E.C. and Eptam would control only 1 of the 10 weeds sampled. Nelson said that although not in the sampling, nightshade was very common in that area, and Treflan E.C. would not control nightshade. Nelson testified that both Eptam and Treflan E.C. would have a similar, temporary negative impact on the growth of seedling alfalfa.

Nelson testified that with seedling alfalfa, Treflan E.C. was approved for use only on ground within the federal government's Acreage Conservation Reserve Program. Nelson opined that application of Treflan E.C. on the Cobbs' field would have been an improper application. See Neb. Rev. Stat. § 2-2646(4) (Reissue 1997). Dillman admitted he knew of the restriction on Treflan E.C., but assumed the Cobbs' field was in the program.

At the conclusion of the Cobbs' case, Sure Crop moved for a directed verdict on the Cobbs' claim. The trial court overruled the motion. Sure Crop reinstated the motion at the close of its case, and the Cobbs also moved for a directed verdict on their claim. The trial court overruled both motions.

The jury returned a verdict against the Cobbs on the Cobbs' claim and against Sure Crop on Sure Crop's counterclaim.

## ASSIGNMENTS OF ERROR

The Cobbs assign, restated, that the district court erred in (1) sustaining Sure Crop's demurrer to their second cause of action; (2) failing to properly instruct the jury regarding the duties of an applicator of herbicides; and (3) failing to properly instruct the jury as to all of the elements of their case, in particular by failing to instruct that they could recover if the application of Treflan E.C. either damaged the alfalfa plants themselves or failed to control the weeds, thereby preventing the alfalfa from germinating and developing a proper stand.

On cross-appeal, Sure Crop assigns that the district court erred in failing to sustain its motion for a directed verdict on its counterclaim.

## SCOPE OF REVIEW

In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Crow v. Giebelhaus*, 241 Neb. 4, 486 N.W.2d 207 (1992). Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995); *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

## ANALYSIS

### Demurrer to Cobbs' Second Cause of Action

The Cobbs contend the district court improperly sustained Sure Crop's demurrer to their second cause of action. Sure Crop argues that the Cobbs' appeal is untimely, given that they waited until trial was had on their remaining cause of action before appealing the demurrer. We reject Sure Crop's argument. In *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995), we stated that a demurrer is not the same as a dismissal of a case.

The sustaining of a general demurrer that is not followed by a judgment of dismissal terminating the litigation does not constitute a reviewable final order. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). Where a demurrer is sustained as to one cause of action in a case which has multiple causes of action, the case still pends until dismissed. *Carlson v. Metz, supra*. Such was the case here, and so the Cobbs' appeal of the order that sustained the demurrer is timely.

In determining whether a cause of action has been stated, 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. *Carlson v. Metz, supra*; *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). In their appellate brief, the Cobbs state that their second cause of action asserts sufficient facts to state a claim for breach of implied warranty of fitness for a particular purpose. Neb. U.C.C. § 2-315 (Reissue 1992) provides and defines such an action, and it states:

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

Assuming all facts pled in their second cause of action are true, see *Crow v. Giebelhaus, supra*, the Cobbs' operative petition fails to state a claim for implied warranty of fitness for a particular purpose. The Cobbs' second cause of action alleges: (1) Cobb contacted Dillman and requested that Eptam be used for a preemergent on the alfalfa seeding; (2) the Cobbs entered into a contract with Sure Crop "for the purpose of application of Eptam on 25 acres to be planted with alfalfa"; (3) the purpose of applying the Eptam was to control weeds; (4) Dillman made an inspection of the field in question; (5) the Cobbs "relied on the expertise of . . . Dillman . . . to determine if the Eptam would or would not, in fact, control the visible weeds in said field"; (6) "it is part of . . . Dillman's duty . . . to make an inspection of the type of weeds and to determine what pesticide would be effec-

tive on them and to so advise the customer"; and (7) "[t]hat, without the consent or knowledge of [the Cobbs], [Sure Crop] applied Treflan EC to [the Cobbs'] land in question . . . ."

Pursuant to § 2-315, implied warranties are imposed upon goods when and only when they become the subject of a contract for their sale. See, e.g., *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir. 1980) (holding trial court erred when it permitted jury to consider U.C.C. implied-warranty theories where evidence was insufficient to prove defective product at issue was sold); *Dunham-Bush, Inc. v. Thermo-Air Service, Inc.*, 351 So. 2d 351 (Fla. App. 1977) (holding that U.C.C. implied-warranty action requires pleading of facts in respect to sale of goods); *Patrick v. Sferra*, 70 Wash. App. 676, 855 P.2d 320 (1993) (holding implied warranty of fitness for particular purpose cannot lie where goods were subject of gift rather than sale); *Johnson v. National Sea Products, Ltd.*, 35 F.3d 626, 630 (1st Cir. 1994) (stating "absent any sale of the fish or contract for the sale of the fish, no warranty of merchantability could have attached"). In other words, the implied warranty of fitness for a particular purpose attaches only to the subject of the contract for sale. Indeed, a seller cannot impliedly warrant a product's fitness for a particular purpose when that product is not a part of the sales contract. Regarding the related implied warranty of merchantability, Neb. U.C.C. § 2-314 (Reissue 1992) expressly states this obvious requirement, and it is also implicit within the language of § 2-315.

In the instant case, the Cobbs allege that the subject of the contract for sale was Eptam. Thus, any implied warranty of fitness for a particular purpose necessarily attached to the sale of Eptam. However, within the same cause of action, the Cobbs allege, and we assume as true, that Sure Crop applied Treflan E.C. Because Treflan E.C. was not the subject of the contract for sale, no implied warranties could have attached thereto. Sure Crop simply could not have impliedly warranted Treflan E.C.'s fitness for the Cobbs' purposes when Sure Crop had not contracted to supply the Cobbs with Treflan E.C. Therefore, we conclude that the trial court correctly sustained Sure Crop's demurrer to the Cobbs' second cause of action for failure to state a claim.

JURY INSTRUCTION NO. 2

At the instruction conference, the Cobbs' counsel objected to the court's jury instruction No. 2, which presented the claims of the parties and the burden of proof. The Cobbs contend they were prejudiced by the district court's failure to specifically instruct the jury that they could recover if the application of Treflan E.C. damaged the new alfalfa *or* that it also did not control the weeds. The court's jury instruction No. 2, as presented to the jury, described the Cobbs' claim as follows:

> The plaintiffs ask for $9,534.50 crop damages for a claimed breach of contract . . . .
>
> . . . [T]he plaintiffs allege that an agreement was made between the plaintiffs and the defendant to spray a chemical, Eptam, on the plaintiffs' alfalfa field; and the defendant mistakenly applied Treflan EC, which caused crop damage.

The Cobbs instead requested the jury be instructed in the following manner:

> Plaintiffs . . . claim that they entered into a contract with the defendants . . . to apply Eptam for the purpose of controlling weeds on 25 acres to be planted with alfalfa. Plaintiffs further claim that defendants did not use Eptam on the field but instead sprayed it with Treflan EC . . . . Plaintiffs further allege that [the] defendants' use of Treflan EC, which damaged the new alfalfa and did not control the weeds, proximately result[ed] in loss of crop and additional labor and seed, in the total amount of $9,534.50, together with the costs of this action.

The court's instruction explained the Cobbs' burden of proof as follows:

> Before the plaintiffs can recover on their petition, they must establish by the greater weight of the evidence, each and every one of the following elements:
>
> 1. That the plaintiffs and the defendant did agree that the chemical Eptam was to be applied to the alfalfa field;
>
> 2. That the defendant breached that agreement by applying Treflan EC instead of Eptam;
>
> 3. That the application of Treflan EC proximately caused some damage to the plaintiff; and

> 4. The extent of that damage measured reasonably certain by profits lost as a proximate result of the incorrect chemical.
>
> . . . .
>
> A **proximate cause** is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.

The Cobbs instead requested that the third element of proof read that "the Treflan EC failed to control weeds and damaged the alfalfa crop and thereby was a proximate cause of some damage to the plaintiffs." The Cobbs contend that because the court failed to include the requested language in their claim's description and in the elements of proof, the jury "was unable to consider the effect the uncontrolled weed growth had on the seedling alfalfa plants." Brief for appellants at 22.

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). The court's instruction, as given, did not prejudice the Cobbs. For clarity, the explanation of the Cobbs' claim given in the instruction could have added the words "proximately" or "directly or indirectly" to the line that ends with "which caused crop damage." However, that failure did not prevent them from arguing about "the effect the uncontrolled weed growth had on the seedling alfalfa plants." The third element of proof given by the court stated that "the application of Treflan EC *proximately caused some damage* to the plaintiff" (emphasis supplied), combined with the court's definition of proximate cause, provided the necessary support for the Cobbs' claim. The Cobbs could have argued to the jury that they should recover if application of Treflan E.C. did not control the weeds in their field as well as Eptam.

### PROPOSED JURY INSTRUCTION ON HERBICIDE APPLICATOR'S DUTIES

The Cobbs proposed an instruction which read: "You are instructed that Nebraska law requires the commercial applicator of herbicides to, among other things, specify the type of weed to be controlled, the location of the application, and the trade name and registration number of the herbicide to be applied." Sure Crop's counsel objected, on the ground that the duties stated in the instruction are regarding the use of *restricted-use* herbicides and pesticides, yet Treflan E.C. is not a restricted-use herbicide. The court refused to give this instruction.

The court's refusal to give this proposed instruction was proper. The language from the Cobbs' proposed instruction comes from 25 Neb. Admin. Code, ch. 2, § 006.02 (1997), which requires specific recordkeeping procedures for commercial and noncommercial applicators of restricted-use pesticides and herbicides. However, Nelson testified at trial that Treflan E.C. is not a restricted-use herbicide. His testimony was undisputed. No evidence was presented on whether Eptam is a restricted-use herbicide. Thus, while the tendered instruction is a correct statement of the law as to restricted-use herbicides, the tendered instruction is not warranted by the evidence. See, *Tapp v. Blackmore Ranch, supra*; *Walkenhorst v. State, supra*. Instructing the jury as to statutory duties when applying restricted-use herbicides where they appear to have no application to this case would have a tendency to confuse and mislead the jury regarding the issues properly raised in the case.

### PROPOSED JURY INSTRUCTION ON HERBICIDE APPLICATOR'S LIABILITY

The Cobbs proposed an instruction which read: "You are instructed that both federal and state law provide that if injury or damage results from unauthorized use of a herbicide, then the applicator is liable for that damage." The court refused to give the instruction.

The proposed instruction states in essence that Sure Crop would be liable to the Cobbs for violating a statute if the viola-

tion caused injury or damage. The instruction sounds in strict liability because it instructs the jury that the Cobbs may recover if Sure Crop used Treflan E.C. in violation of its label restrictions. However, the Cobbs' action is for breach of contract, specifically, a contract to apply a particular chemical, Eptam, to their field. The Cobbs characterize the action as such in their proposed jury instructions, and the district court did so as well in the instructions it gave to the jury, with no objection from the Cobbs. Any damages in their contract action must be in relation to a breach of the contract formed. A party is not entitled to a jury instruction on a theory of the case not presented by the pleadings. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996). Additionally, the proposed instruction referred to damages as they relate to damage from an illegal application of herbicide, not damage related to a breach of contract. The instruction could mislead the jury into believing that the Cobbs were entitled to recover, even absent a breach of contract. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). The district court did not err in refusing the Cobbs' proposed instruction because it was not based upon the theories of the case presented by the pleadings and because it more than likely would have confused the jury in regard to the basis on which the Cobbs could recover damages.

## COUNTERCLAIM

Sure Crop contends the district court erred when the court overruled its motion for directed verdict on its counterclaim, because the only conclusion reasonable minds could draw from the testimony presented at trial is that Sure Crop and the Cobbs entered a contract to apply Treflan E.C. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996). Such is not the case here. If Cobb's testimony is believed, he and Dillman entered into an oral contract to supply and apply Eptam, not Treflan E.C. Thus, a jury could reasonably conclude that the contract

was not for Treflan E.C., contrary to what Sure Crop's counterclaim requires to recover damages. We conclude, then, that the district court properly overruled Sure Crop's motion for directed verdict on its counterclaim.

## CONCLUSION

We affirm the district court's judgment in all respects. The second cause of action in the Cobbs' amended, operative petition did not state a claim. Two of the Cobbs' proposed jury instructions which the district court refused to give either were not supported by the evidence or likely would have misled the jury. The court's jury instruction No. 2, which the district court did not modify as the Cobbs requested, did not prejudice the Cobbs.

Sure Crop's counterclaim was not proved as a matter of law, and thus the district court's dismissal of Sure Crop's motion for directed verdict was entirely proper.

AFFIRMED.

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RICHARD L. GORDON, APPELLANT, V. COMMUNITY FIRST STATE BANK, FORMERLY THE ABBOTT BANK, ET AL., APPELLEES.
587 N.W.2d 343

Filed December 4, 1998. Nos. S-97-618, S-97-1183.

1. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, 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. ____: ____. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

6. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order.
7. **Actions: Proof.** The two elements necessary to establish an action for abuse of legal process are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding.
8. **Torts.** Abuse of process and malicious prosecution are separate and distinct torts.
9. **Actions: Proof.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff.
10. **Actions: Torts: Words and Phrases.** Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.
11. **Actions.** With respect to a cause of action for abuse of process, the judicial process must in some manner be involved. An administrative proceeding cannot form the basis of an action for abuse of process.
12. **Res Judicata: Judgments.** The doctrine of res judicata bars relitigation of a matter that has been 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.
13. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.
14. **Constitutional Law: Jurisdiction: States.** Although the states have concurrent jurisdiction to entertain actions pursuant to 42 U.S.C. § 1983 (1994), 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.
15. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (1994), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.
16. **Constitutional Law.** An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Judgment in No. S-97-618 affirmed in part, and in part dismissed. Judgment in No. S-97-1183 affirmed.

D.C. Bradford, of Bradford, Coenen & Welsh, for appellant.

Terence P. Boyle, of Boyle Partnership, P.C., and J. Michael Coffey, of Stave & Coffey, for appellee Community First State Bank.

Joseph K. Meusey, Joseph E. Jones, and Michael J. Mooney, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees Chapin, Raum, Keslar, and Willnerd.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellees Hansen, Glen, and Plummer.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

In this consolidated action, Richard L. Gordon seeks damages from Community First State Bank, formerly The Abbott Bank (Bank), and several of its officers, as well as the director and two other employees of the Nebraska Department of Banking and Finance (Department). Gordon asserts alternative theories of recovery, including abuse of process and denial of civil rights in violation of 42 U.S.C. § 1983 (1994). The district court for Douglas County sustained demurrers and entered an order of dismissal in each action, from which Gordon appeals. We conclude that we lack jurisdiction over Gordon's appeal in case No. S-97-618 with respect to the individual appellees because there is no final, appealable order as to them. We affirm the judgment in that case with respect to the Bank, and we affirm the judgment in case No. S-97-1183 in its entirety.

## I. SCOPE OF REVIEW

An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

In considering a demurrer, a court must assume that the facts pled, 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 exis-

tence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Id.*

When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Vanice v. Oehm*, 255 Neb. 166, 582 N.W.2d 615 (1998); *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998).

## II. FACTUAL ALLEGATIONS

The operative petitions in both of these actions contain similar factual allegations, which we summarize here, recalling that we must assume the truth of such allegations under the aforementioned standard of review. The Bank is chartered by the State of Nebraska and maintains its principal place of business in Alliance, Nebraska. Approximately 99 percent of the Bank's outstanding common stock was owned by Abbott Bank Group, Inc. (ABGI), a bank holding company incorporated in Delaware. In June 1982, James E. Abbott became the majority shareholder of ABGI.

Prior to a reorganization which occurred between 1987 and 1989, Abbott's banking interests included 10 independent banks, each of which was owned by a separate holding company. In 1987, Abbott became chairman of each bank's board of directors. At that time, Gordon was a shareholder, director, and officer of an Omaha law firm which had represented the banking interests of Abbott and his family since 1978. Abbott designated Gordon as general counsel to the Abbott banks and their respective holding companies and gave Gordon broad authority to review all legal matters involving these entities. As general counsel, Gordon had an attorney-client relationship with the Bank which was founded on an oral contract.

Between 1987 and 1989, the 10 separate banks were reorganized into a single bank owned by ABGI, The Abbott Bank, resulting in the loss of each bank's local name, autonomy, and board of directors. In addition, the reorganization resulted in significant reductions in bank personnel. Gordon alleges that this reorganization created "extremely hard feelings" directed toward those perceived to be responsible for the changes, par-

ticularly Gordon and his law firm. As a part of the reorganization, the Bank instituted a credit card program, which met with resistance from the Bank's management. Also, various actions of the Bank taken to reform policies and collect delinquent accounts furthered animosity toward Abbott and his advisors.

In 1990, Gordon advised Abbott that unless issues regarding management and leadership were addressed, it was likely that the Bank's various professional fees would increase significantly. Rather than replace management, Abbott decided to pursue a sale or merger of the Bank into a larger organization in order to resolve the management issues and realize the value of the investment in the credit card operation. Abbott informed Gordon of this decision in confidence.

In 1993, Abbott retained an investment banking firm to assist in the sale of the Bank. He intentionally did not disclose this fact to some persons on the management team. In July, the decision to sell the Bank was disclosed to Richard J. Chapin, the chief financial officer of the Bank, who later became its president. Gordon alleges that Chapin pretended to support the decision while secretly planning to remove Abbott from controlling the Bank's policies and operations. Gordon alleges that Bank officers Darrell Raum, Pat Keslar, and Tom Willnerd conspired with Chapin (collectively referred to as "the individual officers") to remove Abbott from control of the Bank and place themselves in control. Gordon alleges that the individual officers determined that in order to carry out their plan, they had to first remove Gordon from his position as general counsel.

Gordon contends that in order to attract regulatory disapproval sufficient to cause Abbott's removal and block Abbott's plan to sell the Bank or control the terms of any sale, the individual officers (1) attacked the viability of the credit card operation, (2) attacked the ability of Abbott to set Bank policy and to counsel with Gordon, (3) attacked Gordon as having too much control over the affairs of the Bank, (4) attacked the financial condition of the Bank, (5) attempted to place the Bank in various conditions of default with its primary lender and regulators, (6) alleged that the Bank illegally paid Abbott's personal legal and accounting fees, (7) failed to timely produce a business plan for the Bank, (8) attacked the legal fees of

Gordon's law firm, (9) attacked the fees of the Bank's accounting firm, (10) attacked the fees of the Bank's advertising company, and (11) threatened to quit their respective services to the Bank unless regulators supported them in their efforts to " 'get rid of' " Abbott and Gordon.

Gordon alleges that in late 1993 and early 1994, the individual officers further conspired to take control of the Bank by forming a "joint plan or agreement with the intent of controlling the Bank so that any potential buyer would have to deal with them and thereby preserve their influence and jobs." He alleges that in December 1993, Chapin hired an attorney to represent the Bank without the knowledge or approval of the board of directors. Gordon alleges that the individual officers then began a series of discussions with state and federal banking regulators in which they made the following misrepresentations: (1) that the Bank had unlawfully permitted Gordon to act as an unlicensed Bank officer, (2) that the Bank was in a very perilous financial condition, and (3) that the Bank " 'was in imminent danger of failure.' "

Gordon alleges that on January 27, 1994, Chapin met secretly with Lucinda Glen and Kent Plummer of the Department, and that during this meeting Chapin told Glen and Plummer that the Bank was failing, although he had made no such statement to the Bank's primary lender and subsequently voted to approve the Bank's budget. According to Gordon, at some point between February 28 and March 10, Glen, Plummer, and James Hansen, director of the Department (hereinafter collectively referred to as "the state regulators"), and the individual officers agreed to work together in order to wrest control of the Bank from Abbott, remove Gordon from involvement with the Bank, restrict the sale of the Bank, and guarantee the continued employment of the individual officers. Gordon further alleges that at the time this agreement was made, the individual officers and the state regulators knew that the allegations made by the individual officers were false and that all acts taking place after March 9 were done to further the agreement.

Gordon contends that as a result of the individual officers' discussions with the state regulators, the Federal Deposit Insurance Corporation (FDIC) began an investigation which led

the Department to issue an emergency order pursuant to Neb. Rev. Stat. §§ 8-1,134 to 8-1,139 (Reissue 1991). The emergency order, issued March 10, 1994, provided that the Bank could not terminate any officer or force, require, or coerce any officer to resign without written approval from the Department and the FDIC. On March 11, the Department served a second emergency order on all officers and employees of the Bank, finding that Gordon was acting as an unlicensed executive officer, in violation of Neb. Rev. Stat. § 8-139 (Reissue 1991), and ordering the Bank to cease and desist from the practice of allowing Gordon to act in this manner. Gordon asserts that this action was meant to intimidate officers and employees of the Bank. Gordon further alleges that after the orders were issued, the individual officers began to pressure and intimidate other members of the Bank's executive committee.

Gordon requested a hearing regarding the emergency orders on March 18, 1994. He alleges that the Department sent a copy of the second order to the Omaha World-Herald newspaper. Gordon alleges that the emergency orders allowed the individual officers to have full control of the Bank without the "input or interference" of Abbott and to terminate the Bank's relationship with Gordon and his law firm. Gordon also asserts that the individual officers established a procedure that effectively prevented any Bank employee from having any contact with Gordon or his firm.

Gordon alleges that the state regulators took steps to prevent the discovery of facts that did not support the emergency orders. According to Gordon, no inquiries were made of Abbott, Gordon, Gordon's law firm, the Bank's accounting firm, or the Bank's board of directors. Gordon also states that the state regulators "took great pains" to prevent the company assisting with the possible sale of the Bank from presenting information that would conflict with the state regulators' position. Gordon further alleges that the Bank supported the actions of the state regulators and the individual officers and that these actions exposed Gordon to possible felony charges.

When Gordon appealed the second emergency order, Hansen, the director of the Department, appointed the Honorable John T. Grant, a retired member of this court, to act

as the hearing officer. Gordon alleges that although the Bank and the state regulators knew or should have known that any further prosecution was "reckless," they presented evidence to Justice Grant in an effort to keep the emergency order in effect. The Bank also filed pleadings admitting to the allegations that supported the emergency orders. This, according to Gordon, exposed him, the Bank, the Bank's board of directors, and Abbott to criminal prosecution. Gordon alleges that the Department continued to prosecute its actions against Gordon when it knew that no emergency existed. Justice Grant concluded that the Department failed to carry its burden of proof and recommended that the emergency orders be set aside.

In November 1994, The Abbott Bank entered into a merger agreement with Community First State Bank, which, Gordon alleges, proves that the efforts of the individual officers to prevent the sale were not successful and that the Bank was never in an emergency condition. However, in December, Hansen rejected Justice Grant's findings and drafted an order affirming the original cease-and-desist order. Gordon appealed this order to the district court for Lancaster County, which dismissed Gordon's appeal as moot without reaching a decision on the merits. In May 1995, Community First State Bank acquired The Abbott Bank for approximately $34 million and sold the Bank's credit card receivables for approximately $10 million.

## III. PROCEDURAL HISTORY

### 1. Case No. S-97-618

In this action against the Bank and the individual officers, Gordon alleged that these parties "caused the issuance of process and abusively pursued its application to prevent Abbott from having the representation of his choice" with respect to the sale of the Bank. Gordon stated that the alleged abuse of process caused him to lose income, reputation, and the opportunity to practice law, for which he sought special damages in the amount of $10 million and general damages in an unspecified amount. Gordon also asserted alternative theories of recovery, against the individual officers only, including intentional interference with a business relationship and violation of § 1983.

The Bank and the individual officers filed demurrers, asserting that Gordon had not alleged facts sufficient to constitute a cause of action. In a memorandum and order entered May 13, 1997, the district court sustained the Bank's demurrer and dismissed the action against it based on a determination that Gordon could not establish an abuse of process claim, because he did not allege "a misuse of judicial process issued through a court of law." The court also sustained the individual officers' demurrer but granted Gordon leave to amend with respect to his alternative theories of recovery. Gordon filed a timely notice of appeal from this order.

### 2. Case No. S-97-1183

In this action, Gordon asserted claims against the individual officers and the state regulators. Although the Bank is listed as a defendant in the caption of Gordon's operative petition, no claim against the Bank is asserted. Based upon essentially the same facts as those alleged in case No. S-97-618, Gordon asserts claims against the individual officers and the state regulators based upon theories of abuse of process and violation of § 1983. The individual officers and the state regulators filed separate demurrers, which were sustained by the district court in an order entered on October 14, 1997. The court reasoned that the action constituted an impermissible collateral attack on the administrative order of the Department and the final judgment of the district court for Lancaster County dismissing the appeal from that order. Thus, the district court dismissed the action with prejudice and did not grant leave to amend. Gordon perfected a timely appeal, which was consolidated with case No. S-97-618 for oral argument and disposition. Pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, we removed the consolidated appeal to our docket on our own motion.

## IV. ASSIGNMENTS OF ERROR

Restated, Gordon assigns that the district court erred in (1) concluding that Gordon failed to state a claim for the tort of abuse of process and (2) concluding that his § 1983 action was barred by issue preclusion or as an impermissible collateral attack on an administrative judgment.

## V. ANALYSIS

### 1. Case No. S-97-618

#### (a) Claims Against Individual Officers

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Fitzke v. City of Hastings, ante* p. 46, 582 N.W.2d 301 (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998). In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997); *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997).

The district court sustained the individual officers' separate demurrer but granted Gordon leave to amend with respect to two of his three alternative theories of recovery. Our review of the record discloses no order of dismissal as to the individual officers, and this was confirmed by the parties in their joint response to an order to show cause which we issued following oral argument. The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). On the record before us, there is no order of dismissal terminating this litigation as to the individual officers, Chapin, Raum, Keslar, and Willnerd, and we therefore must dismiss the appeal as to those parties for lack of appellate jurisdiction.

#### (b) Claim Against Bank

As noted above, Gordon's claim against the Bank is based solely upon an alleged abuse of process. Our jurisprudence with respect to this cause of action is not extensive, and our most recent cases discussing it were decided more than 60 years ago. See, *Vybiral v. Schildhauer*, 130 Neb. 433, 265 N.W. 241 (1936); *Martin v. Sanford*, 129 Neb. 212, 261 N.W. 136 (1935). In *Martin*, we stated that the two elements necessary to establish an action for " 'malicious abuse of legal process' " are the existence of an ulterior purpose and an act in the use of the pro-

cess not proper in the regular prosecution of the proceeding. 129 Neb. at 222, 261 N.W. at 141. Quoting 1 Thomas M. Cooley, Torts § 131 (4th ed. 1932), we stated that " '[r]egular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.' " *Martin*, 129 Neb. at 222, 261 N.W. at 141. We reiterated these statements in *Vybiral* and further noted: " ' "Abuse of process" . . . means the perversion of it,—i.e., accomplishing some illegal object or purpose for which such process was not legally intended.' " *Vybiral*, 130 Neb. at 437, 265 N.W. at 244, quoting *Dixon v. Smith-Wallace Shoe Co.*, 283 Ill. 234, 119 N.E. 265 (1918). We stated that "[t]o make out a cause of action for abuse of process, the plaintiff must prove irregular steps taken under cover of the process after its issuance, and damage resulting therefrom." *Vybiral*, 130 Neb. at 437, 265 N.W. at 244, citing *Italian Star Line v. United States Shipping Board E. F. Corp.*, 53 F.2d 359 (2d Cir. 1931).

Although the phrase "malicious abuse of process" appears in both *Vybiral* and *Martin*, we note that abuse of process is not synonymous with malicious prosecution; they are separate and distinct torts.

> " ' "In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff.". . . ' "

*Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 526, 300 N.W.2d 10, 14 (1980), quoting *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974). Thus, "[a]buse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 897 (5th ed. 1984). Historically, the tort of abuse of process " 'evolved as a "catch-all" category to cover improper uses of the judicial machinery that did not fit

within the earlier established, but narrowly circumscribed, action of malicious prosecution. . . .' " *Younger v. Solomon*, 38 Cal. App. 3d 289, 296, 113 Cal. Rptr. 113, 118 (1974), citing *Italian Star Line, supra*. See, also, *Vybiral, supra* (citing *Italian Star Line, supra*).

Gordon's allegations focus on the two "Emergency Orders" issued by the Department on March 10 and 11, 1994, copies of which are appended to his operative petition. A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996). The district court held that an abuse of process claim could not be predicated upon these administrative orders because "[t]o establish an abuse of process claim, Plaintiff must allege a misuse of judicial process issued through a court of law." Our review of this determination requires us to define, for the first time, the meaning of the phrase "legal process" in the context of an action for abuse of process.

In *Vybiral v. Schildhauer*, 130 Neb. 433, 265 N.W. 241 (1936), we cited and quoted Illinois cases defining the essential elements of abuse of process. Subsequent Illinois decisions on this subject define "process" as "any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property." *Holiday Magic, Inc. v. Scott*, 4 Ill. App. 3d 962, 968, 282 N.E.2d 452, 456 (1972). "Process is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants." *Doyle v. Shlensky*, 120 Ill. App. 3d 807, 816, 458 N.E.2d 1120, 1128, 76 Ill. Dec. 466 (1983). See, also, *Community National Bank v. McCrery*, 156 Ill. App. 3d 580, 509 N.E.2d 122, 108 Ill. Dec. 696 (1987) (stating that process is issued by court). Some jurisdictions define "process" more broadly to encompass the entire range of procedures incident to the litigation process, including various discovery documents, entry of defaults, and the utilization of various motions filed with a court. See, e.g., *Hopper v. Drysdale*, 524 F. Supp. 1039 (D. Mont. 1981); *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (Ariz. App. 1982); *Foothill Ind. Bank v. Mikkelson*, 623 P.2d 748 (Wyo. 1981); *Twyford v.*

*Twyford*, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976); *Younger, supra*. However, it is generally accepted that with respect to a cause of action for abuse of process, "the judicial process must in some manner be involved." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 898 (5th ed. 1984).

Gordon argues that we should expand the generally accepted definition of "legal process" to include process issued by an administrative agency acting in a judicial or quasi-judicial capacity. Our research discloses one case supporting this proposition. In *Hillside Associates v. Stravato*, 642 A.2d 664, 669 (R.I. 1994), the Supreme Court of Rhode Island held that a "misuse of an administrative proceeding may give rise to claims for malicious prosecution and/or abuse of process." The court limited its holding to "quasi-judicial contested administrative determinations or proceedings that establish the legal rights, duties, or privileges of a party" following notice and an evidentiary hearing resulting in a recorded decision. *Id.* Although recognizing the distinction between the torts of malicious prosecution and abuse of process, the court based its holding upon its "opinion that when a party invokes an administrative proceeding with malicious intent and without probable cause, that party should be subject to the same sanctions [t]hat would obtain if the action were brought in the judicial branch." *Id.* at 668-69. The Rhode Island court further stated that "numerous jurisdictions have recognized that misuse of certain administrative proceedings may give rise to claims for malicious prosecution and abuse of process," *id.* at 668, but most of the cases cited for this proposition involved only malicious prosecution claims and none reached the specific issue of whether an abuse of process claim could be based upon process issued by an administrative agency.

With the exception of *Hillside Associates*, the cases addressing this issue have held that process issued in an administrative proceeding cannot form the basis of an action for abuse of process. The most recent is *Kirchner v. Greene*, 294 Ill. App. 3d 672, 691 N.E.2d 107, 229 Ill. Dec. 171 (1998), in which the plaintiff asserted a claim for abuse of process based upon allegations that a newspaper article falsely accusing him of child

abuse resulted in the initiation of investigative proceedings by the Illinois Department of Children and Family Services. After reviewing the same elements of an action for abuse of process which we identified in *Vybiral v. Schildhauer*, 130 Neb. 433, 265 N.W. 241 (1936), and *Martin v. Sanford*, 129 Neb. 212, 261 N.W. 136 (1935), the court wrote:

> Kirchner's claim fails for the simple reason that no court process was involved and, thus, it is axiomatic that there can be no abuse of process. Kirchner recognizes this fact in urging us to expand the tort of abuse of process to include proceedings undertaken by the [Illinois Department of Children and Family Services] because it is a quasi-judicial administrative body that is charged with the responsibility of adjudicating claims of child abuse. Such expansion is baseless in the law and would be contrary to the narrow strictures to which courts have confined this tort.

*Kirchner*, 294 Ill. App. 3d at 684, 691 N.E.2d at 117, 229 Ill. Dec. at 181.

Similarly, in *Stolz v. Wong Communications Ltd.*, 25 Cal. App. 4th 1811, 31 Cal. Rptr. 2d 229 (1994), the court held that an allegation of misuse of the Federal Communications Commission broadcast licensing process failed to state a cause of action for abuse of process because no actionable abuse of judicial process was alleged. The court specifically rejected an invitation to extend the tort of abuse of process to administrative proceedings, noting that such action "would not serve the purpose of the tort, which is to preserve the integrity *of the court*." (Emphasis in original.) *Id.* at 1823, 31 Cal. Rptr. 2d at 236.

In *Crosspoint Associates, Inc. v. Papas*, No. 941749, 1994 WL 878943 (Mass. Super. Nov. 7, 1994), the Massachusetts Superior Court cited to *Hillside Associates* and other authorities to hold that a nonmeritorious letter of complaint filed with the Army Corps of Engineers asserting violations of various environmental laws in an attempt to block a construction project could form the basis of a claim for malicious prosecution. However, the court rejected a contention that the complaint also stated a claim for abuse of process, finding that Massachusetts law "narrowly construed the parameters of an abuse of process

action" as applicable only to process issued by a court. 1994 WL 878943 at *3. Other cases reaching similar results include *Sea-Pac Co. v. United Food Workers*, 103 Wash. 2d 800, 699 P.2d 217 (1985) (holding that unfair labor practice charges could not form basis of action for abuse of process because no process was issued by Washington courts and that whether union misused process of National Labor Relations Board was for board to decide); *Char v. Matson Terminals Inc.*, 817 F. Supp. 850 (D. Haw. 1992); and *McCarthy v. KFC Corp.*, 607 F. Supp. 343 (D.C. Ky. 1985) (holding that employer's allegedly nonmeritorious resistance of appeal of unemployment compensation awards did not state claim for abuse of process because no judicial process involved).

We agree with the majority view that an action for abuse of process is historically based upon the need to protect the integrity of judicial process and should be narrowly construed to achieve that purpose. Accordingly, the district court did not err in sustaining the Bank's demurrer without leave to amend and in dismissing the action as to the Bank, based upon its finding that Gordon's allegations of abuse of administrative process failed to state a cause of action. In so holding, we do not decide whether or under what circumstances administrative proceedings could form the basis of an action for malicious prosecution, as those issues are not before us in this case.

### 2. Case No. S-97-1183

In this action against the individual officers and the state regulators, Gordon asserts two alternative theories of recovery: (1) abuse of process, based upon essentially the same factual allegations as those made in case No. S-97-618, and (2) deprivation of his constitutional rights, in violation of § 1983. The district court sustained the individual officers' and the state regulators' demurrers and dismissed the action with prejudice, finding that the order of dismissal entered by the district court for Lancaster County terminating the administrative proceedings was conclusive as to the claims asserted by Gordon in this action and could not be collaterally attacked. That order, however, is not part of the record. In his operative petition, Gordon alleges that the district court for Lancaster County "ultimately found the issue [raised in Gordon's appeal from the order of the

Nebraska Department of Banking and Finance] 'moot' as a result of the sale of the Bank, and dismissed Plaintiff's appeal without reaching a decision on the merits."

The doctrine of res judicata bars relitigation of a matter that has been 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. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997). The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Acosta, supra*; *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

The rationale of the district court is problematic, in that Gordon's petition specifically alleges that the judgment of the district court for Lancaster County was not on the merits, but, rather, resulted from a determination of mootness. See *McCartney v. Ford Motor Co.*, 657 F.2d 230 (8th Cir. 1981) (holding that judgment dismissing action as moot is not conclusive in subsequent proceeding). However, we need not resolve this question, because we determine that the dismissal of this action was justified for other reasons. A proper result will not be reversed merely because it was reached for the wrong reasons. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Pettit v. Paxton, ante* p. 279, 583 N.W.2d 604 (1998); *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997). Our holding with respect to the abuse of process claim in case No. S-97-618 is dispositive of the similar claim asserted in this action. Gordon does not allege abuse of process issued by a court, and his petition therefore fails to state

facts sufficient to constitute a cause of action under this theory of recovery.

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); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994). In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). Gordon alleges that the individual officers and the state regulators conspired to deny him procedural due process and violated his "constitutional right to practice in his chosen profession and liberty interest in his reputation and prospects for further employment." Gordon further alleges that the individual officers and regulators acted "with the intent to restrain Plaintiff's First Amendment rights to free speech (i.e., on banking issues) and free association (i.e., representation of banking interests)" in "retaliation for prior exercise of Plaintiff's First Amendment rights and to deter future exercise of said rights." However, the only factual allegations pertaining to conduct directed at Gordon by the individual officers and the state regulators are (1) the issuance of an emergency order by the Department requiring Gordon to cease and desist from "managing, controlling, directing, or otherwise interfering with any aspect of the ongoing business" of the the Bank and (2) the subsequent termination of the attorney-client relationship between the Bank and Gordon's law firm, as a result of which Gordon alleges to have "lost his position" with the firm. Gordon characterizes his claim as one alleging that "individuals working for the State of Nebraska and the United States Government conspired with private individuals to destroy

the reputation, professional standing, earning ability, and employment of Richard Gordon." Reply brief for appellant at 8.

We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm. Such relationships among private parties and entities are usually terminable at will or governed by contract. They do not constitute intimate human relationships or groups formed for the purpose of exercising First Amendment rights which are subject to a constitutionally protected freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Gordon does not allege any form of public employment which would implicate his freedom of speech under the First Amendment. See, e.g., *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment. *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Lynch v. City of Boston*, 989 F. Supp. 275 (D. Mass. 1997). Likewise, the loss of outside private employment does not come within the ambit of a constitutionally protected property interest. *Id.* In general, any damages for loss of employment opportunities that flow from harm to reputation may be recoverable under state tort law, but not under § 1983. *Siegert, supra.*

Construing the operative petition in a light most favorable to Gordon, we conclude it does not contain factual allegations sufficient to constitute a cause of action under § 1983, because it does not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States. In addition, we conclude that this deficiency cannot be cured by amendment. Therefore, although for reasons different from those stated by the district court, we conclude that it did not err in sustaining the individual officers' and the state regulators' demurrers and dismissing this action.

## VI. CONCLUSION

For the reasons stated in case No. S-97-618, we affirm the judgment of the district court with respect to appellee

Community First State Bank of Nebraska but dismiss the appeal as to appellees Chapin, Raum, Kesslar, and Willnerd because of the absence of a final, appealable order necessary to confer appellate jurisdiction. The judgment of the district court in case No. S-97-1183 is affirmed.

JUDGMENT IN NO. S-97-618 AFFIRMED IN PART, AND IN PART DISMISSED.
JUDGMENT IN NO. S-97-1183 AFFIRMED.

WHITE, C.J., not participating.

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MARTIN F. REISER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES L. REISER, DECEASED, APPELLANT, V. DOUGLAS R. COBURN, APPELLEE.
587 N.W.2d 336

Filed December 4, 1998. No. S-97-631.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Damages: Verdicts: Juries: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
4. **Wrongful Death: Words and Phrases.** The phrase "next of kin" in Nebraska's wrongful death statute means those persons nearest in degree of blood surviving the decedent, who ordinarily are those persons who take the personal estate of the deceased under the statutes of distribution.
5. **Wrongful Death: Damages.** A plaintiff in a wrongful death case can recover damages only for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value.
6. ____: ____. In a wrongful death action, the law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix an amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case.
7. **Wrongful Death: Damages: Evidence.** In a wrongful death action, there is no requirement that there be evidence of a dollar value of companionship, counseling, or advice.

8. **Wrongful Death: Damages: Mental Distress.** In a wrongful death action, no recovery is allowed for mental suffering or bereavement or as solace on account of the death.
9. **Verdicts.** If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record.
10. **Wrongful Death: Damages: Words and Phrases.** In an action for wrongful death of a child, money value of parental loss is not limited to, always equated with, or necessarily dependent on deprivation of the child's monetary contribution toward parental well-being.
11. **Wrongful Death: Damages.** There is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective. Rather, the society, care, and attention of a deceased family member are services having financial value which may be both measured and compensated.
12. **Juries: Verdicts: Stipulations.** A jury is not bound by a stipulation of the parties. However, when stipulated expenses are undisputed, that fact may be considered in determining whether or not the verdict was inadequate.

Appeal from the District Court for Boyd County: WILLIAM B. CASSEL, Judge. Reversed and remanded for a new trial on the issue of damages.

E. Terry Sibbernsen and Mandy L. Strigenz, of E. Terry Sibbernsen, P.C., for appellant.

David D. Ernst and Jeffrey J. Huber, of Gaines, Mullen, Pansing & Hogan, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

James L. Reiser died at the age of 18 as a result of injuries he sustained when the vehicle he was operating collided with a vehicle operated by Douglas R. Coburn at the intersection of two county roads in rural Boyd County, Nebraska. James Reiser's father, Martin F. Reiser, as personal representative of his son's estate, brought this action against Coburn, alleging that Coburn's negligence caused the accident and the death of James Reiser. Following trial, a jury found that Coburn was 50.1 percent negligent, that James Reiser was 49.9 percent negligent, and that James Reiser's estate sustained total damages in the amount of $17,000. The court reduced this award by the per-

centage of James Reiser's negligence as determined by the jury, which resulted in a judgment of $8,517. In this appeal, Martin Reiser does not challenge the determination of comparative negligence but contends that the district court erred in not granting his motion for a new trial on the issue of damages because the amount of the verdicts was clearly inadequate. We agree and therefore reverse, and remand for a new trial on the issue of damages only.

## FACTS

On September 19, 1994, at approximately 6:30 p.m., James Reiser was driving a 1952 Chevrolet pickup north on a county road 5 miles west of Spencer, Nebraska. On the same date and at the same time, Coburn was driving a 1994 Ford pickup east on a county road also located about 5 miles west of Spencer, Nebraska. The two pickups collided at an unmarked intersection.

After receiving medical attention at the accident scene, James Reiser was transported to Niobrara Valley Hospital in Lynch, Nebraska. Upon his arrival there, he was generally unresponsive, although he occasionally squeezed the hand of a nurse when asked to do so. Approximately 1½ hours after his arrival at the hospital in Lynch, James Reiser was transported by helicopter to Marian Health Center in Sioux City, Iowa. He was unconscious upon arrival. While hospitalized in Sioux City, James Reiser underwent surgery to remove a blood clot from his brain. However, he never regained consciousness, and on September 21, 1994, he died from the injuries sustained in the accident.

In his capacity as personal representative, Martin Reiser commenced this action against Coburn. In his first cause of action, he sought damages on behalf of James Reiser's parents for loss of consortium, services, society, companionship, and counsel resulting from the death of their son. In his second cause of action, Martin Reiser claimed damages on behalf of the estate for pain and suffering experienced by James Reiser before his death, medical expenses, and funeral and burial expenses. Coburn filed an answer, denying that he was negligent and alleging that James Reiser was contributorily negligent.

The case was tried to a jury on January 27 through 29, 1997. On a special verdict form, the jury awarded total damages of $0

on the first cause of action and $17,000 on the second cause of action, which the court then reduced to $8,517 in accordance with the jury's finding of comparative negligence. Martin Reiser filed a motion for a new trial on various grounds, including the inadequacy of the verdict on each cause of action. The motion was overruled, and Martin Reiser then perfected this appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## ASSIGNMENTS OF ERROR

Martin Reiser contends that the district court erred in not granting a new trial because of the inadequacy of damages awarded on both of his causes of action.

## STANDARD OF REVIEW

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998).

Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside. *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

## ANALYSIS

We begin by noting that although this case was tried before our decision in *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), the comparative negligence instruction given by the trial court was consistent with our holding in that case. No error is assigned with respect to the determination of comparative negligence, and thus the only issues we address in this appeal are whether the verdicts on both causes of action were inadequate as a matter of law.

Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 1995) authorize a personal representative to bring a civil action on behalf of the surviving spouse or next of kin for damages they have sustained as a result of the decedent's death caused by another person. In this context, "next of kin" means those persons nearest in degree of blood surviving the decedent, who ordinarily are "those persons who take the personal estate of the deceased under the statutes of distribution." *Mabe v. Gross*, 167 Neb. 593, 596, 94 N.W.2d 12, 15 (1959). Prior to 1973, we construed these statutes to provide that the only measure of damages which surviving parents could recover for the wrongful death of a child was the pecuniary loss which the parents sustained by reason of being deprived of the child's services during his or her minority and the loss of contributions that might reasonably be expected to be made after reaching majority. See *Dorsey v. Yost*, 151 Neb. 66, 36 N.W.2d 574 (1949). See, also, *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

In *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), we held for the first time that surviving parents could also recover for the monetary value of the loss of society, comfort, and companionship of their deceased child. A separate action on behalf of the decedent's estate for conscious pain and suffering experienced before death, medical expenses, and funeral and burial expenses may be joined as a separate cause of action in an action for wrongful death. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982). In this case, the jury was instructed that it could consider damages for the parents' loss of society, comfort, and companionship under the first cause of action and damages for conscious pain and suffering prior to death, medical expenses, and burial and funeral expenses under the second cause of action.

### First Cause of Action: Adequacy of Damages for Loss of Society, Comfort, and Companionship

A plaintiff in a wrongful death case can recover damages only for loss of the deceased's society, comfort, and compan-

ionship which are shown by the evidence to have a pecuniary value. *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979). See *Crewdson, supra*. However, we have recognized that in this context,

> the word "pecuniary" is not to be construed in a strict sense, that it is difficult to determine its exact measure, and that the task of determining such must be left to the good judgment and ordinary common sense of the jurors. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case. [Citations omitted.] There is no requirement that there be evidence of the dollar value of companionship, counseling, or advice.

*Maloney v. Kaminski*, 220 Neb. 55, 69, 368 N.W.2d 447, 458 (1985) (affirming verdict of approximately $59,000 to elderly widow for loss of her husband's society and companionship). No recovery is allowed for mental suffering or bereavement or as solace on account of the death. *Garvin v. Coover, supra*.

In *Garvin*, we affirmed a verdict of $0 in general damages in an action for the wrongful death of a 20-year-old unmarried woman. Her parents testified that she had been a bright and loving child who had graduated from high school and was studying to become a nurse at the time of her death. *Id.* She attended church with them, and they took comfort in her attitude toward school, her interest in sewing and music, and her interest in sports. *Id.* In considering whether the verdict should be set aside on appeal, we framed the question as

> whether there was such a reasonable expectation of monetary contributions on Linda's part and a monetary worth which can reasonably be assigned to the loss of her society, comfort, and companionship that we can say the verdict of "none" was so inadequate as to be contrary to the evidence and therefore wrong as a matter of law.

*Id.* at 586, 276 N.W.2d at 227. In answering that question, we noted that "[i]t is virtually impossible to 'color match' cases" to determine whether a verdict in a particular case was adequate. *Id.* After reviewing other cases involving actions for wrongful death of a child, we observed that "one common thread runs

throughout all of those cases, namely, that damages in any wrongful death case are incapable of computation and are largely a matter for the jury." *Id.* We referred to our decision in *Selders v. Armentrout*, 192 Neb. 291, 220 N.W.2d 222 (1974), in which we affirmed verdicts of $1,500 each for the deaths of three children, ages 15, 13, and 9, upon a finding that the evidence was "such that the jury could have concluded the pecuniary loss to the parents, including the value of society and companionship, was relatively small." *Id.* at 293, 220 N.W.2d at 224, quoted in *Garvin, supra.* In *Garvin*, 202 Neb. at 587, 276 N.W.2d at 228, we noted that the case was fairly tried and submitted to the jury under proper instructions, and concluded that we were "not inclined to disturb its verdict."

Two cases decided by this court since *Garvin* provide further guidance in evaluating the adequacy or excessiveness of a verdict awarded as the result of the wrongful death of unmarried young adults. In *Crewdson v. Burlington Northern RR.* Co., 234 Neb. 631, 452 N.W.2d 270 (1990), we considered a challenge to a verdict in the amount of $510,000 awarded to parents for the loss of their 21-year-old son, who was killed by a train. We noted that a jury verdict may be set aside when it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake. Additionally, we stated that passion or prejudice is shown when the verdict "shocks the conscience." *Id.* at 643, 452 N.W.2d at 280. Thus, "[i]f a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record." *Id.* In *Crewdson*, the evidence established that prior to his death, the deceased lived with his parents and did not contribute to his living expenses. He worked part time and did chores around the house, including taking care of the dogs, shoveling snow, mowing, and taking out the garbage. He was engaged to be married. Based upon this evidence, we found that the verdict of $510,000 for the parents' loss of their son's society, comfort, and companionship shocked the conscience and was clearly excessive, necessitating a new trial on the issue of damages.

The second case, *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991), involved the death of an unmarried

24-year-old woman in a motor vehicle accident. The deceased lived with her parents until a year before the accident and visited her parents almost daily, often staying for dinner and even overnight. She attended church each Sunday with her parents and shopped most weekends with her mother. Her mother referred to the deceased as her " 'best friend.' " *Id.* at 357, 470 N.W.2d at 754. The jury returned a verdict which included $250,000 for the parents' loss of the society, comfort, and companionship of their daughter. We held that this verdict was not excessive in view of the uncontroverted evidence regarding the close and loving relationship which had existed between the deceased and her parents. In reaching this conclusion, we noted " '[w]hen children are wrongfully killed, the parents' investment of money and in affection, guidance, security and love is destroyed. Society recognizes the destruction of that value, whether the child is a minor or an adult.' " *Id.* at 359, 470 N.W.2d at 755, quoting *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). We further noted:

> "The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974) (wrongful death action). Accord, *Singh v. Air Illinois, Inc.*, 165 Ill. App. 3d 923, 520 N.E.2d 852 (1988); 1 S. Speiser, Recovery for Wrongful Death § 3:49 (2d ed. 1975). "[T]here is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance . . . ." *Fussner v. Andert*, 261 Minn. 347, 353, 113 N.W.2d 355, 359 (1961).

*Williams*, 238 Neb. at 359, 470 N.W.2d at 755. In *Williams*, 238 Neb. at 359-60, 470 N.W.2d at 755, we also quoted the following observation of the Supreme Court of Michigan in *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960):

> "What, then, is the pecuniary loss suffered because of the taking of the child's life? It is the pecuniary value of the life. . . .

> ". . .[A]n individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value and its loss forms a part of the 'value' of the life we seek to ascertain."

Based upon these principles, we stated in *Williams* that "in an action for wrongful death of a child, 'money value' of parental loss is not limited to, always equated with, or necessarily dependent on deprivation of the child's monetary contribution toward parental well-being." 238 Neb. at 360, 470 N.W.2d at 756. We further stated that

> there is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective. Rather, "the society, care and attention of a deceased [family member] are 'services' having financial value which may be both measured and compensated."

*Id.* at 361-62, 470 N.W.2d at 756.

In the present case, there is uncontroverted evidence of a close and loving relationship between James Reiser and his parents. James Reiser was engaged in farming with his father, who described him as his "right-hand man." Martin Reiser testified that his son was with him all the time and helped him with everything that needed to be done on the farm. He described him as an "honest and loving kid" with whom he had a "real good" relationship. Since graduating from high school several months before his death, James Reiser lived by himself in a farmhouse owned by his grandparents which was located near his parents' farm. The family often gathered at his home for Sunday dinner. James Reiser regularly went to church and engaged in recreational activities with his parents and younger siblings. His mother testified that she thought of the loss of her son every day. When asked to describe what it meant not to have his son with him, Martin Reiser stated: "It was a shock and devastating. I think about it, you know, every time I go to the other

place, you know, what we could be doing . . . ." The parties stipulated that the surviving parents had life expectancies of 39.74 and 34.51 years.

We acknowledge the factual parallel between this case and *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979), decided almost 20 years ago. Nevertheless, mindful of the characteristics and intrinsic value of the relationship between parent and child which we examined and applied in *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991), and applying the same test which we used in reviewing the verdict in *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990), we conclude that a verdict of $0 for the loss of the deceased's society, comfort, and companionship sustained by his parents as the result of his death bears no reasonable relationship to the evidence and shocks the conscience. The verdict on the first cause of action is therefore inadequate as a matter of law.

### Second Cause of Action: Adequacy of Damages for Pain and Suffering, Medical Expenses, and Funeral and Burial Expenses

In his second cause of action, Martin Reiser sought damages for pain and suffering experienced by the deceased before his death, as well as medical expenses and funeral and burial expenses. There is conflicting evidence as to whether James Reiser experienced conscious pain and suffering between the time of the accident and his death, and the jury could have reasonably concluded that the evidence did not sustain this element of damage.

During trial, the parties stipulated that medical and funeral bills in the total amount of $33,747.72 were "necessitated as a result of the accident which occurred on September 19, 1994, which resulted in the death of James Reiser." These expenses were itemized in an exhibit which was received in evidence. It is true that a jury is not bound by a stipulation of the parties. See *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982). However, when stipulated expenses are undisputed, "that fact may be considered in determining whether or not the verdict was inadequate." *Id.* at 377, 322 N.W.2d at 793. In this case, the

stipulated expenses were incorporated into a jury instruction to which neither party objected. The jury was instructed that the reasonable value of funeral and burial expenses incurred by the estate was $6,880.75 and that the reasonable value of medical care provided to the deceased was $26,523.97.

We have held verdicts in personal injury cases to be inadequate as a matter of law where the amount was in irreconcilable conflict with stipulated or uncontested damages. See, *O'Neil v. Behrendt, supra* (holding that verdict of $1,000 was inadequate where special damages for medical expenses were stipulated in amount of $1,641.18); *Webster v. Halbridge*, 185 Neb. 409, 176 N.W.2d 8 (1970) (involving verdict of $1,600 where there was evidence of special damages of approximately $2,000, plus evidence of pain and permanent scarring); *Bohn v. Kruger*, 185 Neb. 407, 176 N.W.2d 14 (1970) (holding verdict inadequate when stipulated medical expenses were $3,194.99 and verdict was in same amount notwithstanding evidence of additional uncontested damages). In *Murrish v. Burkey*, 1 Neb. App. 650, 510 N.W.2d 366 (1993), the Court of Appeals relied on *O'Neil, supra*, in finding a verdict in the amount of stipulated hospital expenses to be inadequate in view of other stipulated special damages for physicians' fees. The court concluded that it was simply not possible to find that the defendant was liable for the plaintiff's injury but not liable for all of the undisputed medical expenses relating to the injury. *Id.*

The same reasoning applies in the present case. We need not speculate why the jury awarded a verdict on the second cause of action in the amount of approximately 50 percent of the stipulated damages. It is sufficient to conclude, as we do, that there is no logical correlation between the stipulated and uncontroverted evidence regarding medical expenses and funeral and burial expenses incorporated in the trial court's instruction and the amount of the verdict returned by the jury on the second cause of action. The verdict is therefore inadequate as a matter of law.

## CONCLUSION

For the reasons discussed, we determine that the verdicts returned by the jury on both causes of action are inadequate as

a matter of law and that the district court abused its discretion in overruling the motion for new trial on this ground. This does not, however, require retrial on the issue of liability. As noted previously, the present case is distinguishable from *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), in which the jury was not properly instructed on the effect of the allocation of negligence as required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). In this case, the jury was properly instructed on that point, and the issue of liability need not be revisited on remand.

We therefore reverse, and remand for a new trial on the issue of damages only. On retrial, the jury should be instructed to determine the total amount of damages without regard to any negligence on the part of James Reiser and then reduce such damages by 49.9 percent, representing the percentage of negligence attributable to James Reiser as determined in the first trial.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

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## BATTLE CREEK STATE BANK, APPELLANT, V. RON HAAKE, APPELLEE.

587 N.W.2d 83

Filed December 4, 1998. No. S-97-713.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below.
2. **Waiver: Words and Phrases.** "Waiver" is 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.
3. **Waiver: Security Interests: Proof.** In cases involving a question of a waiver of a security interest, waiver is a matter of fact for which the standard of proof is by clear and convincing evidence.
4. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
5. **Statutes.** Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning.
6. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be con-

junctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

7. ____: ____: ____. In noncriminal cases, statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.

8. **Courts: Jury Instructions.** A trial court need not instruct the jury where the facts do not justify the instruction.

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

W. Bert Lammli for appellant.

Forrest F. Peetz, of Peetz & Peetz, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

Battle Creek State Bank (BCSB) appeals a jury verdict entered in favor of Ron Haake following the trial of BCSB's conversion claim and the denial of BCSB's motion for new trial. BCSB alleged that Haake wrongfully converted certain cash proceeds which BCSB alleged belonged to it. BCSB assigns as error the trial court's refusal to retroactively apply the 1994 amendments to Neb. U.C.C. § 9-306(2) (Cum. Supp. 1994) and the entry of the jury's verdict finding that BCSB impliedly waived its right to enforce its security interest in certain cash proceeds. For the reasons recited below, we conclude that the 1994 amendments to § 9-306(2) are not retroactive and that there were no reversible errors in connection with the court's evidentiary rulings or instructions. Accordingly, we affirm.

## I. FACTS

In 1986, BCSB began a farm-lending relationship with Todd and Deb Duhachek. The Duhacheks farmed in Madison County, Nebraska. The farm included a small, grade B dairy operation with 25 to 30 cows. When the lending relationship commenced, the Duhacheks granted BCSB a blanket security interest in all of the farm equipment, inventory, and proceeds then owned and thereafter acquired by the Duhacheks. BCSB properly filed and perfected this financing statement and security agreement in

Madison County on April 21, 1986, in accordance with the terms of Nebraska's Uniform Commercial Code (U.C.C.).

The Duhacheks moved to a farm in Holt County, Nebraska, in late spring of 1990. According to Todd Duhachek, the objectives for moving the family's farming business to Holt County were to increase and improve its dairy operation and to correspondingly decrease crop production. The Duhacheks' new farm included facilities for grade A milk production which were larger and more elaborate than the grade B production facilities at the Duhacheks' farm in Madison County. BCSB extended additional loans to the Duhacheks when they moved to Holt County, and BCSB obtained an additional financing statement and security agreement from the Duhacheks, which BCSB filed in Holt County on November 29, 1990, to perfect its ongoing security interest in all of the Duhacheks' property and proceeds.

While farming in Madison County from 1986 through 1990, the Duhacheks sold milk produced by their dairy herd to Dodge Dairy, which collected the raw milk from the Duhachek farm every other day. Dodge Dairy paid the Duhacheks for the raw milk. After Dodge Dairy ceased operation, the Duhacheks subsequently did business with Mid-America Dairymen, Inc. (Mid-Am), in essentially the same manner. After their move to Holt County in 1990, the Duhacheks had an identical business relationship with the Northeast Nebraska Milk Producers Co-op.

The financing statements and security agreements which memorialized BCSB's security interest provided that the Duhacheks could not sell or transfer their interest in any of their farm property or proceeds therefrom without prior written authorization from BCSB. Todd Duhachek testified that at all times, BCSB knew that the Duhacheks were selling the milk produced by their dairy operation and that BCSB expected them to do so. It was uncontroverted that when the Duhacheks sold their milk, they never obtained advance written authorization from BCSB as specified in the financing statements, and that BCSB did not require them to do so. Roger Brestel, president of BCSB, stated that the bank intended and expected that the Duhacheks would sell the milk in which BCSB claimed a security interest without obtaining a written waiver from BCSB for each sale because "it was just something that everybody understood."

When the Duhacheks moved to Holt County, they owned approximately 35 dairy cows. Almost immediately, they increased the size of their herd by purchasing additional cows from local sellers, including Haake. Haake had been a dairy farmer in Holt County for 28 years, and in 1990, he sought to reduce and eventually end his dairy operation. When Haake learned of the Duhacheks' move into the area and their interest in expanding their dairy herd, he struck a deal with them in April 1990 to sell the Duhacheks 28 dairy cows. The Duhacheks took possession of the cows, and they agreed to pay Haake on a monthly basis with proceeds from the sale of the cows' milk. The Duhacheks notified Mid-Am of the arrangement, and the Duhacheks executed a written authorization assigning their interests in $930 of each month's proceeds from the sale of milk to be paid by Mid-Am directly to Haake. Todd Duhachek testified, and Brestel admitted at trial, that at some point in 1990, Todd Duhachek notified BCSB of the assignment of proceeds to Haake, and BCSB did not object to the assignment or payment to Haake. The Duhacheks completed payment of their debt to Haake for this lot of cows in April 1993.

In late 1992, the Duhacheks contacted Brestel and requested that BCSB loan them money to further expand their dairy herd. BCSB refused to do so because of concerns about the Duhacheks' ability to repay the loan. The Duhacheks subsequently arranged with Haake to purchase a second lot of cows from him, again with payments extended over a period of months by assignment of the Duhacheks' milk sales proceeds to Haake.

Haake testified that he discussed with his banker, Ralph Adams, who was apparently not associated with BCSB, his sales arrangements with the Duhacheks. Brestel testified that Adams telephoned him at least once to discuss the sales. Before confirming the sales arrangements with the Duhacheks, Haake took no other steps to ascertain if the Duhacheks' property, including after-acquired property, was subject to any preexisting security interest.

After Haake agreed to the deal for the sale of the second lot of dairy cows, the Duhacheks took possession of 26 Holstein cows from Haake. The Duhacheks executed a promissory note

to Haake for $23,400 for the second purchase of cows on August 1, 1993. The precise date upon which the Duhacheks took possession of these Holsteins is not clear. The record does, however, contain a financing statement and security agreement executed by the Duhacheks in favor of Haake on August 3. Haake filed this document on August 18 and thereafter asserted a purchase money security interest in the second lot of cows that he had sold to the Duhacheks, including both products and proceeds therefrom.

In accordance with the terms of the agreement, the Duhacheks began paying Haake $755 per month for the second lot of cows on August 15, 1993, after the cows freshened. The payments were made directly to Haake by the Northeast Nebraska Milk Producers Co-op based on the Duhacheks' written assignment of monthly milk sales proceeds in that amount to Haake. Todd Duhachek testified that the second lot of Holsteins produced enough, if not more than enough, milk to cover the cost of the monthly payments to Haake due in connection with the second purchase.

The additional cows continued to bear Haake's brand after the Duhacheks took possession of them. The cows were intermingled with the rest of the dairy herd on the Duhachek farm premises, which was inspected periodically by Brestel and other BCSB representatives in 1993 and 1994. There is no evidence that the Duhacheks tried to conceal this addition to their herd during these inspections by BCSB and its agents.

Todd Duhachek testified that he told Brestel about the August 1993 purchase from Haake after the Duhacheks had executed a written assignment of milk sales proceeds to Haake. Deb Duhachek testified that she did not inform Brestel or other BCSB representatives about the second purchase because she believed that her husband had already done so. Brestel denied that either Todd or Deb Duhachek had advised BCSB of the second purchase from Haake or the 1993 assignment of the Duhacheks' milk sales proceeds to Haake.

Brestel testified that BCSB began to "closely monitor" the Duhacheks' financial status in 1992, specifically examining every one of their deposit and withdrawal transactions. In March 1992, BCSB and the Duhacheks executed a written

agreement in which the Duhacheks pledged to deposit all of the proceeds they received from their milk sales into an account at BCSB and to make payments totaling $800 monthly to BCSB to reduce their loan indebtedness to BCSB. Before that time, the Duhacheks had no set schedule for making payments to BCSB, and BCSB did not require such a schedule. Brestel testified that so long as BCSB received the monthly payment specified in the March 1992 agreement, BCSB permitted the Duhacheks to spend the remaining cash in their account, including milk sales proceeds, at the Duhacheks' discretion. Brestel testified that BCSB's close scrutiny of the Duhacheks' accounts never yielded evidence of improper expenditures by the Duhacheks, whom Brestel described as "forthright" in their financial affairs.

A little more than a year later, on April 26, 1993, the Duhacheks executed two renewals of their loan obligations to BCSB. Again, the Duhacheks completed a financing statement and security agreement in which they granted BCSB a security interest in all of their presently owned and after-acquired property. BCSB filed this financing statement and security agreement to perfect its security interest. The promissory note renewals associated with the April 26 agreement were also secured by prior perfected security interests in favor of BCSB.

At about the same time, Brestel telephoned Roger Henn, president of the Northeast Nebraska Milk Producers Co-op, which was then purchasing the Duhacheks' milk. Brestel verbally requested that the co-op make all of the Duhacheks' milk proceeds checks payable jointly to the Duhacheks and BCSB, but Brestel neither obtained from the Duhacheks nor offered to the co-op a written assignment from the Duhacheks authorizing the joint mode of payment. In March or April 1993, Brestel initiated a similar telephone call to Don Walmsley, who was at that time the president of the Northeast Nebraska Milk Producers Co-op. Walmsley told Brestel that the co-op needed written documentation to justify joint payment to the Duhacheks and BCSB. Brestel did not provide Walmsley or the co-op with a written authorization by the Duhacheks consenting to the joint mode of payment of their milk sales proceeds, but Brestel sent Walmsley a photocopy of an earlier perfected financing statement and security agreement executed by the Duhacheks in

favor of BCSB. The record contains photocopies of checks dated April 26, 1993, through March 1994 for sums derived from the Duhacheks' milk proceeds made payable by the Northeast Nebraska Milk Producers Co-op jointly to the Duhacheks and BCSB. At no point, however, did the Duhacheks execute a written assignment of their milk proceeds to BCSB. Walmsley testified at trial that written assignments of proceeds are commonly used by dairy producers to pay their creditors.

The checks issued by the Northeast Nebraska Milk Producers Co-op, which were made payable jointly to the Duhacheks and BCSB, represented the remainder of the sale proceeds due to the Duhacheks after payment of their authorized assignment payments issued directly to creditors, including Haake. Other creditors also received payment by assignment from the Duhacheks' milk proceeds, including Mart and Phyllis Preusker, Deb Duhachek's parents who had loaned money to the Duhacheks, and Ken and Ann Kasselder, from whom the Duhacheks had purchased other dairy cows.

Walmsley testified that when Brestel called him in March or April 1993 to request that BCSB be added as a joint payee on the Duhacheks' milk proceeds checks, Walmsley told Brestel that other creditors of the Duhacheks were receiving monthly payments from the Duhacheks' milk payments as a result of written assignments of proceeds executed by the Duhacheks in favor of these other creditors. Walmsley testified that he did not specifically name the creditors to Brestel. Brestel neither requested the identities of the creditors nor voiced disapproval or made any other comment regarding the assignments already being paid from the Duhacheks' milk proceeds.

The Duhacheks satisfied their monthly loan payments to BCSB until July 1994, during which time they made a partial payment to BCSB. The Duhacheks thereafter defaulted on their loans to BCSB, as well as on their financial obligation to Haake. BCSB sent the Duhacheks a letter in late September, demanding that the Duhacheks surrender all of their milk proceeds to BCSB. Deb Duhachek testified at trial that after receipt of that letter, BCSB did, in fact, take all of the Duhacheks' monthly milk proceeds, leaving the Duhacheks with no money upon

which to live and run their farm. The Duhacheks filed for bankruptcy protection in December.

Haake received slightly more than $12,000 from the Duhacheks in milk proceeds assignments for the second lot of cows which he sold to them in 1993. Haake testified at trial that the Duhacheks still owed him approximately $11,400.

BCSB filed suit against Haake in late 1995, alleging that Haake converted to his own use proceeds from the sale of the Duhacheks' milk which were the rightful property of BCSB. In response, Haake claimed that BCSB had forfeited the right to enforce its security interest in the Duhacheks' milk sales proceeds by consenting to the Duhacheks' sale of milk and application of proceeds without prior authorization from BCSB and that BCSB had thereby impliedly waived its security interest.

Prior to trial, both parties sought summary judgment. In an order dated May 6, 1996, the district court wholly denied Haake's motion, and it granted BCSB's motion in part. The trial court held that BCSB properly perfected its security interest in the Duhacheks' cows, milk, and the proceeds therefrom and that the financing statements and security agreements executed by the Duhacheks were given to BCSB to secure an existing debt. The trial court found that the monies paid by the Duhacheks to Haake by milk assignments were derived from the sales of milk which were covered by BCSB's security interest, and the court held that unless Haake established at trial that BCSB had waived its security interest, the milk proceeds paid to Haake rightfully belonged to BCSB. Accordingly, the trial court ordered that the issues for trial were limited to whether BCSB impliedly consented to the Duhacheks' sale of their milk without the written consent of BCSB and BCSB thereby waived its security interest in the milk and its proceeds and, in the event the jury found such consent and waiver by BCSB, the date upon which it commenced, and whether such consent and waiver extended beyond April 19, 1994, the effective date of certain amendments to § 9-306(2).

The case proceeded to trial by jury on March 31 and April 1, 1997. In connection with evidentiary rulings and jury instructions, BCSB sought unsuccessfully at trial to have the court treat certain amendments to § 9-306(2) effective April 19, 1994,

as retroactive in application, and controlling as a matter of law. A review of the record shows that in its jury instructions, the court advised the jury of the existence of the amendments but did not mandate how to apply them, allowing the jury to determine the amendments' application in accordance with the jury's findings of fact. The jury found for Haake in all respects. BCSB timely moved for a new trial. The motion was denied on June 5, 1997. BCSB appealed. Haake's motion to bypass the Nebraska Court of Appeals was granted by this court.

## II. ASSIGNMENTS OF ERROR

BCSB lists 11 assignments of error, the majority of which overlap. BCSB argues on appeal that the trial court's rulings and instructions erroneously construed and applied portions of the U.C.C., including § 9-306(2), which was amended effective April 19, 1994, partway through the time period during which Haake received milk assignment payments from the Duhacheks. Specifically, BCSB claims that it was entitled to judgment as a matter of law that all milk sales proceeds received by Haake after April 19 were wrongly converted by Haake, including all proceeds generated after September 21, the date upon which BCSB's counsel made demand for such upon the Duhacheks. BCSB also claims that the trial court incorrectly failed to instruct the jury that the amendments to § 9-306(2) were to be applied retroactively to April 19, that it failed to properly instruct on the application of § 9-306(2) as to the period after April 19, and that these allegedly erroneous instructions denied BCSB a fair trial. BCSB argues that the practical effect of the allegedly erroneous jury instructions was a wrongful modification of the summary judgment which had been granted in its favor before trial.

## III. STANDARD OF REVIEW

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below. *State v. Burlison, ante* p. 190, 583 N.W.2d 31 (1998).

## IV. ANALYSIS

All of the issues framed by BCSB on appeal focus upon the "implied waiver" defense asserted by Haake against BCSB. Haake claimed that BCSB waived the right to enforce its security interest in Duhacheks' cows, their milk, and the proceeds therefrom for the entire period in question as a result of BCSB's consent to the Duhacheks' sale of milk without prior written authorization from BCSB and the Duhacheks' use of the sales proceeds for purposes other than repayment of their debt to BCSB.

### 1. U.C.C. Overview: Implied Waiver Defense and 1994 Amendments

The trial court's pretrial order on the competing summary judgment motions filed by BCSB and Haake shaped the ultimate issues presented to the jury at trial. Because BCSB had established its security interest in the context of the summary judgment motions, the trial was limited to Haake's proof of its defense of implied waiver. In its summary judgment opinion, the trial court analyzed the "tortured" history of the implied waiver defense as it relates to enforcement of security interests, particularly regarding farm products. Section 9-306(2) provides that a creditor which has a security interest in collateral pledged by a debtor to secure payment possesses a recognizable interest in the collateral as well as a continuing security interest in identifiable proceeds from the sale or other disposition of that collateral, "unless the disposition was authorized by the secured party in the security agreement *or otherwise*." (Emphasis supplied.) The "or otherwise" portion of § 9-306(2) has, over time, provided the basis for various defenses to a secured party's attempted enforcement of its security interest, including the defense of implied waiver. See 9 Ronald A. Anderson, Anderson on the Uniform Commercial Code §§ 9-306:15 to 9-306:22 (rev. 3d ed. 1994).

"Waiver" is generally recognized as a party's voluntary and intentional relinquishment or abandonment of a known legal right, advantage, benefit, claim, or privilege which, except for the waiver, that party would have enjoyed. *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549

(1984). Waiver may be demonstrated or inferred from a party's conduct. *Elliot v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996). The implied waiver defense has often been asserted in cases where a secured creditor seeks to recover the proceeds of a debtor's sale or other disposition of farm products. See, e.g., *Gretna State Bank v. Cornbelt Livestock Co.*, 236 Neb. 715, 463 N.W.2d 795 (1990); *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987); *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971). The implied waiver defense has also been asserted in cases where competing creditors, such as Haake and BCSB, sought to recover the same collateral or proceeds from a common debtor. See *Five Points Bank v. Scoular-Bishop Grain Co., supra.*

Until relatively recently, purchasers of farm products, unlike other buyers in the ordinary course of business, generally could not purchase such products free of security interests to which the seller had pledged the goods. Farm product purchasers were therefore subject to paying twice for the same goods—once to the seller, and again to a party which held a security interest in the goods. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); Neb. U.C.C. § 9-307(1) (Reissue 1992). In 1985, Congress enacted 7 U.S.C. § 1631 (1994) as part of the federal Food Security Act (FSA). This federal act increased protection for third-party purchasers of farm products by reducing the potential of a secured party's enforcement of its interest against the purchaser, unless the secured party has properly recorded its interest in an "effective financing statement" filed separately from a U.C.C. filing, or the buyer has, within 1 year preceding the sale of the farm products, received from the seller or secured party of the secured interest in the farm products written notice, including specific information about the debtor, and a reasonable description of the farm products which are subject to the security interest. 7 U.S.C. § 1631(e)(1)(A). See, also, 3 James J. White & Robert S. Summers, Uniform Commercial Code, § 33-14 (4th ed. 1995). The Nebraska statutes which govern the "Nebraska Effective Financing Statement" form are found at Neb. Rev. Stat. § 52-1301 et seq. (Reissue 1993).

For a time prior to the passage of the FSA, Nebraska courts were reluctant to allow the defense of implied waiver where such waiver contravened the express written terms of an otherwise valid security agreement between a debtor and creditor. See, e.g., *Farmers State Bank v. Edison Non-Stock Coop. Assn.*, 190 Neb. 789, 212 N.W.2d 625 (1973); *Garden City Production Credit Assn. v. Lannan, supra.* Relying on Neb. U.C.C. § 1-205(4) (Reissue 1992), we held in *Edison Non-Stock Coop. Assn.* and *Lannan* that the express terms of an agreement between the parties controlled and superseded a course of dealing and usage of trade when such dealing or trade usage conflicted with the agreement's express terms, and the failure of the secured party to rebuke the debtor for sales of farm collateral without the express consent of the secured party did not, on the facts of those cases, constitute an implied waiver of a creditor's security interest.

Nebraska courts continuously remained open, however, to the presentation of evidence pertaining to a possible intentional waiver of a secured party's interest in pledged collateral and its proceeds. *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976). Recognizing continuing developments in the law and the practice of secured commercial transactions, we held in *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984), and *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984), that a secured party's waiver of rights is a matter of fact which must be proved by clear and convincing evidence.

In Nebraska jurisprudence, the principal argument historically advanced to defeat the defense of a secured party's implied waiver of rights was based upon the language of the U.C.C. and, in particular, § 1-205(4). Section 1-205(4) provides generally that the express terms of an agreement shall be construed consistently with a course of dealing or usage of trade between the parties. However, when such a construction is unreasonable, the express terms of an agreement rather than usage are controlling. In *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987), we examined and contrasted § 1-205(4) with Neb. U.C.C. § 2-208(3) (Reissue

1992). Section 2-208(3) then provided in pertinent part, as it now does, that a "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." Consistent with our longstanding duty to give meaning to every portion of a statutory scheme wherever possible, see *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998), we concluded in *Farmland Foods* that § 1-205(4) is properly applied to the *preagreement* course of dealing between the parties, whereas § 2-208(3) has more relevant application to the parties' *postagreement* course of performance. On that basis, we found in *Farmland Foods* that a secured party's actions, including, inter alia, knowingly allowing the debtor to repeatedly sell secured collateral without preauthorization, failure to insist upon the remission of sale proceeds for application to the secured debt, and renewal of the debtors' promissory notes, constituted amendments to the parties' agreement which impliedly waived the creditor's right to enforce its security interest against a purchaser of the debtor's farm products. See, also, *Neu Cheese Co. v. Federal Deposit Ins. Corp.*, 825 F.2d 1270 (8th Cir. 1987); *Gretna State Bank v. Cornbelt Livestock Co.*, 236 Neb. 715, 463 N.W.2d 795 (1990).

In 1994, the Nebraska Legislature passed 1994 Neb. Laws, L.B. 974, which amended § 9-306. L.B. 974 was passed with an emergency clause. It became operative on April 19, 1994, and the statutory amendments contained in L.B. 974 are now codified at § 9-306(2). As amended, that section now provides as set forth below with the amendatory terms italicized as follows:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. *Authorization to sell, exchange, or otherwise dispose of farm products shall not be implied or otherwise result, nor shall a security interest in farm products be considered to be waived, modified, released, or terminated, from any course of conduct, course of performance,*

*or course of dealing between the parties or by any trade usage in any case in which: (a) The secured party has filed an effective financing statement in accordance with the provisions of sections 52-1301 to 52-1321, Reissue Revised Statutes of Nebraska, 1943, or (b) the buyer of farm products has received notice from the secured party or the seller of farm products in accordance with the provisions of 7 U.S.C. 1631(e)(1)(A), unless the buyer has secured a waiver or release of the security interest specified in such effective financing statement or notice from the secured party.*

(Emphasis supplied.)

Section 9-306 was amended again in 1995 and 1998. However, these subsequent amendments to § 9-306 do not impact the parties' claims in the case at bar, and we therefore do not discuss them here.

2. Application of § 9-306(2) to Case at Bar

Both BCSB and Haake moved for summary judgment before trial. In Haake's summary judgment motion, he alleged that the uncontroverted facts, including BCSB's actual knowledge of the Duhacheks' sale of milk from their cows without prior written authorization from BCSB and BCSB's allowance of the Duhacheks' application of the milk sales proceeds to other creditors, established BCSB's consent to the Duhacheks' acts and implied waiver of BCSB's security interest as a matter of law, before and after the amendment of § 9-306(2). The trial court denied Haake's summary judgment motion in its entirety.

In BCSB's summary judgment motion, relying on the amendment to § 9-306(2), it sought an order that as a matter of law, Haake should not be permitted to offer evidence that BCSB impliedly waived its security interest at any time after April 19, 1994. This claim, too, was overruled by the trial court, which found that there was a genuine issue of material fact for the jury's determination as to whether BCSB had at any point waived its security interest in the Duhacheks' milk and milk proceeds and, if so, the nature, scope, and duration of that waiver.

In our determination on appeal as to whether the trial court correctly applied § 9-306(2), before and after its amendment in

1994, to the facts of this case, we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute and its amendments. *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998). In construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* Where the terms of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning and they are considered in their plain, ordinary, and popular sense. *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). Further, when considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Id.*

(a) Period Before April 19, 1994:
Should 1994 Amendments to § 9-306(2)
Be Applied Retroactively?

Noting that the 1994 amendments to § 9-306(2) tend to make establishing an implied waiver more difficult, BCSB claims on appeal that the trial court erred in its evidentiary rulings and in its instructions to the jury by declining to retroactively apply the 1994 amendments to § 9-306(2) to the period ending April 18, 1994, a period which predates the April 19, 1994, effective date of the amendments to § 9-306(2). We do not agree.

The payments made by the Duhacheks to Haake which BCSB claims were converted and which BCSB seeks to recover from Haake in this action were made on a monthly basis to Haake throughout the period of August 15, 1993, to December 15, 1994. In its pretrial summary judgment order and in the jury instructions, the trial court allocated the total sum received by Haake from the Duhacheks into two separate periods: August 15, 1993, through April 18, 1994, and April 19, 1994, the effective date of the amendments to § 9-306(2), through December 15, 1994.

BCSB claims that the trial court erred, inter alia, in failing to apply the 1994 amendments to § 9-306(2) to both periods of time before and after the amendments and, in particular, to the period from March 24, 1992, which was the date of the agreement between BCSB and the Duhacheks that all milk proceeds would be deposited by the Duhacheks at BCSB, to April 18, 1994. Haake asserted the defense of BCSB's implied waiver of its security interest during the time periods before and after the 1994 amendments, and the trial court allowed Haake to present evidence to the jury of BCSB's alleged waiver of its secured interest for both periods of time. BCSB claims on appeal that in allowing the jury to consider Haake's evidence of waiver for both periods, the trial court erroneously and prejudicially restricted the application of § 9-306(2), as amended. BCSB claims, in effect, that the 1994 amendments to § 9-306(2) should be applied retroactively to April 19 and that such application would result in no implied waiver of its security interest prior to April 19.

In Nebraska, in noncriminal cases, statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively. *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988). See, also, *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). This is particularly so in the case of an amendment or change to substantive matters, as opposed to changes in procedural matters which may, in some cases, impact a pending action. *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979); *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599 (1960). See, also, *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984). In determining whether statutory amendments should be applied retroactively, we may look to the legislative history of the statute in general and in particular to the legislative intent, if any, regarding retroactivity. *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997).

According to the Statement of Intent accompanying L.B. 974, the legislative objective in the proposed amendment to § 9-306(2) was to provide that notwithstanding a secured

party's authorization of the sale, exchange, or other disposition of farm products, a creditor's security interest would not be considered waived, modified, released, or terminated if the creditor had filed the Nebraska Effective Financing Statement, in accordance with § 52-1301 et seq., or if the buyer of the secured farm products received "'pre-notification'" of the secured party's interest in the farm products before purchase in accord with 7 U.S.C. § 1631(e)(1)(A). Statement of Intent, L.B. 974, Committee on Banking, Commerce, and Insurance, 93d Leg., 2d Sess. (Jan. 25, 1994).

The bill's introducer, Senator Doug Kristensen, stated that L.B. 974 was not intended to and did not alter the primary responsibility of secured parties to perfect their secured interests according to the U.C.C. as well as to properly execute an effective financing statement, and if secured parties failed to properly document and/or perfect their security interest, they would find no relief under § 9-306(2), as amended.

Senator Kristensen articulated several principles which the Legislature sought to effectuate with the passage of L.B. 974. These objectives included eliminating uncertainty regarding the status of secured interests in farm products at purchase, both for the buyer and the secured party, and emphasizing the continued duty of creditors to properly perfect their security interests according to Nebraska statutes.

L.B. 974 was debated at length in the Legislature's Committee on Banking, Commerce, and Insurance. There was considerable discussion by the legislators of past cases in which farm products purchasers had asserted the implied waiver of interest defense in the face of actions brought by secured creditors. The legislative history of L.B. 974 reveals, however, no indication of a legislative intent to make the amendments effective retroactively.

We observe that § 9-306(2) is but one section of the U.C.C., a series of statutes pertaining to commercial transactions which are in pari materia. Therefore, we conjunctively consider and construe these statutes so that different provisions of the act are consistent and sensible. See *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998).

Senator Kristensen aptly noted in legislative committee discussion that the provisions of the U.C.C. should not be interpreted and applied independently of each other. Decisions pertaining to § 9-306(2) have included consideration of other portions of the U.C.C., which of necessity, and by design, impact the § 9-306(2) determination and priority of interests in the disposition of collateral pledged as security for a debt. See, e.g., *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987) (contrasting § 1-205(4) with § 2-208(3), which addresses postagreement course of performance); *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984); *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984) (discussing § 1-205(4) governing preagreement course of dealing).

In the instant case, neither the statutory language taken as a whole nor the legislative history of the amendments to § 9-306(2) presents a circumstance in which there is a need, or an intent, to deviate from Nebraska jurisprudence regarding the interdependent and comprehensive nature of the U.C.C., or the general rule that statutory amendments are not to be applied retroactively. We conclude that the 1994 amendments to § 9-306(2) are not to be applied retroactively. Thus, we find no error in the trial court's evidentiary rulings and jury instructions declining to apply the 1994 amendments to § 9-306(2) retroactive to the effective date of the amendments, April 19, 1994, thereby allowing the jury to consider the implied consent defense asserted by Haake for that period without reference to subsequent statutory amendments.

(b) Period From April 19 to December 15, 1994: Application of § 9-306(2) to Facts

The first sentence of § 9-306(2), which was not changed by the 1994 amendments, provides that except where article 9 otherwise provides, a security interest continues in collateral and its identifiable proceeds, notwithstanding the sale, exchange, or other disposition of the collateral, "unless the disposition was authorized by the secured party in the security agreement *or otherwise*." (Emphasis supplied.) There being no evidence that BCSB specifically authorized the disposition of the Duhacheks'

goods or proceeds to Haake in the security agreement, the trial court correctly found that Haake's claim that BCSB impliedly waived its security interest in the milk proceeds fell within the "or otherwise" clause. See *Gretna State Bank v. Cornbelt Livestock Co.*, 236 Neb. 715, 463 N.W.2d 795 (1990).

The second sentence of the April 19, 1994, amendments to § 9-306(2) provides, inter alia, that authorization to sell, exchange, or otherwise dispose of farm products shall not be implied or otherwise result from any course of conduct, course of performance, or course of dealing between the parties or by any trade usage, nor shall a waiver of a security interest be implied in any case in which: (1) The secured party has filed an effective financing statement in accordance with § 52-1301 et seq. or (2) the buyer of the farm products has received notice from the secured party or seller of the products in accordance with 7 U.S.C. § 1631(e)(1)(A), unless the buyer has secured a waiver or release of the security interest specified in the effective financing statement or notice received from the secured party.

As noted above, an effective financing statement created pursuant to § 52-1301 et seq. represents a separate statement in addition to the security interests referenced generally in the U.C.C. The effective financing statement statutory scheme arose as a result of the passage of the FSA. See *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). An effective financing statement pertains to rights between a seller of collateral in which a security interest has been asserted and a buyer of farm products in the ordinary course of business. An effective financing statement does not govern the rights of a third party such as Haake, who is not a buyer of farm products in the ordinary course of business. See *id.*

In the instant case, BCSB filed effective financing statements in Madison and Holt Counties describing BCSB's security interest in property owned by the Duhacheks. These effective financing statements are relevant merely to Haake's defense of waiver. Brestel testified that at all times during BCSB's lending relationship with the Duhacheks from 1986 through 1994, BCSB knew that the Duhacheks were engaged in dairy production which entailed the sale of milk on an ongoing basis. The

effective financing statement forms filed by BCSB contained spaces and terms which expressly provided for possible security interests in numerous products, including milk and the proceeds therefrom, which the preparer must check off to properly identify the products covered by the effective financing statement. In its effective financing statements, BCSB specifically claimed a security interest in Duhacheks' corn, soybeans, hay, hogs, and cattle and calves. BCSB did not claim a security interest in Duhacheks' milk and milk proceeds in either of the effective financing statements it filed relative to its economic relationship with the Duhacheks. Although the failure of BCSB to list the Duhacheks' milk and the proceeds therefrom in its effective financing statements is relevant evidence of Haake's defense that BCSB waived its security interest in the milk and the milk proceeds, because Haake is not a buyer of farm products in the ordinary course of business, BCSB's failure to list milk, standing alone, is not a waiver of BCSB's security interest as against Haake. See *Preusker, supra.*

The second provision set forth in § 9-306(2) pursuant to which a defense of implied waiver might be defeated applies to secured parties or sellers who provide buyers of farm products in the ordinary course of business with disclosure of the claimed security interest as prescribed by 7 U.S.C. § 1631(e)(1)(A). That federal statute provides that buyers of farm products are subject to a preexisting security interest in collateral created by the seller if, within 1 year preceding the sale of the farm products, the buyer receives written notice of the security interest from the seller or secured party and that notice contains the name and address of the debtor and the secured party, the Social Security number or federal tax identification number of the debtor, and a description of the farm products subject to the security interest.

Brestel testified that he provided Northeast Nebraska Milk Producers Co-op, which purchased the milk produced by the Duhacheks' cows, with a photocopy of at least one of BCSB's filings made to perfect its security interest under the U.C.C. There is no evidence, however, that BCSB ever provided Haake with information regarding BCSB's security interest in the Duhacheks' milk and milk proceeds. More importantly, Haake

was not a "buyer" of farm products in the ordinary course of business with the Duhacheks because Haake sold dairy cows to the Duhacheks, but he purchased nothing from them. It is clear that Haake was not within the class of purchasers of farm products in the ordinary course of business who are restricted from asserting the implied consent or waiver of security interest due to proper notice of another's interest provided for in § 9-306(2), as amended. See *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

Section 9-306(2) contains no other specific limitations upon the assertion of the claim that a secured party impliedly waived its security interest, and we decline to add any further limitations. We are guided by the well-established principle expressio unius est exclusio alterius, that is, the expression of one thing is the exclusion of another. *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997). Had the Legislature intended to further expand the circumstances in which the defense of implied waiver was foreclosed from a litigant as a matter of law, the terms of § 9-306(2) would so reflect. They do not.

Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and evidence. *State v. Yeutter*, 252 Neb. 857, 566 N.W.2d 387 (1997). Furthermore, the trial court need not instruct the jury where the facts do not justify the instruction. See *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998), relying on *State v. Allison*, 238 Neb. 142, 469 N.W.2d 360 (1991). In the instant case, the trial court instructed the jury as to the existence of the amended provisions of § 9-306(2) for the period after April 19, 1994, to which the provisions apply. It did not further elaborate on the application of the amendments to § 9-306(2) regarding effective financing statements or presale notification, as the evidence did not support such instructions. We find no error in the trial court's evidentiary rulings, in its refusal to apply the amendments to § 9-306(2) retroactively, or in its jury instructions allowing Haake to introduce evidence of his claim that BCSB waived its security interest in the proceeds of the Duhacheks' sale of milk during 1993 and 1994, before and after the amendments to § 9-306(2) took effect.

## V. CONCLUSION

It has long been the rule that a party who seeks to assert that a secured creditor has impliedly waived its security interest in farm products bears the burden of proving such a waiver by clear and convincing evidence. *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984). Haake did so to the jury's satisfaction in the case at bar as to the period both before and after the 1994 amendments to § 9-306(2). We conclude that the 1994 amendments to § 9-306(2) are not to be retroactively applied. We further conclude that based on the facts of this case, in general, there was no error in the trial court's rulings and instructions to the jury and, in particular, in its refusal to apply the 1994 amendments to § 9-306(2) retroactively. Because the facts did not justify such specific instructions, the trial court properly declined to instruct the jury on the application of the amendments to § 9-306(2) with respect, inter alia, to the effective financing statements and presale notification. The trial court's rulings and the jury's verdict in favor of Haake are, therefore, affirmed.

AFFIRMED.

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GARY L. STIVER, APPELLANT, V.
ALLSUP, INC., AND KAREN TRETTER, APPELLEES.
587 N.W.2d 77

Filed December 4, 1998. No. S-97-780.

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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.

4. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial.
5. **Negligence: Malpractice: Proximate Cause.** Proximate causation is a necessary element of both ordinary negligence and professional malpractice actions.
6. **Summary Judgment: Evidence: Appeal and Error.** Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.
7. **Negligence: Proximate Cause.** A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which, the result would not have occurred. This is commonly known as the "but for" test.
8. **Appeal and Error.** A party who claims error in a proceeding is required to point out the factual and legal bases that show the error.

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

James E. Schneider, of Schneider Law Office, P.C., for appellant.

David Pederson, of Murphy, Pederson, Waite & McWha, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The district court granted the motion for summary judgment of appellees Allsup, Inc., and Karen Tretter (collectively Allsup), determining that Allsup's negligence, if any, was not the proximate cause of appellant Gary L. Stiver's damages as a matter of law. In this appeal, we are asked to reverse the district court's summary judgment order on grounds that the district court improperly admitted evidence and/or improperly took judicial notice of certain documents over Stiver's objection. We conclude that sufficient evidence was admitted, without objection, to support the district court's summary judgment, and thus we need not reach these assignments of error. We affirm the district court's order.

## BACKGROUND

Stiver, who resides in Sutherland, Nebraska, was injured on the job in 1991 and was diagnosed with a herniated disk. Stiver

returned to work in February 1992 but left within a month, stating that despite surgery, the 1991 injury and lingering effects of a work-related 1987 back injury left him physically unable to perform the duties of his job. He has remained unemployed.

Stiver's employer, Nebraska Public Power and Irrigation District, provided disability insurance for Stiver through North American Life Assurance Company. The policy provided Stiver benefits through February 1994, with such benefits to be reduced by any benefits payable under federal Social Security. North American Life Assurance referred Stiver to Allsup, Inc., to represent Stiver in his claim for disability benefits under title II of the Social Security Act. The principal office of Allsup, Inc., is located in Belleville, Illinois. North American Life Assurance agreed to pay Allsup's fees. The fees would not be deducted from any Social Security benefits awarded to Stiver. Social Security Administration (SSA) regulation allows nonlawyers to represent individuals with all claims and administrative appeals that are handled within the SSA. 20 C.F.R. § 404.1705(b) (1998). Stiver accepted Allsup's representation. Subsequently, Allsup filed a Social Security disability application on Stiver's behalf in November 1992, claiming entitlement to disability benefits beginning March 31, 1992. SSA denied Stiver's claim at the initial and reconsideration levels.

Stiver's case was transferred to Tretter, an Allsup, Inc., employee who handled appeals to SSA administrative law judges (ALJ) and the SSA appeals council, the third and fourth levels of appeal within the SSA. A request for a hearing was filed May 3, 1993.

Tretter informed Stiver by telephone that he had a right to a hearing in which he could personally appear and testify before an ALJ. Tretter understood that Sutherland was "near Omaha." Tretter told Stiver that the hearing would have to be in either Lincoln or Omaha. Tretter did not know and did not inform Stiver that the SSA conducts hearings in North Platte, about 20 miles from Stiver's home. Stiver signed both a written waiver of his right to personally appear before an ALJ and a written waiver of his right to a hearing, based upon Tretter's advice and the fact that his back injury made long automobile trips very painful. However, Stiver believed the only thing that he had

waived was his personal appearance; he believed that a hearing would still be held before an ALJ and that Tretter would represent him at the hearing. The waiver documents also did not state that Stiver could have his hearing in North Platte.

SSA DETERMINATION AND APPEALS

ALJ Franklin Carroll resolved the appeal without a hearing and on the record submitted to him, as the waiver documents requested. On September 23, 1993, ALJ Carroll determined that the extent of Stiver's disability, combined with his age and level of education, was not sufficient to characterize Stiver as "disabled" under the pertinent SSA regulations and, thus, held Stiver was not entitled to Social Security disability benefits. See 20 C.F.R. § 404 subpt. P, app. 2, tbl. 1 (1998). Tretter requested a review of the ALJ decision from the SSA appeals council, which denied the request in March 1994. Tretter discussed the possibility of an appeal to the U.S. District Court with Stiver. However, Stiver told Tretter that he had retained an attorney for that purpose.

Stiver, through his counsel in the instant case, appealed to the U.S. District Court, requesting reversal of the unfavorable ALJ decision. *Stiver v. Shalala*, 879 F. Supp. 1021 (D. Neb. 1995). Stiver contended that his waiver of a hearing before ALJ Carroll was invalid. He argued that if Tretter had told him that he could have had a hearing in North Platte, he would not have waived the right to a hearing. The court granted Stiver's summary judgment motion, finding that Stiver's waiver was not knowing and voluntary, and remanded Stiver's claim. *Id.*

On rehearing of his disability claim, Stiver personally appeared at a hearing before ALJ Hugh Stuart and was represented at the hearing by his counsel in the instant case. On August 18, 1995, ALJ Stuart held that Stiver was not entitled to benefits until Stiver turned 50 years old on September 9, 1994. ALJ Stuart also held that based upon his findings, the SSA regulations that required a denial of benefits prior to Stiver's 50th birthday required a finding of disability once Stiver turned 50. See 20 C.F.R. § 404 subpt. P, app. 2, tbl. 1, rules 201.10 and 201.19 (1998).

In October 1995, Stiver filed a request for review of ALJ Stuart's decision with the SSA appeals council. In June 1996,

the appeals council remanded the case to an ALJ for a de novo hearing because the trial record upon which ALJ Stuart had made his decision was lost.

On August 7, 1996, Stiver personally appeared at a second rehearing before ALJ Emily Cameron Shattil and was again represented by his counsel in the instant case. In a September 23, 1996, decision, ALJ Shattil came to the same ultimate conclusion as the previous ALJ—that Stiver was not entitled to disability benefits before he turned 50 but was entitled to benefits after he turned 50. Stiver did not proceed further in the SSA venue.

### Lincoln County District Court Proceedings

On September 22, 1995, after ALJ Stuart issued his decision, Stiver filed the instant case in Lincoln County District Court, suing Allsup for money damages. Stiver claimed that Allsup inadequately represented him on the appeal to ALJ Carroll and that its negligence and inadequate representation resulted in ALJ Carroll's unfavorable decision. Specific negligent acts Stiver alleged were (1) Tretter's failure to advise him that he could have had a hearing before an ALJ in North Platte and (2) Tretter's advice to waive the right to a hearing and, implicit within that allegation, that Tretter did not make clear that waiving the right would mean there would be no hearing at all.

In June 1997, Allsup moved for summary judgment. Allsup's counsel offered an exhibit which included an affidavit of Tretter and a copy of ALJ Shattil's decision. The exhibit was received into evidence over the objection of Stiver's counsel. Allsup's counsel also moved the district court to take judicial notice of items attached to an affidavit of Robert Sylvia, an Allsup employee. The items consisted of purported copies of (1) ALJ Carroll's decision, (2) the SSA appeals council's denial of a request to review ALJ Carroll's decision, (3) ALJ Stuart's decision, and (4) the *Stiver v. Shalala, supra,* decision. Stiver's counsel objected to the taking of judicial notice of these items; however, the district court overruled the objection and took judicial notice of the documents. Stiver's evidence, admitted without objection, consisted of an affidavit of his counsel, a deposition of Tretter taken during the *Stiver v. Shalala* proceeding, and an affidavit of Stiver.

The district court granted Allsup's motion for summary judgment. The court found that "it is obvious as a matter of law" that any negligence that Allsup may have committed in its representation of Stiver, in regard to Stiver's November 16, 1992, Social Security application, did not proximately cause Stiver any damages. The district court noted that ALJ Stuart's and ALJ Shattil's decisions were consistent with ALJ Carroll's earlier decision in that all three held that Stiver was ineligible for benefits prior to the time he turned 50 years old. Considering those subsequent ALJ decisions, there was "no evidence that [Stiver] was entitled to social security disability benefits had he personally appeared with a competent representative before Administrative Law Judge Carroll . . . ." Stiver appealed the district court's order granting summary judgment.

## ASSIGNMENTS OF ERROR

Stiver assigns the district court erred in (1) finding as a matter of law that the acts, omissions, commissions, misrepresentations, or negligence of Allsup did not proximately cause Stiver any damages; (2) finding as a matter of fact that the acts, omissions, commissions, misrepresentations, or negligence of Allsup did not proximately cause Stiver any damages; (3) finding as a matter of fact that there was no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts; (4) finding that Allsup was entitled to judgment as a matter of law; (5) considering exhibits offered in evidence over objection by Stiver; (6) taking judicial notice of exhibits not properly made a part of the record; and (7) taking judicial notice of the truth of purported exhibits which were not orders, judgments, findings of fact, or conclusions of law made by a court.

## SCOPE OF REVIEW

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. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

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. *Battle Creek State Bank v. Preusker, supra.* A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence was uncontroverted at trial. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 560 N.W.2d 482 (1997).

## ANALYSIS

Stiver alleges that Allsup's negligent representation of his November 1992 Social Security disability claim caused the denial of benefits. Stiver claims that Allsup negligently represented him through its failure to present oral arguments before ALJ Carroll and failure to inform Stiver that he could have personally appeared at a hearing in North Platte.

Whether Stiver's action sounds in ordinary negligence or professional malpractice, which we need not decide, proximate causation is an element of Stiver's cause of action that he must establish to succeed. See, *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998) (negligence); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997) (negligence); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997) (medical malpractice); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995) (legal malpractice).

The district court granted summary judgment for Allsup because it found that there was no genuine issue of material fact regarding the element of proximate causation. Specifically, the court noted that ALJ Stuart and ALJ Shattil subsequently considered the same disability claim and also denied Stiver benefits for the time prior to his 50th birthday and that in both those

instances, Stiver had a hearing before the ALJ and was not represented by Allsup. The district court determined that there was no evidence in the record showing that Stiver was entitled to Social Security disability benefits had he personally appeared with a competent representative before ALJ Carroll.

Stiver argues as part of his assignments of error that the court improperly admitted evidence and improperly utilized judicial notice at the summary judgment hearing. We have often stated that a finding of an erroneous admission of evidence does not necessarily require reversal. Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. See *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996). See, also, Neb. Evid. R. 103(1) ("[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected"). We need not reach any of these assigned errors because we conclude that even if all the contested evidence was improperly admitted or improperly judicially noticed, the district court had sufficient evidence before it to support its grounds for granting Allsup summary judgment.

Exhibit 5 comprises an affidavit of Tretter and a copy of ALJ Shattil's decision. When Allsup submitted exhibit 5 at the summary judgment hearing, Stiver objected only to nine paragraphs of the affidavit. ALJ Shattil's decision was admitted into evidence in its entirety without objection. Relevant facts within the decision are the following: (1) ALJ Shattil reviewed the same claim for benefits as ALJ Carroll; (2) Stiver's current counsel, i.e., someone other than Allsup, represented Stiver at an oral hearing before ALJ Shattil; (3) Stiver personally testified at the oral hearing; and (4) ALJ Shattil determined that Stiver was not entitled to Social Security disability benefits for the time prior to his 50th birthday.

Thus, the uncontroverted evidence indicates that Allsup's alleged negligence could not have been the proximate cause of Stiver's being denied benefits he would have been potentially entitled to at the time of ALJ Carroll's decision.

A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. This is commonly known as the "but for" test. See *Sacco v. Carothers, supra.* Clearly, Allsup's alleged negligence could not be the "but for" cause of Stiver's failure to recover, since an ALJ refused recovery even when Stiver appeared with nonnegligent counsel. It is axiomatic that Stiver's alleged damages were not the result of the natural and continuous sequence of Allsup's alleged negligence, because as ALJ Shattil's decision indicates, Stiver suffered no injury.

ALJ Shattil's decision alone sustains the trial court's necessary factual findings concluding that proximate cause does not exist. See *John Markel Ford v. Auto-Owners Ins. Co., supra.* Without any evidence from Stiver to controvert the effect of ALJ Shattil's decision, the trial court's grant of summary judgment was proper.

Stiver also asserts in his brief that Allsup is liable for the fact that he did not receive the benefits he was entitled to on his 50th birthday (through ALJ Stuart's decision) until about 11 months after his birthday. However, Stiver presents no argument as to *why* or *how* Allsup's actions proximately caused a delay in Stiver's receiving benefits that Stiver was entitled to only after Allsup ceased representing him. We have held that a party who claims error in a proceeding is required to point out the factual and legal bases that show the error. *State v. Dwyer*, 226 Neb. 340, 411 N.W.2d 341 (1987); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). See *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998) (stating that assertion of trial court error, absent argument as to how error affects issue in case, will not be considered). Absent accompanying arguments, we decline to speculate as to the reasoning behind Stiver's assertion.

## CONCLUSION

Allsup's alleged negligence cannot be the proximate cause of Stiver's damages. The fact that Stiver's Social Security disability claim was also rejected by ALJ Shattil, before whom Stiver personally testified while represented by someone other than Allsup, precludes the possibility that Allsup's failure to obtain

an oral hearing on Stiver's claim was the proximate cause of Stiver's being denied benefits. We affirm the district court's grant of summary judgment.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
DAVID D. DITTER, APPELLANT.
587 N.W.2d 73

Filed December 4, 1998. No. S-97-1212.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
5. **Postconviction: Constitutional Law: Proof.** 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 state or federal Constitution.
6. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.
7. **Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
8. **Effectiveness of Counsel: Pleas.** When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty.
9. **Effectiveness of Counsel.** The record must affirmatively show that the party is entitled to no relief due to ineffective assistance of counsel, and the ineffectiveness is not to be judged by hindsight.

10. **Pleas.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
11. **Postconviction.** A motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule.

Appeal from the District Court for Hall County: ROBERT R. STEINKE, Judge. Affirmed.

David D. Ditter, pro se.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

David D. Ditter appeals from the district court's dismissal without an evidentiary hearing of his second motion for postconviction relief. We affirm.

## SCOPE OF REVIEW

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Dandridge*, *ante* p. 364, 585 N.W.2d 433 (1998).

## BACKGROUND

This is the third appearance of this case before this court. Ditter was charged with murder in the first degree for killing his wife. Ditter, pursuant to a plea agreement, entered a plea of guilty to the charge, and was sentenced to life imprisonment. Ditter instituted a direct appeal from his conviction and sentence, but because of jurisdictional defects, the only issue addressed on appeal was excessiveness of sentence. This court affirmed, noting that the trial court could not have imposed a lesser sentence. See *State v. Ditter*, 209 Neb. 452, 308 N.W.2d 350 (1981) (*Ditter I*).

Ditter thereafter instituted his first postconviction action pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat.

§ 29-3001 et seq. (Reissue 1989). Ditter was appointed new counsel to assist him in his attempt to gain postconviction relief. The trial court determined that the pleadings and the file did not present grounds for postconviction relief and summarily denied the petition without an evidentiary hearing. Ditter appealed, and this court considered two consolidated assignments of error: (1) that Ditter's guilty plea was not knowingly, intelligently, and voluntarily made and (2) that Ditter's guilty plea was entered due to ineffective assistance of counsel. See *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989) (*Ditter II*).

In reviewing the record, this court concluded in *Ditter II* that the trial court, in accepting Ditter's plea, had fully complied with the procedures set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). This court further concluded that the transcript and records demonstrated that Ditter's trial counsel "did not coerce [Ditter] into changing his plea, but patiently and carefully explained the available options." *Ditter II*, 232 Neb. at 603, 441 N.W.2d at 624. In addition, this court concluded that Ditter's trial counsel competently represented him and that there was no evidence in the record, other than Ditter's " 'sudden' " change of mind, indicating that his plea was not voluntary. *Id.* at 607, 441 N.W.2d at 626. This court affirmed the trial court's denial of postconviction relief.

In his second motion for postconviction relief, Ditter again argues that his trial counsel rendered him ineffective assistance and that his guilty plea was coerced and was not knowingly, intelligently, and voluntarily made. However, Ditter alleges that the grounds relied upon in this motion did not exist at the time his first motion for postconviction relief was filed. Ditter alleges that it was not until his parole board hearing, which occurred after his first motion for postconviction relief, that he discovered his trial counsel had misled him about the benefits of his guilty plea. Ditter specifically alleges that before the parole board hearing, he was unaware that the parole board was not bound by any plea agreements and was unaware that the parole board could not parole him until he went to the pardons board and requested commutation of his sentence to a set number of years. Ditter alleges that because his trial counsel failed

to tell him these things, his guilty plea was involuntary because "he was misled about its' [sic] benefits and value," and that his trial counsel was ineffective for "misinforming him as to the real benefits (or lack thereof) of the plea bargain." Brief for appellant at 12.

The trial court held that any additional facts alleged in Ditter's second postconviction motion were clearly available at the time he filed his first postconviction relief motion. In addition, the trial court concluded that both of the issues raised in the second motion for postconviction relief were decided in the first motion. The trial court summarily denied the motion without an evidentiary hearing. The trial court also overruled Ditter's motion to produce, in which he asked for the transcript of his parole board hearing, and overruled his motion for the appointment of counsel.

## ASSIGNMENTS OF ERROR

Ditter assigns, restated, that the trial court erred (1) in failing to produce the transcript of the parole board hearing as requested by Ditter, (2) in dismissing Ditter's motion for postconviction relief, and (3) in failing to grant an evidentiary hearing.

## ANALYSIS

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Burlison*, *ante* p. 190, 583 N.W.2d 31 (1998).

Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *Id.*

A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *Id.*

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 state or federal Constitution. *State v. Dandridge*, *ante* p. 364, 585 N.W.2d 433 (1998).

An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *Id.* The record must affirmatively show that Ditter is entitled to no relief due to ineffective assistance of counsel, and the ineffectiveness is not to be judged by hindsight:

> We do not examine the claim of ineffective assistance of counsel as "Monday-morning quarterbacks" attempting to determine whether something might have been done that might have produced better results in light of what in fact transpired. What we are called upon to do is to determine whether a defendant was afforded his constitutional right by receiving effective assistance of counsel in light of recognized standards.

*State v. Hochstein*, 216 Neb. 515, 519, 344 N.W.2d 469, 472 (1984).

The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981).

Ditter seeks to ground his allegations of ineffective assistance of counsel and a coerced plea in errors allegedly committed by counsel different than those cited for the same purpose in his prior postconviction relief attempt. The fact remains that a motion for postconviction relief may not be used to obtain a fur-

ther review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule. See *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989).

This court concluded in *Ditter II* that it was clear from the record that the trial court fully complied with the procedures set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), for instructing defendants before they enter a guilty plea. This court also determined that the transcript demonstrated that Ditter's trial counsel did not coerce Ditter into changing his plea from not guilty to guilty, but, rather, patiently and carefully explained the available options. This court further concluded that the record indicated that Ditter's trial counsel competently represented Ditter. There was no evidence in the record, other than Ditter's "sudden" change of mind, indicating that his plea was not voluntary. Therefore, this court held that Ditter failed to show how he was prejudiced in the defense of his case by his attorney.

Ditter alleges that the grounds he is relying on in this motion for postconviction relief did not exist at the time of the filing of his first motion. Ditter claims that his trial counsel failed to fully instruct him on the effects of his guilty plea and that he did not discover this until his parole board hearing. However, during the first postconviction proceedings, Ditter was appointed a new attorney, different from his trial counsel. Therefore, Ditter and his new counsel had an opportunity to review the transcript and check the accuracy and completeness of what Ditter's trial counsel told him. As such, any relevant question concerning the accuracy and completeness of what Ditter's trial counsel told him about pleading guilty could have been litigated in Ditter's first motion for postconviction relief. We conclude that the trial court was correct in finding that the additional facts alleged in Ditter's second postconviction motion were available at the time he filed his first motion for postconviction relief.

On appeal from denial of Ditter's first motion for postconviction relief, this court rejected the claim of trial counsel's alleged ineffectiveness and the claim that Ditter did not enter his plea knowingly, intelligently, and voluntarily. Therefore, the issues Ditter raises in his second motion for postconviction

relief generally relate to the issues determined in *Ditter II* and were properly rejected for relitigation by the district court.

We further conclude that the trial court was correct in overruling Ditter's motion for order to produce.

## CONCLUSION

Since the file and record in this case affirmatively show that Ditter is entitled to no relief, the trial court properly denied Ditter's motion without an evidentiary hearing. The trial court also properly overruled Ditter's motion for order to produce.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
THOMAS J. SILVERS, APPELLANT.
587 N.W.2d 325

Filed December 4, 1998. No. S-98-126.

1. **Jurisdiction: Final Orders: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
2. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. Special proceedings have also been described as every special statutory remedy which is not in itself an action.
3. **Postconviction: Proof.** 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 state or federal Constitution.
4. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
5. ____. An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.
6. **Postconviction: Case Disapproved.** To the extent that *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998), and *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), suggest that an evidentiary hearing on an adequately pled motion for postconviction

relief is required only where the files and records establish entitlement to relief, they are disapproved.

7. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
8. **Postconviction: Effectiveness of Counsel: Pleas: Proof.** When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions. When a conviction is based upon a guilty plea, the prejudice requirement is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
9. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
10. **Warrantless Searches: Constitutional Law.** Three factors govern the constitutionality of warrantless and nonconsensual entries onto premises that are damaged by fire: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment, whether exigent circumstances justify the government intrusion regardless of any reasonable expectation of privacy, and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity.
11. **Search and Seizure.** If reasonable privacy interests remain in the property damaged by fire, in the absence of consent, any official entry must be made pursuant to a warrant or pursuant to exigent circumstances.
12. **Warrantless Searches: Evidence.** A burning building creates an exigency that justifies the warrantless entry of fire officials to fight the blaze. In addition, once fire officials are in the building, they may remain there without a warrant for a reasonable time to ensure that the fire will not reignite and to investigate the cause of the fire after it has been extinguished. During this time, warrantless seizures of evidence found in plain view while inspecting the premises are also constitutional.
13. **Search and Seizure.** When reasonable expectations of privacy exist, additional investigations after the fire has been extinguished and officials have left the scene must be made pursuant to a warrant or a new exigency.
14. **Search Warrants: Evidence: Probable Cause.** When a warrant is necessary, the object of the search dictates the type of warrant required. If the primary objective is to determine the cause of the fire, an administrative warrant will suffice. However, if the primary objective is to gather evidence of criminal activity, a criminal search warrant must be obtained upon a showing of probable cause.
15. **Arson: Search Warrants: Evidence.** Once investigators determine arson as the cause of a blaze, a search warrant must be obtained in order to gather evidence of criminal activity that was not seized in plain view during the initial search.

16. **Pleas: Waiver.** Guilty pleas are grave and solemn acts which waive certain constitutional rights, and they therefore must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.
17. **Pleas: Effectiveness of Counsel.** A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.
18. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
19. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. However, where the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions.

Thomas J. Silvers, pro se.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In 1986, following a fire at his home that caused the death of his stepdaughter, Thomas J. Silvers pled guilty to first degree arson and first degree felony murder and is currently serving sentences for those convictions. In this action filed in the district court for Buffalo County, Silvers sought postconviction relief on two theories: (1) The arson conviction violated double jeopardy because arson is an underlying felony of first degree felony murder and (2) he was denied effective assistance of counsel because his attorney failed to file a motion to suppress evidence seized by fire and police officials without warrants at various times after the fire and failed to inform him of the viability of such a motion. The district court allowed the State 30 days to show cause or request a hearing as to why the court should not summarily dismiss the arson conviction based upon

a violation of double jeopardy. However, the court denied Silvers' request for relief regarding the felony murder conviction on the basis that Silvers' pleadings did not allege sufficient facts to justify an evidentiary hearing. We conclude that Silvers' pro se motion alleges sufficient facts to state a claim for postconviction relief and that it cannot be determined from the files and records before us that he is not entitled to such relief. Accordingly, we reverse, and remand with directions that Silvers be granted an evidentiary hearing with the assistance of appointed counsel.

## FACTUAL ALLEGATIONS

In his motion for postconviction relief filed in January 1998, Silvers alleges that a fire broke out at his home in Kearney, Nebraska, on May 3, 1986, and that his stepdaughter, Sheila Heard, died on May 11 as a result of extensive burns she suffered in the fire. Silvers alleges that he was arrested by Kearney police on May 6 and that he was eventually charged with first degree felony murder and first degree arson. Shortly after his arrest, Silvers retained an attorney to represent him. After initially pleading not guilty to both charges, Silvers changed his pleas to guilty and was convicted and sentenced to life imprisonment for felony murder and a consecutive term of 5 to 10 years' imprisonment for arson. In his brief, Silvers asserts that his guilty pleas were not entered pursuant to any plea agreement.

Silvers alleges that the alarm which summoned the Kearney Fire Department to his home was turned in at 1:23 a.m. on May 3, 1986, and that firefighters arrived a short time later and extinguished the fire within approximately 5 to 6 minutes of their arrival. He alleges that the fire was confined to a bedroom area and that investigators were able to enter the home and examine the scene shortly after the fire had been extinguished.

Silvers alleges that after determining the point of the fire's origin, investigators contacted Gary Nelson, a deputy State Fire Marshal, who arrived at the scene at 1:48 a.m. Silvers alleges that based on Nelson's experience and the observance of certain burn patterns, Nelson determined that the fire had been intentionally set. Silvers further alleges that a Detective Dreyer of

the Kearney Police Department was then contacted and requested to photograph the area of the home where the arson was believed to have occurred. Silvers states that firefighters departed the scene at 2:25 a.m., leaving only a guard outside the home, and that Dreyer left at 3 a.m, leaving no police officials either inside or outside of the home.

Silvers alleges that while Dreyer was investigating the fire scene, Nelson went to the hospital where Heard was being treated for extensive burns she received in the fire. Upon detecting a strong odor of gasoline on her clothing, he seized it as evidence. Silvers alleges that several meetings and telephone calls occurred during which various investigators and a senior deputy State Fire Marshal concluded the fire was caused by arson and that a call was made requesting assistance from the Nebraska State Patrol.

According to Silvers' motion, beginning at 6:30 a.m. on May 3, 1986, two deputy State Fire Marshals and a detective with the sheriff's office began searching his home for the sole purpose of gathering evidence. He alleges that a mobile crime unit from the Nebraska State Patrol arrived at 7:30 a.m. and also began to participate in the search. Silvers alleges that the searches were carried out in the absence of any exigent circumstances, that they were not accomplished pursuant to either an administrative warrant or a search warrant, and that 17 items of evidence which had not been discovered during the initial investigation were removed from his home. Silvers states that the evidence seized was then used to "coerce" him and his wife to consent to further searches of his home, which resulted in the seizure of 18 more items of evidence. Silvers further alleges that in mid-July, another warrantless and nonconsensual search occurred, which resulted in the seizure of a barbell.

Silvers alleges in his motion that his attorney never advised him of the illegality of the searches, did not file a motion to suppress evidence seized during the searches, and failed to advise him of the true strength of his case had the evidence been suppressed. Silvers further alleges that his attorney did not provide him with documents concerning the searches and did not allow him to review any of his discovery files. Silvers asserts that he would not have entered pleas of guilty if his attorney had

advised him of the viability of a motion to suppress and that his guilty pleas were therefore not intelligently made due to ineffective assistance of counsel.

## FILES AND RECORDS

The record before us does not include a transcript or bill of exceptions from the 1986 criminal proceedings which resulted in Silvers' convictions. Other than the transcript of the postconviction proceeding, the only files and records presented are those contained in a presentence investigation file compiled during the original prosecution. This file contains a copy of a journal entry entered on August 29, 1986, which reflects the entry and acceptance of Silvers' plea of guilty to the charge of first degree arson, as well as various statements and investigative reports. Silvers refers to the presentence investigation file in his motion for postconviction relief, alleging that it supports the factual allegations upon which he bases his claim for postconviction relief.

## PROCEDURAL BACKGROUND

Upon review of Silvers' motion for postconviction relief, the district court entered an order filed January 23, 1998, in which it allowed the State 30 days to show cause or request a hearing as to why the court should not summarily dismiss the arson conviction based upon a violation of double jeopardy. In the same order, the district court denied Silvers' requested relief regarding his felony murder conviction based upon a finding that he had not alleged sufficient facts to warrant an evidentiary hearing or appointment of counsel. The record does not reflect whether the State responded to the show cause order pertaining to the arson conviction, and its time for doing so had not expired when Silvers perfected this appeal on February 9. Although Silvers filed his appellate briefs pro se, he was represented by counsel at oral argument.

## ASSIGNMENTS OF ERROR

Silvers assigns that the district court erred in (1) failing to find a violation of Silvers' Fourth Amendment right to be free from unreasonable searches and seizures, (2) finding that Silvers had received effective assistance of counsel, (3) failing

to grant an evidentiary hearing, and (4) failing to appoint counsel.

## STANDARD OF REVIEW

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Dandridge, ante* p. 364, 585 N.W.2d 433 (1998).

## ANALYSIS

### JURISDICTION

Because the district court left the issue of double jeopardy open to further proceedings and Silvers filed his appeal during that timeframe, we must first consider whether there is a final, appealable order. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Fitzke v. City of Hastings, ante* p. 46, 582 N.W.2d 301 (1998); *Olsen v. Olsen*, 254 Neb. 293, 575 N.W.2d 874 (1998). The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *O'Connor v. Kaufman, ante* p. 120, 582 N.W.2d 350 (1998); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). While the order from which Silvers appeals clearly affected a substantial right, namely, his claim that his conviction for felony murder is void because of ineffective assistance of counsel, it does not fall within the first or third above-listed categories established by § 25-1902, and we must therefore determine whether it was made during a special proceeding so as to be appealable under § 25-1902.

Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *SID No. 1 v. Nebraska Pub. Power Dist., supra.* Special pro-

ceedings have also been described as "every special statutory remedy which is not in itself an action." *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 329 (1997).

Although we have never specifically addressed the issue of whether postconviction actions constitute special proceedings, we have held that various proceedings under Chapter 29 of the Nebraska Revised Statutes constitute special proceedings affecting substantial rights. See, *State v. Gibbs, supra* (order overruling motion for discharge based on violation of speedy trial provisions of Neb. Rev. Stat. § 29-1207 (Reissue 1995)); *State v. Kula, supra* (reaffirming holding in *State v. Gibbs, supra*); *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980) (order issued pursuant to procedures under chapter 29 finding defendant not competent to stand trial); *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944) (application for writ of habeas corpus). Further indication that a postconviction action should be considered a "special proceeding" within the context of § 25-1902 lies in the fact that a postconviction action is a civil statutory remedy which is not encompassed in chapter 25. See Neb. Rev. Stat. § 29-3001 (Reissue 1995) (stating that postconviction proceedings "shall be civil in nature"). We therefore conclude that the order of the district court is appealable under § 25-1902.

## POSTCONVICTION PROCEDURE

The Nebraska Postconviction Act provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.
>
> Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney [and] grant a prompt hearing thereon . . . .

§ 29-3001. 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 state or federal Constitution. *State v. Dandridge, ante* p. 364, 585 N.W.2d 433 (1998); *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996). However, an evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law. *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997); *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992). Also, an evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Dandridge, supra*; *State v. Parmar, supra*. Such files and records may include the presentence report. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). Thus, we have stated that an evidentiary hearing must be granted "when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied." *State v. Lofquest*, 223 Neb. 87, 90, 388 N.W.2d 115, 117 (1986).

We pause here to note that in *State v. Jones*, 254 Neb. at 215, 575 N.W.2d at 159, we articulated the test for denying an evidentiary hearing on the basis of the files and records somewhat differently, stating that a court need not conduct an evidentiary hearing in a postconviction case when "notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable." Accord *State v. Boppre, supra*. To the extent that this statement suggests that an evidentiary hearing on an adequately pled motion for postconviction relief is required only where the files and records *establish* entitlement to relief, it is disapproved. The plain language of § 29-3001 provides that an evidentiary hearing is required under such circumstances "[*u*]*nless* the motion and the files and records of the case show to the satisfaction of the court that the prisoner is *entitled to no relief* . . . ." (Emphasis supplied.) As we stated in *State v. Dandridge*, a motion for postconviction

relief may be denied "when the records and files affirmatively show that the defendant is entitled to no relief." *Ante* at 367, 585 N.W.2d at 435.

INEFFECTIVE ASSISTANCE OF COUNSEL

Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Lyman, supra.* However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.* When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions. *State v. Russell, supra*; *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994). When a conviction is based upon a guilty plea, the prejudice requirement is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Lyman, supra.* The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Lyman, supra.*

Silvers' ineffective assistance of counsel claim centers upon his allegation that his attorney did not adequately assert and advise him of his Fourth Amendment rights pertaining to evidence seized from his home after the fire. The U.S. Supreme Court has set out three factors that govern the constitutionality of warrantless and nonconsensual entries onto premises that are damaged by fire:

> whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth

> Amendment; whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy; and, whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity.

*Michigan v. Clifford*, 464 U.S. 287, 292, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984). If reasonable privacy interests remain in the property damaged by fire, in the absence of consent, any official entry must be made pursuant to a warrant or pursuant to exigent circumstances. *Id.*

A burning building creates an exigency that justifies the warrantless entry of fire officials to fight the blaze. *Id.* In addition, once fire officials are in the building, they may remain there without a warrant "for a reasonable time" to ensure that the fire will not reignite and to investigate the cause of the fire after it has been extinguished. 464 U.S. at 293. See, also, *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). During this time, warrantless seizures of evidence found in plain view while inspecting the premises are also constitutional. *Michigan v. Tyler, supra.* However, when reasonable expectations of privacy exist, additional investigations after the fire has been extinguished and officials have left the scene must be made pursuant to a warrant or a new exigency. *Id.*

What constitutes a "reasonable time" depends upon the circumstances of the case. The U.S. Supreme Court has held that when officials could not remain in a building following a fire to investigate its cause due to darkness and smoke, a search that occurred after the officials left the scene and returned during daylight was a continuation of the initial search and did not require a warrant. *Michigan v. Tyler, supra.* See, also, *U.S. v. Veltmann*, 869 F. Supp. 929 (M.D. Fla. 1994), *aff'd* 87 F.3d 1329 (11th Cir. 1996) (delay justified due to darkness, smoke, and haze). However, the Court has also held that when officials left a private residence and returned after the owner had taken steps to secure the area, reentry without a warrant was impermissible. *Michigan v. Clifford, supra.*

When a warrant is necessary, the object of the search dictates the type of warrant required. *Id.* If the primary objective is to determine the cause of the fire, an administrative warrant will

suffice. *Id.* However, if the primary objective is to gather evidence of criminal activity, a criminal search warrant must be obtained upon a showing of probable cause. *Id.* See, also, *U.S. v. Veltmann, supra* (warrant required to seize evidence not in plain view when searching for evidence of criminal activity). Further, once investigators determine arson as the cause of a blaze, a search warrant must be obtained in order to gather evidence of criminal activity that was not seized in plain view during the initial search. *Michigan v. Clifford, supra*; *U.S. v. Veltmann, supra*. See, also, *Rose v. State*, 586 So. 2d 746, 754 (Miss. 1991) (once search has become "curiosity adventure" which might lead to evidence of criminal activity, warrant is necessary).

We conclude that Silvers alleged sufficient facts which, if proved to be true, would have formed the basis for a viable motion to suppress at least some of the evidence seized from his home after the fire based upon a violation of Silvers' rights under the Fourth Amendment. In particular, he has made specific factual allegations that warrantless searches and seizures occurred without his consent after the fire had been extinguished and its cause determined. He has further alleged that as of the date he entered his guilty plea, his attorney had not filed a motion to suppress on his behalf or advised him of his right to move for suppression of evidence which may have been unlawfully seized. Taken at face value, these alleged facts would be sufficient to satisfy the first part of the aforementioned test for ineffective assistance of counsel; i.e., performance below the standard expected of reasonable criminal defense counsel.

The question then becomes whether Silvers has alleged facts sufficient to satisfy the second part of the test, i.e., that he was prejudiced as the result of a deficiency in the performance of his attorney. The State argues that because, with the exception of a "barbell," Silvers' motion for postconviction relief does not identify the specific items of evidence alleged to have been unlawfully seized, there is no factual allegation sufficient to establish the element of prejudice. Although it is true that Silvers does not specifically identify the evidence which he contends should have been suppressed, he does allege that 35 items of evidence were seized during warrantless searches con-

ducted after the fire had been extinguished and its cause determined. He also alleges that his attorney did not provide him with reports or documents concerning these searches or permit him to review any discovery files and that his attorney did not advise him as to the viability of a motion to suppress and its potential impact on the strength of the prosecution's case prior to the time that he entered his guilty plea. "Guilty pleas are 'grave and solemn' acts which waive certain constitutional rights, and they therefore must be '* * * knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' " *United States ex rel. Watson v. Mazurkiewicz*, 326 F. Supp. 622, 625 (E.D. Pa. 1971), quoting *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases. *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

Certainly, competent criminal defense counsel would be expected to evaluate evidence seized from a defendant's residence by law enforcement personnel and advise the defendant regarding the probability of its suppression as a part of advising him whether or not to enter a guilty plea. One inference which can be drawn from Silvers' motion is that the evidence which he alleges to have been unlawfully seized was the only evidence of his guilt. If that were proved to be true, it could establish a reasonable probability that Silvers would have chosen to go to trial instead of pleading guilty, had the evidence been suppressed.

The question before us is not whether Silvers is entitled to postconviction relief, but whether an evidentiary hearing should be held to determine that question. Taken as a whole and considering that Silvers filed his motion pro se, we conclude that Silvers' allegations of ineffective assistance of counsel are sufficiently specific to require us to examine files and records to determine whether they affirmatively show that Silvers is not entitled to postconviction relief. See *State v. Russ,* 193 Neb. 308, 226 N.W.2d 775 (1975). In some postconviction cases involving claims that counsel was ineffective in failing to seek suppression of inadmissible evidence, we have concluded that

no evidentiary hearing was required because information contained in files and records showed that the movant was not entitled to relief. See, e.g., *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991) (suppression motion would have been unsuccessful under circumstances); *State v. Britt*, 237 Neb. 163, 465 N.W.2d 466 (1991) (objection to seized evidence would not have been successful); *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986) (record showed that counsel raised Fourth Amendment issue that defendant alleged he was not informed of, and actually did file motion to suppress); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977) (hearing not required in absence of any grounds which would be source for counsel's challenge to search).

However, in *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987), we held that an evidentiary hearing was necessary based upon allegations that the defense counsel was ineffective in failing to file a motion to suppress evidence vital to the State's case and in failing to object to the evidence at trial on the basis that it had been unconstitutionally seized from the defendant at the time of his arrest. We wrote:

> The facts concerning the defendant's arrest, as shown by the files and records, are almost completely unknown to this court. Defendant's amended postconviction petition, while not as artful as it might be, is sufficient to raise the issue of the lawfulness of his arrest. Defendant alleges an illegal search. The files and records of the case do not show that "defendant is entitled to no relief." If defendant can establish his allegations, he might be entitled to relief.

226 Neb. at 862, 415 N.W.2d at 468.

We are unable to conclude from our review of Silvers' presentence investigation file that he is not entitled to postconviction relief. At least to some degree, the information contained in the file is consistent with the chronology of events alleged in Silvers' motion. One investigative memo makes reference to a search warrant, but neither its scope nor time of issuance is reflected, and a copy of the warrant itself is not contained in the file. Another investigative memo indicates that a consent to search was executed by Silvers and his wife at some time on May 3, 1986, but the consent form itself is not contained in the

file and there is no information upon which to evaluate Silvers' claim that the consent was "coerced" other than a statement taken from Silvers' wife on that date in which she stated that she did not understand the consent form she was being asked to sign. The file contains some indication that law enforcement personnel searched Silvers' home, took photographs, and seized certain evidence on the morning of May 3 without a warrant or consent and at a time when Silvers may have had a reasonable expectation of privacy in the premises. The file does not indicate any confession prior to the guilty plea, and we are unable to ascertain from its contents whether there was incriminating evidence other than that seized from his home. The file does not indicate whether a motion to suppress was filed or whether Silvers was counseled by his attorney on this issue before he entered his plea. Thus, we conclude that an evidentiary hearing is necessary to resolve Silvers' claim for postconviction relief and that the district court's determination to the contrary was clearly erroneous.

### APPOINTMENT OF COUNSEL

Silvers also assigns as error the failure of the district court to appoint counsel to represent him. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997). Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. *Id.* However, where the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. *Id.*

As previously discussed, Silvers' petition presents a justiciable issue for postconviction determination. Accordingly, it was an abuse of discretion for the district court to deny Silvers' request for the appointment of counsel. We reverse, and remand

with directions to appoint counsel for Silvers and conduct an evidentiary hearing on his motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

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GRAMERCY HILL ENTERPRISES, A GENERAL PARTNERSHIP, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH, APPELLEE, AND AMBASSADOR LINCOLN, INC., INTERVENOR-APPELLEE.

587 N.W.2d 378

Filed December 11, 1998. No. S-97-675.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Final Orders: Appeal and Error.** 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.
3. **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.
4. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality.
5. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently than others similarly situated. Absent this threshold showing, one lacks a viable equal protection claim.

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

Douglas L. Curry and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

Don Stenberg, Attorney General, and Lynn A. Melson for appellee.

Richard H. Hoch and Max J. Kelch, of Hoch, Funke & Kelch, for intervenor-appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

Gramercy Hill Enterprises (Gramercy), appellant, is a residential retirement center which sought to add 60 skilled nursing beds to its existing facility. Gramercy appeals the district court's order affirming the decision of the Certificate of Need Review Committee (Review Committee) which had affirmed the decision of the Nebraska Department of Health, now known as the Department of Health and Human Services (Department), to deny Gramercy a certificate of need (CON). For the reasons recited below, we affirm the district court's order.

## BACKGROUND

On October 6, 1995, Gramercy filed an application for a CON with the Department. Gramercy presently operates 89 independent living and 59 personal care apartments in Lincoln, Nebraska. In its application, Gramercy proposed to construct a three-story addition to its existing facility. The addition would consist of an additional 26 residential apartments on the third floor and 60 skilled nursing beds on the first and second floors. The 60 skilled nursing beds would be situated in 42 rooms, 18 semiprivate and 24 private. A CON is required only for the skilled nursing bed portion of the addition. The estimated cost of the skilled nursing bed portion of the addition was approximately $2.34 million. The proposed addition would be located within the "Region 2" health planning area.

On October 25, 1995, a public hearing was held on Gramercy's application. On December 29, the Department issued extensive findings and denied Gramercy's application. On January 3, 1996, Gramercy appealed to the Review Committee regarding the denial of its application. On January 12, Ambassador Lincoln, Inc. (Ambassador), one of Gramercy's competitors, filed a petition to intervene, contending that the Department's decision to deny Gramercy a CON should be affirmed. Gramercy waived the requirement set forth in Neb. Rev. Stat. § 71-5866 (Reissue 1996) that the Review Committee render a decision within 45 days of the request for appeal.

On April 12 and 13, 1996, a hearing was held before the Review Committee. The transcription of that 2-day hearing comprises 557 pages of testimony. Several witnesses appeared at the hearing, including the following who testified on Gramercy's behalf: Donald Smith, financial feasibility analyst with the Department; John Strauss, manager of the strategic and facilities planning division of Coopers & Lybrand's Chicago health care practice; Shirley Travis, vice president of patient care services at Lincoln General Hospital; Andrew Jacobs, president of the Gramercy Hill corporation, the general partnership which owns Gramercy; John Austin, research associate at the Nebraska Bureau of Business Research; and Larry Morrison, of the Department. Several of the Department's employees testified on behalf of the Department: Kathleen Kelly, a research analyst; Rodney Laucomer, an architect with the licensing and data section; Smith; and Stephen Frederick, an administrator in the health assistance planning and development section. Lastly, Michael Ryan, director of operations at Ambassador, spoke in opposition to Gramercy's application.

At the hearing, a copy of the Department's "Findings, Conclusion, and Decision" was received into evidence by the Review Committee. After its review, the Review Committee affirmed the Department's denial of a CON to Gramercy. Gramercy appealed to the district court, pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994 & Supp. 1995), which affirmed the decision of the Review Committee. Gramercy appeals.

## ASSIGNMENTS OF ERROR

Gramercy's eight assignments of error may be consolidated for purposes of this appeal. On appeal, Gramercy generally contends that the district court's judgment is not supported by the evidence; is contrary to law; and is arbitrary, capricious, and unreasonable. Specifically, Gramercy argues that the district court erred (1) in determining that Gramercy had failed to satisfy the criteria for a CON set out in the Nebraska Health Care Certificate of Need Act (CON Act), Neb. Rev. Stat. §§ 71-5801 through 71-5870 (Reissue 1990 & Cum. Supp. 1994), and in the CON regulations promulgated thereunder, 182 Neb. Admin.

Code, ch. 2, §§ 001 through 006 (1983); (2) in concluding that the CON Act, as written and applied by the Department, does not violate procedural due process protections; and (3) in failing to address and therefore rejecting Gramercy's equal protection claim.

## STANDARD OF REVIEW

An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.*

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. *Id.*

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. *Id.*

## ANALYSIS

### 1. Gramercy's Failure to Satisfy CON Criteria

Gramercy argues that the district court erred in determining that Gramercy failed to satisfy the criteria for a CON set out in the CON Act and the CON regulations. The Department and Ambassador argue that Gramercy failed to meet the criteria set out in the Nebraska statutes and the CON regulations.

Section 71-5830(7) requires that a CON be obtained prior to "[a]ny capital expenditure or obligation incurred by or on behalf of a health care facility in excess of the capital expenditure minimum made . . . [i]n preparation for the offering or developing of a new institutional health service [or] in preparation for initiating a substantial change in an existing health ser-

vice . . . ." Section 71-5805.01 defines capital expenditure minimum as a "base amount of one million two hundred thousand dollars . . . ." Because the cost of Gramercy's new addition for skilled nursing beds exceeds this amount, a CON was required for the addition.

In § 71-5802, the Legislature stated that the purpose of the CON Act is

> to conserve the limited health care resources of personnel and health care facilities in order to provide quality health care to all citizens of the state, to minimize unnecessary duplication of facilities and services, to encourage development of appropriate alternative methods of delivering health care, to promote wherever appropriate a more competitive health care delivery system, to encourage the provision of high-quality health care which is available and accessible to all citizens of the state, and to maximize the effectiveness of expenditures made for health care.

The consideration of a CON application is governed by three authorities: (1) the CON Act, (2) Department regulations promulgated under the act, and (3) the state health plan. *Beverly Enter.-Nebraska v. Columbus Health Care*, 2 Neb. App. 410, 510 N.W.2d 569 (1993), citing *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986).

Under the Nebraska Administrative Code, "the applicant bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria in [the Department] regulations which are appropriate and significant to the proposal." 182 Neb. Admin. Code, ch. 2, § 003.02C (1983). Additionally, "[i]n an appeal of a decision to deny a [CON], the person requesting the appeal shall bear the burden of proving that the project meets the applicable criteria . . . ." § 71-5865.

In its order, the district court affirmed the Review Committee's decision and set forth specific findings, stating that Gramercy had not met several of the criteria for a CON set out in the CON regulations. As noted above, an applicant must meet all of the applicable criteria in order to be granted a CON. The failure of Gramercy to meet at least two criteria for a CON disposes of this appeal.

(a) Least Costly of Alternatives

The district court found, inter alia, that Gramercy had not met its burden in establishing that its proposed facility is the most cost-efficient alternative. This finding is amply supported by the record.

Section 005.02A2 states in relevant part:

> The applicant must demonstrate that the proposed project is the least costly of the alternatives for meeting the need established under part 005.01A above, or if it is not the least costly, that it is the most effective alternative for meeting such need. In determining which alternative is the least costly, consideration shall include (but without limitation to) the following: the total cost of the project; charges to all consumers and payers, including government reimbursement programs; the effect of the proposed means of financing on consumers and payers considered as a whole; and, in the case of construction projects (including remodeling), the design, methods, and materials of construction and the long-term energy costs for the project.

In its order, the district court stated:

> The record reflects that Gramercy's proposed facility will have nursing stations on separate floors which is unusual because the typical long-term care facility incorporates a one-story design. Evidence suggests that such a design will not be the most cost efficient. . . . The Appellant Gramercy emphasis [sic] that "a multi-story design was the most efficient for purposes of the actual building site of the proposed structure". Appellant's brief at 36. However, the issue is not what is the best design for that particular building site but rather what is the best alternative for the community. While a multi-story design may be the best plan for that site, it is not a justification for granting a certificate when a more efficient facility could exist at another site. As a result, the Appellant Gramercy has not met its burden to establish that the proposed facility is the most cost efficient alternative.

There is sufficient competent evidence in this record to support the district court's findings. At the hearing before the Review Committee, Laucomer remarked on Gramercy's two-

story addition for the skilled nursing beds and stated that "there could be more efficient ways . . . of providing care for sixty beds." Laucomer stated that the cost of the project for Gramercy's proposed two-story addition would be more expensive than a one-story design on a square-foot basis. Laucomer further testified that Gramercy's proposed addition would not be as efficient as a one-story design, because Gramercy's proposed multistory design would require duplication of and provision for certain items that a single-story design would not, including multiple nursing stations and an elevator. The district court did not err in concluding that Gramercy's proposed addition was not the least costly of alternatives, and therefore, Gramercy failed to meet the criteria for a CON on this basis.

(b) Financially Feasible

The district court found, inter alia, that Gramercy had not met its burden of establishing that its project would remain financially feasible. This finding is amply supported by the record.

The regulations state, "The resources and proposed means of financing the proposed project must in fact be available." 182 Neb. Admin. Code, ch. 2, § 005.02C (1983). Additionally, "[i]t must be reasonably certain that the proposed project will be financially feasible for the period of life of the assets." *Id.*

In its order, the district court quoted Jacobs' testimony at the hearing before the Review Committee, stating that "under at least one analysis, when taking the 'capital in minus the losses — the partners' capital accounts are negative. . . . There have been more losses than there has been cash contributed.' " The district court concluded that "the record reflects that if the certificate is granted, Gramercy's total debt will increase to approximately $10,000,000. The losses along with limited capital contributions and increased debt does not suggest financial soundness."

A review of the record on appeal reveals that there is sufficient competent evidence to support the district court's finding that Gramercy's project would not remain financially feasible for the life of its assets. Therefore, the district court did not err in finding that Gramercy failed to meet the criteria for a CON set out in §§ 005.02A2 and 005.02C.

## 2. Constitutional Issues

### (a) Due Process

Gramercy argues that "[t]he district court erred in determining that the CON Act, as written and applied by the Department, does not violate procedural due process protections." Brief for appellant at 5. The Department contends that Gramercy's due process rights were not violated, and Ambassador makes no comment on this issue in its brief.

In the instant case, Gramercy questions the constitutionality of the CON regulations set forth pursuant to the CON Act, while asking this court to direct the Department to grant its request for a CON under those same regulations. The inconsistency of Gramercy's actions as to its argument that the CON Act is unconstitutional as written is precluded by the rule that "a litigant who invokes the provisions of a statute may not challenge its validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality." *In re Application of Nebraskaland Leasing & Assocs.*, 254 Neb. 583, 590, 578 N.W.2d 28, 33 (1998). Therefore, Gramercy's due process argument as to the constitutionality of the CON Act as written is without merit.

### (b) Equal Protection

Gramercy contends that the Department violated its equal protection rights by evaluating its proposed project differently than other projects that the Department had previously reviewed and approved. Specifically, Gramercy argues that the Department treated its application for a CON differently than applications submitted by Northfield Villa, Inc. (Northfield), Lincoln General Hospital (Lincoln General), and Bryan Hospital (Bryan). The Department denies that Gramercy's equal protection rights were violated in any way, and Ambassador makes no comment in its brief. We conclude that Gramercy's equal protection claims are without merit.

#### *(i) Northfield*

It is fundamental that "the initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently than others similarly situated. Absent

this threshold showing, one lacks a viable equal protection claim." *State v. Atkins*, 250 Neb. 315, 320-21, 549 N.W.2d 159, 163 (1996), citing *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied* 513 U.S. 1185, 115 S. Ct. 1177, 130 L. Ed. 2d 1130 (1995).

In June 1991, Northfield filed an application for a CON, more than 4 years before Gramercy's filing on October 6, 1995. Northfield proposed to build 94 residential apartments and 20 long-term skilled nursing beds in Scottsbluff, Nebraska, outside Lancaster County or Region 2 in which Gramercy proposes to build its addition.

The record shows that Northfield's 20 beds were exclusively for Northfield's own residents and not open to the public, in contrast to Gramercy's proposed addition of 60 skilled nursing beds, which would become only partially occupied by Gramercy's current residents. Additionally, in Northfield's case, there were no other retirement care facilities in the Scottsbluff area besides a retirement facility already operated by Northfield in Gering, Nebraska, whereas in Gramercy's case, other entities in Region 2 offer services similar to those of Gramercy. Gramercy and Northfield are not similarly situated with respect to their respective applications for a CON. Therefore, we need not reach the merits of Gramercy's equal protection claim regarding Northfield.

*(ii) Lincoln General and Bryan*

With regard to Lincoln General and Bryan, Gramercy argues that it was held to a different standard of need than Lincoln General or Bryan. The CON regulations state, "The applicant [for a CON] must establish that there is an unmet need for health care services for a specific population." 182 Neb. Admin. Code, ch. 2, § 005.01A (1983). Gramercy argues that when the Department assessed the need for Gramercy's proposed addition, the Department used different numbers to calculate the need for Gramercy's proposed addition than those used to calculate the need for Lincoln General's and Bryan's recent additions. Both Lincoln General and Bryan are located in Region 2 and applied for and were granted CON's shortly before Gramercy applied for a CON.

While we do not endorse the Department's use of different figures in calculating the need for Gramercy's proposed addition, the Department's act is of no legal consequence on the facts of this case, because regardless of need, Gramercy failed to meet other criteria, detailed above, necessary for the Department to grant Gramercy a CON. That is, regardless of the Department's conduct with respect to the provision of figures for Gramercy's use in its effort to establish unmet need, Gramercy's application failed because it did not meet other criteria, including a failure to demonstrate that the project was the least costly of alternatives and that the project was financially feasible for the life of the assets.

## CONCLUSION

We have reviewed the district court's order for errors appearing on the record and conclude that the order is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. To the extent that Gramercy properly raises constitutional issues, they are without merit. Therefore, we affirm the district court's order affirming the Review Committee's and the Department's conclusions to deny Gramercy a CON.

AFFIRMED.

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DENNIS D. SCHUELKE, APPELLANT,
V. DAVID L. WILSON, APPELLEE.
587 N.W.2d 369

Filed December 11, 1998. No. S-97-827.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. **Contracts: Actions: Pleadings.** A counterclaim may be asserted by a defendant against a plaintiff in the same action where the counterclaim arises from the same contract or transaction set forth in the plaintiff's petition as the foundation of the plaintiff's claim.
4. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are affirmative defenses.

5. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the party alleging the defense.
6. **Res Judicata.** Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies.
7. **Proof: Trial: Appeal and Error.** All matters expressly or by necessary implication adjudicated by the Nebraska Supreme Court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. The burden of showing a material and substantial difference in the facts is on the party asserting the difference.
8. **Contracts: Pleadings: Consideration.** Generally, there is an entire failure of consideration where property purchased is entirely worthless, but there is no failure of consideration if the property is not entirely worthless or if it has any substantial value, although less than the consideration paid, as where, by reason of some unsoundness or imperfection, it is merely diminished in value.
9. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court.
10. **Actions: Words and Phrases.** An action is frivolous or in bad faith when a party attempts to relitigate the same issue previously resolved in an action involving the same parties or when a legal position is wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position.
11. **Attorney Fees: Actions.** Any doubt as to whether a legal position is frivolous so as to warrant an award of attorney fees should be resolved in favor of the party whose legal position is in question.

Appeal from the District Court for Lancaster County: PAUL D. MERRIT, JR., Judge. Affirmed.

Terry K. Barber for appellant.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

Dennis D. Schuelke appeals a judgment of the Lancaster County District Court, ordering him to pay David L. Wilson $268,607 plus interest, in connection with two promissory notes which Schuelke executed in favor of Wilson for the purchase of a business. We affirm.

## STATEMENT OF FACTS

In October 1989, Schuelke entered into a contract with Wilson for the purchase of a Maaco automobile painting business that Wilson had owned in Lincoln, Nebraska, since 1980. The sales agreement between Schuelke and Wilson was the product of at least 4 months of discussion between the parties. The purchase price upon which they agreed was $250,000. Schuelke paid Wilson $140,000 in cash at the time of purchase. Schuelke executed two promissory notes in favor of Wilson to finance the remainder of the purchase price.

Schuelke executed both promissory notes on October 6, 1989. One note was in the principal amount of $65,000. The first payment on this note was $15,000, due on June 12, 1991. This note provided that interest would accrue at the rate of 16 percent per annum on all overdue installment payments. The second promissory note was for the principal sum of $45,000, all of which was due and payable on October 6, 1994. The second note also provided for interest accruing on unpaid sums due and owing at the rate of 16 percent per annum.

Schuelke assumed operation of the Maaco business in mid-October 1989. Within less than a month, Schuelke sent a letter to Wilson, stating that he desired to rescind the sales contract. Schuelke claimed that Wilson had materially misrepresented, inter alia, the revenue and operating costs of the Maaco business in order to induce Schuelke to purchase it. Wilson refused to consent to Schuelke's request to rescind the contract.

Schuelke operated the Maaco business from October 1989 through June 1990, at which time he closed and abandoned the business premises. Maaco Enterprises, Inc., which authorized Schuelke to operate the Lincoln business, terminated his franchise agreement.

Schuelke filed an action against Wilson in the district court for Lancaster County on January 12, 1990, to compel rescission of the sales contract. Wilson counterclaimed, alleging that he was entitled to an award of damages occasioned by Schuelke's default on the terms of the two promissory notes, by Schuelke's failure to continue operating the Maaco business, by Schuelke's sale without notice to Wilson of collateral that Schuelke had pledged to secure his debt to Wilson, and by

Schuelke's filing of the action seeking rescission of the sales contract. Schuelke denied Wilson's counterclaim, and he affirmatively alleged that Wilson's right to recover on the promissory notes was barred by a failure of consideration, as well as Wilson's alleged fraudulent representations to Schuelke, which were described in detail in Schuelke's petition seeking rescission of the contract. The parties' claims against each other were tried to the court during an 8-day trial in late 1992. In an order filed on October 8, 1993, the trial court ordered rescission of the sales contract between Schuelke and Wilson on the basis of fraudulent misrepresentation.

On appeal, in *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996), this court reversed the trial court's rescission order. We found that Schuelke had failed to prove by clear and convincing evidence that Wilson intended for Schuelke to rely upon certain representations, and we further held that Schuelke's reliance upon these representations was neither justified nor undertaken in an ordinary and prudent manner. We concluded *Schuelke* by reversing the rescission order entered by the trial court and remanding the cause to the trial court to address Wilson's counterclaim for payment of the promissory notes.

On remand, the district court conducted a trial of Wilson's counterclaim for payment of the promissory notes on February 5, 1997. In a brief hearing, counsel for the parties agreed that the trial court could decide the counterclaim based upon the evidence submitted in the 1992 trial of Schuelke's rescission claim, all of which was contained in the 10-volume bill of exceptions submitted on appeal in *Schuelke*. The parties jointly introduced one new exhibit, a stipulation signed by counsel for both parties which stated that as of the date of trial, no money payments had been made by Schuelke to Wilson to satisfy either of the promissory notes executed by Schuelke in favor of Wilson.

In an order filed on May 29, 1997, the trial court noted that with the exception of the parties' written stipulation that no money payments had been made by Schuelke to Wilson on the promissory notes, no evidence submitted on remand was "materially and substantially different from the evidence considered by the Supreme Court in *Schuelke* [*v. Wilson*, 250 Neb. 334, 549

N.W.2d 176 (1996)]." On the basis of the law-of-the-case doctrine, the trial court held that Wilson was entitled to payment by Schuelke of $268,607, plus interest accruing on the judgment at the rate of $75.98 per day from and inclusive of February 6, 1997, the day after the trial on Wilson's counterclaim. Schuelke appeals.

## ASSIGNMENTS OF ERROR

Schuelke claims, restated, that the trial court erroneously failed to consider, and to find, that Schuelke's "legal" defenses to Wilson's claim for payment of the promissory notes were valid and precluded the judgment rendered against him for default on the promissory notes.

## STANDARD OF REVIEW

A suit for damages arising from breach of a contract, including breach of the terms of a promissory note, presents an action at law. *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Richardson v. Mast*, 252 Neb. 114, 560 N.W.2d 488 (1997).

## ANALYSIS

Schuelke's assigned errors regarding his "legal" defenses to Wilson's claim for damages due to Schuelke's default on the notes necessitate that we commence our analysis by distinguishing the nature of the claims asserted by the parties against each other.

Schuelke initiated this action by seeking rescission of his contract with Wilson for the purchase of the Maaco business. An action for rescission sounds in equity, and it is subject to de novo review upon appeal. *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996). In a rescission case, a party alleging fraud as the basis for rescission must prove all of the elements of the fraudulent conduct by clear and convincing evidence. *Id.*, relying on *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

Wilson counterclaimed against Schuelke for an award of money damages based upon Schuelke's breach of two promissory notes. Wilson's counterclaim constituted an action at law.

It required proof by only a preponderance of evidence, as opposed to the higher "clear and convincing" standard necessary in an equitable fraud action. *Schuelke, supra.* Factual findings in judgments in law actions tried to the bench are generally affirmed on appeal unless they are determined to be clearly erroneous. *Richardson v. Mast, supra.*

While Schuelke's claim against Wilson was equitable in nature and Wilson's counterclaim against Schuelke was an action at law, the two claims nonetheless were capable of existing in the same suit. A counterclaim may be asserted by a defendant against a plaintiff in the same action where, inter alia, the counterclaim arises from the same contract or transaction set forth in the plaintiff's petition as the foundation of the plaintiff's claim. Neb. Rev. Stat. §§ 25-812 and 25-813 (Reissue 1995). See, also, *Klitzing v. Didier*, 215 Neb. 122, 337 N.W.2d 418 (1983).

After the trial court's order granting rescission was reversed by this court in *Schuelke, supra*, Wilson's counterclaim against Schuelke for payment on the notes was the sole matter in need of resolution upon remand. The parties stipulated on remand that the trial court could consider all of the evidence introduced at the first trial in lieu of introducing live testimonial evidence. The evidence before the court at the hearing on remand thus consisted entirely of the record from the first trial, except for the written stipulation introduced by the parties that Schuelke had made no money payments on the notes to Wilson as of the date of the second trial. As noted above, the trial court subsequently entered judgment in Wilson's favor.

In Wilson's brief, he inaccurately claims that the trial court's order in his favor must be affirmed because in *Schuelke*, this court "dismissed the basis of Schuelke's claims and merely requested that the District Court calculate the exact amount of the judgment to be entered against Schuelke given that the [sales] contract between the parties is wholly enforceable." Brief for appellee at 10. In fact, we made no findings in *Schuelke* regarding either the merits of Wilson's claim for damages against Schuelke on the promissory notes or the amount of those damages, if any. In *Schuelke*, this court determined merely that Schuelke had failed to prove by clear and convinc-

ing evidence that Wilson had fraudulently misrepresented the Maaco business and, thus, that Schuelke had failed to prove that rescission of the contract was warranted. On remand, Wilson therefore was obligated to proceed on his counterclaim in effect, as the plaintiff, carrying the burden of proof as to his entire claim for liability and damages against Schuelke for breach of the two promissory notes. See *Klitzing v. Didier*, 215 Neb. at 126, 337 N.W.2d at 421 (holding that where claim by plaintiff dismissed, defendant would proceed on counterclaim "in effect, [as] plaintiff").

In his timely filed answer to Wilson's counterclaim, Schuelke specifically alleged the defenses of failure of consideration and Wilson's alleged fraudulent misrepresentation in inducing Schuelke to execute the sales contract and promissory notes. Matters which seek to avoid a valid contract are affirmative defenses, and the burden of proving an affirmative defense rests upon the party alleging the defense. *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). Failure of consideration is an affirmative defense, which Schuelke was obligated to plead or else forgo as a basis of defense. See *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

At the trial on remand, as well as in this appeal, Schuelke claims generally that the condition of the Maaco business he bought from Wilson was so deficient that it failed to constitute meaningful consideration for the promissory notes executed in connection with the purchase. Specifically, Schuelke alleged that the business' equipment was " 'old and moldy' " at best and, in some instances, nonexistent. Brief for appellant at 8. Schuelke further claimed that unbeknownst to him, Wilson depleted the business' inventory immediately prior to Schuelke's purchase by conducting a paint sale. Schuelke also claimed that the Maaco business' financial status was much less stable than Wilson had represented it to be.

Wilson asserts in the case at bar that our findings in *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996), precluded Schuelke, on remand, from introducing evidence to support any and all of the affirmative defenses Schuelke pled in response to Wilson's prayer for enforcement of the promissory notes.

Wilson argues that this is so based on the doctrines of res judicata and the law of the case. Wilson misperceives the effect of *Schuelke*.

With respect to Wilson's reliance on res judicata, we observe that under the traditional rule of res judicata, sometimes called claim preclusion,

> any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies.

*Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 20, 230 N.W.2d 99, 102 (1975). In the first trial, which culminated in our ruling in *Schuelke, supra*, neither the trial court nor this court rendered findings of fact or conclusions of law pertaining to the merits of Wilson's counterclaim raising Schuelke's alleged breach of the promissory notes or of the merits of Schuelke's affirmative defense thereto. Neither Wilson's counterclaim nor Schuelke's affirmative defenses are res judicata. The elements of proof in Schuelke's initial claim against Wilson for rescission based upon fraudulent misrepresentation and Wilson's counterclaim against Schuelke for breach of contract are not the same, and claim preclusion was properly not invoked by the trial court upon remand to bar Schuelke's presentation of evidence in support of his affirmative defense to Wilson's counterclaim alleging default on the notes. See, e.g., *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995) (holding that where elements of proof differ between causes, judgment in one action may, but does not necessarily, preclude judgment in another, factually related action).

With respect to the doctrine of the law of the case, we observe that in its decision awarding Wilson damages for Schuelke's breach of the two promissory notes, the trial court upon remand properly relied upon the law of the case established in *Schuelke*. Matters which have been expressly adjudicated in prior proceedings become the law of the case on remand, and such matters will not be considered again unless it is shown that the facts presented at the second trial are materi-

ally and substantially different from the facts presented at the first trial. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 219, 142 L. Ed. 2d 180. The burden of showing a material and substantial difference in the facts is on the party asserting the difference, in order to avoid the effect of the law of the case created as a result of the prior proceedings. *Id.*, relying on *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988).

At trial on remand, Schuelke and Wilson each elected to rely, with the exception of the stipulation of nonpayment, upon the written record of evidence introduced in the first trial. Wilson offered the prior evidence in order to prove his counterclaim for breach of contract and damages, and Schuelke offered it to prove his affirmative defenses. In doing so, each party forwent the opportunity to present new evidence to demonstrate a material and substantial change in the facts. Given our opinion in *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996), and the ensuing trial upon remand, the trial court was justified in relying upon the law of the case to the extent set forth in *Schuelke*. See, also, *State v. Jacob, supra.*

Upon remand, the trial court correctly found that one of Schuelke's affirmative defenses, that Wilson fraudulently misrepresented the matters material to the contract, failed because of the law of the case articulated in *Schuelke*. As noted above, in *Schuelke*, this court expressly found that Wilson had not fraudulently misrepresented any matter pertaining to the sales contract from which the promissory notes were generated. Thus, the sole remaining basis upon which Schuelke could avoid liability for his failure to pay on the promissory notes was the affirmatively pled defense of failure of consideration. The trial court found insufficient proof of failure of consideration, a finding amply supported by the record.

Failure of consideration occurs where, inter alia, the purpose of the parties' agreement or contract wholly fails. For example, in *Cotner College v. Estate of Hester*, 155 Neb. 279, 281, 51 N.W.2d 612, 614 (1952), a case relied upon by Schuelke, this court found that the consideration for a testamentary "endowment note" intended by the decedent to fund religious education scholarships at a seminary in Bethany, Nebraska, failed and

could not be enforced because the seminary had changed locations and it no longer offered the course of instruction for which the scholarships were expressly intended. Failure of consideration is an affirmative defense to enforcement of a contract which may be proved in law cases, *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982), as well as in equity cases, *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993). In the instant claim for damages for breach of contract, the burden of proving failure of consideration was upon Schuelke, the party asserting it as an affirmative defense. See *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995).

Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other. Valuable consideration for a contract, including a promissory note, "'"'need not be one translatable into dollars and cents[.]'"'" *Hyde v. Shapiro*, 216 Neb. 785, 788, 346 N.W.2d 241, 243 (1984). Sufficiency of consideration is not dependent upon a contracting party's realization of the profit or gain which he or she expected as a result of the contract. It has been stated:

> The motive to contract and the consideration for the contract are distinct and different. 1 S. Williston, A Treatise on the Law of Contracts § 111 (3d ed. 1957). "An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'" *Philpot v. Gruninger*, 81 U.S. 570, 577 (14 Wall.), 20 L. Ed. 743 (1871). Parties are led into agreement by many inducements, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain. These inducements are not legal or equitable considerations, and compose no part of a contract. See 17 Am. Jur. 2d *Contracts* § 93 (1964).

*Hyde v. Shapiro*, 216 Neb. at 790-91, 346 N.W.2d at 245.

In the case at bar, Schuelke assumed the ownership and operation of the Maaco business in mid-October 1989. There is no evidence in the record that Wilson impeded Schuelke's possession or operation of the business for a profit or that the business

was not in active operation when Schuelke purchased it. Schuelke operated the business until June 1990, when he closed and abandoned it. The record contains no evidence that Wilson or any other party forced or induced Schuelke to close and abandon the Maaco business. Schuelke testified that when he did so, he simply left behind all of the business equipment, except for some paint.

It is the law of the case that Schuelke failed to prove facts which entitled him to rescission of the sales contract. See *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996). While there is evidence in the record that Schuelke lost money during his operation of the Maaco business, the record is devoid of proof that Wilson failed to perform his contractual duty to transfer title and ownership of the Maaco business to Schuelke. The fact that the business failed to generate profit in the manner and time anticipated by Schuelke does not, on the facts of this case, amount to a failure of consideration for the contract.

The case *Nathan v. McKernan*, 170 Neb. 1, 101 N.W.2d 756 (1960), provides useful guidance in evaluating Schuelke's affirmative defense. In *Nathan*, after considerable negotiation, the buyers purchased a meat locker business, including the locker itself, from the seller. Soon after assuming ownership and operation of the business, the buyers claimed, inter alia, that the locker's physical facilities were grossly defective and that the business was without an adequate customer base, all contrary to the seller's representations during sales negotiations. Like the instant case, the seller in *Nathan* had financed the buyers' purchase of the business and the buyers operated the business for a relatively short period of time and then " 'turned the key and walked away.' " 170 Neb. at 15, 101 N.W.2d at 766.

The buyers in *Nathan* defaulted on their repayment obligation and sought to avoid the seller's claim for damages by asserting the defense of failure of consideration. On appeal, this court declined to find a failure of consideration, stating:

> "As a general rule there is an entire failure of consideration where the property purchased is entirely worthless . . . . [T]here is not a failure of consideration if the property is not entirely worthless, or if it has *any* substantial value, although less than the consideration paid . . . as where, by

> reason of some unsoundness or imperfection, it is merely diminished in value . . . ."

(Emphasis supplied.) *Nathan v. McKernan*, 170 Neb. at 16, 101 N.W.2d at 766. See, also, 77A C.J.S. *Sales* § 27b (1994).

The evidence contained in the record suggests that the gravamen of Schuelke's defense of failure of consideration is, at best, a claim that the Maaco business had higher operating costs than he had anticipated and that it failed to generate profits in the manner that he had hoped it would. Such facts do not rise to the level of failure of consideration. The trial court properly considered all of Schuelke's defenses, and its conclusion that Schuelke failed to demonstrate failure of consideration is supported by the record. The court's order awarding damages to Wilson for Schuelke's breach of the two promissory notes is correct and is affirmed.

Wilson has moved this court for an award of attorney fees on appeal pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995), claiming that Schuelke's appeal is frivolous. Wilson did not seek attorney fees at the second trial before the district court, and no attorney fees or costs were assessed against Schuelke. An appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court. *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

In support of his request for attorney fees, Wilson asserts that Schuelke's instant appeal is frivolous because of our holding in *Schuelke, supra.* Wilson further notes in his appellate brief that Schuelke's burden in this appeal is difficult, given the standard of review.

For purposes of § 25-824, "frivolous" means an attempt to relitigate the same issues resolved in prior proceedings with the same parties, see *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998), or a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position, see *Foiles v. Midwest Street Rod Assn. of Omaha, supra.* Any doubt as to whether a legal position is frivolous should be resolved in favor of the party whose legal position is in question. *Id.*

Following our review of the record, we observe that Schuelke did not take a frivolous approach either to the trial on Wilson's counterclaim for damages or on appeal. Although Schuelke's defense and appeal ultimately failed, Schuelke's approach to the litigation was not frivolous. Wilson's motion for attorney fees on appeal is denied.

## CONCLUSION

We affirm the trial court's order awarding Wilson damages for breach of the promissory notes. Wilson's motion for attorney fees on appeal is denied.

AFFIRMED.

STEPHAN, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
TERRY W. LYTLE, APPELLANT.
587 N.W.2d 665

Filed December 11, 1998. No. S-97-1221.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. In evaluating probable cause for the issuance of a search warrant, a magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before the magistrate, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is to ensure that the magistrate issuing a search warrant had a substantial basis for determining that probable cause existed.
3. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibil-

ity must be established in the affidavit through a police officer's independent investigation. An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.

4. **Search Warrants: Affidavits: Appeal and Error.** An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant.
5. **Search Warrants: Affidavits.** Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
6. **Search Warrants: Affidavits: Probable Cause.** The status of citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred. When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. A citizen informant is a citizen who purports to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement.
7. **Probable Cause.** An anonymous Crimestoppers tip, by itself, is not adequate to support probable cause without further investigation to verify or corroborate the information contained in the tip.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions to dismiss.

Barbara Thielen, of Fabian & Thielen, for appellant.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Search warrants authorizing searches of appellant Terry W. Lytle's home and business were issued solely on the basis of a tip provided by an anonymous informant using the "Crimestoppers" program. Lytle filed a motion to suppress evidence

seized from his home and business pursuant to the search warrants. The trial court denied Lytle's motion to suppress, finding that the magistrate's determination of probable cause was correct. The question presented is whether a tip provided by an anonymous informant using the Crimestoppers program, which is unsupported by other corroborating evidence, is sufficient to support a finding of probable cause for the purpose of issuing a search warrant. Specifically, is such an informant a "citizen informant," such that she/he is presumptively reliable? We conclude that anonymous informants using the Crimestoppers program are not citizen informants and that the search warrant in the instant case was not supported by probable cause. We reverse, and remand with directions to dismiss.

## BACKGROUND

Officer Robert C. Laney received a telephone call from an anonymous person who stated that Lytle was storing stolen Harley-Davidson motorcycles in the garage at his residence and using stolen motorcycle parts at his shop, One-Stop Motorcycles. The anonymous person also indicated that there would be some Harley-Davidsons that properly belonged to Lytle stored with the stolen ones. The anonymous person indicated that she/he had called before and nothing had been done and that she/he wanted something done. She/he indicated that the stolen motorcycles had been in Lytle's garage for 8 months. The anonymous person gave Laney no information as to how she/he was aware of these facts. Laney suggested that the anonymous person call the Crimestoppers program.

Another anonymous person, believed to be the same person that called Laney, later called Sgt. William Connelly through Crimestoppers. This anonymous person reiterated the information that had been given to Laney by the previous anonymous person, with the addition of some detail concerning the types of Harley-Davidsons stored at the two locations.

Laney drafted an affidavit and application for issuance of a search warrant based on the above telephone calls. The affidavit and application stated:

> The complaint and affidavit of Officer Robert C. Laney #1206, on this 19 day of SEPTEMBER, 1996, who, being first duly sworn, upon oath says:

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to wit:

A 1992 Or 93 Maroon or Brown HARLEY DAVIDSON with silver panels and gold pinstripes and full touring equipment believed to be stolen.

A 1992 or 93 Silver HARLEY DAVIDSON FAT BOY thought to have been stolen in late summer of [sic] fall of 1995.

A 1985 to 90 Black HARLEY DAVIDSON Sportster thought to have been stolen out of state along with other stolen motorcycles and motorcycle parts[,] false identification tags, titles, numbers, and/or implements, tools, and materials for fabricating same.

That said property is concealed or kept in, on, or about the following described places or person(s), to wit:

#1 6309 Boyd St. a tan single story family dwelling with the front door facing to the north with the numbers 6309 to the left of the front door and a detached single car garage with lean on addition built on to the rear of the garage. The garage is sitting to the south east of the house.

#2 1125 NORTHWEST RADIAL HIGHWAY, OMAHA, DOUGLAS COUNTY NEBRASKA, doing business as ONE STOP MOTORCYCLE SHOP. The business name is painted on a sign which is hung on the front door of 1125 NORTHWEST RADIAL HIGHWAY. The building is a single garage tan in color with a stucco finish. The numbers 1125 appear on the left side of the front door[.] To the left or North of the front door is a roll up garage door facing west toward NORTHWEST RADIAL HIGHWAY. The address 1125 is adjoined to a two story tan stucco building which has the address of 1123 NORTHWEST RADIAL HIGHWAY.

That said property is under the control or custody of
LYTLE,Terry, W.
W/M, DOB 5-12-50
5'10' 150 Lbs.
Data # . . .
SSN # . . .

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief to wit:

Omaha Police Sgt. CONNELLY #832 took a crime stoppers tip from an anonymous source who said they [sic] had personal knowledge that within the past forty eight hours, concealed in an addition to a detached garage to the rear of 6309 Boyd St, Omaha Douglas County NE were several stolen HARLEY DAVIDSON Motorcycles. The caller said that a party by the name of LYTLE, TERRY who lives at that address has stored the stolen HARLEY DAVIDSON MOTORCYCLES at that location under a large blue tarp. The caller said that LYTLE pays unknown parties up to two thousand dollars for each HARLEY DAVIDSON MOTORCYCLE that they steal for him. The caller went on to say that LYTLE uses these motorcycles for parts at LYTLES motorcycle shop which is ONE-STOP MOTORCYCLE PARTS at 1125 NORTHWEST RADIAL HIGHWAY. The caller also said that LYTLE has been doing this for several years.

The Omaha Police Department Auto Theft Unit has numberous [sic] unrecovered stolen Harley Davidson Motorcycles on file.

The Omaha Police Division, in 1982, began a Crime Stoppers Program. This program is a [sic] one by which the Omaha Police Division obtains information from the public about various Crimes and Fugitives in an effort to solve crimes reported to the Police, apprehend Fugitives, and recover stolen property. Since the inception of this program in 1982 over 1600 felony arrests have been made which cleared over 3155 reported crimes with a conviction rate of over 90% as a result of Omaha Police division Crime Stoppers tips. The value of property recovered as a result of tips is in excess of $2,811,427. Callers are promised anonymity and may be granted a reward if the information proves to be true and accurate and leads to the arrest and conviction of perpatrators [sic] and/or the recovery of stolen property or other contraband.

> Affiant officer did confirm through the 1996 Polk City directory that LYTLE, Terry is the listed resident at 6309 Boyd St., Omaha, Douglas County NE. Affiant officer also confirmed through M.U.D. that LYTLE, Terry is the party being billed for gas and water services at 1125 Northwest Radial Highway.
>
> WHEREFORE, he prays that a Search Warrant may be issued according to law.

The county court issued two search warrants. The first authorized the search of Lytle's shop and the second authorized the search of his home.

Both Lytle's shop and residence were simultaneously searched pursuant to the warrants. Officer Charles J. Venditte was involved in the search of Lytle's shop. When Venditte arrived, he asked Lytle if he had any weapons. Lytle stated that he did and told Venditte where the weapon was located.

Laney was involved in the search of Lytle's residence. Lytle, who was at the shop when the search began, was brought to his residence while the garage was searched. When Lytle arrived at his residence, Laney asked him whether there was anything in the house that would be of any danger to the police officers. Lytle stated that there were two loaded guns in a dresser by his bed. Lytle then showed Laney the location of the guns. The weapons at both locations and some motorcycles were seized.

Lytle was charged with one count of theft by receiving stolen property and three counts of possession of a deadly weapon by a felon. Lytle filed a motion to suppress the evidence seized during the search of his home and shop and a motion to dismiss the three felon in possession of a deadly weapon counts, both of which were denied. The jury found Lytle guilty on all three felon in possession of a deadly weapon charges, and he was sentenced to probation. However, the jury could not reach a verdict on the theft charge, and thus, the trial court declared a mistrial thereon.

## ASSIGNMENTS OF ERROR

Lytle contends that the trial court erred in (1) failing to grant his motion to suppress and admitting evidence at trial which was obtained in violation of his constitutional rights to be free

from unreasonable search and seizure; (2) failing to grant his pretrial motion to dismiss the three felon in possession of a deadly weapon counts, which was based upon the plenary restoration of civil rights; and (3) granting the State's motion in limine and excluding at trial testimony and evidence regarding the restoration of Lytle's civil rights.

## SCOPE OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998).

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In evaluating probable cause for the issuance of a search warrant, a magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before the magistrate, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison, ante* p. 190, 583 N.W.2d 31 (1998). The duty of the reviewing court is to ensure that the magistrate issuing a search warrant had a substantial basis for determining that probable cause existed. *Id.*

## ANALYSIS

Lytle argues that the trial court erred in failing to suppress the evidence seized during the searches of his residence and business because the affidavit did not establish the basis of the informant's knowledge of criminal activity or that the anonymous informant was reliable.

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Grimes, supra.* An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred. *Id.* Moreover, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant. *Id.*; *State v. Morrison, supra.*

Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Grimes, supra.*

It is clear that there is nothing in the affidavit indicating that the informant in the instant case had given reliable information in the past or that the informant's statement was against his or her penal interest. Likewise, the police officers did not conduct an independent investigation establishing the informant's reliability. See *id.* Thus, the question is whether the informant was a citizen informant.

The status of citizen informant cannot attach unless the affidavit used to obtain a search warrant *affirmatively* sets forth the circumstances from which the existence of the status can reasonably be inferred. *Id.*; *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d

83 (1996). Unlike the professional informant, the citizen informant is *without motive* to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* A citizen informant is a citizen who purports to have been the witness of a crime who is motivated by good citizenship and acts *openly* in aid of law enforcement. *Id.*

Relying on *Detweiler*, the State argues that an anonymous caller using the Crimestoppers program who is capable of identifying certain motorcycles by year, color, and model, such as the informant in the instant case, is reliable.

In *State v. Detweiler, supra*, a confidential informant told the police that a friend had taken photographs inside the Detweiler residence of an elaborate marijuana-growing operation. The police told the confidential informant to tell the friend to give the photographs to the police and to make an anonymous report regarding the photographs to Crimestoppers. The police later received the photographs and an anonymous telephone call from a person who acknowledged sending the photographs and requested a Crimestoppers identification number. The anonymous person subsequently made another telephone call to Crimestoppers, again acknowledging the photographs and stating that they were taken in an upstairs room of the Detweiler residence. The caller had also observed many cars at, and different people going in and out of, the Detweiler residence.

In analyzing whether the caller was a citizen informant, the *Detweiler* court first noted that a tipster may be a citizen informant even though the tipster remained anonymous. We stated that an anonymous tipster's explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the tip to greater weight than might otherwise be the case. We noted that the caller made an anonymous report to Crimestoppers, claiming to have taken photographs of a crime in progress; had sent those photographs to the police; and then had verified the photographs' contents. We stated that there was "no evidence that the caller had any selfish motivation for working with the police, such as promises of leniency or financial benefit," and that there was "no indication that the caller had any incentive to exaggerate the information made available to [the police] in pursuit of personal ends." *Id.*

at 493, 544 N.W.2d at 89. We stated that there was a "significant basis," *id.*, for finding that the anonymous caller was a citizen informant, but did not so hold. Rather, we held that under the "totality of the circumstances, probable cause existed to justify the issuance of the search warrant." *Id.* at 493, 544 N.W.2d at 90.

Lytle relies on this court's analysis in *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), to support his contention that the affidavit did not affirmatively indicate that the informant in the instant case was a citizen informant.

In *Utterback*, the affidavit set forth information indicating that an anonymous informant had told the police that a certain "Randy," living at a certain residence, had sold the informant marijuana and that the informant had observed the sale of illegal drugs at the residence. The informant also had been in the residence within the last 5 days and had seen a large quantity of marijuana, along with lesser amounts of hashish, cocaine, LSD, and PCP. The informant had also observed and personally inspected an AK-47 assault rifle and an Uzi submachine gun at the residence, along with other weapons. The affidavit stated that the informant was neither a paid nor a habitual informant and that the informant's physical description of "Randy" matched the physical description of Randall Utterback, an individual documented in police files.

This court held that there was nothing in the affidavit "even hinting that the informant was 'motivated by good citizenship.' " *Id.* at 988, 485 N.W.2d at 768.

This court's holding in *Utterback* indicates that the fact that an anonymous tipster is not paid for information, in and of itself, does not affirmatively show that the tipster is a citizen informant. *Utterback* also held that a tip from an anonymous caller who is not a citizen informant detailing a crime in progress, absent some other corroborating information, is insufficient to support a finding of probable cause to support the issuance of a warrant.

Our holding in *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996), is consistent with that in *State v. Utterback, supra.* *Detweiler* did not hold that informants using the Crimestoppers program are citizen informants. Rather, the fact that the tipster

was an anonymous informant using the Crimestoppers program was but one element of the totality of the circumstances indicating that the informant was sufficiently reliable. In *Detweiler*, unlike *Utterback*, there were additional circumstances beyond the fact that the tipster was an anonymous informant using the Crimestoppers program. These circumstances indicated that the informant and the information provided thereby was reliable.

The Montana Supreme Court has addressed the reliability of an anonymous informant using the Crimestoppers program. See *State v. Rinehart*, 262 Mont. 204, 864 P.2d 1219 (1993). In *Rinehart*, the court stated:

> The anonymous Crimestoppers' tip, by itself, is not adequate to support probable cause without further investigation to verify or corroborate the information contained in the tip. . . . This does not mean, however, that the anonymous tip has absolutely no probative value in the probable cause determination. Factors which have little probative value on their own can still provide a basis for a determination of substantial evidence to conclude probable cause existed to issue a search warrant when such factors are considered in combination with other information under the totality of the circumstances test.

(Citations omitted.) *Id.* at 211, 864 P.2d at 1223. We agree with this analysis.

In the instant case, the only evidence in the affidavit which tended to show that the anonymous tipster was a citizen informant, or was otherwise reliable, was the fact that the tipster used the Crimestoppers program. Although that fact may be a factor tending to support a finding of probable cause, it is not enough, in and of itself, to render a tipster a citizen informant. See, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Detweiler, supra*. The fact that a tipster uses the Crimestoppers program is likewise not enough, in and of itself, to otherwise support a finding of probable cause. See *State v. Rinehart, supra*.

Indeed, the affidavit stated that persons using the Crimestoppers program "may be granted a reward if the information proves to be true and accurate." That fact indicates that such an informant may be motivated by money, rather than solely by

"good citizenship." See *State v. Detweiler, supra*. For example, someone who has only the barest suspicion of criminal activity would not likely implicate another person in a crime. Such would not be "good citizenship." However, when presented with the opportunity for reward, such speculation may prompt a person to make a report. If the suspicion turns out to be incorrect, the anonymous informant is not harmed. However, if the suspicion is correct, the anonymous informant will likely be paid. Thus, such an informant would have a "'"'motive to exaggerate, falsify or distort the facts to serve his own ends.'"'" *Id.* at 492, 544 N.W.2d at 89.

Based on the foregoing analysis, we conclude that the anonymous informant in the instant case was not a citizen informant and that the affidavit did not otherwise establish that the informant was reliable. "When it is not established that an informant is reliable, a search warrant issued upon information supplied by such unreliable source is invalid." *State v. Utterback*, 240 Neb. 981, 996, 485 N.W.2d 760, 773 (1992). Accordingly, Lytle's suppression motion should have been granted and the evidence suppressed. Under the totality of the circumstances, "[t]he magistrate would have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip." *State v. Valley*, 252 Mont. 489, 494, 830 P.2d 1255, 1258 (1992).

Our conclusion does not mean that anonymous tips obtained through the Crimestoppers program have no value. It is clear that information received from such a program can be a useful tool for law enforcement. But, standing alone, without corroboration of details by law enforcement, the information gleaned from such an informant is insufficient to establish the informant's reliability or establish probable cause. In this regard, we note that the mere confirmation of Lytle's address and verification of utilities was insufficient to establish, along with the tip, probable cause to issue the search warrant. See *State v. Utterback, supra* (holding police verification of defendant's address, car registration, utilities, and physical description are insufficient to corroborate informant's information for purpose of issuing warrant).

Because we have already concluded that the affidavit failed to establish the informant's reliability and that Lytle's motion to

suppress should have been granted, we do not address Lytle's remaining assignments of error.

## CONCLUSION

The affidavit in support of the issuance of the search warrant was insufficient to establish the reliability of the informant and, therefore, insufficient to establish probable cause. Accordingly, the evidence seized pursuant to the search warrant should have been suppressed. Moreover, because the illegally seized evidence was the only evidence as to Lytle's guilt, this cause is remanded with directions to vacate Lytle's convictions and dismiss the charges against him.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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## REBECCA S. DUKAT, APPELLANT, V. LEISERV, INC., DOING BUSINESS AS MOCKINGBIRD LANES, APPELLEE.

587 N.W.2d 96

Filed December 18, 1998. No. S-96-1257.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a 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.
2. **Jury Instructions: Appeal and Error.** A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues.
3. **Negligence: Proof: Trial.** Before the issue of assumption of risk may be submitted to the jury, the defendant has the burden to establish the elements of assumption of risk, which are 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. **Negligence.** Assumption of risk is predicated upon the plaintiff's voluntary exposure to the known danger caused by the defendant's negligence.
5. ____. A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk. 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.
6. ____. If the person against whom the doctrine of assumption of risk is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered.

7. ____. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event.
8. ____. The subjective standard which is applied to assumption of risk involves 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.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Douglas County, MARY G. LIKES, Judge. Judgment of Court of Appeals affirmed.

Daniel W. Ryberg for appellant.

Richard J. Gilloon, of Erickson & Sederstrom, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

This is a petition for further review of the Nebraska Court of Appeals' order of reversal and remand for a new trial on the negligence claim of appellant, Rebecca S. Dukat, against appellee, Leiserv, Inc., doing business as Mockingbird Lanes. Leiserv asserts that the Court of Appeals erred in determining that the trial court should not have instructed the jury on the theory of assumption of risk. We affirm.

## BACKGROUND

Dukat arrived at Mockingbird Lanes, a bowling alley in Omaha, Nebraska, at approximately 6 p.m. on February 2, 1994, to bowl in her league games. Dukat walked from her car to the bowling alley on the only sidewalk provided to and from the building. Dukat testified that she noticed the sidewalk was icy. She bowled three games in her league that night. Dukat left the bowling alley around 9 p.m. and retraced her steps on the same sidewalk, which was still ice-covered. As Dukat proceeded along the sidewalk toward her car, she slipped and fell. Dukat suffered a fracture of both bones in her left ankle and a ruptured ligament.

Dukat sued Leiserv and Brunswick Corporation, the parent company of Leiserv, in the district court for Douglas County. Dukat alleged that Leiserv and Brunswick were negligent in failing to keep the sidewalk in a reasonably safe condition, in failing to warn Dukat of a dangerous condition, and in failing to take adequate and reasonable measures to protect Dukat. Leiserv and Brunswick alleged two affirmative defenses: contributory negligence and assumption of risk. At the end of Dukat's evidence at trial, the court granted Brunswick's motion for a directed verdict on the ground that there was no evidence of Brunswick's responsibility or control over the employees of Mockingbird Lanes.

The trial court instructed the jury on the contributory negligence and assumption of risk defenses, and the jury returned a general verdict for Leiserv. Dukat appealed, asserting among other assignments of error that the trial court erred in instructing the jury on contributory negligence and assumption of risk.

The Court of Appeals concluded that Leiserv did not meet its burden of proving that Dukat voluntarily exposed herself to the risk of injury by walking on the icy sidewalk, because "Leiserv did not introduce any evidence of an alternative safe route or course of conduct which would have allowed [Dukat] to safely leave the bowling alley as she had a right to do and wanted to do." *Dukat v. Leiserv, Inc.*, 6 Neb. App. 905, 916, 578 N.W.2d 486, 494 (1998). The Court of Appeals concluded that it was error for the trial court to submit the issue of assumption of risk to the jury. After concluding the assumption of risk instruction was reversible error, the Court of Appeals "deem[ed] it necessary to discuss Dukat's other assignments of error because those questions may recur on retrial." *Id.* The Court of Appeals continued its opinion with an analysis of whether the instruction on contributory negligence was properly given. It concluded that based on Dukat's testimony that she knew of the icy condition of the sidewalk, she might have done things a reasonably careful person might not have. The Court of Appeals stated that a reasonable person might have decided not to navigate the same icy path she had taken earlier without asking the assistance of a friend and that a reasonable person also might have asked a Mockingbird Lanes employee to spread an ice-melting sub-

stance on the sidewalk. Therefore, the Court of Appeals concluded that reasonable minds could arrive at the conclusion that Dukat did not act as a reasonable person and that the slip and fall were contributed to by Dukat's own negligence. As such, the Court of Appeals determined that the trial court was correct in submitting to the jury the question of Dukat's contributory negligence.

Leiserv now asserts the Court of Appeals erred in determining that the record did not contain evidence of an alternative course of conduct. Leiserv focuses on the Court of Appeals' recognition in its contributory negligence analysis that Dukat could have asked a friend for assistance in getting to her car or that she could have asked a Mockingbird Lanes employee to spread an ice-melting substance on the sidewalk. Leiserv argues that this shows the record did contain evidence of an alternative course of conduct. Leiserv further argues that what is seen as a reasonable alternative course of conduct for a contributory negligence instruction should be seen as a reasonable alternative course of conduct for an assumption of risk instruction.

## ASSIGNMENT OF ERROR

Leiserv assigns that the Court of Appeals erred in reversing the jury verdict in favor of Leiserv after concluding that the jury should not have been instructed on assumption of risk.

## STANDARD OF REVIEW

In an appeal based on a 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. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995).

## ANALYSIS

There is not an issue in this case of an alternate route available to Dukat. In answers to interrogatories entered into evi-

dence, Leiserv admitted that Dukat did not have an alternate route. Therefore, the only issue as to assumption of risk is whether there was an alternative course of conduct.

Before the issue of assumption of risk may be submitted to the jury, the defendant has the burden to establish the elements of assumption of risk, which are 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. *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996). Assumption of risk is predicated upon the plaintiff's voluntary exposure to the known danger caused by the defendant's negligence. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

> "(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 v. Lukes*, 182 Neb. 168, 170-71, 153 N.W.2d 733, 735 (1967), quoting Restatement (Second) of Torts § 496 E (1965). If the person against whom the doctrine of assumption of risk 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, 128 N.W.2d 835 (1964).

The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Williamson v. Provident Group, Inc., supra.* The subjective standard involves 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. at 171, 153 N.W.2d at 735, quoting the Restatement, *supra*, § 496 D, comment *c*.

Leiserv argues that Dukat assumed the risk under the theory of alternative course of conduct by failing to ask someone to assist her outside when she knew of the icy condition of the sidewalk. This conduct would only have exposed two persons to

the risk and would not necessarily have provided Dukat with safe passage to her automobile. Therefore, it is not an alternative course of conduct that would entitle Leiserv to an assumption of risk instruction.

Leiserv also argues that Dukat could have reported the icy conditions to a Mockingbird Lanes employee and requested that an ice-melting substance or sand be applied. Leiserv did not introduce evidence that such action on the part of Dukat would have alleviated the icy condition of the sidewalk.

The Court of Appeals found that Leiserv did not introduce any evidence of an alternative course of conduct and, thus, failed to prove the prerequisites for an assumption of risk instruction. We agree and, therefore, affirm.

## CONCLUSION

The burden to prove the defense of assumption of risk was Leiserv's. There was no issue of an alternate route by reason of Leiserv's answers to interrogatories. The only issue was alternative course of conduct, and Leiserv did not offer proof to support this theory. We agree with the Court of Appeals that an assumption of risk instruction should not have been submitted to the jury.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
TALLULAH WOODS, APPELLANT.
587 N.W.2d 122

Filed December 18, 1998. No. S-97-642.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Rules of the Supreme Court: Appeal and Error.** A petition for further review by the Supreme Court and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals.
3. **Appeal and Error.** The Supreme Court will not consider errors not properly assigned in a petition for further review and discussed in the supporting memorandum brief.

4. ____. An error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review by the Supreme Court, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause, constitutes plain error for consideration on further review.
5. ____. Consideration of plain error occurs at the discretion of an appellate court, and a party who fails to properly assign an error on further review does so at its peril.
6. ____. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **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.
8. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of moot issues requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for further guidance of public officials, and the likelihood of future recurrence of the same or similar problem.
9. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
10. ____. A statute, rule, or regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
11. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
12. ____. It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there.
13. **Criminal Law.** Notice-of-alibi statutes are in derogation of the common-law traditions of criminal procedure, and must be strictly construed.
14. **Statutes: Intent.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
15. **Pretrial Procedure: Witnesses.** In the absence of a specific statutory directive, Neb. Rev. Stat. § 29-1927 (Reissue 1995) does not allow a court to order the disclosure of the identity of a defendant's alibi witnesses prior to trial.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed as modified.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

## NATURE OF CASE

The appellant, Tallulah Woods, was, pursuant to verdict, adjudged guilty of acquiring a controlled substance by fraud. The conviction arose from an incident in which it was alleged that Woods went to a pharmacy and picked up a prescription that did not belong to her.

Prior to her trial, Woods complied with a statutory requirement by filing a notice of her intent to present an alibi defense. The State subsequently asked that Woods be ordered to disclose her potential alibi witnesses, and the trial court granted this request. Under protest, Woods complied with the disclosure order. This appeal presents the issue whether a defendant may be ordered to disclose the names of alibi witnesses, absent a clear statutory authorization.

## FACTUAL BACKGROUND

Woods was charged by information with acquiring a controlled substance through fraud, in contravention of Neb. Rev. Stat. § 28-418(1)(c) (Reissue 1995). Violation of § 28-418(1)(c) is a Class IV felony, punishable, under Neb. Rev. Stat. § 28-105 (Reissue 1995), by up to 5 years' imprisonment, a fine of no more than $10,000, or both.

At some point prior to trial, Woods evidently filed a notice of intent to use an alibi defense pursuant to Neb. Rev. Stat. § 29-1927 (Reissue 1995), although such notice does not appear in the record on appeal. A hearing was held at which Woods' counsel advised the court that the alibi notice had been filed out of the 30-day time limit imposed by the statute. Counsel for Woods and the State later agreed to allow Woods to present an alibi defense, and the State waived any defect in notice.

The record also reveals that at the hearing, the court ordered Woods to disclose who her alibi witnesses would be. Woods then filed a motion asking the court to reconsider its alibi dis-

closure order. Subsequently, Woods filed an "Involuntary Disclosure of Alibi Witnesses," listing seven witnesses, including Woods; Woods' husband, Robert Woods; and Woods' daughter, Lakishia Jones. Thereafter, the State filed a motion asking the court to allow the taking of depositions from Woods' alibi witnesses. Following a hearing, the court overruled Woods' motion to reconsider and sustained the State's motion to allow depositions. The record does not reflect whether any witnesses were actually deposed prior to trial.

At trial, the State called Evangelisa Kingston, the person whose medication had allegedly been misappropriated. Kingston testified that she and Woods had become friends after being introduced by Kingston's granddaughter, who had lived with Woods for a time. Kingston had a history of medical problems that had required knee surgeries, the effect of which was to leave Kingston with "a lot of pain." Because of this, Kingston had been prescribed pain medications, including a medication known by the trade name "Darvocet."

Kingston said that she sometimes had people help her by picking up her medication and that Woods had been among them. Kingston testified that when this happened, Woods would pick up Kingston's prescription and bring it to Kingston, and the two would "share" the medication.

Woods' counsel objected to this testimony, arguing that it was character evidence of the sort prohibited by Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Woods' counsel asked for an admonishment to the jury to disregard the statement and moved for a mistrial. However, the trial court did not admonish the jury as requested and overruled Woods' motion for mistrial.

Kingston further testified that Woods was no longer authorized to pick up prescriptions for Kingston. Kingston testified that the last time Woods had been given permission to pick up one of Kingston's prescriptions, the portion of the label indicating the quantity had been ripped off and Woods had taken more of the pills than she had indicated to Kingston.

Woods' counsel also objected to this testimony under § 27-404 and argued that this evidence could not be introduced without a hearing outside the presence of the jury as contemplated by § 27-404(3). The objection was overruled.

Finally, Kingston testified that on August 1, 1996, Woods had come to Kingston's house and asked if Kingston had any pills. Kingston reported telling Woods that Kingston did not have any pills because Kingston's new Darvocet prescription had not yet been picked up from her pharmacy, a Walgreen's drugstore located in Lincoln, Nebraska. Kingston said that she then specifically told Woods that one of Kingston's granddaughters was going to take Kingston to get the prescription the next day. When Kingston went to pick up her prescription, however, she was unable to do so.

Brady Brostrom, a pharmacist at the Walgreen's pharmacy, testified that during the morning of August 2, 1996, he was working the late shift at Walgreen's. Brostrom testified that between 7 and 8 o'clock that morning, he had dispensed a prescription filled for Kingston consisting of 30 tablets of generic Darvocet. Brostrom positively identified Woods as the person to whom he had given the prescription. Mary Amen, another Walgreen's pharmacist, testified that she had filled Kingston's prescription and that it contained generic Darvocet, which was a Schedule IV controlled substance.

Following Amen's testimony, the State rested. The defense called three witnesses: Woods, her husband, and her daughter. Woods testified that she had gone to see Kingston on the evening in question, but Woods denied asking Kingston about any drugs. Woods claimed that she had already obtained a prescription from her own doctor for Lorcet, which Woods said was a stronger medication than Darvocet. According to Woods, Kingston said nothing about a prescription.

Woods further testified that after leaving Kingston's house, Woods had gone home and then to her husband's place of employment, a local restaurant. Woods said that she remained there until after the restaurant closed, and then she and her husband went straight home. Woods said that she slept until nearly 9 o'clock the next morning. Woods claimed that shortly after she awoke, she went with her daughter and another woman to run several errands around Lincoln; Woods generally testified that she and her companions were away until about noon. Woods testified that she had not been in the vicinity of Walgreen's during

the entire course of the morning on which Kingston's prescription was dispensed.

The remaining witnesses for the defense were Robert Woods and Jones. Robert Woods and Jones testified generally in corroboration of Woods' claim to have been elsewhere at the time that the prescription was allegedly misappropriated. Both witnesses were cross-examined generally regarding their memory of the events of August 2, 1996, as compared with their recollection of events on other particular days around the same time.

After Jones' testimony, the defense rested. The State offered no rebuttal evidence. The jury ultimately returned a guilty verdict, and the trial court entered judgment upon the verdict. Woods was sentenced to serve 180 days in the county jail.

Woods appealed to the Nebraska Court of Appeals, alleging, inter alia, that the trial court erred in ordering disclosure of Woods' alibi witnesses and in allowing the introduction of evidence of Woods' prior bad acts without a hearing. The Court of Appeals determined that Woods was correct on both issues and ordered the cause remanded for a new trial. *State v. Woods*, 6 Neb. App. 829, 577 N.W.2d 564 (1998). The State petitioned this court for further review, which we granted. The State's petition, however, alleged only that the Court of Appeals erred in its construction of the alibi notice statute; the State did not assign error to the Court of Appeals in any other regard.

## ASSIGNMENT OF ERROR

In its petition for further review, the State claims that the Court of Appeals erred in finding that under § 29-1927, a defendant is obliged to do no more than announce an intention to rely on an alibi defense at trial and need not provide names and addresses of the proposed alibi witnesses.

## SCOPE OF REVIEW

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Kimball v. Nebraska Dept. of Motor Vehicles, ante* p. 430, 586 N.W.2d 439 (1998).

## ANALYSIS

### ERRORS NOT ASSIGNED IN PETITION FOR FURTHER REVIEW

We note, as a preliminary matter, that the State did not assign error to the Court of Appeals on any issues other than those presented by the notice-of-alibi statute. The Court of Appeals, however, found reversible error in both the trial court's interpretation of the notice-of-alibi statute and the trial court's erroneous admission of evidence of prior bad acts. *State v. Woods, supra.* The State does not assign error in the latter ground for reversal.

We have previously noted that a petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993) (citing Neb. Ct. R. of Prac. 2F(3) (rev. 1992)). We have also written that we will not consider errors not properly assigned in a petition for further review and discussed in the supporting memorandum brief. *Id.*

The only established exception to this rule is found in plain error. We have held:

> [A]n error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause, constitutes plain error for consideration on further review.

*Id.* at 691, 502 N.W.2d at 433.

We emphasize, however, that consideration of plain error occurs at the discretion of an appellate court and that a party who fails to properly assign an error on further review does so at its peril. We have held, in this context, that plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

With that in mind, we find no plain error in the Court of Appeals' resolution of the issues relating to § 27-404, and we will not reconsider such in this appeal. Our review of the record and the Court of Appeals' decision leads us to conclude that the Court of Appeals was correct in determining that evidence of Woods' prior bad acts was admitted without the statutorily required hearing, outside the presence of the jury, with the State proving by clear and convincing evidence that Woods committed such bad acts. See § 27-404(3). Woods' conviction must therefore be reversed and this cause remanded for a new trial.

With that established, we must consider whether it is proper for this court to consider the issue raised by the State's petition for further review. As this cause must, in any event, be remanded for new trial, consideration of the alibi notice statute has arguably been rendered moot. 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. *DeCoste v. City of Wahoo, ante* p. 266, 583 N.W.2d 595 (1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997).

The public interest exception to the rule precluding consideration of moot issues, however, requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for further guidance of public officials, and the likelihood of future recurrence of the same or similar problem. *State ex rel. Shepherd v. Neb. Equal Opp. Comm., supra.*

In the present case, we find that the elements of the public interest exception are met. An authoritative construction of the statute at issue is necessary to guide public officials, resolve public concerns, and prevent a recurrence of the uncertainty that is evident from the case at bar.

Moreover, the remedy proposed by the Court of Appeals in this case presents an issue of public concern. In order to prevent the State, on retrial, from taking advantage of information that the Court of Appeals found to be erroneously disclosed, the Court of Appeals ordered the appointment of a special prosecutor for retrial of this cause. In a further attempt to unscramble this particular egg, the Court of Appeals ordered the district

court "to ensure that the special prosecutor shall not receive or use any information obtained as a result of the court's having ordered Woods to disclose the identity of her alibi witnesses." *State v. Woods*, 6 Neb. App. 829, 836, 577 N.W.2d 564, 569 (1998).

The necessity and complexity of this remedy require review. Thus, because of the need for an authoritative adjudication of the statute at issue and because of the necessity to guide the court and counsel on the procedures at retrial, we will proceed to consider the State's assignment of error on further review regarding the Court of Appeals' resolution of the issue regarding disclosure of alibi witnesses.

## DISCLOSURE OF ALIBI WITNESSES

On appeal, Woods claimed that the trial court erred in ordering her to disclose the identity of her alibi witnesses. The statute providing a notice-of-alibi requirement in Nebraska is § 29-1927, which states:

> No evidence offered by a defendant for the purpose of establishing an alibi to an offense shall be admitted in the trial of the case unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least thirty days before trial, except that such notice shall be waived by the presiding judge if necessary in the interests of justice.

By the plain language of this statute, Woods was required only to give notice of her intent to rely on an alibi defense and was not required, as the trial court ordered, to provide information regarding the witnesses she intended to call to support that alibi. The trial judge, nonetheless, in ordering disclosure of Woods' alibi witnesses, stated that "the defendant is obligated to disclose witnesses; that is, to identify witnesses, otherwise the thirty-day notice requirement to the alibi statute doesn't make much sense."

The trial court's reasoning, however, does not take into consideration certain basic tenets of statutory interpretation. We first note that when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the

contrary, words in a statute will be given their ordinary meaning. *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995); *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). A statute, rule, or regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *Kimball v. Nebraska Dept. of Motor Vehicles, ante* p. 430, 586 N.W.2d 439 (1998); *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Father Flanagan's Boys Home v. Dept. of Soc. Servs., ante* p. 303, 583 N.W.2d 774 (1998); *State v. Burlison, ante* p. 190, 583 N.W.2d 31 (1998).

It is clear that the plain and ordinary language of § 29-1927 does not include a requirement that the defendant disclose the identity of alibi witnesses. It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *State v. Jansen*, 241 Neb. 196, 486 N.W.2d 913 (1992); *State v. Salyers, supra.*

Moreover, notice-of-alibi statutes are in derogation of the common-law traditions of criminal procedure. The common law recognized no right of discovery in a criminal case by either the prosecution or the defendant. See *Scott v. State*, 519 P.2d 774 (Alaska 1974). See, also, generally, 2 Wayne R. LaFave and Jerold H. Israel, Criminal Procedure § 19.4 (1984); Annot., 45 A.L.R.3d 958 (1972 & Supp. 1998). In Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute. See Neb. Rev. Stat. §§ 29-1916 and 29-1917 (Reissue 1995). Additionally, in the absence of a statute, Nebraska has not required defendants to plead defenses in advance. See *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986) (holding that in absence of statute, defendant was not required to plead self-defense in advance of trial).

Since Nebraska's notice-of-alibi statute effects a change in the common law, it must be strictly construed. Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which

restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998).

We therefore hold that in the absence of a specific statutory directive, § 29-1927 does not allow a court to order the disclosure of the identity of a defendant's alibi witnesses prior to trial. This holding is consistent with the holdings of other appellate courts faced with similar circumstances. See, e.g., *State v. Miller*, 289 S.C. 316, 345 S.E.2d 489 (1986); *Reynolds v. Superior Court of Los Angeles County*, 12 Cal. 3d 834, 117 Cal. Rptr. 437, 528 P.2d 45 (1974); *Rodriguez v. Superior Court*, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970) (holding that in absence of statute, courts were not empowered to adopt rule providing for discovery of alibi witnesses). Contra, *Commonwealth v. Edgerly*, 372 Mass. 337, 361 N.E.2d 1289 (1977).

It is understandable why the trial court may have questioned the efficacy of § 29-1927 without the requirement that a defendant disclose the identity of alibi witnesses. However, as an appellate court, we are often called upon to apply the plain and ordinary meaning of statutory language, and our task is not to pass on the wisdom or efficacy of the statute as written. The Court of Appeals properly noted that § 29-1927 became effective in 1993—long after the federal rules of criminal procedure adopted an alibi notice rule, long after numerous other jurisdictions adopted alibi notice rules, and long after Nebraska adopted other notice rules such as the hearsay exception notice rule contained in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995). See *State v. Woods*, 6 Neb. App. 829, 577 N.W.2d 564 (1998). Observing that § 29-1927 was not modeled after the language of any of the foregoing, the Court of Appeals wrote:

> Fed. Rule of Crim. P. 12.1 requires the defendant in a criminal case, upon written demand of the government, to file a written notice of intention to offer an alibi defense. Rule 12.1 further requires that "[s]uch notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the wit-

> nesses upon whom the defendant intends to rely to establish such alibi." Similarly, the Maryland Court of Appeals noted in a 1983 decision that, at that time, "[a] requirement for notice of an alibi defense, with identification of proposed alibi . . . witnesses, now exists under statute or rule of court in 35 of our sister states and in the District of Columbia." *Taliaferro v. State*, 295 Md. 376, 387, 456 A.2d 29, 35 (1983).
>
> The Nebraska alibi notice statute, § 29-1927, as noted above, was adopted in 1993. The Nebraska statute, however, does not contain an explicit requirement similar to that in the federal system or the other jurisdictions referenced above which would require a defendant, in addition to providing "notice of intention to rely upon an alibi," to also provide the names and addresses of the witnesses upon which the defendant intends to rely in establishing the alibi defense. In addition to the fact that this Nebraska statute was adopted after the federal and other state statutes, such that the Legislature could have modeled the Nebraska statute after those statutes, we note that the Nebraska Legislature did require notice of the names and addresses of witnesses when it enacted § 27-804(2)(e). The Legislature stated that a proponent who desires to use the catch-all hearsay exception must make known to the adverse party "his intention to offer the statement and the particulars of it, including the name and address of the declarant." As such, it is apparent that the Legislature was fully aware of how to require such disclosure if it had desired to also require it in § 29-1927.

*State v. Woods*, 6 Neb. App. at 834-35, 577 N.W.2d at 568.

We agree. Section 29-1927 requires only that the defendant disclose his or her intention to rely on an alibi defense. We specifically decline to infringe on the Legislature's province by adding disclosures not required by the language of the statute, especially when other constitutional and statutory construction issues may be implicated. Therefore, we conclude that the Court of Appeals correctly determined that the trial court erred in ordering Woods to disclose the identity of her alibi witnesses, based on the plain and unambiguous language of § 29-1927.

### RECIPROCAL DISCOVERY PROVISION

Nonetheless, the State also urges this court to ratify the trial court's order of alibi witness disclosure, if not based upon § 29-1927, then upon the criminal reciprocal discovery provisions of § 29-1916. Section 29-1916 provides, in pertinent part, that whenever the court grants a request by the defendant for discovery, the court may

> condition its order by requiring the defendant to grant the prosecution like access *to comparable items or information included within the defendant's request* which:
>
> (a) Are in the possession, custody, or control of the defendant;
>
> (b) The defendant intends to produce at the trial; and
>
> (c) Are material to the preparation of the prosecution's case.

(Emphasis supplied.)

However, in the instant case, Woods filed a motion for discovery requesting to inspect and copy any statements made by Woods; any prior criminal record of Woods; the results and reports of any physical, mental, or scientific tests or experiments; and any other documents, papers, books, accounts, letters, photographs, objects, or other tangible things which could be used as evidence by the State. Woods did not request access to any information about the witnesses expected to testify for the prosecution. As such, Woods requested nothing that could be characterized as "comparable items or information" to a list of her alibi witnesses. Cf. *State v. Hinn*, 229 Neb. 556, 427 N.W.2d 791 (1988).

Therefore, the reciprocal discovery provisions of § 29-1916 provide no basis for the trial court's order that Woods disclose the identity of her alibi witnesses. The State's claim in that regard is without merit.

### PROCEDURE ON REMAND

Finally, because this cause is remanded for a new trial, and recognizing that some damage from Woods' disclosure of alibi witnesses has already occurred, we must consider the procedural remedy upon remand of the instant cause. In fashioning any sort of procedural remedy, we recognize that the remedy is unique to these unusual circumstances and must take into

account the nature of the damage from the disclosure of alibi witnesses at the initial trial.

We note that at trial, pursuant to the statutory notice of intent to use an alibi defense, Woods testified that she was not at or near the Walgreen's pharmacy during the early morning hours of August 2, 1996, when the prescription was allegedly misappropriated. Instead, Woods testified that she was at home, sleeping with her husband, until nearly 9 a.m. on August 2. Woods claimed that thereafter, shortly after she awoke, she went with her daughter and another woman to run several errands around Lincoln; Woods testified that she and her companions were away until about noon. Woods' husband and her daughter testified generally in corroboration of Woods' claim to have been elsewhere at the time of the alleged crime. The State minimally cross-examined both witnesses regarding their memory of the events of August 2, as compared with their recollection of events on other particular days around the same time. The State offered no rebuttal evidence regarding Woods' alibi defense.

Recognizing that the testimony of the State's witnesses and Woods' witnesses is now part of the public domain in the bill of exceptions, it is not realistic to expect that the district court will be able to employ a procedure that would effectively shield a new prosecutor from all information obtained as a result of the court's initial order of alibi witness disclosure. Further, we consider the fact that the testimony of Woods' husband and daughter, not unexpectedly, corroborated Woods' testimony of her whereabouts on August 2, 1996, and the State did little or nothing to impeach or rebut the alibi witnesses' testimony at trial.

Therefore, we order that the State, upon remand, be granted no further right of discovery with reference to the alibi witnesses that the trial court erroneously ordered Woods to disclose to the State. This remedy is designed to place the parties as close to the pretrial status quo as possible, given Woods' statutory notice of intent to use an alibi defense and the aforedescribed circumstances at trial.

## CONCLUSION

For all of the foregoing reasons, we conclude that the Court of Appeals (1) did not commit plain error in its resolution of the

issues relating to § 27-404 and (2) correctly determined that the trial court erred in ordering Woods to disclose the identity of her alibi witnesses based on the plain language of § 29-1927. The Court of Appeals was correct in reversing Woods' conviction and remanding the cause for a new trial; however, to the extent that the Court of Appeals ordered, upon remand, the appointment of a special prosecutor and directed the district court to ensure that the special prosecutor not receive or use any information obtained as a result of the erroneous order of alibi witness disclosure, the Court of Appeals' judgment is modified as follows: We order that the State, upon remand, be granted no further right of discovery with reference to the alibi witnesses that the trial court erroneously ordered Woods to disclose to the State. The Court of Appeals' judgment is affirmed in all other respects.

AFFIRMED AS MODIFIED.

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BRAD LEE WILLERS, A MINOR CHILD, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CAROLE L. POWELL, APPELLEE, V. GARY LEE WILLERS, APPELLANT.

587 N.W.2d 390

Filed December 18, 1998. No. S-97-788.

1. **Summary Judgment.** Summary judgment is proper 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

6. **Statutes: Appeal and Error.** With respect to statutory interpretation, the court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
7. **Statutes: Intent.** When construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
8. **Statutes: Legislature: Intent: Appeal and Error.** In considering and applying a statute, courts must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
9. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
10. **Child Support: Legislature: Intent.** Neb. Rev. Stat. § 43-1402 (Reissue 1993), which is in pari materia with Neb. Rev. Stat. § 43-512.04 (Cum. Supp. 1994), exhibits a legislative intent to provide children born out of wedlock child support retroactively to the date of birth.
11. **Child Support.** The plain words of Neb. Rev. Stat. § 43-1402 (Reissue 1993) require that out-of-wedlock children be supported to the same extent and in the same manner as children born in wedlock.
12. **Parent and Child.** Parents have a duty to provide their children with the basic necessities of life.
13. **Child Support: Modification of Decree: Time.** The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification itself.
14. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
15. **Rules of the Supreme Court: Attorney Fees.** Neb. Ct. R. of Prac. 9F (rev. 1996) requires that any person who claims the right to an attorney fee in a civil case appealed to the Nebraska Supreme Court must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought.

Appeal from the District Court for Antelope County: RICHARD P. GARDEN, Judge. Affirmed.

Forrest F. Peetz, of Peetz & Peetz, for appellant.

Gina L. Schaecher, of Domina Law, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HENDRY, C.J.

## QUESTION PRESENTED

The question presented is whether the parental duty to support minor children can be enforced retroactively to the date of the divorce decree where a child is born in wedlock and the parents are subsequently divorced, but the divorce decree is silent on the issue of child support.

## BACKGROUND

Gary Lee Willers and Carole L. Powell, formerly known as Carole L. Willers, were married on August 11, 1978, in Plainview, Nebraska. One child, Brad Lee Willers, was born to the marriage on December 13, 1979. From Brad's birth until approximately July 14, 1982, the parties lived together as a family in the State of Nebraska. On July 15, Powell received a telephone call from a relative informing her that her mother was ill. The relative informed Powell that she was needed to help care for her mother, who was living in the State of Washington. Powell asked Willers if she could go to Washington to be with her mother and, further, if she could take Brad with her. Willers consented, and Powell, together with her 2½-year-old son, traveled to Washington.

On September 8, 1982, Powell filed a petition for dissolution of marriage in the Superior Court for King County, Washington. Willers received personal service of summons and the petition in Nebraska, yet failed to file any responsive pleadings. On June 10, 1983, Willers was personally served with a motion and order for default and presentation of findings, conclusions of law, and a decree of dissolution. On September 19, the Washington court dissolved the marriage and awarded Powell permanent care, custody, and control of Brad, subject to Willers' reasonable visitation rights. The Washington court refused to grant Powell a child support order, finding that "[t]his court has no personal jurisdiction over [Willers] to make an award against him regarding child support."

After the divorce, Powell supported Brad by working outside the home as a drug and alcohol counselor. A year later, in 1984, she married Ed Powell. She continued working outside the home until sometime in 1984 when Brad's extreme asthmatic

condition required her immediate and constant attention. From 1984 until 1988, Powell did not work so she could stay at home and care for Brad.

In 1988, Brad's asthmatic condition improved to the point where he was able to attend school on a regular basis. As a result, Powell was also able to return to work. However, on October 15, 1990, Powell was permanently injured in an automobile accident. Due to the injuries sustained in the accident, Powell's medical condition prevented her from retaining employment outside the home. From this time forward, the Powell family was supported solely by Ed Powell, other family members, and friends.

Willers concedes that he contributed no support to Brad's upbringing other than attempting to send Brad a card, a $50 money order, a book, and a toy tractor. Willers testified that the birthday card and money order were returned to him unopened, but he is unsure whether Brad ever received the other items. Willers also conceded that even though he "had an idea" where Brad was located, he made no attempt to make arrangements to pay child support after the divorce.

Powell stated that due to the level of Willers' contributions, Brad urged her to seek child support on his behalf. Powell testified that she did not want to bring the action, but upon Brad's insistence she began the process of trying to obtain child support. On April 23, 1996, Powell filed suit on behalf of Brad in the Antelope County District Court against Willers, seeking to establish retroactive and prospective child support. Willers filed an amended responsive pleading and alleged the claim for support was barred under the equitable theory of laches.

Powell filed a reply to Willers' response and reaffirmed that she had brought the action on behalf of Brad. On March 27, 1997, Willers filed a motion for partial summary judgment, alleging that there were no genuine issues of material fact and that he was not liable for retroactive child support prior to the date the petition for child support was filed in the Antelope County District Court. Powell also filed a motion for partial summary judgment and urged the court to award her retroactive and prospective child support.

The district court heard both motions and in its written order of May 22, 1997, determined there was no genuine issue of material fact regarding Willers' liability for retroactive and prospective child support and entered judgment in favor of Powell. In support of the district court's decision, the district court found that no support order was entered at the time the divorce decree was granted because the Washington court lacked personal jurisdiction over Willers and that no other court had exercised jurisdiction to enter a support order. The district court further found that Willers had a duty to support Brad and that he had failed to provide financial support since the marriage dissolution. The district court also found that Willers was able bodied and capable of providing support at all relevant times.

The case proceeded to trial to determine the overall amount of child support to be awarded and to determine Willers' liability for costs, attorney fees, and expenses. In its judgment filed July 14, 1997, the district court calculated child support by applying the Nebraska Child Support Guidelines to the parties' average monthly income figures. From these calculations, the court determined Willers' overall retroactive and prospective child support obligation and ordered him to pay the sum of $34,082.08 as retroactive child support and $159 per month in future support. The district court also awarded Powell $2,000 in attorney fees and taxed the costs of the proceedings to Willers.

Willers perfected his appeal, and on October 14, 1997, filed a petition to bypass the Nebraska Court of Appeals. We granted Willers' petition to bypass and removed the case.

## ASSIGNMENTS OF ERROR

Willers contends, rephrased and summarized, that the district court erred in (1) awarding child support payments retroactively to September 19, 1983, the date of the Washington divorce decree; (2) precluding him from introducing evidence regarding the circumstances surrounding the parties' divorce; (3) precluding him from introducing evidence regarding the alleged difficulties he encountered trying to enforce his visitation rights; and (4) failing to allow him the opportunity to make offers of

proof regarding the defense of laches and the alleged difficulties he encountered trying to enforce his visitation rights.

## STANDARD OF REVIEW

Summary judgment is proper 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. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998). In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

Statutory interpretation presents a question of law. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998). In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997).

With respect to statutory interpretation, the court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997). In so doing, the court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997).

## ANALYSIS

In Willers' first assignment of error, Willers claims the district court erred in awarding child support payments retroactively to September 19, 1983, the date of the Washington

divorce decree. Willers claims the district court incorrectly characterized the action as being governed by Neb. Rev. Stat. § 42-733 (Reissue 1993) and not Neb. Rev. Stat. § 43-512.04(2) (Cum. Supp. 1994). Section 42-733(a) provides: "If a support order entitled to recognition under the Uniform Interstate Family Support Act has not been issued, a responding tribunal of this state may issue a support order if: (1) the individual seeking the order resides in another state . . . ." In the district court's order granting retroactive child support, the court quoted § 42-733(a) and determined that the district court was a responding tribunal which was obligated to enforce a support order entitled to recognition.

Section 42-733 is not applicable under the facts of this case. Section 42-733 applies to situations where an existing support order which has been entered by one state court (the initiating tribunal) is sought to be enforced (recognition) in another state court (the responding tribunal). See Neb. Rev. Stat. § 42-702 (Reissue 1993) and § 42-733. In this case, no support order existed to be enforced or recognized. The Washington court expressly refused to grant Powell child support because the court lacked personal jurisdiction over Willers. As a result, the Nebraska district court was not a responding tribunal, but, rather, an initiating tribunal. The appropriate analysis involves an interpretation of § 43-512.04.

Section 43-512.04(1) provides that "[a]n action for child support . . . may be brought in the district court separate and apart from any action for dissolution of marriage. Such action for support may be filed on behalf of a child . . . [w]hose paternity has been established . . . by the marriage of his or her parents . . . ." Even though Willers concedes that § 43-512.04 is the applicable statute, he claims that retroactive child support payments are still prohibited. Willers contends that because § 43-512.04 was amended on July 1, 1994, adding the additional language authorizing children to bring an action through their next friend, retroactive child support can be permitted, if at all, only to the operative date of the statute, July 1, 1994. In support of his claim, Willers cites this court's holding in *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987), for the proposition that a legislative act will operate only prospectively, and not

retroactively, unless the legislative intent and purpose of the statute to operate retroactively is clearly disclosed.

While this may be a correct statement of law, Willers fails to recognize that the *In re Application U-2* court rejected an argument against retroactivity where the statute in question was silent on the issue. *In re Application U-2* involved an application for recognition of underground water storage pursuant to Neb. Rev. Stat. § 46-226.01 (Reissue 1984). In *In re Application U-2*, appellants claimed that § 46-226.01 should not be given retroactive effect because the statute did not disclose any reference to a retroactive application allowing for recognition of incidental underground storage occurring prior to August 26, 1983, the effective date of the statute. This court disagreed with appellants' position and noted that in considering and applying a statute, courts must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense. *Id.* (citing *Clinchard v. White*, 223 Neb. 139, 388 N.W.2d 477 (1986)). This court noted that while § 46-226.01 does not, in and of itself, indicate a legislative intent to apply the statute retroactively, the components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Id.* See, e.g., *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998); *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997). The *In re Application U-2* court then considered various other statutes addressing the same or similar issues. This court concluded that when read collectively, it was clear that the intent of the Legislature was to apply the statutes concerning the recognition of incidental underground water storage retroactively to include the recognition of incidentally stored water occurring prior to the effective date of those statutes.

In the instant case, neither the plain language nor the legislative history of § 43-512.04 indicates an intent to permit or prohibit retroactive child support payments. See, 1994 Neb. Laws, L.B. 1224; 1991 Neb. Laws, L.B. 457; 1976 Neb. Laws, L.B.

926. However, this does not end our inquiry. We must next determine whether the various statutes pertaining to the establishment, enforcement, and liability of child support reveal a legislative intent to prohibit or permit retroactive child support payments. See *In re Application U-2, supra.*

Several Nebraska statutes historically pertaining to child support fail to indicate one way or the other whether retroactive child support payments should be permitted or denied. See, Neb. Rev. Stat. § 42-701 et seq. (Reissue 1993); Neb. Rev. Stat. § 42-762 et seq. (Reissue 1988); Neb. Rev. Stat. § 42-762 et seq. (Reissue 1974); Neb. Rev. Stat. § 42-701 et seq. (Reissue 1952). However, this court has determined that Neb. Rev. Stat. § 43-1402 (Reissue 1993), which is in pari materia with § 43-512.04, exhibits a legislative intent to provide children born out of wedlock child support retroactively to the date of birth. See, *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996); *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995); *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993).

In *Dunkle, supra*, this court first addressed the question whether children born out of wedlock are entitled to child support retroactively to the date of birth. In *Dunkle*, the appellant filed suit, seeking paternity and retroactive child support to the date of birth. The appellant based her claim to retroactive child support on § 43-1402. Section 43-1402 provides, in pertinent part, that "[t]he father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support."

Resolving the issue, this court initially noted that the plain words of § 43-1402 require that out-of-wedlock children be supported to the same extent and in the same manner as children born in wedlock. Citing our own holding in *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990), we noted that parents have a duty to provide their children with the basic necessities of life. From the language of § 43-1402 and our prior holdings regarding the duty of support, this court deter-

mined that a child born out of wedlock was entitled to child support retroactively to the date of birth, stating:

> It is obvious that such a requirement [the duty of support] must begin at the time of the child's birth, for it is at that time that a child is most helpless and most dependent upon its parents for the child's very survival. This is true for any child, not just for a child born in wedlock.

*Dunkle*, 244 Neb. at 644, 508 N.W.2d at 583. This court reasoned:

> When paternity is legally established, there is no rational basis to distinguish the support obligations of a father to a child born out-of-wedlock from the support obligations of a father to a child born in wedlock, and an out-of-wedlock child should be entitled to support from its father from the time of birth under the provisions of § 43-1402. We can perceive of no other way in which an out-of-wedlock child whose paternity is legally established could be supported by its father "to the same extent and in the same manner" as a child born in wedlock.

*Id.*

From our holding in *Dunkle* and the lineage of cases that followed, the law is firmly established that children born out of wedlock are entitled to the same duty of support as children born in wedlock. Our interpretation of § 43-1402 makes this point emphatically clear. A child born out of wedlock is entitled to child support retroactively to the date of birth, because it is upon the child's birth that the parental duty of support commences. The same is true for a child born in wedlock, and such duty toward a minor child does not terminate upon divorce. At divorce, the duty of support is merely quantified.

In this case, the Washington court did not have jurisdiction to quantify that duty of support. Because the Washington court lacked jurisdiction, that duty devolved to the district court, which possessed the requisite jurisdiction. In exercising that jurisdiction, the district court was merely enforcing Brad's right to support owed him by his father. Under these circumstances, that right of enforcement accrued on the date of the divorce decree, and to enforce that right retroactively is consistent with

this court's rationale in *Dunkle, supra*, as well as the general support obligation parents owe their minor children.

Willers cites this court to cases which allegedly stand for the proposition that retroactive child support payments cannot be granted to children born in wedlock. For example, Willers cites to the holdings in *Dean v. Dean*, 4 Neb. App. 914, 552 N.W.2d 310 (1996), and *Meyer v. Meyer*, 17 Ohio St. 3d 222, 478 N.E.2d 806 (1985), to support his claim that retroactive child support payments should be denied. In *Dean*, the Court of Appeals addressed the issue of whether a *child support modification* may be ordered to be retroactive to a date prior to the filing of the application to modify. The court did not address whether the parental duty to support minor children could be enforced retroactively to the date of the divorce decree where a child is born in wedlock, the parents are subsequently divorced, but the divorce decree is silent on the issue of child support. The court recognized this distinction and specifically stated:

> This case is distinguishable from . . . actions in which there is no previous order of the court deciding the issue of support. [Appellant] does not cite us to, nor does our research disclose, any child support *modification* cases in which a court has allowed child support retroactive to a date prior to the date of the filing of the application.

(Emphasis in original.) *Id.* at 919, 552 N.W.2d at 313.

In *Meyer, supra*, the Ohio Supreme Court addressed the issue of whether a custodial mother is entitled to reimbursement where no support order was made or requested at the time the mother received custody of the minor children. In *Meyer*, the court analyzed the issue as if the mother had filed a petition for *modification* of support. The court ultimately ruled against the mother and reasoned that while child support orders are subject to modification, such orders apply prospectively only.

All of the other cases cited by Willers specifically addressing this issue were also characterized as motions to modify. We are cognizant that the general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification itself. See *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). The case at bar, however, does not involve a modification order. It involves the legal

enforcement of the parental duty to support where the divorce decree contained no order of support.

Our conclusion is amply supported by decisions from other jurisdictions holding that such a proceeding is not a modification proceeding. See, *Warren v. Hart*, 747 P.2d 511 (Wyo. 1987); *Williams v. Williams*, 498 S.W.2d 585 (Mo. App. 1973), *overruled on other grounds* 510 S.W.2d 452 (Mo. 1974). See, also, *Scaling v. Scaling*, 805 P.2d 866, 870 (Wyo. 1991) (holding that decree silent on issue of child support is "not a motion to modify; rather '[i]t is merely ancillary or supplemental . . .' "); *Armstrong v. Sparks*, 360 So. 2d 1012 (Ala. Civ. App. 1978) (holding that where decree is silent as to support, there is nothing for court to modify, and action for support should have been treated as supplementary petition). See, e.g., *Marriage of Nelson*, 27 Or. App. 167, 555 P.2d 806 (1976); *Wacaster v. Wacaster*, 220 So. 2d 914 (Fla. App. 1969); *Wiles v. Wiles*, 211 Or. 163, 315 P.2d 131 (1957); *Effland v. Effland*, 171 Kan. 657, 237 P.2d 380 (1951); *Mack v. Mack*, 91 Or. 514, 179 P. 557 (1919); *Gibbons v. Gibbons*, 75 Or. 500, 147 P. 530 (1915).

In sum, we find none of the cases cited by Willers applicable to the case at bar. We also find that the parental duty to support minor children can be enforced retroactively to the date of the divorce decree where a child is born in wedlock, the parents are subsequently divorced, but the divorce decree is silent on the issue of child support.

In Willers' three remaining assignments of error, Willers claims that the district court erred in denying him the opportunity to introduce certain evidence and to make offers of proof regarding the defense of laches and his visitation rights. Because Willers' remaining assignments of error are interrelated, we will address them together. See *Schindler v. Mulhair*, 132 Neb. 809, 273 N.W. 217 (1937).

Both parties having filed motions for partial summary judgment requesting that the district court resolve the issue of retroactive child support, the court entered judgment in favor of Powell on this issue. The court stated that "[w]hile the right to child support may be barred by laches, an unreasonable delay in seeking support cannot waive the right of the child to support, or remove the obligation of the father to support the child"

(quoting 67A C.J.S. *Parent and Child* § 75 at 390 (1978)). The court concluded that the defense of laches was inapplicable because the action was "brought on behalf of the child, Brad, and not on his custodial parent's behalf."

The case proceeded to trial on the remaining issue of the amount of child support. During trial, Willers attempted to introduce evidence regarding the defense of laches and his alleged difficulty in exercising visitation. Specifically, Willers attempted to introduce into evidence copies of the Washington court proceedings, conduct direct examination regarding the circumstances surrounding the parties' divorce, and conduct direct examination regarding the alleged obfuscation of his visitation rights. Opposing counsel objected to the introduction of this evidence, which the district court sustained. Willers then requested permission to make offers of proof on each issue. Each time Willers requested to make an offer of proof, he indicated that the offers were intended to reveal the district court's error in permitting retroactive child support payments. Willers specifically stated that the Washington court proceedings directly related to the defense of laches. Willers also stated that Nebraska case law indicates that an unreasonable interruption of visitation rights concomitantly affects the collection of child support payments.

The court rejected the offers of proof and ruled that the retroactive child support issue had been decided by summary judgment. The district court reasoned that to attempt to introduce evidence at this time would run counter to the order granting partial summary judgment. The district court did not address this issue further in its judgment entered after trial.

On appeal to this court, Willers argues the district court erred in denying him the opportunity to introduce evidence and to make offers of proof regarding the defense of laches and his visitation rights. Willers claims that laches is a viable defense because Powell "prejudiced Willers in that he is now confronted with the imposition of a judgment in the amount of $34,082.08" by "sitting back and doing nothing for thirteen years and then coming forward under the guise of an action brought as next friend for her son . . . ." Brief for appellant at 22.

Willers' claims that the district court erred in denying him the opportunity to introduce evidence and to make offers of proof regarding the defense of laches and his alleged difficulty in enforcing his visitation rights are without merit.

Willers cites *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994), as authority for the proposition that a noncustodial parent who unduly frustrates visitation rights can have child support suspended; as such, Willers claims that evidence of his difficulties in exercising his visitation rights should have been allowed. However, *Welch* does not stand for the proposition that difficulty in exercising visitation rights can release a parent from the initial duty of support. In *Welch*, this court merely recognized a court's power to suspend a court-ordered judgment of child support as a last resort when the custodial parent deprives the noncustodial parent of visitation. In this case, there was no existing judgment of support subject to suspension or reduction. See, also, *McGee v. McGee*, 190 Neb. 415, 209 N.W.2d 339 (1973). Furthermore, unlike the facts in *McGee, supra*, the evidence in the record shows that at the time Powell took Brad to the State of Washington, there was no existing court order preventing such a move. Under these circumstances, the district court did not err in sustaining Powell's objection to the introduction of such evidence at trial.

Willers' claim that the district court erred in denying him the opportunity to introduce evidence on the issue of laches is also unpersuasive. Assuming, without deciding, that laches is a viable defense in a proceeding to enforce an initial obligation of support, any such offer was untimely in the case at bar.

The district court had already granted Powell's motion for summary judgment by determining there was no issue of material fact regarding Willers' liability for retroactive child support. Trial was had merely to determine the amount of child support Willers owed.

The defense of laches does not go to the amount owed, but, rather, to whether Willers owed any child support at all for the period in question. If Willers thought there was a material issue of fact concerning laches, that evidence should have been introduced in opposition to Powell's motion for summary judgment.

Therefore, the district court did not err in excluding such evidence at trial.

Finally, Willers claims the district court erred in refusing his request to make offers of proof on the issues of laches and his alleged difficulty in exercising visitation. Assuming, without deciding, that the district court should have permitted Willers to make offers of proof, we nonetheless conclude that Willers' offers were not relevant and, therefore, were not prejudicial. Since Willers was not prejudiced, any error is harmless. In *Ashby v. First Data Resources*, 242 Neb. 529, 534, 497 N.W.2d 330, 335 (1993), this court held that " ' "[e]rror without prejudice provides no ground for appellate relief" ' " (quoting *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991)). We therefore find that any error committed by the district court was harmless. See, *Ashby, supra*; *In re Interest of R.R., supra.*

The only remaining issue needing to be addressed is Powell's request for attorney fees. Neb. Ct. R. of Prac. 9F (rev. 1996) requires that "[a]ny person who claims the right . . . to an attorney fee in a civil case appealed to the Supreme Court . . . must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought . . . ." Powell's counsel filed the requisite motion for the allowance of such a fee but failed to file a supporting affidavit. We confronted a similar situation in *DeCoste v. City of Wahoo, ante* p. 266, 583 N.W.2d 595 (1998), where we permitted counsel 2 weeks' leave to file a rule 9F motion and affidavit in support thereof where the attorney failed to file either the motion or the affidavit. Powell's counsel is thereby granted 2 weeks' leave to file a rule 9F affidavit in support of Powell's motion for attorney fees.

## CONCLUSION

The district court's judgment granting Powell retroactive child support payments to the date of the Washington divorce decree is affirmed, and Powell's counsel is granted 2 weeks' leave to file an affidavit supporting Powell's motion for attorney fees.

AFFIRMED.

MILLER-LERMAN, J., not participating.

# STATE OF NEBRASKA EX REL. NEBRASKA HEALTH CARE ASSOCIATION, APPELLANT, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT AND JEFF ELLIOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF FINANCE AND SUPPORT FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, APPELLEES.

587 N.W.2d 100

Filed December 18, 1998. No. S-97-941.

1. **Mandamus: Proof.** When a writ of mandamus is sought pursuant to Neb. Rev. Stat. § 84-712.03 (Reissue 1994), the party seeking the writ must first show (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record, and (3) that the party has been denied access to the public record; thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 1998) or § 84-712.08 (Reissue 1994).
2. **Mandamus: Judgments: Appeal and Error.** An action for a writ of mandamus is a law action, and in an appellate review of a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and 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.
4. **Administrative Law: Records: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 1998), a public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body's duty to investigate or examine supports a colorable claim of rationality.
5. **Administrative Law: Records.** If a document is compiled ancillary to an agency's administrative function, then it is not protected from disclosure under the public records statutes; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception.
6. **Administrative Law: Records: Words and Phrases.** Disclosure, within the meaning of Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 1998), refers to the exposure of documents to public view and not simply to the transmission of a document to the subject of an agency's investigation.
7. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result; an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.

8. **Administrative Law: Records: Words and Phrases.** Records "disclosed" within the meaning of Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 1998) are only those records that a public body has, in its official capacity, already made available to the general public.
9. **Estoppel.** The elements which must be satisfied for equitable estoppel to apply are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or persons; and (3) knowledge, actual or constructive, of the real facts; and, as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
10. ____. The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.

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

Abbie J. Widger, of Nelson Morris & Titus, for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and Cecile A. Brady for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

## NATURE OF CASE

The Nebraska Health Care Association (NHCA), the relator-appellant, sued the Nebraska Department of Health and Human Services Finance and Support and its director (collectively Department), seeking a writ of mandamus to compel the Department to release certain documents pursuant to the public records statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 1994 & Cum. Supp. 1998). The documents sought were created by the Department as part of its supervision of medicaid payments to Nebraska nursing homes. The documents were requests for information sent by the Department to nursing homes as part of the Department's audits of the claims for reim-

bursement submitted annually by the nursing homes. The issue presented in this case is whether those documents are records produced in the course of an investigation, such that they are exempt from disclosure under the public records statutes.

## PROCEDURAL BACKGROUND

The NHCA is a nonprofit corporation that represents nursing homes and intermediate care facilities in the State of Nebraska. The NHCA sued the Department after the Department refused part of the NHCA's request to review documents relating to the Department's administration of nursing home medicaid reimbursement.

On March 27, 1997, the NHCA had submitted a written request to the Department to review public records as authorized by the public records statutes. The requests generally dealt with records relating to the audit process used by the Department to verify the expenditure claims made by nursing homes seeking medicaid reimbursement. In a letter dated April 3, the Department indicated generally that access to the records would be provided and suggested that the parties meet to coordinate the inspection.

In a letter dated April 23, 1997, the NHCA memorialized the events of an April 22 meeting with the Department. The letter indicated the Department's agreement to allow access to most of the documents but indicated reservations by the Department regarding two particular requests. The NHCA began copying documents on June 16. On July 1, a letter was sent to the NHCA by the Department, as required by § 84-712.04, officially denying access to the documents described by the two remaining requests at issue.

To obtain access to the documents, the NHCA sought a writ of mandamus in the district court, as authorized by § 84-712.03. A hearing was held at which witnesses from the Department and the NHCA testified about the audit process and the nature of the documents at issue. The documents themselves were not examined by the court, with the exception of one audit record that was mistakenly given to the NHCA by the Department.

After the hearing, the district court denied the NHCA's request, finding, based on the evidence presented, that the doc-

uments requested fell within the investigatory records exception to the public records statutes, as set forth in § 84-712.05(5). The NHCA appeals.

## FACTUAL BACKGROUND

The contested requests seek documents relating specifically to the auditing process of the Department. Each year, every nursing home in Nebraska submits detailed cost reports that are used by the Department to calculate the rates at which each facility will receive medicaid reimbursement payments. Cost reports are forms issued by the Nebraska medicaid program in order to gather data and supporting information from nursing homes about the nursing homes' expenses.

These reports are audited by the Department in order to verify that the costs reported are accurate. Moreover, certain expenses of nursing homes are not compensated by medicaid, and the audits are used to distinguish compensable from noncompensable expenses. Two types of audit are used by the Department to verify cost reports: desk audits and field audits.

A desk audit generally occurs every year for each of Nebraska's 230 nursing homes. For a desk audit, an auditor reviews the cost report submitted by the facility and then sends written requests to the facility, seeking documentation for particular aspects of the cost report. The auditor may seek additional documentation for reported costs that seem unusual or are not described in sufficient detail for the Department to determine whether or not they are compensable.

A field audit is more extensive and utilized less often. The Department conducts about 20 to 30 field audits per year, in which an auditor goes "on site" to the nursing home and reviews every aspect of that nursing home's cost report by checking the report against the records that the nursing home maintains. While a field audit is in progress, or after the field work has been completed but before a final report is issued, the auditor may send written requests to the nursing home for additional information the auditor believes to be necessary.

The public records sought by the NHCA and retained by the Department are the written communications from the Department to the nursing homes that are sent out as a part of

the desk and field audit process. Essentially, the NHCA wants copies of the letters that the Department has sent to nursing homes when the Department needs more information from a nursing home to complete a desk or field audit.

## ASSIGNMENTS OF ERROR

The NHCA claims that the district court erred (1) in finding the documents requested by the NHCA are exempt from disclosure as public records pursuant to § 84-712.05(5); (2) in failing to consider that once the Department makes a document public by mailing or faxing it to the entity being investigated, the document is no longer afforded any protection pursuant to § 84-712.05(5); (3) in failing to find the Department waived its right to claim an objection to producing the documents; (4) in failing to find the Department should be estopped from claiming the requested documents are exempt from production; (5) in failing to issue a writ of mandamus ordering the department to produce the public records.

## BURDEN OF PROOF AND STANDARD OF REVIEW

### Burden of Proof

The appropriate burden of proof in this case is established by statute. Section 84-712.03 provides, in relevant part:

> Any person denied any rights granted by sections 84-712 to 84-712.03 may elect to . . . file for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision officer who has custody of said public record can be served . . .
>
> In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo and the burden is on the public body to sustain its action.

Pursuant to § 84-712.03, it is clear that the burden of proof in a case such as this is not on the party seeking the writ of mandamus, but on the party attempting to withhold records.

The quantum of proof necessary to sustain the burden of proof is unspecified by the statute. However, we have held that in a mandamus action, the relator must show "clearly and conclusively" that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. Fick v. Miller, ante* p. 387, 393, 584 N.W.2d 809, 815 (1998). In the context of § 84-712.03, the burden of proof has been placed by statute on the public body opposing the issuance of the writ, and we determine that the quantum of proof necessary to sustain this burden should remain the same as in any mandamus action.

This determination is supported by the public policy considerations underlying the statute. Section 84-712.01(3) provides:

> Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, *audit*, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

(Emphasis supplied.)

With this public policy consideration in mind, we conclude that the burden is appropriately placed on the Department to show by clear and conclusive evidence that the records sought by the NHCA fit within the bounds of a statutory exception to the disclosure requirement.

Requiring the public body to demonstrate that an exception applies to the disclosure of a particular public record does not, however, change the fact that it is the initial responsibility of the relator to demonstrate that the record in question is a public record within the meaning of § 84-712.01. Under § 84-712.03, a writ may be sought by "[a]ny person denied any rights granted by sections 84-712 to 84-712.03 . . . ." In order to establish standing and jurisdiction, therefore, it must be shown that the party seeking mandamus has been denied rights under § 84-712. A necessary component of this showing is that the party was

seeking a record that is a "public record" within the meaning of § 84-712.01.

Therefore, we hold that when a writ of mandamus is sought pursuant to § 84-712.03, the party seeking the writ must first show (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record as defined by § 84-712.01, and (3) that the party has been denied the access to the public record guaranteed by § 84-712. Thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by § 84-712.05 or § 84-712.08.

### Standard of Review

An action for a writ of mandamus is a law action, and in an appellate review of a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State ex rel. Fick v. Miller, supra*; *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993); *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992).

A claim of equitable estoppel rests in equity, and 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. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996); *Redick v. Redick*, 220 Neb. 86, 368 N.W.2d 463 (1985).

## ANALYSIS

### Investigatory Records Exception

It is uncontested in this case that the NHCA is a party entitled to seek access to public records, that the documents at issue in this case are public records under the definition provided in § 84-712.01, and that the Department has denied the NHCA access to the records requested. Therefore, the NHCA has made a prima facie case for release of the records. The issue, then, is whether the Department has met its burden of showing that the

documents fall within an exception to the general disclosure requirement. At trial, the Department offered two exceptions: the trade secrets exception of § 84-712.05(3) and the investigatory records exception of § 84-712.05(5). The Department, however, does not argue trade secrets on appeal.

It is provided by § 84-712.05(5), in relevant part, that public records may be withheld if they are

> [r]ecords developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training . . . .

It is uncontested by the parties that the Department is a public body charged with duties of investigation. Therefore, the Department must prove that the documents at issue here are part of an investigation or examination, as those are the particular aspects of § 84-712.05(5) that are most relevant to the present case.

Nebraska jurisprudence has not previously set forth any particular standards by which a court can determine what records are part of an investigation. The federal courts, however, in interpreting a similar provision of the federal Freedom of Information Act, 5 U.S.C. § 552 et seq. (1994 & Supp. II 1996), have used a two-part standard for determining whether records are investigatory. It has been held that (1) the agency's investigatory activities that give rise to the documents sought must be related to the enforcement of laws or the maintenance of national security and (2) the nexus between the investigation and one of the agency's law enforcement duties must be based on information sufficient to support at least a colorable claim of its rationality. *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982). See, also, e.g., *Davin v. U.S. Dept. of Justice*, 60 F.3d 1043 (3d Cir. 1995); *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803 (9th Cir. 1995), *cert. dismissed* 516 U.S. 1103, 116 S. Ct. 833, 133 L. Ed. 2d 832 (1996); *Keys v. U.S. Dept. of Justice*, 830 F.2d 337 (D.C. Cir. 1987).

This analysis has merit. In applying the unique elements of the Nebraska statute, we determine that the corresponding requirement is that a public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body's duty to investigate or examine supports a colorable claim of rationality.

In the present case, the Department is charged with the duty to investigate and examine nursing homes' claims for medicaid reimbursement. The Department's auditing activities are clearly and rationally related to the Department's investigatory duty.

This leaves open the question, however, whether these auditing activities are investigations or examinations within the meaning of § 84-712.05(5). In this instance, again, other jurisdictions have developed standards which are helpful to our analysis.

It has generally been held that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. See, e.g., *Center for Nat. Pol. Rev. on Race & Urb. Is. v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73 (D.C. Cir. 1974); *Goldschmidt v. United States Dept. of Agriculture*, 557 F. Supp. 274 (D.D.C. 1983); *Gregory v. Federal Deposit Ins. Corp.*, 470 F. Supp. 1329 (D.D.C. 1979), *rev'd in part on other grounds* 631 F.2d 896 (D.C. Cir. 1980); *State ex rel. Yant v. Conrad*, 74 Ohio St. 3d 681, 660 N.E.2d 1211 (1996); *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985); *McClain v. College Hosp.*, 99 N.J. 346, 492 A.2d 991 (1985). If a document is compiled ancillary to an agency's administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception. *Center for Nat. Pol. Rev. on Race & Urb. Is. v. Weinberger, supra.*

For instance, in *Gould Inc. v. General Services Admin.*, 688 F. Supp. 689 (D.D.C. 1988), the court dealt with the disclosure

of documents relating to government audits of bids for government contracts. The court agreed with the government that

> the audit reports were not prepared as a matter of routine. At the time these reports were in the process of being completed—and perhaps even when they were initiated—[the agency's] inquiry had "departed from the routine" and had "focuse[d] with special intensity" upon specific . . . activities. An investigation was underway.

*Id.* at 697.

Similarly, in the instant case, the activities of the Department had departed from the routine when the auditors began to make specific requests for the production of specific documentation. The Department is charged with the administrative function of reviewing the cost reports submitted by nursing homes. When certain aspects of those reports draw special attention, be they the entire report or simply particular items within the report, then the investigatory duties of the Department have supplanted the Department's routine administration of the medicaid program.

More specifically, it is clear that a field audit is ordinarily a nonroutine investigation by the standard set forth above. It is equally clear that a desk audit departs from the routine, and becomes an investigation, when an auditor's attention is drawn by a particular deficiency in a cost report and the auditor decides to make a specific request for further information. Considering our standard of review on this issue and having reviewed the record, we cannot say that the trial court's determination was clearly erroneous when it found, as a matter of fact, that the records in this case were produced by the Department as part of an investigation.

Therefore, we find no error in the trial court's determination that the documents requested by the NHCA were created by the Department as part of their investigations, as those investigations were rationally related to the investigatory duties imposed by law on the Department. Consequently, the documents may be withheld from disclosure at the discretion of the Department. The NHCA's first assignment of error is without merit.

TRANSMISSION OF DOCUMENTS BY DEPARTMENT

Much of the NHCA's argument on appeal is based on the fact that the Department sent the documents at issue to the individual nursing homes from which it was seeking information. The NHCA argues that since the documents have left the Department, they are no longer subject to the investigatory records exception.

In support of this proposition, the NHCA refers us to § 84-712.05, which states, in relevant part, that the documents described by that section's exceptions may be withheld "unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . ." The NHCA argues that by sending the documents to nursing homes, the Department has disclosed the documents pursuant to its duties, therefore excluding them from the § 84-712.05 exceptions.

We disagree. The term "disclose" has been defined as "[t]o bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance . . . ." Black's Law Dictionary 464 (6th ed. 1990). See, also, 26A C.J.S. *Disclose* at 971 (1956 & Supp. 1998); *State v. Krokston*, 187 Mo. App. 67, 172 S.W. 1156 (1915). Simply stated, the Department did nothing with the documents at issue that meets the criteria of this definition. Disclosure, within the meaning of this statute, refers to the exposure of documents to public view and not simply to the transmission of a document to the subject of an agency's investigation.

Moreover, if we were to accept the NHCA's interpretation of this statute, the consequences to personal privacy would be very detrimental. Citizens are currently authorized, under a number of statutory provisions, to review information in the possession of the government that is personal to them. In fact, much of the information described in the disclosure exceptions of § 84-712.05 can be accessed by the particular persons to whom the information relates or from whom it was gathered.

For instance, § 84-712.05(2) provides an exception for medical records. Some of those medical records are made available by statute to the subjects of the records and to certain third parties. For example, under Neb. Rev. Stat. § 81-666 (Reissue

1996), the Department is authorized to release collected personal medical records to medical researchers for research purposes. Under the NHCA's suggested reading of the public records statutes, the transmission of private records to carefully chosen researchers would place those records in the public domain. As further illustration, Neb. Rev. Stat. § 83-109 (Cum. Supp. 1996) provides that patients at state medical and psychiatric institutions may access their own records from those institutions. The NHCA's interpretation of the statute would require us, then, to allow the public at large to access medical records at any time after they have been reviewed by the person whose medical history they contain.

We reject the construction of § 84-712.05 offered by the NHCA. In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result; an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 339, 142 L. Ed. 2d 280. We conclude that records that have been "disclosed" within the meaning of § 84-712.05 are only those records that a public body has, in its official capacity, already made available to the general public. That has not happened in the instant case, and the NHCA's argument is without merit.

### EQUITABLE ESTOPPEL

Finally, the NHCA contends that the Department should be estopped from claiming an exception to the disclosure requirement due to the Department's delay in notifying the NHCA that some of its requests for production would not be granted. Specifically, the NHCA has invoked the doctrine of equitable estoppel. The NHCA argues that the Department has the discretion to retain or release documents which meet the requirements of the § 84-712.05 exceptions and that the Department has waived that discretion by its delay in this case.

The elements which must be satisfied for equitable estoppel to apply are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression

that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or persons; and (3) knowledge, actual or constructive, of the real facts; and, as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

The doctrine of equitable estoppel, however, will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Inner Harbour Hospitals v. State, supra*; *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991).

In the present case, the NHCA has presented no evidence of injury, detriment, or prejudice based on the 26-day delay before the Department gave an oral notice that certain documents might be withheld, or the 96-day delay before the Department issued a written denial of access to those documents. We can discern, on this record, no evidence whatsoever of prejudice to the NHCA or any of its members, much less the "manifest injustice" necessary to justify the invocation of equitable estoppel against the State.

Moreover, there is no evidence that the Department misled or deceived the NHCA regarding the Department's intent to release the records. The NHCA claims that the Department's initial response to the NHCA's request for documents expressed an intent to fully comply with the NHCA's request. However, the NHCA's claim is unsupported by a reading of the Department's April 3, 1997, letter. The letter from the Department to the NHCA indicates an intent to release *some* of the requested records and identifies those particularly, but does not address

the documents at issue in the present case. The letter concludes by promising nothing more than a meeting to coordinate examination. This letter, simply put, was not misleading regarding the Department's intent to release the records at issue.

It has been held that in the absence of misrepresentation, when a person, knowing his or her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his or her position such that the adverse party cannot be restored to that party's former state if the rights are enforced, the delay becomes inequitable, and the person is estopped from asserting the rights. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). The NHCA contends that the Department's failure to assert its rights to withhold documents should, under this authority, deprive it of its statutory discretion to do so. This argument is without merit. As noted above, there is no evidence that the NHCA has been prejudiced by the Department's delay in asserting its rights. In the absence of prejudice, equitable estoppel will not be invoked.

## CONCLUSION

We find no clear error in the trial court's finding that the Department met its burden of showing that the records requested by the NHCA fall within the ambit of an exception to the disclosure requirement of the public records statutes. Moreover, we find no basis for the NHCA's argument that equitable estoppel should be invoked against the Department. Consequently, the judgment of the trial court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE,
V. KEVIN J. MURPHY, APPELLANT.
587 N.W.2d 384

Filed December 18, 1998. No. S-97-1237.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.

2. **Pretrial Procedure: Speedy Trial: Good Cause.** Any delay caused by a defendant's act or conduct, namely, those pretrial situations or matters described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of good cause, as provided in § 29-1207(4)(f).
3. **Depositions: Case Overruled.** To the extent that *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), indicates a motion for depositions is not finally disposed until the depositions are taken, it is overruled.
4. **Words and Phrases.** A proceeding is, in a particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for a remedial object.
5. ____. The term "proceeding," as used within Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), should be read narrowly.
6. **Depositions: Words and Phrases.** To the extent the parties rely on their own devices to secure depositions, the taking of such depositions is not a "proceeding" within the meaning of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995).
7. **Depositions: Time: Good Cause.** The period of time from the trial court's ruling on a motion for depositions until the depositions are taken is not excludable under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995). However, such a period may or may not be excluded under § 29-1207(4)(f), with the inquiry turning upon whether there is "good cause" for the delay.
8. **Speedy Trial: Time: Good Cause.** If a trial court relies on Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) in excluding a period of delay from the 6-month speedy trial computation, a general finding of "good cause" will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time.
9. **Appeal and Error.** When a trial court's findings are incomplete, an appellate court must remand the cause for further consideration.

Appeal from the District Court for Colfax County: ALAN G. GLESS, Judge. Reversed and remanded with directions.

Wm. D. Kurtenbach, of Kurtenbach Law Office, for appellant.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Kevin J. Murphy, was charged with several felonies. He then filed, inter alia, a motion with the trial court

to take depositions, which motion was sustained. He later filed a motion for discharge, claiming that his statutory right to a speedy trial had been violated. The State opposed Murphy's motion to discharge, claiming that the period of time from the trial court's ruling on Murphy's motion for depositions until those depositions were concluded was excludable pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1995). The trial court found that said period was excludable under § 29-1207(4)(a) and overruled Murphy's motion to discharge. We granted the State's petition to bypass the Nebraska Court of Appeals. The question presented is whether the time consumed by taking depositions on behalf of a defendant is excludable under § 29-1207(4)(a). We conclude that it is not. However, such a period may be excluded under § 29-1207(4)(f). Because the trial court did not make any findings in that regard, we reverse, and remand with directions for the trial court to do so.

## BACKGROUND

Murphy was charged by information with five felony counts on January 24, 1997. Murphy had filed motions for discovery, production, and depositions the previous day, which motions were granted on February 5, with the exception of paragraph 11 of Murphy's discovery motion. We note that pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 1995), a motion for depositions must be filed by a defendant *after* the information is filed. However, Murphy's motions were granted, and no objection by the State as to the time they were filed appears on the record. Thus, the State waived any objection it may have had to Murphy's untimely filing.

The trial court wrote the following comments on an entry filed the day it granted Murphy's motion for depositions: "Defense counsel shall notify the court when discovery has been completed and shall have 30 days thereafter to file all other types of pretrial motions." Three certificates were filed by the court reporter on July 30, 1997, indicating that three witnesses had been deposed by Murphy on July 17.

A docket entry dated September 3, 1997, indicates that a pretrial conference was set for October 22. On October 22, the day of the pretrial conference, Murphy filed a motion to compel dis-

covery or to sanction the State for failure to perform discovery and a motion for discharge on speedy trial grounds. The trial court set a hearing on the motion for discharge for November 5 and sustained the motion to compel discovery, providing a deadline for compliance of November 5. Murphy filed a certificate of receipt of discovery materials on October 27.

A hearing was had, and on November 25, the trial court denied Murphy's motion to discharge. Exhibit 1 consists of correspondence between the attorneys and the trial court, as well as one docket entry. The first letter in the exhibit was dated May 21, 1997, and contained a request by defense counsel that the prosecutor provide potential deposition dates. In a letter dated June 3, 1997, the prosecutor responded to defense counsel concerning the depositions and provided several dates in June. Exhibit 2 consists of all case filings through November 5, which were judicially noticed.

The trial court found that the last day for trial was July 24, 1997. However, the trial court also found that the entire period from the time the information was filed on January 24, 1997, until the certificates of deposition were filed on July 30, totaling 187 days, should be excluded. This period was excluded because, according to the trial court, Murphy's motion for depositions was not "finally disposed" within the meaning of § 29-1207(4)(a) until the certificates of deposition were filed with the court. The trial court then added 187 days to July 24 and concluded that trial could be commenced in a timely manner up to January 27, 1998. Finally, the trial court excluded the time from the filing of Murphy's motion to discharge until its disposition, which the trial court found was an additional 33 days. Thus, the trial court concluded that the trial could be commenced on March 2 (March 1 being a Sunday) with no speedy trial violation.

## ASSIGNMENT OF ERROR

Murphy contends that the district court erred in determining that his speedy trial rights pursuant to § 29-1207 were not violated and in denying his motion for discharge.

## SCOPE OF REVIEW

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

## ANALYSIS

Because the information filed against Murphy was filed on January 24, 1997, the last day for commencement of Murphy's trial was July 24, unless any period between the filing of the information and July 24 must be excluded in computing the time for commencement of trial. Clearly, trial was not commenced on July 24. Thus, the question is whether the State proved by a preponderance of the evidence the existence of a period of time that is authorized by § 29-1207. *State v. Turner, supra*. Section 29-1207(4) provides:

The following periods shall be excluded in computing the time for trial:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant . . . .
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

Murphy argues that the trial court erred in excluding the period of time from the final disposition of Murphy's motion for depositions until the certificates of deposition were filed. Specifically, Murphy argues that the trial court erred in relying on *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), wherein this court held that the period of time from the final disposition of a motion for depositions until the depositions are actually taken may be excluded. Murphy contends that *Fatica* is inconsistent with this court's decision in *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), and thus, that *Fatica* should be overruled.

In *Brown*, this court held that the period of time from the day the defendant filed a motion for depositions until the trial court

authorized the depositions should be excluded under § 29-1207(4)(a). However, *Brown* did not address whether the period from disposition of such a motion until the depositions are actually taken may be excluded. Thus, *Brown* indicates that a motion for depositions is "finally disposed" on the date that it is granted.

Whether such a period may be excluded was addressed in *State v. Fatica*, 214 Neb. at 778, 336 N.W.2d at 102, where defense counsel "for one reason or another caused the postponement of the depositions." The trial court found that the time used in obtaining the depositions requested by the defendant constituted a delay " 'for good cause' " under § 29-1207(4)(f), *id.* at 779, 336 N.W.2d at 102, and thus, that it should be excluded. This court agreed with the trial court that "[t]he delay regarding the depositions was not attributable to any negligence or misconduct on the part of the State," *id.* at 778, 336 N.W.2d at 102, and held that "[a]ny delay in trial was attributable to the depositions, and such delay was for 'good cause' under § 29-1207(4)(f)," *id.* at 779, 336 N.W.2d at 103. See, also, *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985) (indicating that time consumed in obtaining depositions at request of defendant, in absence of impermissible conduct by state delaying depositions, should be excluded).

The State notes that in *State v. Fatica*, 214 Neb. at 779, 336 N.W.2d at 103, this court also stated that "[t]he pretrial motion for discovery was not 'finally disposed,' within the meaning of § 29-1207(4)(a), until the depositions were taken . . . ." Thus, according to this language, no showing of good cause need be made by the State under § 29-1207(4)(f). We disagree.

In *State v. Lafler*, 225 Neb. 362, 373, 405 N.W.2d 576, 584 (1987), we distinguished subsection (4)(a) of § 29-1207 from subsection (4)(f):

> [A]ny delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in § 29-1207(4)(a), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act. Any period of delay resulting from a defendant's act or conduct

> specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).

See, also, *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

In *Fatica*, we emphasized that any delay in taking the depositions was not due to the State's misconduct or neglect. However, such an inquiry would be entirely unnecessary had we been relying on § 29-1207(4)(a) rather than § 29-1207(4)(f). As *Lafler* makes clear, under § 29-1207(4)(a), there is no reasonableness inquiry; periods falling under that section are *automatically* excluded. If the period of time required to take depositions was excludable under § 29-1207(4)(a), it would always be excluded. Yet, we did not exclude that period of time in *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), even though we were clearly applying that section. To the extent that *Fatica* indicates a motion for depositions is not "finally disposed" until the depositions are taken, *Fatica* is overruled.

The State argues that even if the motion for depositions was "finally disposed" on February 5, 1997, the time consumed in taking depositions may still be excluded under § 29-1207(4)(a), since by its own language, that subsection is "not limited to" the periods specifically enumerated therein. However, § 29-1207(4)(a) refers only to "proceedings." Black's Law Dictionary 1204 (6th ed. 1990) states that a "proceeding" is "[i]n a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." If the term "proceedings" was read broadly, rather than in its "particular sense," § 29-1207(4)(a) would include any delay at trial that "concerns" the defendant. If the Legislature had intended that the term "proceeding" encompass such a broad purview, there would have been little reason for the

Legislature to have provided for exclusion under § 29-1207(4)(f), the "catchall provision." *State v. Turner*, 252 Neb. at 629, 564 N.W.2d at 237. Thus, the term "proceeding" must be read narrowly.

Clearly, a motion for depositions is an "application to a court of justice" and, thus, is a "proceeding," as the statute specifically provides. However, once that application has been granted, no further application to a court of justice is required to obtain the depositions. Of course, a defendant may later make a motion to compel the taking of depositions. Such a motion would be a "proceeding" under § 29-1207(4)(a), and the time required for its disposition would be automatically excluded. Nonetheless, to the extent the parties rely on their own devices to secure the necessary depositions, the taking of the depositions is not a "proceeding" within the meaning of § 29-1207(4)(a).

Thus, the period of time from the trial court's ruling on a motion for depositions until the depositions are concluded is not excludable under § 29-1207(4)(a). Accordingly, the trial court erred in excluding the time period from the trial court's ruling on the motion for depositions until the certificates of deposition were filed under that section. However, such a period may or may not be excluded under § 29-1207(4)(f), with the inquiry turning upon whether there is "good cause" for the delay.

Accordingly, the issue is whether the time consumed by Murphy to take the depositions is excludable pursuant to § 29-1207(4)(f). "[I]f a trial court relies on § 29-1207(4) (f) in excluding a period of delay from the 6-month computation, a general finding of 'good cause' will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time." *State v. Kinstler*, 207 Neb. 386, 391, 299 N.W.2d 182, 186 (1980). See, also, *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). In the instant case, the trial court did not make any findings under § 29-1207(4)(f). When a trial court's findings are incomplete, an appellate court must remand the cause for further consideration. See *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

## CONCLUSION

We conclude that the trial court erred in excluding the period of time from the final disposition of Murphy's motion for depositions until the certificates of depositions were filed under § 29-1207(4)(a). Even though such a period may be excluded under § 29-1207(4)(f), the trial court made no findings in that regard. Accordingly, we reverse, and remand with directions to the trial court to determine whether the State proved by a preponderance of the evidence that the time from the granting of Murphy's motion for depositions until the depositions were taken is excludable for good cause.

REVERSED AND REMANDED WITH DIRECTIONS.

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JIM MILLER, APPELLEE, V. MEISTER & SEGRIST, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, GRE INSURANCE GROUP, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND UNITED STATES FIDELITY & GUARANTY COMPANY, DEFENDANT, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

587 N.W.2d 399

Filed December 18, 1998. No. S-98-050.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Upon appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Workers' Compensation: Second Injury Fund: Proof.** Under Neb. Rev. Stat. § 48-128 (Reissue 1993), the elements required to establish the Second Injury Fund's liability are (1) a prior permanent partial disability known to the employer and hindering the employee's employability, (2) a subsequent compensable injury causing permanent disability to the employee, and (3) a combined permanent disability substantially greater in degree or percentage than would have resulted from the subsequent injury considered alone.

3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Workers' Compensation: Second Injury Fund: Liability.** The Second Injury Fund's liability cannot be determined until and unless the employee's subsequent injury is permanent.
5. **Workers' Compensation: Insurance: Liability: Time.** When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. However, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable.
6. **Workers' Compensation: Appeal and Error.** A finding in regard to causation of an injury is one for determination by the Workers' Compensation Court as the finder of fact.
7. **Workers' Compensation: Attorney Fees: Words and Phrases.** Neb. Rev. Stat. § 48-125(1) (Reissue 1993) authorizes attorney fees only if the employer files an application for review before the Workers' Compensation Court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award. A workers' compensation insurance carrier is an "employer" within the meaning of this statute.
8. **Workers' Compensation: Second Injury Fund: Attorney Fees.** Attorney fees are appropriate under Neb. Rev. Stat. § 48-125 (Reissue 1993) even when the action does not seek to reduce the employee's award, but, rather, seeks to apportion responsibility for payment of the award among insurers and the Second Injury Fund.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

Tylor J. Petitt, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellee Miller.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, for appellees Meister & Segrist and United States Fidelity & Guaranty Company.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee Second Injury Fund.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Appellee Jim Miller originally brought this action against appellee Meister & Segrist, his employer, for workers' compensation benefits. Appellant, GRE Insurance Group (GRE), Meister & Segrist's insurer, then brought an action as a third-party plaintiff against appellee State of Nebraska, Second Injury Fund (Fund) as a third-party defendant. In its third-party petition against the Fund, GRE argued that the Fund was liable for part of Miller's injuries even though Miller's injuries were not classified as permanent. Thus, the instant case presents the question, Can the Fund be liable to an employee who has not received a permanent disability rating? We conclude that the Fund cannot be held liable unless a permanent disability rating has been awarded. Therefore, we affirm in part, and in part reverse.

## BACKGROUND

### 1992 INJURY

Miller, who had undergone surgeries due to a back injury suffered in 1985, incurred additional injuries to his neck and lower back while lifting a 5-gallon water jug in August 1992. The injuries arose out of and occurred in the scope of Miller's employment with Meister & Segrist. The parties stipulated that United States Fidelity & Guaranty Company (USF&G) was acting as Meister & Segrist's insurer at that time.

Douglas W. Beard, M.D., treated Miller for his 1992 injuries. Beard concluded that Miller should have surgery performed on his lower back, but Miller declined to have the surgery. However, Beard also stated that "delaying surgical intervention until such time as [Miller] feels it warranted poses him no substantial risk of great deterioration" and that he was "not in disagreement in [Miller's] present attempt to postpone this [surgery] as long as possible." Miller did not have surgery performed on his lower back as a result of the 1992 injuries.

However, Miller did have surgery performed on his neck. Miller underwent cervical fusion on September 1, 1993, via an anterior cervical decompression with grafting from levels C4 to C7, and a titanium locking plate was inserted.

As of March 18, 1994, Beard had "no specific further treatment recommendations concerning Mr. Miller." Beard noted that Miller had not missed substantial amounts of work as a result of the 1992 injuries and that any further treatment "would be aimed primarily at controlling resurgence or flares of symptomatology." Beard reexamined Miller on August 12 and concluded that Miller had reached maximum medical improvement.

Miller continued to see Beard on an intermittent basis, reporting that his condition was continuing to deteriorate. Miller was given an MRI, and on September 4, 1995, it was Beard's conclusion that lower back surgery would be helpful but was not mandatory.

Miller was also examined by Scott J. Primack, D.O. On July 1, 1994, Primack stated that "[n]o further medical treatment with the exception of an individualized exercise program emphasizing both aerobic and isometric strengthening as well as a flexibility program is necessary." He concluded that Miller had reached maximum medical improvement as of that date but that Miller would have further degenerative changes secondary to his previous injuries and surgeries.

Primack concluded that Miller's pain was not entirely due to his 1992 injury, although that injury was a partial factor. In Primack's opinion, Miller's pain was due in part to his prior degenerative joint disease and a prior surgery performed in 1986. Beard had likewise concluded that Miller evidenced degenerative disk disease changes in both the cervical and lumbar regions and that they were "age related changes [that] likely preexisted his injury." However, Beard noted that Miller was largely asymptomatic prior to his 1992 injuries and that his discal pathology was "certainly potentially attributable to the August 13, 1992, incident." He concluded that Miller's injuries stemming from the 1992 incident were not a "substantial aggravation of any previous condition."

Primack again examined Miller on September 1, 1995, and noted that Miller's condition had recently worsened. Primack concluded that the symptoms Miller was suffering at that time were not specifically work-related, but, rather, were the result of a natural spine degradation process. It was Primack's opinion that Miller should not wait long to have surgery.

1996 INJURY

Miller was injured yet again on February 27, 1996, when he slipped and fell, injuring his leg and back. The injury arose out of and occurred in the scope of Miller's employment with Meister & Segrist. As a result of these injuries, Miller has been temporarily totally disabled.

Beard saw Miller on March 1, 1996. Beard stated that he "planned to continue to treat [Miller] conservatively." During a follow-up appointment on March 18, Beard indicated that Miller might need to proceed with immediate surgical intervention. Miller agreed to schedule surgery once his "life affairs" were in order. Beard considered the delay appropriate.

At the time the 1996 injuries occurred, GRE was the workers' compensation carrier for Meister & Segrist. Miller was earning an average weekly wage of $701.92, entitling him to benefits of $409 per week commencing on February 27, 1996, and continuing until such time as Miller was no longer temporarily totally disabled. However, GRE paid benefits to Miller only from February 27 until November 2, 1996, when it discontinued its payments.

USF&G has paid benefits to Miller for the 1992 incident from September 8, 1993, until at least the time of trial in the Workers' Compensation Court.

The instant case was originally brought by Miller against Meister & Segrist for benefits allegedly due as the result of his 1996 injuries. After Meister & Segrist answered, GRE entered the case as an additional defendant and filed a cross-claim against USF&G as an additional defendant and a third-party petition against the Fund as a third-party defendant. The cross-claim was premised upon GRE's assertion that any disability suffered by Miller due to his 1996 injuries was in part the result of the 1992 injuries and that benefits should be paid by USF&G. The third-party petition was premised upon GRE's assertion that on the date the 1996 injuries were incurred, Miller had a preexisting permanent partial disability supporting a rating greater than 25 percent, making the Fund liable for benefits accruing from the 1996 injuries.

In a deposition taken on February 20, 1997, Beard acknowledged that Miller suffered from degenerative changes that pre-

existed the 1985 injury and that they would have likely progressed over time. However, when asked whether Miller would be in his present condition had he not fallen, Beard responded by stating that Miller's 1996 fall "may have been the final event that pushed him over the edge." Beard opined that the 1996 fall was a new injury superimposed on an existing injury. It was Beard's opinion that 20 percent of Miller's current disability was attributable to the 1985 injuries, 50 percent to the 1992 injuries, and the remaining 30 percent to his fall in 1996.

WORKERS' COMPENSATION COURT'S DETERMINATION

In a detailed order, the Worker's Compensation Court found that Miller had not unreasonably refused medical treatment by postponing his lower back surgery. The court found that Miller's 1996 fall "aggravated his preexisting condition to the point where he is now completely disabled." The court concluded that this finding required that GRE's cross-claim against USF&G be dismissed, since Miller's current disability was not the result of a progression of his 1992 injuries, and that no surgery would ever have been undertaken but for the 1996 fall. The court noted that Miller planned to undergo surgery when his life affairs were in order. Accordingly, the court found that he had not yet reached maximum medical improvement and was entitled to a running award of temporary total disability. As for the Fund, the court found that it was liable, but that the extent of its liability could not yet be determined because Miller's disability was still considered temporary. The court found that GRE should continue to pay for Miller's future medical and hospital services reasonably necessary as a result of his injuries. Finally, the court found that Miller was entitled to a 50-percent waiting-time penalty from Meister & Segrist and GRE due to their failure to pay any benefits beyond November 2, 1996.

The court ordered that Meister & Segrist and GRE continue to pay temporary total disability in the sum of $409 per week for so long as Miller remains temporarily totally disabled. Once Miller's temporary total disability ceases, the court ordered that he be entitled to any residual permanent partial disability with credit to be given Meister & Segrist and GRE for disability compensation paid. The order also provided that once Miller's

temporary total disability ceases, a hearing may be had to determine the Fund's liability.

The trial court's order was reviewed by a panel of the Worker's Compensation Court. The panel concluded that the trial court's dismissal of USF&G was based upon a factual question as to whether or not the 1996 injury was a recurrent event to an earlier injury or whether it was an aggravation of a preexisting condition. The panel determined that there was sufficient evidence to support the trial court's finding. The panel also determined that sufficient evidence supported the trial court's finding that Miller had not reached maximum medical improvement and that until he does, the liability of the Fund cannot be determined. GRE was ordered to pay $500 in attorney fees to Miller because GRE failed to obtain a reduction in the amount awarded Miller.

## ASSIGNMENTS OF ERROR

GRE asserts the trial court erred in (1) determining that the extent of the liability of the Fund could not be determined at this time, (2) dismissing the cross-claim against USF&G and directing all benefits to be paid by GRE, and (3) ordering GRE to pay an attorney fee to Miller.

## SCOPE OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Upon appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Crouch v. Goodyear Tire & Rubber Co., ante* p. 128, 582 N.W.2d 356 (1998).

## ANALYSIS

### SECOND INJURY FUND

GRE argues that the elements establishing the Fund's liability have been met and that the Fund is liable for Miller's temporary benefits. More specifically, GRE contends that the compensation court erred in failing to determine the extent of the Fund's liability. The Fund disagrees, contending that its liability cannot be determined at all until a percentage of disability rating for the last injury standing alone and by itself has been determined. Although the Fund did not cross-appeal, the compensation court's finding that the Fund is liable is a pivotal issue. If the Fund cannot be held liable at all, then GRE's contention concerning the extent of the Fund's liability is necessarily without merit. Thus, the issue is whether the Fund may be liable to Miller even though he has not received a permanent disability rating for his 1996 injuries.

To determine the Fund's liability, we must look to Neb. Rev. Stat. § 48-128 (Reissue 1993), which states:

> (1) If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. . . .
>
> . . . .
>
> (3) As used in this section, preexisting permanent partial disability shall mean any preexisting permanent con-

> dition, whether congenital or the result of injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. No condition shall be considered a preexisting permanent partial disability under this section unless it would support a rating of twenty-five percent loss of earning power or more or support a rating which would result in compensation payable for a period of ninety weeks or more for disability for permanent injury . . . .

In sum, the elements required to establish the Fund's liability are (1) a prior permanent partial disability known to the employer and hindering the employee's employability, (2) a subsequent compensable injury causing permanent disability to the employee, and (3) a combined permanent disability substantially greater in degree or percentage than would have resulted from the subsequent injury considered alone. See *Crouch v. Goodyear Tire & Rubber Co., supra.*

GRE relies on this court's holding in *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987). In *Parker*, the issue was stated to be whether the Fund may be liable for "other than permanent disability." *Id.* at 527, 412 N.W.2d at 471. Parker, the employee, had polio as a child. On July 15, 1982, he experienced a compensable injury while employed by St. Elizabeth Community Health Center. He had surgery on September 29, 1983, and returned to work on November 1. He was later terminated by the health center in 1985 and gained employment selling home water treatment systems. Parker's condition deteriorated, and he resigned from his new job in April 1986.

A review panel of the Workers' Compensation Court found that Parker was temporarily totally disabled from July 15 through August 28, 1982; from September 29 through October 31, 1983; and from May 1 through July 24, 1986, which was the date of the rehearing, and that he would "remain temporarily totally disabled for an indefinite period of time." *Id.* at 528, 412 N.W.2d at 472. The panel further found that Parker's polio was a permanent partial disability; that Parker's subsequent injury, when combined with his preexisting disability, resulted in a

substantially greater degree or percentage of disability than would have occurred due to the subsequent injury alone; that the health center had knowledge of Parker's preexisting condition; and that when Parker's total disability should cease, he would be entitled to compensation for any residual permanent partial disability. The panel found that the subsequent injury Parker suffered would of itself have caused only a 5-percent permanent partial disability to Parker's body as a whole and that the Fund was liable for the additional disability.

Accordingly, the panel ordered the Fund to pay 95 percent of Parker's benefits from May 1, 1986, for so long as Parker shall remain totally disabled. If Parker were to remain totally disabled for more than 300 weeks, the Fund was to pay the entire amount of Parker's benefits. If Parker's total disability were to cease prior to the passage of 300 weeks, the Fund was to pay compensation for that permanent partial disability that Parker thereafter suffered in excess of 5 percent.

On appeal, the Fund urged this court to reverse the panel's order, noting that § 48-128 mentions only permanent partial or permanent total disability. The Fund argued that it could not be held liable until a finding of permanent disability was made. This court disagreed:

> [The employee] should not be denied compensation simply because the Workers' Compensation Court used the term "temporary" instead of "permanent," nor should [the employer] be required to pay this compensation. [T]o carry out the purposes of the Fund, the [compensation] court correctly ordered that the Fund pay temporary total disability benefits to [the employee].

*Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 535, 412 N.W.2d 469, 475 (1987).

This court relied on *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982), in reaching the above conclusion. In *Pollard*, like *Parker*, the Fund argued on appeal that it could not be held liable for an employee's injuries in the absence of a finding that the employee's disability was permanent. This court held that the Fund was liable for payment of benefits and that no finding of permanent disability was necessary. "Whether the ultimate amount of permanent disability

after rehabilitation is 60 percent, 80 percent, or total, the Second Injury Fund is liable for it." *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. at 193, 322 N.W.2d at 402.

Thus, *Parker* and *Pollard* suggest that the Fund may be held liable absent a permanent disability rating. However, a close reading of *Parker* and *Pollard* indicates that the Fund was held liable because it was undisputed that the employees were permanently disabled, rather than temporarily disabled.

> The record reflects that the medical treatment for [the employee's] physical injuries has been completed and the employer has been assessed with that cost. The only further medical treatment contemplated is for the purpose of pain rehabilitation. *Under such circumstances* there should be little question but that the physical injuries currently present *are permanent rather than temporary*. The plaintiff should not be denied compensation for what is currently total permanent disability simply because his employability and earning capacity might become enhanced by rehabilitation and his permanent disability possibly reduced at some time in the future. . . . The award against the Second Injury Fund in the present case was for permanent disability and was properly entered.

(Emphasis supplied.) *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. at 193-94, 322 N.W.2d at 402. Likewise, in *Parker*, the review panel labeled the employee's disability as "temporary" even though it found that his disability would be total for an "indefinite period."

Thus, in *Parker* and *Pollard*, this court concluded that the review panel was clearly wrong in labeling the employee's disability as temporary rather than permanent and not that the amount of the Fund's liability could be determined even though the injury was temporary.

In the instant case, Miller has contemplated surgery and has indicated that he will schedule surgery once his life affairs are in order. Accordingly, there is competent evidence indicating that Miller's current percentage of disability is temporary. Therefore, we conclude that the compensation court was not clearly wrong in finding that Miller's injuries were temporary. We note that there is no evidence before this court as to whether

Miller has indeed had the surgery. If Miller has not yet had the surgery and he continues to postpone it indefinitely, his injuries, at some point, may become permanent and modification may be sought. See Neb. Rev. Stat. § 48-141 (Reissue 1993).

Because we have concluded that the compensation court was not clearly wrong in finding that Miller's injuries are temporary, we must still address the question of whether the Fund may be held liable even though Miller's injuries are not permanent. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). The plain language of the statute clearly indicates that the Fund's liability cannot be determined until and unless the employee's subsequent injury is "permanent." Because the Fund cannot be held liable until an employee's injuries are considered permanent, the extent of the Fund's liability likewise cannot be determined. Thus, we conclude that the compensation court did not err in finding that the extent of the liability of the Fund could not be determined, but did err in determining that the Fund was liable.

## CROSS-CLAIM

GRE argues that the compensation court erred in dismissing its cross-claim against USF&G. We disagree.

When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Pacher v. Fairdale Farms*, 166 Vt. 626, 699 A.2d 43 (1997). See, also, 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 95.21-22 (1998). However, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable. *Hull v. Aetna Ins. Co., supra*; *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987); *Pacher v. Fairdale Farms, supra*. As we stated in *Mendoza*, quoting Larson's Workers' Compensation Law, " 'There is . . . a fine line separating aggravations from recurrences . . . .' " (Omissions in original.) *Mendoza* at 782, 408 N.W.2d at 287. Nonetheless, "[a] finding with regard to

causation of an injury is one for determination by the compensation court as the fact finder." *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 63, 421 N.W.2d 32, 37 (1988).

In the instant case, the compensation court specifically found that Miller's 1996 injuries were an aggravation of his previous condition. Furthermore, this finding is supported by competent evidence and is not clearly wrong. Thus, the insurer at risk at the time of the 1996 injuries, GRE, bears liability. Accordingly, we conclude that the compensation court was correct in dismissing USF&G as a party.

## ATTORNEY FEES

GRE argues that the review panel erred in ordering GRE to pay $500 in attorney fees to Miller, because GRE was not seeking to reduce Miller's award, but, rather, was seeking to apportion that award.

Neb. Rev. Stat. § 48-125(1) (Reissue 1993) authorizes attorney fees if "the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award . . . ." A workers' compensation insurance carrier, such as GRE, is an "employer" within the meaning of this section. *Neeman v. Otoe County*, 186 Neb. 370, 183 N.W.2d 269 (1971). Ordinarily, the phrase "reduction in the amount of such award" found in this section refers to the total amount of the award to the employee, but includes the issue of total disability. *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988). See, also, *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). Does the phrase include an attempt to apportion the responsibility for payment of an award among insurers and the Fund?

In *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982), the compensation court determined that the insurer/employer had obtained a "reduction" in the award by successfully shifting liability to the Fund. On appeal, this court reversed the compensation court's decision, stating:

> It seems clear that "reduction in the amount of such award" ordinarily refers to the total amount of the award to the employee and not to a reduction in the amount to be

> paid by a specific defendant who is liable to pay a portion of the award. In this case there was no reduction in the total amount of the award to the plaintiff. The only change which occurred was that the Second Injury Fund was held liable for a portion of the award rather than the tree service, which was liable alone on the initial award. The action of the compensation court in refusing to make an award of attorney fees to the plaintiff was in error.

*Id.* at 194-95, 322 N.W.2d at 403.

Accordingly, this court held that the insurer/employer was liable for attorney fees under § 48-125. Thus, *Pollard* clearly indicates that attorney fees are appropriate under § 48-125 even when the action does not seek to reduce the employee's award, but, rather, seeks to apportion responsibility for payment of the award among insurers and the Fund.

We conclude that the Workers' Compensation Court did not err in awarding attorney fees.

## CONCLUSION

Because Miller's injuries were not permanent, we conclude that the compensation court erred in determining that the Fund is liable. However, the compensation court did not err in dismissing USF&G and awarding attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED.

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## IN RE INTEREST OF TABATHA R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. RONDA R., APPELLANT, AND RONALD D., APPELLEE AND CROSS-APPELLANT.

587 N.W.2d 109

Filed December 18, 1998. No. S-98-081.

1. **Juvenile Courts: 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 give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination made following an adjudication in a special proceeding which affects

the substantial rights of parents to raise their children is a final, appealable order. A dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order.

3. **Jurisdiction: Appeal and Error.** Once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties.
4. **Parental Rights: Juvenile Courts.** A dispositional order removing children from the care of parents and a subsequent proceeding adjudicating the termination of one parent's parental rights are both governed under the juvenile code and involve the same basic subject matter.
5. **Parental Rights: Juvenile Courts: Proof.** In order for a court to disapprove of a plan proposed by the Department of Health and Human Services, a party must prove by a preponderance of the evidence that the department's plan is not in the child's best interests.
6. **Parental Rights.** Although parental rights may not be terminated solely as the result of a parent's incarceration, incarceration and the parent's consequent unavailability are factors the court may consider in deciding whether or not to terminate the parent's rights. A parent's incarceration is a factor to consider in determining whether or not a rehabilitation plan should be adopted for that parent.
7. **Parental Rights: Juvenile Courts.** There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected, and particularly if such a plan has very little chance of success and it would not be in the best interests of the child.
8. **Juvenile Courts: Rules of Evidence.** Strict rules of evidence do not apply at a dispositional hearing. Even though relaxed rules of evidence may be employed, the proceedings must still be fundamentally fair.
9. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
10. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed in part, and in part vacated and set aside.

A. Michael Bianchi for appellant.

Regina T. Makaitis for appellee State.

Dean M. Johnson for appellee Ronald D.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

Ronda R., natural mother of Tabatha R., appeals and Ronald D., natural father of the infant, cross-appeals from a portion of a dispositional order filed by the juvenile court of Douglas County on December 22, 1997. The dispositional order directed that the infant remain in the custody of the Department of Health and Human Services (DHHS) for appropriate care and placement and adopted DHHS' recommendation that no rehabilitation plan be ordered for either parent. DHHS was previously known as the Department of Social Services, and for clarity, we refer to both as "DHHS" throughout this opinion. For the reasons cited below, we vacate and set aside the juvenile court's January 26, 1998, order requiring the Lincoln Regional Center to release the father's medical records, and we affirm the juvenile court's dispositional order dated December 22, 1997.

## BACKGROUND

This is the second appearance of this case in this court. See *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997) (*Tabatha I*), *amended by* 252 Neb. 864, 566 N.W.2d 782 (1997). A detailed statement of facts is set forth in *Tabatha I*. The infant was born on December 29, 1995. Briefly summarized, on January 22, 1996, paramedics brought the infant to St. Joseph Hospital in Omaha. At that time, the infant was in full cardiac and pulmonary arrest.

On January 26, 1996, the juvenile court entered an emergency ex parte order, placing temporary custody of the infant in and with DHHS. Following a detention hearing, the court, without resistance from either parent, continued temporary custody in and with DHHS and authorized DHHS to consent to any medical, surgical, or psychiatric treatment which in the opinion of a licensed and practicing physician "may be necessary and in the best interest of" the infant.

Subsequently, on March 12, 1996, DHHS filed a "Notification of Informed Consent," advising the parents that it intended to direct St. Joseph Hospital to remove the infant from the "mechanical ventilator and all extraordinary life support" systems and to "not resuscitate" her. On March 15, the mother filed a motion with the juvenile court, requesting that the court

enter an order staying DHHS from giving the instruction, which order the court granted after a hearing.

On April 29, 1996, the juvenile court held an adjudication hearing. On May 3, the court filed an order, concluding that, in accord with Neb. Rev. Stat. § 43-279.01(3) (Reissue 1993), the record established by a preponderance of the evidence that the infant was a child within its jurisdiction and that the evidence further established that it was in the infant's best interests that life support be discontinued and that the infant not be resuscitated, thereby assenting to DHHS' recommendation.

Subsequently, the mother appealed and the father cross-appealed. In an opinion dated June 20, 1997, this court reversed the juvenile court's order and remanded the cause for further proceedings, holding that the juvenile court erred in assenting to DHHS' determination to withdraw life support measures from the infant and to not resuscitate her. *Tabatha I.* This court stated that DHHS' determination to withdraw life support systems from the infant and to not resuscitate her was likely to result in the infant's death, essentially severing the relationship between the infant and the parents and was functionally equivalent to a termination of the parents' parental rights. This court held that the juvenile court had not found by clear and convincing evidence, as required, that the parents' parental rights should be terminated.

In *Tabatha I*, the evidence showed that the infant had been in the sole custody of the parents prior to her injuries and we concluded:

> Although the admissible evidence is not without conflict, we independently find, on de novo review of the record, that under any civil standard of proof, the record establishes that the infant's condition is the result of her having sustained severe brain injury as the consequence of having been vigorously shaken, not, as the parents suggest, as the result of respiratory syncytial viral disease, the method in which she was resuscitated, or any other cause.

252 Neb. at 694, 564 N.W.2d at 604.

Additionally, we noted, "Although there is some conflict in the admissible medical evidence, we independently find, on de novo review of the record, that under any civil standard of

proof, the record establishes that the infant is irreversibly comatose and in a persistent vegetative state." *Id.* at 693, 564 N.W.2d at 603.

Subsequently, the State filed a motion for rehearing, claiming that this court had not expressly ruled that the juvenile court correctly adjudged the infant to be within its jurisdiction, pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), as a juvenile lacking proper parental care by reason of the fault or habits of her parents.

In a supplemental opinion dated July 25, 1997, this court overruled the State's motion and amended its conclusion in *Tabatha I* to state:

> For the foregoing reasons, we affirm the judgment of the juvenile court that notice, service, and jurisdiction were proper and that Tabatha R. is a juvenile within the meaning of § 43-247(3)(a); but we reverse the remainder of the judgment of the juvenile court and remand the cause for further proceedings consistent with this opinion.

252 Neb. at 865, 566 N.W.2d at 782.

On June 23, 1997, after the release of our original opinion but before the filing of the mandate in the juvenile court, the juvenile court, on its own motion, set the matter for disposition.

On August 7, 1997, the State filed a motion requesting psychological evaluations of both parents, and after a hearing, the juvenile court granted the State's motion.

The dispositional phase of these juvenile court proceedings occurred in two separate hearings. It began on October 21, 1997, and it concluded in a hearing conducted on December 22. Both the parents were present in person at each of these hearings, with counsel. At the December 22 hearing, each parent appeared with an attorney guardian ad litem and each was represented by her or his trial counsel. A guardian ad litem was also present on the infant's behalf at each hearing.

Before allowing the presentation of evidence at the October 21, 1997, hearing, the juvenile court first addressed the State's suggestion that the dispositional hearing was unnecessary. Counsel for the State noted that it had filed a motion to terminate the parents' parental rights earlier that same day. In that motion, pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1993),

the State alleged that both the parents are unable to perform their parental responsibilities because of mental illness or mental deficiency and that there are reasonable grounds to believe that these conditions will continue for a prolonged, indeterminate period. Furthermore, the State alleged, pursuant to § 43-292(1), that the father had abandoned the infant for a period in excess of 6 months immediately preceding the filing of the State's motion to terminate. The State also claimed that termination of the parents' parental rights is in the infant's best interests.

Agreeing with the objection raised by the mother's counsel, the juvenile court expressly declined to adopt the State's posture, noting, "What I don't want to get into is a situation where I don't afford the parents due process for a hearing in anticipation of evidence on a Motion to Terminate Parental Rights, the outcome of which is unknown[.]" The dispositional hearing proceeded.

Otto Burton, a case manager for DHHS, testified at both the October 21 and December 22, 1997, hearings, explaining, inter alia, the rationale for his recommendation that a rehabilitation plan not be provided for either parent. Burton testified that he had completed an assessment information and written report detailing his findings for the court, although the report was not received into evidence. Burton recommended that neither parent be reunited with the infant, and he testified that he was exploring possible options for legal guardianship or adoption of the infant. Burton also stated that while parents' desires are important, the child's best interests are his primary concern. Burton testified that throughout his experience as a case manager, he had never recommended a rehabilitation plan for parents when he knew that a motion or petition to terminate parental rights had been filed alleging mental deficiency of the parents.

At the time of the dispositional hearings, the infant remained in the condition described in *Tabatha I*, that is, in a comatose state, totally dependent on a ventilator, and requiring 24-hour nursing care. The infant's care providers had expressed additional concern to Burton regarding the size of the infant's head due to the buildup of fluid attributable to her condition. Since September 24, 1996, the infant has resided at Ambassador

Acute Care Center, a 24-hour nursing home. Burton testified that the center is able to meet the infant's extensive medical needs.

Prior to the October 21, 1997, hearing, Burton met separately with the parents to discuss their relationships with the infant. Both parents expressed to Burton a desire to regain custody of the infant, even though both at that time were living in institutional settings. The mother was imprisoned in Mitchellville, Iowa, for violating the terms of her parole from a burglary conviction in Iowa. The father was confined to the Lincoln Regional Center as a result of a judicial determination that he was not guilty of the crime of robbery by reason of insanity. The mother was paroled on October 20, the day before the first dispositional hearing. The father remained confined to the Lincoln Regional Center throughout the dispositional proceedings, although he was transported to court for both hearings. Both parents advised Burton that when and if one or both were released from an institutional setting, they planned to remain married.

Burton stated that as the infant's caseworker, he did not feel that a plan for parental rehabilitation or reunification with the infant was appropriate for either parent, and he recommended to the court that such a plan not be adopted. He testified that the basis for this belief was essentially fourfold: (1) the mother's incarceration and the father's commitment to the Lincoln Regional Center; (2) the infant's very considerable medical needs; (3) the mother's history of gravitating toward relationships with physically aggressive men, which put the safety and well-being of her children at risk; and (4) the written report and recommendations of Dr. Cynthia Topf, a psychologist who examined both parents. Topf's report was not entered into evidence at the dispositional hearing, and its contents are not subject to our review in this appeal.

Burton stated that when he formulated his recommendation that a rehabilitation plan not be adopted, he was unaware that the mother's release from the Correctional Institute for Women in Mitchellville, Iowa, was imminent. He testified, however, that her release did not change his recommendation that a rehabilitation plan not be adopted for the mother.

On cross-examination, the mother's counsel attempted to question Burton regarding the number and percentage of juvenile cases in which he had not recommended a rehabilitation plan to reunite a child with his or her parents. The juvenile court refused to allow this line of inquiry, reasoning that the facts of each juvenile case are unique and that each case must be addressed on its own merits. The juvenile court also refused to allow the mother's counsel to question Burton about who he believed caused the infant's injuries. The court's basis for this ruling was the law of the case, as announced in this court's opinion in *Tabatha I*. The father offered no evidence at either the October 21 or December 22, 1997, hearings. The mother testified on her own behalf at the December 22 hearing. She admitted that she had recently served a term of approximately 1½ years' imprisonment for violating a condition of her parole on a burglary conviction. She testified that since her release from prison, she had resided with her mother, and that she had secured employment at a dry cleaning and tailoring business. The mother testified that while in prison, she obtained her general equivalency degree (GED), and the court accepted into evidence copies of the mother's GED certificate and test scores. The mother also testified that in prison, she had taken coursework in parenting, self-esteem, family relations, "criminality," typing, and computers. She testified regarding this coursework and offered into evidence exhibits 61 through 65, which are certificates of attendance and completion for these courses. While the juvenile court allowed all of the mother's testimony regarding her accomplishments in these courses, it refused to receive the certificates into evidence. The mother testified that she wanted to regain custody of the infant and that she was willing to undergo at her own expense whatever training is necessary to care for the infant in her home.

In an order filed December 22, 1997, the juvenile court found that the infant should remain in DHHS' custody for appropriate care and placement. The court also adopted DHHS' recommendation that no rehabilitative plan be ordered for either parent. In so holding, the juvenile court noted that the parents failed to appreciate the severity of the infant's condition. The juvenile court ordered that both parents should have reasonable rights of

supervised visitation with the infant as arranged by DHHS. The court also ordered each parent to notify various persons in the event of any change of address or phone number and ordered that each parent pay an agreed-upon amount of child support for the infant. The court also noted that the motion to terminate the parents' parental rights would remain set for hearing on February 2 and 3, 1998. The mother filed a notice of appeal from the dispositional order on January 20. The father cross-appealed on January 21.

On January 13, 1998, the State filed a motion and notice in juvenile court, requesting that the juvenile court direct the Lincoln Regional Center to release the father's medical records, including all psychiatric and psychological evaluations and mental health treatment records, in light of the State's pending motion to terminate parental rights.

At the hearing on the State's motion to produce medical records pursuant to the motion to terminate parental rights, both parents requested that the court allow them to undergo independent psychiatric evaluations. In an order filed January 20, 1998, the juvenile court granted the oral motion for independent psychiatric evaluations, and in a supplemental order, filed January 26, 1998, the court ordered the Lincoln Regional Center to release the father's medical records, including all psychiatric and psychological evaluations and mental health treatment records.

The mother appeals and the father cross-appeals from the juvenile court's dispositional order of December 22, 1997, in which the juvenile court adopted the State's recommendation that the infant remain in DHHS' custody for appropriate care and placement and ordered that no rehabilitation plan be provided for either parent.

## ASSIGNMENTS OF ERROR

On appeal and cross-appeal, the parents claim that the juvenile court erred (1) by adopting DHHS' recommendation that a rehabilitation plan not be ordered for either of them and that they were denied equal protection in this regard, (2) in rendering numerous evidentiary rulings which allegedly precluded them from demonstrating that DHHS' plan or lack thereof was

not in the infant's best interests, (3) by failing to make a written determination that reasonable efforts had been made to prevent or eliminate the need for removal of the infant from her home and to make it possible for the infant to return home, and (4) by conducting the dispositional hearing in a manner which denied them due process.

## 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 give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

## ANALYSIS

*Jurisdiction and Comment on Termination-Related Orders.*

A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Borius H.*, 251 Neb. 397, 558 N.W.2d 31 (1997). To be appealable, the order in the special proceeding must affect a substantial right. *Id.* We conclude that in this case the juvenile court's order of December 22, 1997, declining to establish a rehabilitation plan, affects a substantial right, and is, therefore, appealable.

It is well settled that a judicial determination made following an adjudication in a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997) (citing *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman, ante* p. 120, 582 N.W.2d 350 (1998)); *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). More specifically, it has been held that a dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order. *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998), citing *In re Interest of Joshua M. et al., supra.*

The law is clear that parents have a recognized liberty interest in raising their children. *In re Interest of R.G., supra* (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)). As the case now stands, the parents are precluded from raising the infant. Furthermore, the order of December 22, 1997, does not provide a plan allowing either of them to rehabilitate herself or himself or to take steps to reunite with the infant. Given the December 22 order, as well as the length of time over which the parents' parental rights may reasonably be expected to be affected, we conclude on the facts of this case that the court's December 22 order declining to order a rehabilitation plan for either parent affected a substantial right and was a final, appealable order. See *In re Interest of R.G., supra*.

On January 20, 1998, the mother filed an appeal from the court's dispositional order. On January 21, the father filed his cross-appeal from the court's dispositional order. On January 26, after both parents had filed appeals, the juvenile court filed an order requiring the Lincoln Regional Center to release the father's medical records, including all psychiatric and psychological evaluations and mental health treatment records, in preparation for the hearing on the State's motion to terminate parental rights.

However, once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties. *In re Interest of Joshua M. et al., supra* (citing *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995)).

In *In re Interest of Joshua M. et al.*, 251 Neb. at 626, 558 N.W.2d at 558, this court noted that "a dispositional order removing children from the care of parents and a subsequent proceeding adjudicating the termination of that parent's parental rights are both governed under the juvenile code and involve the same basic subject matter." This court specifically held that once an appeal from a dispositional order is perfected, the juvenile court loses jurisdiction to address the issue of terminating parental rights while the appeal from the disposition is pending.

In the instant case, the juvenile court had no jurisdiction to enter orders relating to the State's motion to terminate once the mother appealed the juvenile court's dispositional order. Consequently, because the juvenile court was without jurisdiction to enter orders relating to the State's motion to terminate the parents' parental rights, these orders are null and void, and accordingly, we vacate them and set them aside. See, *In re Interest of Brittany B.*, 249 Neb. 936, 546 N.W.2d 811 (1996); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

*Failure to Order Rehabilitation Plan.*

On appeal, the parents contend that the juvenile court erred in failing to order a rehabilitation plan and that the court's decision to not adopt a rehabilitation plan for either of them violated their equal protection rights. The State argues that under the circumstances, the juvenile court correctly adopted DHHS' recommendation that no rehabilitation plan be ordered for either parent and that the parents' equal protection rights were not violated. After reviewing the record de novo, we conclude that the juvenile court did not err in adopting DHHS' recommendation that a rehabilitation plan not be adopted for either parent.

While Neb. Rev. Stat. § 43-285 (Cum. Supp. 1996) grants a juvenile court discretionary power over a recommendation proposed by DHHS, it also grants preference in favor of such proposal. In order for a court to disapprove of DHHS' plan, a party must prove by a preponderance of the evidence that DHHS' plan is not in the child's best interests. § 43-285; *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995). The parents failed to establish that DHHS' proposal was not in the infant's best interests.

At the dispositional hearing, Burton testified that there were several reasons why he recommended against a rehabilitation plan for either parent. Burton testified that he did not recommend a rehabilitation plan for the mother in part because of the mother's incarceration at the Correctional Institute for Women in Mitchellville, Iowa. Similarly, Burton testified that he did not recommend a rehabilitation plan for the father, first, because the father was committed to the Lincoln Regional Center at the time of the dispositional hearing, and second and more important, because the father was placed at the Lincoln Regional Center on

the basis of a plea of not guilty by reason of insanity. Burton also testified that he did not recommend a rehabilitation plan for either parent based in part on the written report and recommendations of Topf, the psychologist who examined both parents. However, because Topf's report was not entered into evidence at the dispositional hearing, we cannot review the report.

With respect to the significance of incarceration, this court has held, in the context of terminating parents' rights, that although parental rights may not be terminated solely as the result of a parent's incarceration, incarceration and the parent's consequent unavailability are factors the court may consider in deciding whether or not to terminate the parent's rights. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). We logically extend this reasoning and conclude that a parent's incarceration is a factor to consider in determining whether or not a rehabilitation plan should be adopted for that parent.

Burton further testified that he would not recommend a rehabilitation plan for the mother even though the mother had been paroled and regardless of the fact that the mother had made certain efforts while in jail to better herself. Burton noted that because of the mother's history of gravitating toward relationships with physically aggressive men, the safety and well-being of the mother's children were at risk. Additionally, Burton testified that although the mother had taken certain classes while in prison, the mother failed to present any evidence indicating that any of these classes would assist the mother in caring for the infant's extensive medical needs.

At the dispositional hearing, Burton testified that the infant remains in the condition described in *Tabatha I*, that is, in a comatose state, totally dependent on a ventilator, and requiring round-the-clock nursing care. The infant's care providers had expressed additional concern to Burton regarding the size of the infant's head due to the buildup of fluid as a result of her condition. Since September 24, 1996, the infant has resided at Ambassador Acute Care Center, a 24-hour nursing home, and Burton testified that the center is able to meet the infant's extensive medical needs. Burton testified, in effect, that given the infant's medical condition, a rehabilitation plan for the parents

which would result generally in better parenting skills suited to a child in home care would not enable the parents to meet the infant's acute medical needs.

Although the father argues that the juvenile court erred in failing to order a rehabilitation plan for him, he presented no evidence at the dispositional hearing in support of this appellate contention. Similarly, although the mother testified at the December 22, 1997, hearing and stated that she had taken certain classes while in prison, Burton testified that he was unable to state that any of these classes would enable the mother to care for the infant. We note that although the mother stated that she was willing to undergo whatever training is necessary to care for the infant in her home, the record suggests that the infant's extensive medical needs require the infant to remain in an institutional setting providing 24-hour medical care and monitoring of the infant's condition. Neither parent produced any evidence that the infant's institutional care needs were less than constant or that it would be possible for an individual in the infant's condition to live with her parents at their home. The parents did not overcome the presumption in favor of adopting DHHS' recommendation. See, § 43-285; *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

On appeal, the mother and, to some extent, the father argue that the juvenile court erred in not implementing a rehabilitation plan for either of them on the basis that neither had accepted responsibility for the infant's injuries. The parents claim that their equal protection rights were violated by the juvenile court's findings, holding them both responsible for the infant's injuries absent sufficient evidence to indicate that both of them, or either of them individually, actually caused or knows who caused the infant's injuries. Following our review of the record, we conclude that the parents misperceive the juvenile court's reasoning and the weight of the evidence. This assignment of error is without merit, and the parents' equal protection rights were not violated by the court's decision not to provide a rehabilitation plan for either parent.

In *In re Interest of Hollenbeck*, 212 Neb. 253, 264, 322 N.W.2d 635, 641 (1982), this court quoted *In re Interest of*

*Carlson*, 207 Neb. 540, 299 N.W.2d 760 (1980), and stated, "'[T]here is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected, and particularly if such a plan has very little chance of success and it would not be in the best interests of the child.'" Specifically, this court held in *In re Interest of Hollenbeck* that any rehabilitation plan the court could devise for the mother would have very little chance for success because of the mother's refusal to recognize that her daughter had been the victim of incest by the father. See, also, *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Similarly, after reviewing the record in the instant case de novo, we conclude that the juvenile court did not err in deciding to not order a rehabilitation plan for either parent based, in part, on the fact that neither has acknowledged or accepted the severity of the infant's injuries and the fact that the infant requires constant care in an institutional setting. Indeed, to the extent that the parents offered evidence, it was designed to show their ability to care for the infant in a home setting. This record demonstrates that the parents do not appreciate the nature and extent of the infant's injuries. Under the facts of this case, a plan would have little chance of success. On this record, there was no showing by either parent that the lack of a rehabilitation plan for either of them was not in the infant's best interests, nor was the juvenile court's order issued to force a confession by either parent as to how or by whom the infant was injured. Compare *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). Like the situation in *In re Interest of Hollenbeck, supra*, the parents in the instant case fail to appreciate their child's severe condition. The imposition of a rehabilitation plan in the instant case would not have served a useful purpose or been in the infant's best interests, since the infant's condition and extensive medical needs necessarily require that the infant live apart from the parents.

For the foregoing reasons, we conclude that the juvenile court did not err in declining to provide a rehabilitation plan for the parents, nor were the parents' equal protection rights violated by the dispositional order.

*Evidentiary Rulings.*

Both parents contend that the juvenile court committed reversible error, as a matter of law, through a variety of evidentiary rulings which effectively precluded them from demonstrating that DHHS' plan was not in the infant's best interests. The State argues that the juvenile court's evidentiary rulings did not constitute reversible error. We agree with the State.

We are aware that strict rules of evidence do not apply at a dispositional hearing. Neb. Rev. Stat. § 43-283 (Reissue 1993); *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998). Even though relaxed rules of evidence may be employed, the proceedings must still be fundamentally fair. *Id.*

First, both parents argue that the juvenile court committed reversible error when it precluded them from asking Burton about who he believed caused the infant's injuries. At the dispositional hearing, the parents attempted on more than one occasion to question Burton in this regard. The State objected to such questioning on the grounds that Burton's beliefs were irrelevant and, additionally, that the issue had already been determined at the adjudication. The court sustained the State's objection on these grounds, essentially stating that the law-of-the-case doctrine precluded such an inquiry.

The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998).

In *Tabatha I*, the parents appealed the adjudication of the infant as a child described in § 43-247(3)(a) and alleged, among other things, that the juvenile court had erred in admitting certain evidence concerning the infant's medical condition, the cause thereof, and the parents' roles therein. In *Tabatha I*, this court stated,

> Although the admissible evidence is not without conflict, we independently find, on de novo review of the record, that under any civil standard of proof, the record establishes that the infant's condition is the result of her having sustained severe brain injury as the consequence of having been vigorously shaken, not, as the parents sug-

> gest, as the result of respiratory syncytial viral disease, the method in which she was resuscitated, or any other cause.

252 Neb. at 694, 564 N.W.2d at 604. Based on the established facts in *Tabatha I*, the juvenile court properly sustained the State's objection.

The parents next contend that the juvenile court erred when it precluded them from eliciting testimony concerning Burton's and DHHS' treatment of other juvenile cases. This assignment of error is without merit.

At the dispositional hearing, the mother's attorney asked Burton how often he had recommended a permanency plan other than reunification in juvenile cases. The State objected on relevancy grounds, and the court sustained the State's objection, stating that it was improper to compare this juvenile case to other juvenile cases. The mother's attorney stated that he was attempting to establish that it is not a normal practice to deny a parent reunification or a chance to rehabilitate herself or himself. In an offer of proof, Burton stated that he had recommended that parents not be reunited with their child in less than one-fourth of his juvenile cases.

While we recognize that strict rules of evidence do not apply to a dispositional hearing, see, § 43-283; *In re Interest of Gloria F., supra*, in our de novo review we observe that regardless of whether or not Burton should have been permitted to comment on other cases, the exclusion of this evidence did not prejudice the parents. Although Burton was not allowed to state that he normally attempts to reunify parents with their child, Burton testified in detail as to why he declined to recommend a rehabilitation plan for either parent under the facts of this case. The juvenile court's ruling disallowing Burton's testimony regarding his treatment of other juvenile cases was harmless.

Finally, the parents contend that the juvenile court committed reversible error when it refused to admit exhibits 61 through 65, the mother's certificates of attendance and completion for prison classes, into evidence. We do not agree.

At the dispositional hearing, the mother testified that she had been in prison in Iowa on a burglary charge for the last year and a half and that while in prison she had taken several classes,

including classes in parenting, self-esteem, family relations, criminality, typing, and computers.

The mother also testified that she was awarded a certificate of completion for all these classes after passing certain tests. The mother attempted to admit these certificates, marked as exhibits 61 through 65, into evidence. The State objected to the admission of the certificates on foundation grounds, stating that there was no way to know of what these classes consisted. The court sustained the State's objection.

On appeal, the mother argues that the court should have allowed these exhibits into evidence because the admission of these exhibits would have permitted the mother to show that she had made efforts at rehabilitating herself. After reviewing the record, we conclude that regardless of whether the court erred in failing to admit exhibits 61 through 65, the mother was not prejudiced by this ruling because the mother was allowed to testify concerning the substance of these exhibits. Specifically, the mother testified that she completed these classes and that she received certificates of completion after doing so. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997).

The parents' assignment of error regarding evidentiary rulings is without merit.

*Reasonable Efforts to Return Infant to Her Home.*

On appeal and cross-appeal, the parents contend that the juvenile court erred in failing to make a written determination under Neb. Rev. Stat. § 43-284 (Supp. 1997) that reasonable efforts had been made to prevent or eliminate the need for removal of the infant from her home and to make it possible for the infant to return home. The State argues that the juvenile court was not required to make a finding regarding removal in this case. We agree with the State.

The relevant portion of § 43-284 provides:

> The court may enter a dispositional order removing a juvenile from his or her home only upon a written determination that continuation in the home would be contrary

> to the welfare of such juvenile and that reasonable efforts have been made to prevent or eliminate the need for removal of the juvenile from his or her home and to make it possible for the juvenile to return.

In *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990), this court specifically held that the above-cited language from § 43-284 applies only to the dispositional order which initially removes the juvenile from the parental home. In the instant case, the State previously removed the infant from the parents' home and the record indicates that the parents did not object. The instant order is not one of initial removal, but, rather, it continues out-of-home placement. Therefore, this assignment of error is without merit.

*Due Process.*

The parents claim that the manner in which the juvenile court conducted the dispositional hearing and the juvenile court's decision not to order a rehabilitation plan for either of them denied them due process. After reviewing the record de novo, we conclude that the parents' due process rights were not violated, either by the manner in which the juvenile court conducted the dispositional hearing or by the court's decision to not order a rehabilitation plan.

The substance of the parents' due process argument has been treated in this opinion in connection with our affirmance of the trial court's various orders, including its refusal to order a rehabilitation plan and its evidentiary rulings, and we conclude the parents received due process at the disposition hearing. This assignment of error is without merit.

## CONCLUSION

Following our de novo review of the record, we vacate and set aside the juvenile court's January 26, 1998, order requiring the Lincoln Regional Center to release the father's medical records, and we affirm the juvenile court's December 22, 1997, dispositional order directing that the infant remain in DHHS' custody for appropriate care and placement and adopting DHHS' recommendation that no rehabilitation plan be ordered for either parent.

AFFIRMED IN PART, AND IN PART VACATED AND SET ASIDE.

WRIGHT, J., concurring.

On January 22, 1996, Tabatha R. arrived at St. Joseph Hospital in full cardiac and pulmonary arrest. The infant is irreversibly comatose and in a persistent vegetative state. In *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997) (*Tabatha I*), we independently found on de novo review that the infant's condition occurred as the result of her having sustained severe brain injury as a consequence of having been vigorously shaken. In my concurrence in *Tabatha I*, I stated that there are factual situations in which only one act by a parent is sufficient to provide the basis for termination of parental rights under Neb. Rev. Stat. § 43-292 (Reissue 1993).

In *Tabatha I*, we concluded that the order entered by the juvenile court was, in effect, a termination of parental rights and that before such rights could be terminated, Neb. Const. art. I, § 3, required that the evidence clearly and convincingly establish the existence of one or more of the statutory grounds stated in § 43-292 and that such action was in the infant's best interests.

In my opinion, following our decision in *Tabatha I*, the State could have filed a motion to terminate parental rights. The State did not file such a motion until the day of the dispositional hearing, and therefore, the juvenile court properly refused to consider the termination issue.

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DENTON W. BRUNGES, APPELLEE,
v. MARY E. BRUNGES, APPELLANT.
587 N.W.2d 554

Filed December 31, 1998. No. S-97-312.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Divorce: Trial.** In order to dissolve a marriage, the trial court must find that the marriage is irretrievably broken.
3. **Pleadings: Evidence: Proof: Waiver.** Generally, admissions made in pleadings are taken as proof of the fact alleged and thereby waive or dispense with the need to produce evidence of that fact.
4. **Divorce: Trial: Witnesses: Testimony: Depositions.** Neb. Rev. Stat. § 42-356 (Reissue 1993) requires that hearings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Johnson County, ROBERT T. FINN, Judge. Judgment of Court of Appeals reversed and remanded with directions.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for appellant.

Timothy W. Nelsen, of Nelsen Law Office, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

Mary E. Brunges appealed from a decree of dissolution entered by the district court for Johnson County. The Nebraska Court of Appeals affirmed the judgment with regard to the issues of dissolution and alimony, but reversed the judgment and remanded the cause for an evidentiary hearing on the issues of child support, visitation, and custody. We granted further review.

## SCOPE OF REVIEW

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

## FACTS

Mary and Denton W. Brunges were married on July 12, 1986, in Genesee County, Michigan. Four children were born to the marriage: Jennifer N., born August 24, 1988; Kari M., born November 19, 1990; Breanna L., born April 7, 1993; and Haley M., born April 7, 1993. Denton filed a verified petition on July 1, 1996, in the district court for Johnson County, alleging that he was a resident of Otoe County and had been a resident of Nebraska for more than 1 year prior to filing the petition. He alleged that Mary was a resident of Johnson County and that neither party was a member of the armed forces. He claimed

that all reasonable efforts at reconciliation had failed and that the marriage between the parties was irretrievably broken and should be dissolved by the court.

The petition stated that during the course of the marriage, the parties had acquired an interest in certain real and personal property and had become liable for certain debts. Denton requested that a fair and reasonable division of such property be made by the trial court and that a determination be made concerning the payment of debts. Denton's prayer for relief requested that the marriage be dissolved, that the property of the parties be equally divided, and that the debts be determined and divided, as well as such further and other different relief as the court deemed just and equitable.

Mary's responsive pleading admitted that Denton was a resident of Otoe County, that he had resided in the state for more than 1 year prior to the filing of the petition, that she was a resident of Johnson County, and that neither party was a member of the armed forces. She admitted that the marriage between the parties was irretrievably broken and that the trial court should dissolve the marriage. She acknowledged that the parties had acquired an interest in personal property and had become liable for certain debts and requested that the court make a fair and equitable distribution of such matters. Her prayer for relief requested that the marriage be dissolved; that she be awarded care, custody, and control of the minor children subject to visitation; that she be awarded child support consistent with the Nebraska Child Support Guidelines; that she be awarded alimony; that the court divide the property and debts; and that she be awarded costs, fees, and such other relief as the court deemed just and equitable.

Subsequently, Mary was granted temporary custody of the minor children subject to visitation by Denton. Denton was ordered to pay $452 per month in child support and one-half of the medical or dental expenses not covered by his insurance. He was also required to share in one-half of the cost of child care.

A hearing on the dissolution was held December 18, 1996, at which time no witnesses testified and no depositions, exhibits, or written stipulations were offered or admitted into evidence. Both parties were present at the hearing, but neither party testi-

fied. Denton's attorney told the trial court that the parties were both fit persons to have the care, custody, and control of the minor children, but that Denton would stipulate and agree that it was in the children's best interests for Mary to have custody. The attorney stated that all efforts at reconciliation had failed and that the marriage between the parties was irretrievably broken and should be dissolved by the court. He stated that during the course of the marriage, the parties had been given certain property, which he claimed had been "basically split" except for those items set forth in "Exhibit 1"; that there was no money left in the retirement account; and that the parties had deviated from the child support guidelines because Denton was presently unemployed. He suggested to the court that it order $50 per month child support until such time as Denton became employed.

In response, Mary's attorney stated that she would ask the trial court to consider extending Denton's one-half share of the child-care expenses to apply to those times when Mary attended a class which she was taking to improve her employment status. Denton's attorney responded that child-care expenses should not be required while Mary attended class.

The trial court ordered the marriage dissolved and asked the attorneys what the stipulation was on custody of the children. Denton's attorney stipulated that Mary would have custody, that Denton would receive visitation on even-numbered weekends from Friday through Sunday, and that "Wilson v. Wilson[, 224 Neb. 589, 399 N.W.2d 802 (1987),] will be followed as to the holidays." The court announced that it would set child support at $150. No testimony or deposition evidence was offered, nor were any documentary exhibits introduced into evidence.

A decree of dissolution was filed on February 11, 1997, in which the trial court stated that it had taken judicial notice of its records and files and heard the stipulation offered by the parties. Upon the evidence submitted by the parties and the pleadings filed therein, the court found that all reasonable efforts at reconciliation had failed; that the marriage between the parties was irretrievably broken; that the parties had agreed to a division of property, with the parties retaining the property in each's custody; and that Denton's retirement account was used before

the filing of the dissolution and Denton should not be ordered to pay any moneys back to Mary. Each party was to be responsible for his or her own bills, if any, and legal custody of the minor children was awarded to Mary, subject to reasonable rights of visitation set forth in the decree. Denton was ordered to pay $50 per month in child support commencing on January 1, 1997, and one-half of the child care costs while Mary was working, but not while she was attending school. Neither party was found to be entitled to alimony, and each party was directed to pay his or her own attorney fees.

On appeal, Mary assigned as error that the trial court erred in entering a decree of dissolution without hearing any oral testimony or receiving any evidence. In a memorandum opinion filed May 7, 1998, the Court of Appeals concluded that the procedures employed by the trial court were in a number of instances flawed and at variance with the established law and that evidence was needed on the matters of child support, visitation, and custody. Therefore, it vacated those portions of the decree setting child support, visitation, and custody and remanded the cause to the trial court for a proper hearing in accordance with the opinion in order to create a record for the trial court and, in the event of an appeal, the appellate court. The Court of Appeals affirmed the remainder of the decree. Temporary custody of the children remained with Mary pending completion of the matters remanded to the trial court.

## ASSIGNMENTS OF ERROR

On petition for further review, Mary assigns as error that the Court of Appeals erred in determining that a trial court can enter a divorce decree where the parties have adduced no evidence upon which the court could base its findings and orders, erred in affirming portions of a written decree which varied from the trial court's pronouncements from the bench, and erred in failing to vacate the entire decree and remand the cause to the trial court for an evidentiary hearing on all issues.

## ANALYSIS

Our determination of whether the trial court could dissolve the marriage presents a question of law. On questions of law, an appellate court has an obligation to reach its own conclusions

independent of those reached by the lower courts. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

In order to dissolve a marriage, the trial court must find that the marriage is irretrievably broken. Neb. Rev. Stat. § 42-361 (Reissue 1993) provides in relevant part:

> (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

In his petition, Denton stated under oath that the marriage was irretrievably broken, and Mary made the same claim in her responsive pleading. The acknowledgment at the end of Mary's pleading stated that the facts contained therein were "true and accurate to the best of her knowledge and belief." We note that this equivocal statement may not qualify as an oath, but we do not find this fact decisive, since what is significant is that Mary did not deny that the marriage was irretrievably broken. Thus, the issue is whether the parties' statements in their pleadings that the marriage is irretrievably broken satisfy the requirements of § 42-361(1). Relying on *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991), Mary claims that an evidentiary hearing was required in order for the dissolution of the marriage to be entered by the court.

In *Wilson*, both the petitioner and the respondent were incarcerated. In her petition, the petitioner alleged that the marriage was irretrievably broken, but the respondent denied this fact in his responsive pleading. Despite this disagreement between the parties, the district court dissolved the marriage without conducting a hearing. The respondent appealed, claiming that the district court erred in rendering a decision based solely on the pleadings. We held that it was error to proceed with a trial on the petition and response alone without allowing the parties to appear in person or to provide evidence through testimony or depositions, because pursuant to § 42-361(2), "[i]f one of the parties . . . denie[s] under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including . . . the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken." We held

that in circumstances where one of the parties denies that the marriage is irretrievably broken, the pleadings alone cannot be treated as proof of this fact. We concluded that oral testimony or depositions of witnesses must be received into evidence in open court before a court may dissolve a marriage.

We recognize that the facts of the case at bar are distinguishable from those in *Wilson v. Wilson, supra.* In *Wilson*, one party admitted that the marriage was irretrievably broken while the other denied such fact, and thus, § 42-361(2) was applicable. Here, we proceed under § 42-361(1), since at least one party admitted in a verified pleading that the marriage was irretrievably broken and the other did not deny the allegation.

Generally, admissions made in pleadings are taken as proof of the fact alleged and thereby waive or dispense with the need to produce evidence of that fact. *U S West Communications v. Taborski*, 253 Neb. 770, 784, 572 N.W.2d 81, 91 (1998) ("judicial admission" is formal act done in course of judicial proceedings which is substitute for evidence, thereby waiving or dispensing with production of evidence by conceding that proposition of fact alleged by opponent is true).

The question is whether the pleadings by the parties were sufficient to dispense with the need to produce evidence that the marriage was irretrievably broken. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

We conclude as a matter of law that the trial court erred when it relied only upon the pleadings to find that the marriage was

irretrievably broken. Pursuant to § 42-361(1), "the court, after hearing, shall make a finding whether the marriage is irretrievably broken." The statute requires that a hearing be held.

Neb. Rev. Stat. § 42-356 (Reissue 1993) requires that "[h]earings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions." The hearing which was conducted in the case at bar, although held in open court, does not satisfy all of the requirements of § 42-356 because no testimony or deposition evidence was received.

The basic difference between § 42-361(1) and (2) has to do with whether the trial court must consider the prospect of reconciliation. Under § 42-361(1), reconciliation is not an issue, but it is under § 42-361(2). Section 42-361(1) requires that the trial court "make a finding [as to] whether the marriage is irretrievably broken." Because § 42-356 requires that the hearing be held in open court upon the oral testimony of witnesses or upon the deposition of such witnesses, the court could not make such a finding on the pleadings alone. The trial court erred in finding that the marriage between Mary and Denton was irretrievably broken without receiving oral testimony or depositions on this issue.

## CONCLUSION

Without a hearing as required by § 42-356, the marriage should not have been dissolved, and the trial court's dissolution of the marriage must be reversed. Consequently, all determinations made by the trial court in regard to the property settlement, alimony, child support, visitation, and custody will need to be redetermined at the hearing.

Based upon our interpretation of the requirements of § 42-361, we hold that in all decrees of dissolution which are granted subsequent to this opinion, the trial court shall comply with the requirements of § 42-356 as set forth herein. Our decision shall not retroactively affect any decrees of dissolution other than that of the instant appeal which have been entered prior to the date of this opinion.

The decision of the Court of Appeals is reversed, and the cause is remanded to that court with directions to reverse the

trial court's dissolution of the marriage and remand the cause for an evidentiary hearing pursuant to § 42-356. Temporary custody of the children shall remain with Mary pending completion of the matters remanded to the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

## CHARLES VRANA & SON CONSTRUCTION COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

587 N.W.2d 543

Filed December 31, 1998. No. S-97-570.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Final Orders: Appeal and Error.** An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Summary Judgment: Words and Phrases.** A partial summary judgment proceeding is not a special proceeding.
5. **Summary Judgment: Actions.** A partial summary judgment merely resolves one or several of the issues involved in the entire action or the "main case."

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

Don Stenberg, Attorney General, John E. Brown, and Gary R. Welch for appellant.

Joseph E. Jones, Michael F. Coyle, and Travis S. Tyler, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This action comes to us by way of a petition to bypass. Appellee, Charles Vrana & Son Construction Company, Inc. (Vrana), brought an action against appellant, State of Nebraska, Department of Roads (State), pursuant to contract and then filed a motion for partial summary judgment, which was granted. The State now appeals to this court the trial court's order granting partial summary judgment. Because a partial summary judgment proceeding is not a special proceeding, the trial court's order was not final, and we are without jurisdiction to hear this appeal. Therefore, we dismiss.

## BACKGROUND

Vrana contracted with the State to reconstruct eight-tenths of a mile of Capehart Road and two bridges in Sarpy County, Nebraska. The contract required that the work be completed in 412 calendar days; however, the work was completed in 708 calendar days.

The contract provided for liquidated damages in the sum of $875 per calendar day the work remained incomplete beyond the 412-day time period allowed. The contract also contained incentive and disincentive provisions which provided that Vrana receive $4,700 per calendar day that the work was completed prior to the expiration of the 412-day time period, to a maximum of $94,000, or that Vrana pay $4,700 per calendar day that the work remained incomplete beyond that time period, with no maximum imposed.

Vrana brought this action, alleging that Vrana had performed all its obligations under the contract and that the State had failed to pay Vrana $208,393.11, an amount still outstanding with certain additions and change orders, pursuant to the contract. Vrana prayed for payment in that amount, interest thereon, and attorney fees and costs.

The State counterclaimed, alleging that Vrana owed the State $210,000 pursuant to the contract's liquidated damages provision and $755,700 pursuant to the contract's disincentive provision. The State prayed for payment in that amount, less $197,942.30 retained, and attorney fees and costs.

Vrana filed a motion for partial summary judgment, alleging that there were no issues of material fact in regard to the portion of the State's counterclaim praying for $755,700 pursuant to the disincentive provision. At the hearing on the motion, Vrana argued that the disincentive provision constituted a penalty as a matter of law and, thus, was void. The trial court found that the provision did indeed constitute a penalty and granted Vrana's motion for partial summary judgment.

## ASSIGNMENTS OF ERROR

The State asserts that the trial court erred in (1) determining that the disincentive provision of the contract constituted a penalty and was therefore void; (2) determining that the disincentive provision of the contract, rather than the liquidated damages provision of the contract, should be declared void because of the court's determination that both contract provisions attempted recovery of the same damages; and (3) finding that there was no issue of material fact regarding the computation, assessment, and recovery of liquidated damages by the State.

## SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

## ANALYSIS

Vrana filed a motion for summary dismissal, asserting that this court was without jurisdiction to hear this appeal because the trial court's order granting Vrana's motion for partial summary judgment was not a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997). Thus, we must determine whether the trial court's order granting Vrana's motion for partial summary judgment was a final order. If not, we are without jurisdiction to hear this purported appeal.

An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. See *O'Connor v. Kaufman, ante* p. 120, 582 N.W.2d 350 (1998).

It is clear and undisputed that the order in the instant case affected a substantial right. It is likewise clear and undisputed that the order was not entered *after* judgment and, thus, was not made on summary application in an action after judgment was rendered. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman, supra*. Finally, it is also clear and undisputed that the order did not determine the action and prevent a judgment, since the order disposed of only one of the State's counterclaims and none of Vrana's claims. See *O'Connor v. Kaufman, supra*. Thus, we must determine whether the order in the instant case was made during a special proceeding.

In *O'Connor v. Kaufman*, we held that a partial summary judgment proceeding is not a special proceeding. See, also, *Burroughs Corp. v. James E. Simon Constr. Co.*, 192 Neb. 272, 220 N.W.2d 225 (1974) (holding that partial summary judgment is not final appealable order). We stated that a partial summary judgment "merely resolves one or several of the issues involved in the entire action or the 'main case.' " *O'Connor v. Kaufman, ante* at 124, 582 N.W.2d at 354. In the instant case, the trial court's summary judgment order disposed of the State's counterclaim only as to the damages sought by the State in regard to the disincentive provision of the contract. The summary judgment order did not dispose of the damages sought by the State in regard to the liquidated damages provision, nor did it dispose of the State's request for attorney fees and costs. Moreover, the order did not dispose of any of Vrana's claims. Thus, the trial court's order granted partial summary judgment. Accordingly, we conclude that the order in the instant case was not made during a special proceeding.

Because the order in the instant case was not made during a special proceeding, the trial court's order was not final, and we are without jurisdiction to hear this appeal.

## CONCLUSION

We are without jurisdiction to hear this appeal because the trial court has not issued a final order. Therefore, we dismiss.

APPEAL DISMISSED.

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DONALD WANHA AND LEE WANHA, HUSBAND AND WIFE, APPELLEES, V. ROBERT LONG AND JOLANE K. OLANDER LONG, HUSBAND AND WIFE, APPELLANTS, AND AMERUS BANK, A CORPORATION, APPELLEE.

587 N.W.2d 531

Filed December 31, 1998. No. S-97-808.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. It not only is within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Equity: Quiet Title: Appeal and Error.** A quiet title action sounds in equity. In an appeal of an equitable 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, 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. **Statutes.** Interpretation of a statute presents a question of law.
4. **Jurisdiction: Final Orders: Motions for New Trial: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. A timely motion for new trial suspends the time limit for filing a notice of appeal, until the motion for new trial has been disposed of by the court rendering the decision. However, an untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
5. **Motions for New Trial: Time.** When the 10th day after a judgment is a Saturday or Sunday, a motion for new trial is timely filed on the following Monday.
6. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
7. **Adverse Possession.** Actual occupancy or possession is always involved in any claim to land by adverse possession. No particular act is required to establish actual possession. Rather, the acts required depend upon the character of the land and the use that can reasonably be made of it.

8. ____. In a claim for adverse possession, possession must be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession. Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party for the purpose of establishing adverse possession.
9. ____. The acts of dominion over land allegedly adversly possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.
10. ____. Although the enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious; nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient.
11. **Adverse Possession: Words and Phrases.** A possession that is adverse is under a claim of ownership. Claim of ownership or claim of right means "hostile," and these terms describe the same element of adverse possession. The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land.
12. **Adverse Possession: Notice.** The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
13. **Adverse Possession: Title.** Title may be acquired by adverse possession though the claim of ownership was invalid and the occupant believed he was asserting legal rights only. The claim of adverse possession is founded upon the intent of the occupant, such intent being determined by his acts. Intent, even though mistaken, is sufficient where the claimant occupies to the wrong line believing it to be true and even though he does not intend to claim more than that described in the deed. The possession of the occupant is not less adverse because he took and had possession innocently and through mistake; it is the visible and exclusive possession with intention to possess the land occupied under the belief that it belongs to him that constitutes its adverse character.
14. ____: ____. Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby.
15. **Adverse Possession: Boundaries: Intent: Proof.** Where neither party considers a fence a boundary, it does not constitute evidence of adverse possession. Both parties need not consider the fence a boundary; rather, it is the adverse possessor's intent that is relevant. The placement of a fence within one's boundary line does not lead to the

relinquishment of ownership of lands outside the fence through adverse possession without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time.

16. **Adverse Possession: Titie: Time: Words and Phrases.** Title cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for the required period. The term "continuous" in the context of adverse possession means a possession for the 10-year period which is uninterrupted or stretches on without break or interruption.
17. **Adverse Possession: Streets and Sidewalks.** An individual cannot adversely possess a public way. However, when streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed.
18. **Adverse Possession.** So long as incidents of adverse possession are complied with, platted land is no less subject to adverse possession than unplatted land.
19. **Municipal Corporations: Boundaries.** According to its plain language, Neb. Rev. Stat. § 14-116 (Reissue 1997) does not govern the subdivision of property within an organized city or village. Rather, that section governs property outside of any organized city or village.
20. **Adverse Possession: Title.** The title of an adverse possessor is not derived from anything in the nature of a transfer or grant by operation of law from the former titleholder. The title of the adverse possessor is independent and relates back to the very beginning of such possession. His own possession is the source of title.
21. **Adverse Possession.** Neb. Rev. Stat. § 14-116 (Reissue 1997) has no application to the doctrine of adverse possession and is not in conflict with it.

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

Richard N. Berkshire and Steffanie N. McCarthy, of Andersen, Berkshire, Lauritsen & Brower, for appellants.

John M. Lingelbach, of Marks Clare & Richards, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Appellees Donald Wanha and Lee Wanha own property abutting the property of appellants, Robert Long and Jolane K. Olander Long. The Wanhas brought a quiet title action against the Longs, claiming adverse possession of a portion of the Longs' property, and the Wanhas prevailed. The Longs assert that the trial court erred in finding that the Wanhas adversely possessed the disputed property and that the Wanhas' alleged

adverse possession conflicts with Neb. Rev. Stat. § 14-116 (Reissue 1997), which regulates subdividing and platting. We conclude that the trial court did not err in finding that the Wanhas had adversely possessed the disputed property and that § 14-116 does not apply to the instant case. We affirm.

## I. BACKGROUND

### 1. Ownership of Lots 104 and 105 and Description of Disputed Property

The Wanhas purchased Lot 105, in Mockingbird Heights Replat, a subdivision in Douglas County, Nebraska, in 1965 and have owned Lot 105 continuously since. On December 27, 1977, Jolane Olander Long purchased Lot 104 in Mockingbird Heights Replat, which lot abuts the Wanhas' lot on the west. After their marriage, Robert Long moved into the house on Lot 104 in 1980 to live with Jolane Olander Long, but he did not acquire an interest in Lot 104 until February 15, 1996. Lot 104's chain of title from 1964 until Jolane Olander Long purchased it in 1977 is as follows: 1964 to 1966, Pacesetter Corporation; 1966 to 1968, Robert and Marie Yochim; 1968 to 1973, Victor and Catherine Brown; 1973 to 1975, Richard and Maureen Shannon; 1975 to 1977, Billy and Anita Holman.

Orchard Avenue runs along the north side of the lots, which are bounded on the south by other lots. The disputed property is a wedge-shaped piece of land bounded on the east by the true, platted boundary line between Lots 104 and 105. The west boundary of the disputed property, the "disputed property line," runs north from the south post of a fence which was removed in 1996 to a seam in the sidewalk running along Orchard Avenue.

### 2. History of Disputed Property

When the Wanhas moved into the home on Lot 105, the lot contained no sod and no sidewalk along Orchard Avenue. However, Lot 104 had sod and a sidewalk alongside Orchard Avenue, both of which stopped short of Lot 104's eastern boundary. Instead, the sod and edge of the sidewalk paralleled the disputed property line. The Wanhas later built a sidewalk along Orchard Avenue, which extended from the edge of the existing sidewalk on Lot 104 to the northeast corner of Lot 105.

The Wanhas also seeded Lot 105 and that portion of Lot 104 up to the western edge of the disputed property. They seeded the disputed property believing that it was part of Lot 105.

Sometime between 1973 and 1974, the Shannons, then owners of Lot 104, built a fence between Lots 104 and 105. The fence ran along the disputed property line from the southern property line of Lot 104 to a point east of the back of the house on Lot 104. The Shannons did not discuss the fence with the Wanhas before installing it. The Wanhas believed that the fence was located on the property line between Lots 104 and 105. The subsequent owners of Lot 104, the Holmans, did not object to the location of the fence, and the Wanhas never discussed the fence with them either. Likewise, Jolane Olander Long never discussed the fence with the Wanhas, nor did she register any concern regarding the fence's location. The fence was not modified in any way until it was removed by Robert Long in 1996.

### 3. Origins of Dispute

In the summer of 1996, Robert Long began constructing a deck behind his house on Lot 104. During the construction of the deck, he removed the fence built by the Shannons. The edge of the deck abutted the former fence line. When he started building the deck, he did not have a permit. A city inspector inspected the deck prior to its completion and told Robert Long that the deck needed to be set back 5 feet from the edge of the Longs' property line. Robert Long asked Donald Wanha whether he would approve a waiver of the 5-foot setback requirement. After asking Donald Wanha to approve a waiver, Robert Long had the property surveyed. Neither the Longs nor the Wanhas knew the location of the platted boundary line until after the survey was taken.

According to Donald Wanha, he first discovered the location of the platted boundary line in the summer of 1996 when he discovered survey flags in the area of the disputed property. Prior to that time, he had always believed that the seam in the sidewalk and the sod line, later the fence line, determined the boundaries between the lots. Robert Long did not know the location of the platted boundary until the survey was taken, but

assumed that the true boundary lay "somewhere between the houses."

After the survey was taken, the Longs and the Wanhas began contesting ownership of the disputed property.

### 4. Use of Disputed Property

According to Robert Long, Donald Wanha had told him that Donald Wanha cut the grass "about in the middle until the fence was put up." Robert Long had no other evidence as to the use of the disputed property from 1965, when the Wanhas moved in, until 1980, when Robert Long moved in. Robert Long claims that he has mowed and trimmed the disputed property since 1980 and has talked to neighbors while standing on the disputed property. The Wanhas claimed that they used and maintained the disputed property from 1965 until 1996, when Robert Long took the fence down.

The owner of Lot 106 stated that the Wanhas had maintained the disputed property for 30 years, even prior to the installation of the fence by the Shannons. The owner of Lot 106 had never seen Robert Long maintain the disputed property prior to 1996, nor had he seen anyone other than the Wanhas do so. The owner of Lot 107 also stated that he was unaware of anyone other than the Wanhas being in possession of the disputed property during the 30 years he had owned Lot 107.

### 5. Trial Court's Findings

The trial court found that the Longs' claims were not persuasive. The trial court noted that the Wanhas' claims concerning the original sod line and sidewalk seam were uncontested. The trial court also noted that the fence had remained in place until Robert Long took it down, finding that until that time, the parties recognized the fence line as the true boundary line. Accordingly, the trial court concluded that from 1965 until 1996, the boundary line was the sod/fence line, and that the Wanhas had adversely possessed the disputed property.

The trial court rendered its judgment on April 16, 1997. The Longs then filed a motion for new trial on April 28, which was denied by the trial court on July 1. The Longs filed a notice of appeal on July 30, which resulted in the instant appeal.

## II. ASSIGNMENTS OF ERROR

The Longs assert that the district court erred in (1) finding that the Wanhas had met the requirements for adverse possession of the disputed property for the statutory period when the evidence showed the Wanhas' possession was not actual, continuous, exclusive, notorious, or adverse under a claim of ownership for the full statutory 10-year period and (2) quieting title to the disputed property in the Wanhas, because such order conflicts with § 14-116, the prescribed statutory procedure affecting the plat of real estate.

## III. SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. It not only is within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Parmar, ante* p. 356, 586 N.W.2d 279 (1998).

A quiet title action sounds in equity. In an appeal of an equitable 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, 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. *Rush Creek Land & Live Stock Co. v. Chain, ante* p. 347, 586 N.W.2d 284 (1998).

Interpretation of a statute presents a question of law. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

## IV. ANALYSIS

### 1. JURISDICTION

The Wanhas contend that this court is without jurisdiction to hear the instant appeal because the Longs failed to make a timely appeal. Specifically, the Wanhas argue that since the Longs' motion for new trial was filed 12 days after the judgment was rendered, the 30-day period for filing the notice of appeal was not tolled.

In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). A timely motion for new trial suspends the time limit for filing a notice of appeal, until the motion for new trial has been disposed of by the court rendering the decision. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). However, an untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Id.*

In the instant case, the notice of appeal was filed within 30 days of the order overruling the motion for new trial. Thus, the question is whether the motion for new trial was timely filed such that it effectively tolled the time for perfection of the appeal.

Neb. Rev. Stat. § 25-1143 (Reissue 1995) states: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered . . . ." Neb. Rev. Stat. § 25-2221 (Reissue 1995) prescribes the method for computing the 10-day period:

> [T]he period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.

See *Harsche v. Czyz*, 157 Neb. 699, 61 N.W.2d 265 (1953). Thus, when the 10th day after a judgment is a Saturday or Sunday, a motion for new trial is timely filed on the following Monday. See *Fiala v. Tomek*, 164 Neb. 20, 81 N.W.2d 691 (1957).

In the instant case, the 10-day period ended on April 26, 1997, which was a Saturday. Accordingly, the motion for new trial could be timely filed on the following Monday, which was April 28. The Longs filed their motion for new trial on that date,

and thus, it was timely filed. Because their motion for new trial was timely filed, the time for perfection of their appeal was tolled, and their notice of appeal was likewise timely filed. Therefore, we conclude that this court has jurisdiction to hear the instant appeal.

### 2. Adverse Possession

The Longs argue that the Wanhas failed to establish the simultaneous and continuous existence of each element of adverse possession for the requisite period. See *Rush Creek Land & Live Stock Co. v. Chain, ante* p. 347, 586 N.W.2d 284 (1998). A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Id.*

#### (a) Actual

Actual occupancy or possession is always involved in any claim to land by adverse possession. *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959). See, also, *Dartmouth College v. Rose*, 172 Neb. 764, 112 N.W.2d 256 (1961). No particular act is required to establish "actual possession." See *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961). Rather, the acts required depend upon the character of the land and the use that can reasonably be made of it. *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993). See *Saunders v. Rebuck*, 242 Neb. 610, 496 N.W.2d 472 (1993).

In the instant case, the land was residential in character. In 1965, the Wanhas constructed a sidewalk on and seeded the disputed property. The evidence indicated that from 1965 until 1975, no one other than the Wanhas used or maintained the property. This use and maintenance was not inconspicuous. It is not necessary that a party prove a complete enclosure or that he remain continuously on the land for the statutory period, but only that the land be used continuously for the purposes to which it was by its nature adapted. *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960).

We conclude that the Wanhas actually and continuously possessed the disputed property for a period of at least 10 years.

(b) Exclusive

Possession must be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party for the purpose of establishing adverse possession. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993).

In the instant case, the evidence indicates that the Wanhas were the only persons to use the disputed property in any way from 1965 to 1975. At best, the Longs would have begun using the property in 1978. Prior to that time, there is no evidence that anyone other than the Wanhas used the property.

We conclude that the Wanhas' possession was continuously exclusive for a period of at least 10 years.

(c) Notorious

The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997). If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious. *Dugan v. Jensen, supra.* Although the enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious, see *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957); nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient, see *Brownfield v. Bleekman*, 4 Neb. (Unoff.) 443, 94 N.W. 714 (1903). See, also, *Woodcock v. Unknown Heirs of Crosby*, 92 Neb. 723, 139 N.W. 646 (1913).

In the instant case, it is clear that the Wanhas' use was not inconspicious. See, *Pettis v. Lozier*, 217 Neb. 191, 349 N.W.2d

372 (1984); *Bailey v. Mahr*, 199 Neb. 29, 255 N.W.2d 866 (1977). There was no "clandestine occupancy and concealment" of the Wanhas' claim of title. See Henry H. Foster, *Nebraska Law of Adverse Possession*, 23 Neb. L. Rev. 1, 8 (1933). The Wanhas improved the property by constructing a sidewalk and seeding the area. The owners of Lots 106 and 107 both noted that they had never seen anyone other than the Wanhas on the disputed property prior to 1996. Robert Long himself was obviously aware of the Wanhas' possession of at least part of the disputed property, since he asked Donald Wanha for a waiver of the city setback requirements.

We conclude that the Wanhas' possession was continuously notorious for a period of at least 10 years.

(d) Adverse Under Claim of Ownership

A possession that is adverse is under a claim of ownership. Henry H. Foster, *Nebraska Law of Adverse Possession*, 11 Neb. L. Bull. 378 (1933). Claim of ownership or claim of right means "hostile," and these terms describe the same element of adverse possession. *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981). The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. *Ballard v. Hansen*, 33 Neb. 861, 51 N.W. 295 (1892). The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

Title may be acquired by adverse possession though the claim of ownership was invalid and the occupant believed he was asserting legal rights only. *Erickson v. Crosby*, 100 Neb. 372, 160 N.W. 94 (1916). The claim of adverse possession is founded upon the intent of the occupant, *such intent being determined by his acts*. *Nennemann v. Rebuck*, 242 Neb. 604,

496 N.W.2d 467 (1993). Intent, even though mistaken, is sufficient where the claimant occupies to the wrong line believing it to be true and even though he does not intend to claim more than that described in the deed. *Weiss v. Meyer, supra.* The possession of the occupant is not less adverse because he took and had possession innocently and through mistake; it is the visible and exclusive possession with intention to possess the land occupied under the belief that it belongs to him that constitutes its adverse character. *Vrana v. Stuart*, 169 Neb. 430, 99 N.W.2d 770 (1959).

In the instant case, the evidence clearly indicates that the Wanhas believed that the disputed property was theirs, and treated it as such, from 1965 until the present.

The Longs argue that the Wanhas' possession of the disputed property was permissive, and thus, not hostile. Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. *McCaslin v. Meysenburg*, 228 Neb. 748, 424 N.W.2d 331 (1988). However, there is no evidence that any of the previous owners of Lot 104 gave the Wanhas any permission to use the disputed property. Thus, the Wanhas' possession was not permissive from at least 1965 until 1978, when Jolane Olander Long purchased Lot 104.

The Longs also argue that the trial court erred in relying on evidence concerning the Shannons' fence in determining that the Wanhas had adversely possessed the property. The Longs contend that there was no evidence as to whether the Shannons constructed the fence as a boundary line, and thus, that the parties did not consider it as such.

In *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993), this court addressed a situation where neither party considered a misplaced fence the boundary. This court held that where neither party considers a fence a boundary, it does not constitute evidence of adverse possession. We concluded that the Nebraska Court of Appeals had erred in relying on evidence concerning a fence in determining that one party had adversely possessed the property.

Thus, the law is clear that the placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence through adverse possession without an additional showing that those lands outside the fence have been used *by the neighboring landowner under a claim of ownership* for the requisite period of time. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Martin v. Kozuszek*, 216 Neb. 705, 345 N.W.2d 26 (1984). Both parties need not consider the fence a boundary, see *Horky v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983); rather, it is the adverse possessor's intent that is relevant. In the instant case, the Wanhas clearly considered the fence to be a boundary line, which is unlike the situation in *Thornburg* where neither party considered the fence a boundary line.

We conclude that the trial court did not err in relying on evidence concerning the fence in finding that the Wanhas adversely possessed the disputed property. Moreover, we conclude that the Wanhas' possession was continuously adverse and under a claim of right for a period of at least 10 years.

(e) Continuous

Title cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for the required period. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). The term "continuous" in the context of adverse possession means a possession for the 10-year period which is uninterrupted or stretches on without break or interruption. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). We have already concluded in our preceding analysis that the Wanhas established the simultaneous and continuous existence of the other elements of adverse possession for a period of at least 10 years, from 1965 until 1975.

Based on our de novo review, and giving due weight to the trial court's findings, we find that the Wanhas established their adverse possession of the disputed property by a preponderance of the evidence, and we conclude that the trial court did not err in so finding.

### 3. Platted and Subdivided Land and § 14-116

The Longs argue that platted and subdivided land within a municipality cannot be adversely possessed. They also allege that the Wanhas' adverse possession altered the boundary lines of a platted lot within the city limits of Omaha and thus conflicts with § 14-116.

#### (a) Platted and Subdivided Land

The law has long been that an individual cannot adversely possess a public way. See, e.g., *Teter v. Teter*, 163 W. Va. 770, 260 S.E.2d 270 (1979). However, when streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed. See, e.g., *Bauer Enterprises, Inc. v. City of Elkins*, 173 W. Va. 438, 317 S.E.2d 798 (1984); *Gammons v. Caswell*, 447 A.2d 361 (R.I. 1982); *Schlueter v. Ackerman*, 215 Md. 173, 137 A.2d 179 (1957); *Mumaw v. Roberson*, 60 So. 2d 741 (Fla. 1952); *Cook v. Langhorne*, 219 Ark. 443, 242 S.W.2d 838 (1951). This court has adopted this view. See *Schock v. Falls City*, 31 Neb. 599, 48 N.W. 468 (1891).

In *Schock*, the trial court sustained a demurrer to the plaintiff's petition. The petition had alleged that the plaintiff's land had been previously surveyed, platted, and laid out into lots, blocks, streets, and alleys. The grantors of plaintiff had enclosed and cultivated part of the platted land, including a section platted as a street, which had never been opened or prepared for public use. More than 10 years after the street had been enclosed and allegedly adversely possessed, the city of Falls City threatened to remove the plaintiff's fences and open the street to public use. This court stated, "If the allegations in the petition are true, the plaintiff has been in possession of the land in controversy adversely for a sufficient length of time to give him title by adverse possession." *Id.* at 605, 48 N.W. at 470. We held that the petition stated a cause of action entitling the plaintiff to relief.

In *Roberts v Duddles*, 47 Mich. App. 601, 209 N.W.2d 720 (1973), the appellant argued that the acknowledgment and recording of a plat creates an adverse possession estoppel between successor owners. The court rejected that argument:

"So long as the incidents of adverse possession are complied with, platted land is no less subject to adverse possession than unplatted land. To hold otherwise would defeat the historical and general application of the doctrine." *Id.* at 605, 209 N.W.2d at 722. Accordingly, we conclude that the fact Lot 104 was platted does not act to defeat the Wanhas' adverse possession claim.

(b) § 14-116

Section 14-116 states in part:

> No owner of any real estate located in an area which is within three miles of the corporate limits of any city of the metropolitan class, when such real estate is located in any county in which a city of the metropolitan class is located, and is *outside of any organized city or village*, shall be permitted to subdivide, plat, or lay out said real estate in building lots and streets or other portions of the same intended to be dedicated for public use or for the use of the purchasers or owners of lots fronting thereon or adjacent thereto without first having obtained the approval thereof by the city council of such city and no plat of such real estate shall be recorded in the office of the register of deeds or have any force or effect unless the same shall have been first approved by the city council of such city.

(Emphasis supplied.) The Longs contend that the Wanhas' adverse possession constituted an attempt to " 'subdivide, plat, or lay out . . . real estate . . . without first having obtained the approval thereof by the City Council [of Omaha].' " Brief for appellants at 23. Accordingly, they assert that the Wanhas should have sought the city council's approval prior to bringing the instant action for adverse possession and that the Wanhas' failure to do so was fatal.

The Longs admitted that the disputed property lies within the Omaha city limits. According to its plain language, § 14-116 does not govern the subdivision of property within an organized city or village. Rather, that section governs property outside of any organized city or village. Thus, the statute does not apply to the disputed property in the instant case.

Even if the property were located within 3 miles of the city limits, § 14-116 would not apply.

> [I]t is . . . thoroughly established that the title of the adverse possessor is not derived from anything in the nature of a transfer or grant by operation of law from the former title holder. The title of the adverse possessor is independent and "relates back" to the very beginning of such possession. . . . His own possession is the *source* of his title.

(Emphasis supplied.) Henry H. Foster, *Nebraska Law of Adverse Possession*, 11 Neb. L. Bull. 378, 380 (1933). See, also, *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957) (indicating that once period of limitations has run, title is vested in adverse possessor); *Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917) (stating that adverse possession of land for period of limitation operates of itself as grant of all adverse title and interests to occupants). Thus, there is nothing left for the adverse possessor to do to gain title, i.e., no application to the city or any other authority need be made, once the period of limitations has run.

It is likewise true that an adverse possessor need not make any such application prior to the running of the period of limitations. By its own language, § 14-116 applies only to the subdivision of property by its owner. Until the period of limitations has run, the adverse possessor does not own the property that is being adversely possessed. The actual owner may bring an action to quiet his or her title at any time before the period has elapsed, rendering any application of § 14-116 a nullity.

Therefore, § 14-116 has no application to the doctrine of adverse possession and is not in conflict with it.

## V. CONCLUSION

We conclude that the Wanhas adversely possessed the disputed property and that § 14-116 does not apply to claims of adverse possession. Therefore, we affirm the district court's decision in all regards.

AFFIRMED.

MILLER-LERMAN, J., not participating.

# STATE OF NEBRASKA, APPELLEE, v. MICHAEL E. JOHNSON, APPELLANT.

587 N.W.2d 546

Filed December 31, 1998. No. S-97-849.

1. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution.
2. **Criminal Law: Constitutional Law: Trial: Witnesses: Juries.** A violation of an accused's right of confrontation occurs when a defendant in a criminal case is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.
3. **Constitutional Law: Trial: Witnesses.** The right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial.
4. **Constitutional Law: Trial: Witnesses: Juries.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
5. **Trial: Witnesses: Appeal and Error.** The denial of a defendant's right of confrontation is subject to harmless error analysis.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that error was harmless beyond a reasonable doubt.
8. **Constitutional Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, KAREN FLOWERS, Judge. Judgment of Court of Appeals reversed and remanded for a new trial.

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

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Following a jury trial in the district court for Lancaster County, Michael E. Johnson was convicted of first degree sexual assault and use of a weapon to commit a felony. He was sentenced to consecutive sentences of 6 to 10 years' imprisonment on the sexual assault conviction and 3 to 5 years' imprisonment on the weapon conviction. The convictions and sentences were affirmed by the Nebraska Court of Appeals in a memorandum opinion filed on May 14, 1998, and the case is before us on Johnson's petition for further review. We conclude that prejudicial error occurred and therefore reverse, and remand for a new trial.

## FACTS

At approximately 11 p.m. on July 30, 1996, a woman whom we will refer to as "C." contacted the Lincoln Police Department and reported that she had been sexually assaulted at knifepoint in her apartment earlier that evening. She identified the assailant as "Mike," who worked at a Lincoln cafe. A neighbor told police that she had observed Johnson inside C.'s apartment approximately 5 minutes before observing C. run out of the apartment, crying and upset, stating that Johnson had sexually assaulted her. The neighbor directed police to Johnson's nearby home, where they took him into custody and placed him in a police vehicle. C.'s neighbor observed Johnson in the vehicle and identified him as the person she had seen in C.'s apartment earlier in the evening. During initial police questioning after being advised of his *Miranda* rights, Johnson denied being present in C.'s apartment or having any sexual contact with her on July 30. Police searched Johnson's home pursuant to a warrant and seized articles of clothing and two kitchen knives which matched the general description of the knife which C. reported that Johnson had used in the assault.

Johnson's counsel sent a letter to the State on or about February 13, 1997, with Johnson's knowledge and consent. The

letter stated that Johnson and C. were acquainted prior to the date of the alleged assault and that they had worked together for a short time at the cafe which Johnson managed. The letter stated that during this period, the two had consensual sexual relations. The letter also recited Johnson's version of the events of July 30, 1996, as related to his counsel. In that account, Johnson claimed that while visiting C. at her apartment on that evening, she told him that her lights had been shut off because she was unable to pay her electric bill. According to Johnson, C. offered sex in exchange for money to pay the electric bill, and Johnson agreed. After what Johnson described as consensual sexual intercourse, he told C. that he did not have the money she had requested but would give it to her at a later date. He contended that this caused her to become upset and report a sexual assault. Through his counsel, Johnson offered to take a polygraph examination to confirm the truthfulness of his version of what had occurred. The State declined his offer. The trial court sustained the State's motion in limine regarding Johnson's offer to take a polygraph examination and refused to permit Johnson to testify regarding the conversation with his counsel, which led to the writing of the aforementioned letter, on the proffered ground that it constituted a prior consistent statement. The court also granted the State's oral motion in limine, to which Johnson did not object, precluding questioning regarding whether C. had ever been incarcerated.

In the State's opening statement, it told the jury that the evidence would establish that C. was sexually assaulted by Johnson at knifepoint. Johnson told the jury that the evidence would establish that the two had consensual sexual intercourse and that C. became upset when Johnson subsequently told her that he did not have the money he had promised her.

During C.'s direct examination at trial, she testified that she became acquainted with Johnson when she briefly worked at a restaurant which he managed in May 1996. She testified that Johnson walked into her apartment without knocking at some time between 9 and 10 p.m. on July 30. She stated that after a conversation lasting approximately 10 minutes, she told Johnson she was going to bed and he left the apartment, but he returned about 10 minutes later with some cigarettes. C. testi-

fied that when she repeated that she was going to bed, Johnson threatened her with a knife he had pulled from his clothing, pushed her up the stairs of her apartment, and forced her to have sexual intercourse against her will. During the assault, C. heard her neighbor knocking on her door. According to C., after the alleged assault, Johnson threatened both her and her daughter and walked downstairs. After remaining upstairs for a period of time, C. went to the back door, asked her neighbor to retrieve her daughter, and reported the assault to the police.

During her direct examination, C. stated that the electrical service in her apartment had been turned off for approximately 1 week prior to July 30, 1996, because she had not paid a previous bill. However, she stated that she had planned to get the electricity turned back on at the first of the month. During cross-examination, C. testified that she was receiving state aid and was unemployed at the time of the assault, but she denied having financial problems. C. admitted that payment of the electric bill on the first of August would have left her with only $128 to live on during the month, but stated that her mother would have assisted her financially if requested and insisted that she was not experiencing financial problems as of July 30.

At this point, Johnson asked the court to reconsider its pretrial ruling barring evidence of C.'s incarceration. In an offer of proof made out of the presence of the jury, Johnson questioned C. and established that from August 5 through 8, 1996, she served jail time in lieu of paying fines on traffic citations and that she had written a number of insufficient-fund checks between April and July 1996. The trial court sustained the State's objection in part, permitting Johnson to establish only that C. had unpaid fines as of July 30. When cross-examination of C. resumed, she acknowledged owing debts to the county court as of the date of the alleged assault but reiterated that she had no financial problems at that time.

An emergency room physician who examined C. soon after she reported the assault testified that he found no bruises, scratches, abrasions, or other evidence of trauma. He stated that the absence of such evidence could be consistent with either sexual assault or consensual sexual intercourse. A forensic serologist testified that on the basis of her analysis of tissue

samples, Johnson could not be excluded as the source of hair, blood, and semen collected from C.'s clothing and apartment.

Johnson testified on his own behalf as the last witness at trial. He stated that he met C. in 1995 through his female companion, who then worked with C. at a fast food restaurant. Later, C. moved to an apartment located approximately one block from Johnson's home. Johnson testified that in May 1996, he hired C. to work at the restaurant he managed, but she quit after working 2 or 3 weeks. Johnson stated that he visited C.'s apartment on several occasions prior to July 30 and that on one of those occasions, he had consensual sexual contact with C. after he offered her money.

Johnson testified that on the afternoon of July 30, 1996, he had been replacing window glass in a car, using tools which included pliers, a "door handle windshield clip remover," and a knife. Johnson stated that he had these tools with him when he went to C.'s apartment between 9:30 and 10 that evening. He testified that when he knocked on the door, C. let him in to the apartment and they had a brief conversation. He testified that he left briefly to purchase cigarettes at C.'s request. Johnson stated that when he returned to the apartment, he and C. smoked marijuana and talked for approximately 10 minutes. According to Johnson, C. told him that her electricity had been turned off because of her failure to pay a bill and asked for his financial help. Johnson said that he told C. he would give her money in exchange for sex and that she agreed. He further stated that after having consensual sexual intercourse with C., he told her that he did not have the money he had promised her but would give it to her when he got paid in 2 days. Upon hearing this, C. became upset and Johnson left her apartment and returned to his home, where he was later arrested. He testified that when initially questioned by police, he denied having sexual relations with C. because he did not want his companion to learn of what had occurred.

Prior to the closing argument and after the court had overruled Johnson's offer of the aforementioned letter written by his attorney to the State in February 1997, Johnson moved that the State be prohibited from arguing to the jury that Johnson changed his story after reading the reports in the case, after the

taking of the depositions, or after listening to the evidence. The State then stated that it thought Johnson's request "was fair." The court stated that when and how Johnson may have changed his story was not for the jury to know. The State appeared to agree with this, indicating that it would argue that Johnson had changed his story after his initial questioning by police "without suggesting a time frame."

During closing arguments, the State made the following statement:

> I also anticipate that [the defense] will argue to you that [Johnson]'s version in court is corroborated or substantiated by other evidence in this case, and to a large part, I think that is true. But gee, isn't it pretty easy when you have ten months in the luxury of sitting through all of the witnesses, to conform your story to what those people say? It's quite a luxury.

Johnson moved for a mistrial immediately following this statement on the ground that it violated the court's prior ruling. The trial court overruled both the motion and Johnson's subsequent request that the jury be instructed to disregard the statement. In the State's rebuttal argument, it stated: "There is no evidence that [C.] is a desperate woman. Her lights are out. She admits her lights are out. She has arrangements to have them back on two days after this would have happened. . . . She is not desperate for anything."

## ASSIGNMENTS OF ERROR

Johnson originally asserted six assignments of error, all of which the Court of Appeals resolved against him. In his petition for further review, Johnson contends that the Court of Appeals erred in concluding that the restrictions placed upon the cross-examination of C. did not violate his constitutional right to confrontation and in finding that the State's closing argument was not improper, prejudicial, and in violation of his constitutional rights.

## ANALYSIS

"Any person who subjects another person to sexual penetration . . . without consent of the victim . . . is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-319(1) (Reissue

1995). Johnson admitted that he had sexual intercourse with C. on July 30, 1996, and his guilt or innocence therefore depended upon whether the State met its burden of proving that the act occurred without the consent of C. Other than Johnson and C., there were no witnesses to what occurred and no physical evidence of force. Their testimony as to whether the act was forced at knifepoint or consensual in exchange for a promise of money was in direct conflict, and each version was supported by at least some circumstantial evidence. Thus, the jury's determination rested upon whether it believed C.'s testimony or that of Johnson.

The issue before us is whether the order of the district court prohibiting Johnson from eliciting on cross-examination that C. had served jail time in lieu of paying court fines several days after the alleged assault and had written insufficient-fund checks during a 4-month period prior thereto violated Johnson's constitutional right of confrontation. The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution. See, *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996); *State v. Hartmann*, 239 Neb. 300, 476 N.W.2d 209 (1991). The U.S. Supreme Court has held that a violation of this right occurs when a defendant in a criminal case is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness. *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

*Olden* involved a prosecution for rape and forcible sodomy in which the defendant contended that the sex acts were consensual. The alleged victim testified that the defendant raped her and then drove her to a location where she was released. Her testimony was corroborated by a male witness who testified that he observed the woman get out of the defendant's car and that

she immediately told him she had been raped. The woman testified at trial that she lived with her mother at the time of the assault. On cross-examination, the defendant sought to elicit the fact that the woman was living with and having an extramarital affair with the corroborating witness at the time of the alleged rape, arguing that this evidence established a motive on the part of the woman to lie about being raped. The trial court acknowledged the relevance but excluded the evidence on the ground that the relevance was outweighed by the potential for prejudice. The Supreme Court held that this ruling violated the defendant's right to confrontation, concluding: "It is plain to us that '[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.' " 488 U.S. at 232, quoting *Delaware v. Van Arsdall, supra.*

This court reached a similar conclusion in *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982), an appeal from a conviction for first degree sexual assault in which the central issue of whether the sex act was forced or consensual rested entirely on the credibility of the defendant and his alleged victim. The woman testified on direct examination that she moved from her residence on the day following the assault out of fear that the defendant would return. The district court precluded the defendant from eliciting on cross-examination that the woman had changed residences numerous times prior to the alleged assault. During closing argument, the prosecutor argued that the woman's leaving her residence was " 'corroboration for her side of the story' " and that the defendant had " 'been able to offer no explanation as to why she would suddenly move unexpectedly away like this. She moved because she had been raped, and she was afraid of him. . . .' " *Id.* at 626, 316 N.W.2d at 320.

We noted that the right of cross-examination " 'is implicit in the constitutional right of confrontation' " and " ' "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." ' " *Id.* at 627, 316 N.W.2d at 320, quoting *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Further, we recognized that " '[t]he right of a defendant to engage in a searching and wide-

ranging cross-examination is an essential requirement for a fair trial.' " *State v. Thaden*, 210 Neb. at 627, 316 N.W.2d at 321, quoting *United States v. Jones*, 557 F.2d 1237 (8th Cir. 1977). We concluded that in view of the final argument made by the prosecuting attorney, "the restriction upon the defendant in his cross-examination of the prosecutrix was unreasonable, an abuse of discretion, and constituted prejudicial error." *Id.* at 628, 316 N.W.2d at 321.

*Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), and *State v. Thaden, supra*, involved a total prohibition of the right to cross-examine on a specific subject. In the present case, Johnson's counsel was permitted to cross-examine generally on the issue of C.'s financial condition, but was restricted from specific inquiry regarding the fact that she wrote insufficient-fund checks and served jail time in lieu of paying traffic fines.

In *State v. Privat*, 251 Neb. 233, 248, 556 N.W.2d 29, 38 (1996), we held that

> an accused's constitutional right of confrontation is violated when *either* (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

(Emphasis supplied.)

In this case, the Court of Appeals reviewed the trial court's action to determine whether it had abused its discretion in excluding the evidence under Neb. Evid. R. 403, reasoning as follows:

> The question that must be asked here is the extent to which the fact that [C.] served three days in jail rather than pay fines proves that she was not truthful in her denial of financial desperation—beyond that already prove[d] by the evidence which was admitted about her financial condition. Accepting jail time, in lieu of paying a fine, obviously says something about [C.]'s financial condition because it would be highly extraordinary for a financially

> sound man or woman to spend three days in jail in lieu of paying a traffic fine, particularly when it meant leaving behind a 2-year-old child. But, the probative value of such evidence as well as the need for it is diminished by other evidence in the record. Specifically, [C.] admitted the core of Johnson's premise of "financial desperation." She admitted that her electricity had been shut off for two weeks before July 30, that she was illuminating her house with candles and a kerosene lamp, that she was receiving state aid for herself and her baby, and that she was unemployed. She also admitted that if she had paid the $175 to turn her electricity back on, she would have had only $128 for herself and her baby to live on for the rest of August. Thus, while [C.] testified that she did not have "any financial problems," the jury did not need evidence that [C.] spent three days in jail sitting out traffic fines to conclude the argument that her financial situation was "desperate" was sound. Furthermore, the evidence that [C.] spent time in jail is prejudicial in two respects: (1) it portrays her in a negative light as someone who could not manage her own affairs, and (2) it bespeaks poorly as to her ability to raise her child. Finally, it is after-the-fact evidence, as she started serving the time in August of 1996.

The Court of Appeals thus concluded that while the fact that C. served jail time in lieu of paying traffic fines was "somewhat probative" of her financial condition, it was not essential because there was "more than ample evidence in the record to allow the jury to reach the rather obvious conclusion that her denial of financial problems was either groundless or a monumental denial of reality." Similarly, the court held that although evidence of C.'s writing insufficient-fund checks during a 4-month period prior to the alleged assault said "something about her financial condition or at least her money management skills" and that it "probably should have been admitted," its exclusion was harmless error because "[t]here was ample evidence in the record for defense counsel to argue that [C.]'s financial condition was 'desperate,' 'poor,' 'unstable,' or virtually any other adjective he wanted to use."

In the instant case, the Court of Appeals did not apply the test in *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996), or otherwise discuss the issue of whether the restrictions on cross-examination impinged upon Johnson's right to confrontation. We conclude that the second prong of the *Privat* test is applicable and leads to the conclusion that Johnson was denied the right to effectively cross-examine C. regarding her financial condition at the time of the alleged assault. Although C. testified that she had a limited income and unpaid bills, she specifically denied that she had "financial problems" and stated that her mother would have assisted her financially, if requested to do so.

By arguing that "there is no evidence that [C.] is a desperate woman" and that she could have made arrangements to restore electricity in her home within 2 days after the alleged assault, the State was clearly asking the jury to draw an inference that C. would never have agreed to have sex with Johnson in exchange for money, as he contended. It would have been considerably more difficult for the jury to draw this inference if it had known that C. had been writing insufficient-fund checks for months prior to the alleged assault and that within a few days thereafter, she served jail time in lieu of paying traffic fines. While the Court of Appeals correctly notes that there is other evidence which calls into question C.'s denial that she was in a desperate financial condition, none of it is as persuasive as the evidence which the trial court excluded. For example, C.'s testimony that she could have obtained financial help from her mother to meet her August 1996 expenses is seriously undermined by the fact that she served jail time in lieu of paying traffic fines during that month. Thus, we conclude that the exclusion of this evidence violated Johnson's right of confrontation because a reasonable jury would have received a significantly different impression of C.'s credibility had Johnson been permitted to pursue the proposed line of cross-examination.

The denial of a defendant's right of confrontation is subject to harmless error analysis. *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *State*

*v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998); *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). An erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that error was harmless beyond a reasonable doubt. *State v. Buechler, supra.* Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison, ante* p. 190, 583 N.W.2d 31 (1998).

As we have noted previously, the outcome in this case depended almost entirely upon whether the jury believed C.'s testimony that Johnson forcefully assaulted her, or Johnson's testimony that C. consented to sex in exchange for money. We agree with the Court of Appeals' statement that the properly admitted evidence did not overwhelmingly establish Johnson's guilt. Accordingly, we cannot say that the error we have noted was harmless beyond a reasonable doubt. The trial court's refusal to permit Johnson to cross-examine C. on the issues of insufficient-fund checks and serving jail time in lieu of paying traffic fines constituted reversible error that entitles Johnson to a new trial. Accordingly, we do not reach the other issue raised by Johnson in his petition for further review.

REVERSED AND REMANDED FOR A NEW TRIAL.

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## DOUG JORN, APPELLANT, V. PIGS UNLIMITED, INC., AND FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLEES.

587 N.W.2d 558

Filed December 31, 1998. No. S-97-1270.

1. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.

2. ____: ____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Words and Phrases.** "Earning power" is not synonymous with wages, nor is it synonymous with loss of physical function, but is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the tasks required by the work, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.
4. **Workers' Compensation.** When an employee sustains an occupational disease in the course of his or her employment, which disease permanently restricts the return to his or her prior type of employment, the employee may recover for proven loss of earning power or capacity without establishing a permanent physical impairment to the body as a whole.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Todd D. Bennett, of Rod Rehm, P.C., for appellant.

Anne E. Winner, of Keating, O'Gara, Davis & Nedved, P.C., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

Doug Jorn suffers from reactive airways dysfunction syndrome, an occupational disease which arose out of and in the course of his employment with Pigs Unlimited, Inc., due to long-term exposure to "hog dust." Relying upon our opinion in *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986), the Workers' Compensation Court held that in order to apply the measure of damages for loss of earning capacity, there must first be a permanent physical impairment to the body as a whole. The compensation court found no evidence of a permanent physical impairment and, thus, denied Jorn recovery for loss of earning power or capacity.

## SCOPE OF REVIEW

Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Gibson v. Kurt Mfg., ante* p. 255, 583 N.W.2d 767 (1998).

In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the higher appellate court reviews the findings of the single judge who conducted the original hearing. *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998).

## FACTS

Jorn worked for Pigs Unlimited from 1976 until he terminated his employment on December 15, 1995. Jorn was responsible for overseeing the entire pig operation, and he, his wife, and one other part-time worker performed all the physical labor. Jorn was paid $1,200 biweekly; he received a housing subsidy, a $50-per-month automobile allowance, free utilities, and life and health insurance; and he earned profit sharing of $1.30 for each pig produced.

The Pigs Unlimited facility consists of four buildings, or "confinements," the first of which houses 400 adult animals. The second building is a farrowing house which houses 80 adult animals and between 400 and 500 piglets. There are also two buildings used as nurseries. One houses 400 to 600 piglets, and the other houses 600 to 800 piglets. An addition onto one of the buildings houses approximately 150 adult animals. The pigs are kept in pens located in each building.

Each confinement contains a static-pressure ventilation system, with fans which draw air in from the outside as needed. Jorn testified that each confinement was small and enclosed, and became humid given the number of animals kept inside. The confinements were often filled with feed dust and gas emitted from the animals' waste. Feed dust was constantly in the air, and Jorn testified that anyone working inside the pens would be brown with dust within an hour.

A mask worn by Jorn filtered out the heaviest portion of the dust. Jorn alleged, however, that he was exposed to chemicals when the animals were sprayed for mange or mites and when they were given medication. Jorn stated that in 1994, he had an increased exposure to dust, fumes, and pig waste, which was attributed to a change in the handling of the manure. At that time, the lagoon into which the manure was dumped was "getting out of control," and a truck was used to haul the manure

away from the site. This disposal procedure required Jorn to have more direct contact with the manure and increased the concentration of manure gases in the buildings.

In the fall of 1994, Jorn sought medical attention because he was experiencing breathing difficulties. He complained to Dr. R.L. Burghart that he was experiencing tightness in his chest, having difficulty breathing on exertion, and coughing up phlegm. Jorn complained of having discomfort when he was inside the pigpens, and at times, he had to go outside because he felt as if he might pass out from choking. Burghart confirmed Jorn's respiratory problems and referred him to Dr. Susanna Von Essen for treatment.

Von Essen's initial recommendation was that Jorn try an improved air-filter mask. When Jorn's breathing did not improve, Von Essen recommended that he stay away from his working environment. Von Essen made a "progress note" in her records stating that Jorn was being treated for "airways disease secondary to hog handling." She noted that Jorn had changed his respiratory protection while working with the hogs approximately 1 month before, but continued to have the same symptoms. Von Essen cautioned Jorn that the best way to alleviate his symptoms would be to go into a different line of work, in which he was not exposed to hog-confinement areas.

Von Essen completed a workers' compensation medical report on December 12, 1996. In this report, Von Essen indicated that Jorn had reached maximum medical improvement, but opined that there was no evidence for a finding of permanent impairment. Von Essen stated that Jorn's reactive airways dysfunction syndrome would likely become symptomatic again if he continued to work in hog confinements. She concluded that vocational retraining would be in his medical best interest.

In January 1995, Jorn was examined by Dr. Jeremiah Donovan because he was feeling tired, fatigued, and listless, and because a prior test revealed that he had an elevated concentration of "ALT" enzymes, which is symptomatic of liver disease. Donovan wrote to Burghart, suggesting that Jorn not be exposed to his work environment for 6 weeks to see whether his enzyme levels would decrease. If Jorn was unable to get out of

the pig business for 6 weeks, Donovan suggested that he be prescribed medication.

On March 13, 1996, Donovan wrote to Ross Smith, a vocational rehabilitation counselor, to inform him that Jorn had taken a temporary hiatus from working inside the hog confinements. He stated:

> In terms of your questions of any physical limitations or restrictions, I believe that he should try to avoid any toxin exposure whether it be inhaled or by direct skin contact. These things that have potential to lead to hepatotoxicity for him may not be toxic for most people in this work environment but certainly something has triggered off a change in his liver and the fact that when he's removed from the workplace his liver tests improve would suggest that it's something in his work environment that he's exposed to. His actual diagnosis then [would] be non-alcoholic steatohepatitis, possibly toxin induced.

Donovan predicted that Jorn might develop cirrhosis of the liver if he continued his exposure to hog confinements. Donovan could not opine that Jorn's exposure to chemicals and the environment at Pigs Unlimited was the sole etiology of his liver disease.

Dr. John Poterucha, of the Mayo Clinic, also evaluated Jorn regarding his liver disease. Poterucha stated that "[t]he question is whether or not his exposure in the hog confinement areas is contributing to [his liver disease]. I explained to him that it is impossible to be sure but would strongly recommend that he be removed from this environment for a period of at least three months."

On January 11, 1997, Burghart concluded that Jorn's liver disease appeared to be the result of long-term exposure to hog dust. He also concluded, to a reasonable degree of medical certainty, that Jorn's industrial asthma and liver disease were caused by, significantly contributed to, aggravated by, and/or a direct result of the hog-confinement employment with Pigs Unlimited. Burghart found that to avoid exacerbation or aggravation of Jorn's condition, Jorn should not have any further exposure to hog dust.

Subsequently, Jorn filed suit against Pigs Unlimited, claiming that he was entitled to workers' compensation benefits because of the medical problems he was experiencing. Jorn's amended petition alleged that he sustained an occupational disease arising out of and in the course of his employment with Pigs Unlimited "when he sustained liver disease and chronic obstructive pulmonary disease from exposure to hog dust."

At the time of the hearing before the trial court, Jorn continued to be treated by Burghart. Jorn testified that he was treating his reactive airways dysfunction syndrome by using inhalers when needed and by staying away from anything that agitated his symptoms. Jorn stated that he continued to have discomfort when exposed to any kind of smoke or dust and that he had trouble breathing upon physical exertion. He alleged that he was "out of air" whenever he performed any type of heavy physical labor. Jorn also testified that since quitting his job with Pigs Unlimited, he had worked as a substitute teacher in the Omaha public school system for 2 weeks, earning $75 per day. At night, he worked as a telemarketer and earned approximately $120 per week.

The trial court found that Jorn had been employed by Pigs Unlimited as a hog-confinement manager and that he suffered an occupational disease arising out of and in the course of his employment. The trial court attributed Jorn's occupational disease to long-term exposure to hog dust, which resulted in reactive airways dysfunction syndrome. The trial court found that the medical evidence did not preponderate in favor of Jorn's liver disease claim.

The trial court determined that Jorn's injury had occurred on December 15, 1995, when Jorn terminated his employment, and that Jorn was entitled to benefits provided under the Nebraska Workers' Compensation Act. It also concluded that there was not sufficient evidence to entitle Jorn to temporary or permanent benefits under the Nebraska Workers' Compensation Act and that Jorn had no periods of temporary total disability through the end of his employment with Pigs Unlimited. The trial court stated that it could speculate that during the term of subsequent employment, Jorn had earned less than while he was working

for Pigs Unlimited, but that there was not sufficient evidence of his earnings to allow a calculation of temporary partial disability. The trial court found that from the evidence it was clear that the physicians had recommended Jorn leave his employment in the hog-confinement business and that he was permanently restricted from returning to such employment because exposure to hog dust would likely cause recurrent symptoms of his reactive airways dysfunction syndrome. Von Essen found no medical evidence of permanent impairment and did not give Jorn a whole-body permanent functional impairment rating. Relying on our opinion in *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986), the trial court found that without a determination of permanent functional impairment, Jorn could not recover for any loss of earning power or capacity.

On appeal to a three-judge review panel, the review panel found no evidence of permanent physical impairment by any of the medical witnesses and affirmed the trial court's determinations.

## ASSIGNMENTS OF ERROR

Summarized and restated, Jorn asserts that the Workers' Compensation Court erred as a matter of law (1) in finding that there was not sufficient evidence to entitle Jorn to permanent partial disability payments; (2) in finding that there must be a physical impairment of the body as a whole to determine the benefits due under the Nebraska Workers' Compensation Act; (3) in finding that Jorn did not have a loss of earning power and, thus, was not entitled to a loss of earning power evaluation, since Jorn was permanently restricted from returning to the hog production industry; and (4) in finding that a permanent restriction such as that assigned to Jorn does not equate to a loss of earning power.

## ANALYSIS

Here, the issue is whether Jorn, who has no medically diagnosed permanent physical impairment, but who has an occupational disease which permanently restricts him from returning to his former work, can recover for any loss of earning power attributable to that occupational disease. This is a question of law. Regarding questions of law, an appellate court in a work-

ers' compensation case is obligated to make its own determinations. *Gibson v. Kurt Mfg., ante* p. 255, 583 N.W.2d 767 (1998).

In our analysis of this issue, we are governed by the following principle: "Earning power" is not synonymous with wages, nor is it synonymous with loss of physical function, but is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the tasks required by the work, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. See, *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987); *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980); *Snyder v. IBP, Inc., supra*; *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W.2d 878 (1998).

Neb. Rev. Stat. § 48-151 (Reissue 1993) states:

> (3) The term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed;
>
> (4) The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment.

It is undisputed that Jorn suffered an occupational disease which arose out of and in the course of his employment with Pigs Unlimited. Nevertheless, the Workers' Compensation Court did not compensate Jorn for any alleged loss of earning power or capacity. Relying upon our decision in *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986), the trial court held that since Von Essen had concluded that Jorn suffered no permanent impairment of the body as a whole, he was not entitled to be compensated for loss of earning power or capacity. Jorn argues that he has experienced a loss of earning power or capac-

ity as a result of this occupational disease and should, therefore, be compensated for his loss.

In *Snyder*, a meat-industry worker injured his shoulder during the scope of his employment. He was awarded temporary total disability and certain medical and hospital expenses. Snyder had seen several doctors in regard to recurring shoulder pain. One doctor opined that Snyder was in too much pain to really go back to work but that his condition would improve. Another opined that in light of the work he had done during the summer, he could not be having too much trouble with his shoulder. On appeal, we considered whether the Workers' Compensation Court erred in finding that Snyder's disability was not permanent. We interpreted the medical testimony to mean that Snyder suffered no permanent disability and thus affirmed the then Workmen's Compensation Court's finding that Snyder did not have any loss of earning power which could be attributed to his work-related injury.

We held that once it is determined that no permanent disability, that is to say, no permanent physical impairment of the body as a whole, resulted from the subject accident, then it necessarily follows that no loss of earning power or capacity could result from that accident. In other words, unless it could be shown that the person had suffered a permanent physical impairment to the body as a whole, no award could be made for loss of earning power or capacity.

In the present case, the trial court noted that many occupational respiratory diseases can and do manifest during the course of certain types of employment which subsequently restrict an employee from returning to that type of employment. Jorn has an occupational disease which exhibits no permanent impairment, but which will likely reoccur if he returns to his former employment.

If the requirement in *Snyder* applies, Jorn cannot recover for loss of earning power or capacity because there was no evidence introduced which proved that he sustained a permanent physical impairment to the body as a whole. However, as we compare the facts in *Snyder* to the case at bar, we conclude that *Snyder* is distinguishable. The medical evidence established that Snyder sustained no permanent impairment to his shoulder.

Both doctors who evaluated Snyder opined that his injury would improve. Further, Snyder did not have an occupational disease that permanently restricted him from returning to his previous type of employment.

In some regards, occupational diseases are different from injuries to scheduled members. The practical consequence of an occupational disease is that it can result in an impairment of earning capacity even after the disease is no longer symptomatic. The employee who has been trained in one occupation but who cannot return to that occupation because the employee will become sick or disabled if he returns, obviously, must pursue another occupation. That same employee may find it difficult, if not impossible, to obtain a medical opinion that he has suffered a permanent impairment of the body as a whole, since the employee is symptomatic only while at work. When not at work, the employee is asymptomatic and appears healthy.

As we previously noted, "earning power" is not synonymous with wages, but includes the worker's general eligibility to procure and hold employment, the worker's capacity to perform the tasks required by the work, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. See, *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987); *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980); *Snyder v. IBP, Inc., supra*; *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W.2d 878 (1998). We therefore hold that when an employee sustains an occupational disease in the course of his or her employment, which disease permanently restricts the return to his or her prior type of employment, the employee may recover for proven loss of earning power or capacity without establishing a permanent physical impairment to the body as a whole.

Other courts which have evaluated the permanency of occupational diseases which are symptomatic only when the employee returns to the same work environment have also concluded that the employee has a claim for wage-loss compensation for purposes of workers' compensation.

In *State ex rel. v. Indus. Comm.*, 76 Ohio St. 3d 272, 667 N.E.2d 392 (1996), a worker developed industrial bronchitis due to exposure at work to a caustic soda solution. The worker was subsequently fired for absenteeism and tardiness, and he filed a workers' compensation claim seeking lost wages. It was medically established that the worker suffered from an occupational disease caused by repeated exposure to caustic soda and that the worker had reached maximum medical improvement. The worker was no longer symptomatic, but the doctor expected that the worker would once again have pulmonary symptoms if he were exposed to the caustic soda. The doctor concluded that the best solution from a medical standpoint was to prohibit any exposure to caustic soda mist or vapors.

Compensation for lost wages was denied because the hearing officer found that the worker did not suffer from permanent physical impairment, and therefore, loss of wages was not attributable to his occupational disease. One of the issues on appeal was whether the industrial commission had abused its discretion by denying compensation because the industrial bronchitis had resolved itself. The commission had apparently reasoned that because the worker no longer suffered the symptoms of industrial bronchitis, there was no causal connection between his occupational disease and his claimed wage loss. In reversing the decision, the appellate court concluded that where the medical evidence establishes that the worker's medical condition prohibits a return to his former position of employment and the worker suffers a loss of wages as a result thereof, such worker has a legitimate claim for wage-loss compensation.

In *Dayron Corp. v. Morehead*, 509 So. 2d 930 (Fla. 1987), a machinist developed contact dermatitis as a result of using cutting oils in the course of his employment. At the compensation hearing, the physician testified that the claimant had a permanent sensitivity to the cutting oils and would be unable to work when exposed to them, but would have no permanent impairment if not exposed. Florida law required that there be a finding of permanent physical impairment, as defined in the American Medical Association guidelines, prior to allowing a claimant to recover for economic loss. Even though the guidelines did not characterize the claimant's condition as permanent, the Florida

Supreme Court determined that he suffered from a permanent physical disability. The court noted there was confusion with regard to the terms "impairment" and "disability." The court concluded that "impairment" was a medical assessment, while "disability" was a legal issue. Because Florida statutes provided for compensation for disability and it had already been concluded that the claimant suffered from a permanent physical disability, the court found that the claimant was entitled to compensation even though his illness was not symptomatic if he did not return to his prior working conditions.

Courts which have evaluated loss of wages attributable to an occupational disease which is not perpetually symptomatic but which prohibits the employee from returning to work have concluded that a finding of physical impairment, per se, is not necessary for determination of benefits. Those courts have required that the claimant must prove that the occupational disease caused the loss of wages.

In *Frit Industries v. Langenwalter*, 443 N.W.2d 88 (Iowa App. 1989), a maintenance worker was exposed to a toxic level of lead and developed lead poisoning. Although the claimant's doctor required him to remain off work for 2 weeks, his employer ordered the claimant to return to work or be fired. The claimant did not report to work and ultimately lost his job. At the time of trial, although the claimant was not symptomatic, the compensation court found that he suffered from an occupational disease and was 25-percent industrially disabled.

On appeal, the employer claimed that the compensation court erred in finding the claimant had an industrial disability of 25 percent of the body as a whole. Pursuant to Iowa case law, the term "disability" included loss of earning capacity and not merely physical or functional disability. The appellate court noted that although the claimant had not suffered any permanent physical disability as a result of the former lead intoxication, he had suffered a loss of earning capacity proximately caused by an occupational disease, because the claimant was required to refrain from working in environments where he was exposed to lead. The appellate court concluded that while not permanently physically impaired, the claimant had suffered

economic hardship due to the lead intoxication, which justified a finding of 25-percent industrial disability.

In *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 728, 403 S.E.2d 548, 549 (1991), the claimant developed " 'chronic hand eczema' " from exposure to chemicals and coolants that she used at work as a machinist. Her eczema was exacerbated by chemical exposure and greatly improved when she ceased work. A doctor testified that if the claimant continued to be exposed to the chemicals, she could have problems with eczema for an indefinite period of time. Another physician concluded that the claimant was fully capable of working in another capacity where exposure to these chemicals was not necessary. It was not disputed that the claimant suffered from an occupational disease. Without making a finding of permanent physical impairment, the court concluded that any reduction in her earning capacity was the result of an occupational disease and awarded benefits.

## CONCLUSION

Jorn's occupational disease prevents him from returning to a job which he held for 19½ years. He is permanently restricted from this prior form of employment in that if he returns to it, his respiratory symptoms will likely reappear. For these reasons, we hold that if a claimant suffers from an occupational disease which permanently restricts the claimant from returning to his or her prior type of employment, a finding of a permanent impairment of the body as a whole is not required in order for the claimant to recover any proven loss of earning power or capacity.

The question is what must be done in this case to resolve the issue of whether Jorn has sustained an impairment of earning power or capacity. Initially, there needs to be a determination whether Jorn qualifies for vocational rehabilitation. If Jorn meets such qualifications, then vocational rehabilitation is the next step. Following vocational rehabilitation, if appropriate, the trial court should make a determination of Jorn's impairment of earning power or capacity, if any. Unlike the rule discussed in *Gibson v. Kurt Mfg.*, *ante* p. 255, 583 N.W.2d 767 (1998), a determination of earning capacity should be made fol-

lowing rehabilitation. Whether there has been a reduction of loss of earning power will not depend upon whether there has been a decrease of Jorn's whole-body impairment, since none was assessed.

In the event that Jorn does not qualify for vocational rehabilitation, the trial court should proceed with a determination of whether Jorn has sustained an impairment of earning power.

The judgment of the Workers' Compensation Court is reversed, and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. JOHN L. LOTTER, APPELLANT.
587 N.W.2d 673

Filed January 8, 1999. Nos. S-96-297, S-96-298, S-96-312.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant, and, on brief, John L. Lotter, pro se.

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

## SUPPLEMENTAL OPINION

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

This matter is before us on the motion for rehearing of the appellant, John L. Lotter, regarding our opinion reported at *State v. Lotter, ante* p. 456, 586 N.W.2d 591 (1998). Lotter claims, in seeking rehearing, that we improperly addressed his claim that an ex parte communication between his trial judge and the prosecution violated his right to an impartial trial court

under the Due Process Clause of the 14th Amendment to the U.S. Constitution. This argument was not clearly set forth in Lotter's appellate brief, but for the sake of completeness, we feel it necessary to address Lotter's claim. We overrule the motion for rehearing, but after the two paragraphs under the subheading "1.1. Trial Judge's Impartiality," *id.* at 474-75, 586 N.W.2d at 610, we add the following:

> This determination, however, does not dispose of the issue. In *State v. Barker*, 227 Neb. 842, 844, 420 N.W.2d 695, 697 (1988), we noted that "consideration of questions reaching constitutional dimensions is unnecessary for disposition of Barker's appeal . . . ." The requirement in *Barker* that a judge who has participated in an ex parte communication must recuse himself or herself upon request was based upon Nebraska law, and not upon federal constitutional grounds. Thus, *Barker* and its progeny do not dispose of Lotter's claim that the ex parte communication in this case presented a threat to the impartiality of the trial court and violated his rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution. Consequently, we must determine if his failure to seek recusal during trial serves as a waiver of his right to assert a due process claim on appeal.
>
> In support of his contention that his due process claim in this regard has not been waived, Lotter cites two interrelated decisions from the U.S. Court of Appeals for the Eighth Circuit for the proposition that a defendant does not waive the due process right to an impartial trial court unless the evidence shows that the defendant was personally aware of the potential bias and personally waived the right to seek recusal. See, *Dyas v. Lockhart*, 771 F.2d 1144 (8th Cir. 1985) (*Dyas II*); *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir. 1983) (*Dyas I*).
>
> *Dyas I* was a postconviction action in which the petitioner claimed that the relationship between his trial court judge and the prosecuting attorneys deprived him of an impartial trial. Dyas' trial court judge was the uncle of the prosecuting attorney and the brother and father of the deputy prosecutors. *Id.* In addition, the judge's wife was

the court reporter and the prosecutor was dating and subsequently married the daughter of Dyas' defense attorney. *Dyas II*. In addition, the trial judge actually participated in obtaining certain evidence and, based on his personal knowledge, corrected a witness at trial who was testifying about the chain of custody for that evidence. The trial court divulged these facts to defense counsel and offered to recuse himself, but counsel declined recusal. *Id.*

On appeal, the Arkansas Supreme Court found that Dyas' complaint regarding these relationships was untimely and could not be raised for the first time on appeal, despite Dyas' claim that he had not personally known of the interrelationships and thus had not personally waived recusal. *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976).

On postconviction review, the Eighth Circuit found that Dyas could not have waived recusal, consistent with due process, if he had not been personally informed regarding the potential threats to the impartiality of the trial court. *Dyas II*; *Dyas I*. In *Dyas I*, the Eighth Circuit reversed the federal district court's denial of postconviction relief, remanding the cause for an evidentiary hearing on whether Dyas had personally known of the potential bias of his trial court and, if not, for hearing on whether the trial court had actually been biased against Dyas.

In *Dyas II*, the Eighth Circuit again reversed the decision of the federal district court, which had found that Dyas had not known of the trial court's relationships with the prosecution but which had evidently not conducted an inquiry into whether the trial court had actually been biased. Finally, in *Dyas v. Lockhart,* 878 F.2d 1105 (8th Cir. 1989) (*Dyas III*), the Eighth Circuit affirmed the federal district court's finding of no evidence of actual bias by the trial court.

We find no evidence in the record before us that Lotter was personally apprised of the ex parte communication at issue. Thus, Lotter has not waived his claim that the ex parte communication threatened the trial judge's impartiality in a way that violated Lotter's due process rights.

After evaluating Lotter's due process claim, we find it to be without merit. While the threat to the impartiality of the trial judge in this case, as noted above, would be sufficient under Nebraska law to require the judge's recusal upon request, it is not sufficient, under the Due Process Clause, to suggest that the trial judge "had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused." *Dyas I*, 705 F.2d at 997 (citing *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)).

Moreover, our comprehensive review of the record in this case reveals no evidence of actual bias on the part of the trial court. Absent an instance of actual bias on the part of the trial court, we determine that Lotter's due process right to a fair and impartial judge was not violated. See *Dyas III*. Lotter's assignment of error is meritless.

The remainder of the opinion shall remain unmodified, resuming with the subheading "1.2. Separation of Powers" found at *State v. Lotter, ante* p. 456, 475, 586 N.W.2d 591, 610 (1998).

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

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ALLEN RO'NAY COTTON, APPELLANT, V. JOHN STEELE AND DENNIS CARLSON, NEBRASKA STATE BAR ASSOCIATION, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, APPELLEES.
587 N.W.2d 693

Filed January 8, 1999. No. S-97-735.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.

3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
6. **Disciplinary Proceedings: Attorneys at Law.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
7. **Standing.** Sufficient standing as a party in litigation may not be based merely on a general interest common to all members of the public.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Allen Ro'nay Cotton, pro se.

Neal E. Stenberg and Maren Lynn Chaloupka, of Harding, Shultz & Downs, for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Allen Ro'nay Cotton appeals from an order of the district court for Douglas County dismissing his petition against John Steele and Dennis Carlson, who are sued both individually and in their respective capacities as Assistant Counsel for Discipline and Counsel for Discipline of the Nebraska State Bar Association (NSBA). We affirm, based upon our determination that Cotton lacks standing to assert a claim against Steele and Carlson based upon allegations that they improperly disposed of a disciplinary complaint which Cotton filed against a Nebraska attorney.

## FACTUAL AND PROCEDURAL BACKGROUND

In his petition, Cotton alleged that in December 1996 he filed a complaint with the NSBA against an unidentified attorney who, according to Cotton, violated a copyright law. Cotton

alleged that on February 5, 1997, Steele dismissed his complaint without supplying a reason and without instructing the attorney to respond to the complaint. Cotton asserted that Steele refuses to investigate complaints submitted by pro se litigants, Steele always resolves complaints in favor of the attorney, and Carlson is aware of Steele's "bias [sic] opinions." Cotton also alleged that on February 11, he wrote a letter to Carlson, informing him of Steele's actions and requesting that a proper investigation be conducted. Cotton further alleged that Carlson never responded to this letter and that Carlson refuses to enforce the "NSBA rules."

In his petition, Cotton alleged a violation of 42 U.S.C. § 1983 (Supp. II 1996) and §§ 1985 and 1986 (1994), based on malpractice, abuse of authority, inadequate investigation, inadequate training, and failure to prosecute, in violation of the Due Process and Equal Protection Clauses of the U.S. Constitution. In addition, Cotton asserted that Steele and Carlson were negligent. Cotton requested that the district court issue an injunction ordering Steele to follow the rules and regulations of the NSBA and a declaratory judgment stating that the "mental abuse" Cotton suffered violated his rights under the 14th Amendment and state law. Cotton also requested $50,000 in compensatory damages from Steele and Carlson for "psychological damges [sic] including personal humiliation and mental anguish sustained throughout this entire ordeal."

On April 28, 1997, Steele and Carlson filed a demurrer to Cotton's petition on the following grounds: (1) The petition failed to state facts sufficient to constitute a cause of action, (2) the petition failed to adequately allege subject matter jurisdiction, (3) Steele and Carlson were entitled to absolute immunity from suit for any claims alleged in the petition, (4) Steele and Carlson were immune from suit for damages in their official capacities by virtue of the 11th Amendment to the U.S. Constitution, (5) Cotton lacked standing, and (6) the petition failed to adequately allege proximate causation and damages. On June 13, the district court sustained the demurrer without leave to amend and dismissed the petition. Cotton perfected this appeal, and we subsequently granted Steele and Carlson's petition to bypass.

## ASSIGNMENTS OF ERROR

Cotton asserts, summarized, that the district court erred in sustaining Steele and Carlson's demurrer and dismissing his petition.

## STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Syracuse Rur. Fire Dist. v. Pletan*, 254 Neb. 393, 577 N.W.2d 527 (1998); *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998); *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998).

## ANALYSIS

We initially address the jurisdictional question of whether Cotton has standing to bring this action. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Hawkes v. Lewis, supra*; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). As an aspect of jurisdiction and justiciability, "standing" requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Hawkes v. Lewis, supra*; *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party " 'advancing it is not properly situated to be entitled to its judicial determination. . . .' " *State v. Baltimore*, 242 Neb. 562, 568, 495 N.W.2d 921, 926 (1993), quoting 13 Charles A. Wright et al., Federal Practice and Procedure: Standing § 3531 (2d ed. 1984).

In this case, we must determine whether one who files a disciplinary complaint against a Nebraska lawyer has standing to bring an action for legal and equitable relief based upon allegations that the complaint was not properly handled by the office of the Counsel for Discipline. As a starting point in this analysis, we summarize the system by which Nebraska attorneys may be disciplined in response to a citizen complaint.

This court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska. *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995); *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). Pursuant to that authority, we have promulgated disciplinary rules which govern the processing and disposition of complaints charging Nebraska lawyers with violations of the Code of Professional Responsibility. See *State ex rel. NSBA v. Barnett, supra*. The preface to the disciplinary rules states: "The discipline of attorneys is for the protection of the public, the profession, and the administration of justice." We have written that the purpose of an attorney disciplinary proceeding is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice. *State ex rel. NSBA v. Barnett, supra*; *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957).

The disciplinary rules require the NSBA to employ a Counsel for Discipline, whose appointment and tenure are subject to the approval of this court. Neb. Ct. R. of Discipline 8(A) (rev. 1996). The Counsel for Discipline and his or her staff possess specifically enumerated powers and duties which include the initial screening of complaints of attorney misconduct to determine whether there is sufficient evidence to warrant further processing of the complaint under the procedures established by the disciplinary rules. Neb. Ct. R. of Discipline 8(B)(1), (3), and (4). In addition, the Counsel for Discipline is responsible for prosecution of disciplinary cases filed in this court. Neb. Ct. R. of Discipline 10(Q) (rev. 1996). By rule, the Counsel for Discipline and his or her representatives are granted immunity from suit "for any conduct in the course of their official duties"

under the disciplinary rules. Neb. Ct. R. of Discipline 22(B) (rev. 1996).

Any citizen wishing to initiate a disciplinary proceeding against a Nebraska attorney must file a written complaint with the Counsel for Discipline, alleging conduct on the part of the attorney which, if true, would constitute a violation of the attorney's oath or certain provisions of the Code of Professional Responsibility. See Neb. Ct. R. of Discipline 9(A) (rev. 1996). When a complaint is filed, the Counsel for Discipline is required to make an initial determination of whether the allegations warrant formal investigation. In making this determination, the Counsel for Discipline may make such preliminary inquiry regarding the underlying facts as deemed appropriate and must resolve all doubts in favor of an investigation. If the Counsel for Discipline determines, on the basis of this preliminary review, that the allegations are without merit or, if true, would not constitute grounds for discipline, he or she may decline to conduct an investigation but must give the complainant a written explanation of the reasons for doing so. Neb. Ct. R. of Discipline 9(C).

If the Counsel for Discipline determines that investigation is warranted, the attorney against whom the complaint is directed must be given notice and a request to submit a written response to the complaint. Neb. Ct. R. of Discipline 9(D) and (E). After conducting an investigation, if the Counsel for Discipline determines that there are reasonable grounds for discipline, he or she must prepare and file charges with the appropriate committee on inquiry appointed by this court. Neb. Ct. R. of Discipline 9(G). On the other hand, if the Counsel for Discipline concludes on the basis of an investigation that reasonable grounds for discipline do not exist, he or she may dismiss the complaint upon providing the complainant with a written explanation of the reasons for doing so and notifying the complainant of his or her right to appeal the dismissal of the complaint to the appropriate committee on inquiry. Neb. Ct. R. of Discipline 9(F) and 14(A) (rev. 1996).

When disciplinary charges are filed with a committee on inquiry, it must either (1) dismiss the charges based upon a

determination that if true, they would not constitute grounds for discipline; (2) issue a reprimand to the attorney, based upon a determination that the charges, if true, would constitute grounds for discipline but no public interest would be served by the institution of a formal charge; or (3) conduct a nonadversary, investigative hearing to determine if there are sufficient grounds to warrant that a formal charge be filed with the Disciplinary Review Board. Neb. Ct. R. of Discipline 9(H). The Counsel for Discipline is required to notify the complainant of charges filed with the committee on inquiry, the findings of the committee, and the complainant's rights of appeal to the Disciplinary Review Board. If the committee on inquiry dismisses the charges without conducting a hearing, either the Counsel for Discipline or the complainant may appeal to the Disciplinary Review Board; however, if the charges are dismissed following a hearing, only the Counsel for Discipline may appeal. Neb. Ct. R. of Discipline 14(B) and (C). When a committee on inquiry issues a reprimand, only the Counsel for Discipline and the attorney have a right to appeal. Neb. Ct. R. of Discipline 14(D). A formal charge filed with the Disciplinary Review Board must be in the name of the State of Nebraska on the relation of the NSBA. Neb. Ct. R. of Discipline 9(H)(3)(i). The Disciplinary Review Board is empowered but not required to conduct an additional hearing and may either dismiss the formal charge, return it to the committee on inquiry with directions, issue a reprimand, or file the formal charge with this court. Neb. Ct. R. of Discipline 9(I) through (L). No formal charge may be docketed in this court until it has been considered by a committee on inquiry and the Disciplinary Review Board. Neb. Ct. R. of Discipline 9(M).

Disciplinary proceedings filed in this court "shall be considered civil in their nature and for the purpose of protecting the public and the good name" of attorneys admitted to practice in Nebraska. Neb. Ct. R. of Discipline 10(A). Such proceedings may be prosecuted in the name of the State of Nebraska on the relation of the NSBA with or without leave of court, or on the relation of a private person after obtaining leave of court. "Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for

disciplinary proceedings, and only after the matter has been submitted to the appropriate Committee on Inquiry, and considered by the Disciplinary Review Board." Neb. Ct. R. of Discipline 10(B).

Under our disciplinary rules, "[n]either unwillingness nor neglect of the Complainant to sign a complaint or to assist in the prosecution of Charges, nor settlement, compromise or restitution, shall, in itself, justify termination of any disciplinary proceedings." Neb. Ct. R. of Discipline 19 (rev. 1996). In *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 470, 441 N.W.2d 161, 176 (1989), we held that a document signed by the personal representative of an estate releasing her attorney from certain liability with regard to his representation of the estate was not determinative of disciplinary charges arising from such representation, because the personal representative "had no standing to maintain a disciplinary action against respondent or any authority to effectively discharge a complaint."

Likewise, similarity of the substance of a disciplinary action to the material allegations of pending civil or criminal litigation does not in itself prevent or delay such disciplinary proceedings, and disposition of criminal charges or civil litigation in favor of an attorney does not in itself justify the termination of disciplinary proceedings predicated upon the same or substantially the same material allegations. Neb. Ct. R. of Discipline 20 (rev. 1996). *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987).

The specific standing issue in this case is one of first impression in this state. However, the question of standing under similar circumstances was addressed in *Doyle v. Oklahoma Bar Assn.*, 998 F.2d 1559 (10th Cir. 1993). Doyle, an Australian barrister, brought an action under 42 U.S.C. § 1983 (1988) against the Oklahoma Bar Association and several of its employees, including its general counsel and assistant general counsel, after becoming dissatisfied with the manner in which bar counsel and members of the Oklahoma Professional Responsibility Commission handled a grievance which he had filed against his ex-wife's lawyer. Doyle alleged that his civil rights were violated by the assistant general counsel's decision that his grievance lacked merit and therefore did not warrant investiga-

tion and by the subsequent failure of bar officials to respond favorably to his attempts to obtain a reversal of this decision. Doyle's allegations included claims that he was discriminated against because he was not a U.S. citizen and that the actions of bar officials infected the integrity of the investigatory process and deprived him of fairness and procedural safeguards required by due process. Doyle alleged that because of the actions of bar officials, he was unsuccessful in his state court litigation, suffered emotional distress, and incurred various expenses and loss of income. In concluding that Doyle lacked standing to assert these claims, the court noted that the Oklahoma attorney discipline system was prosecutorial in nature, with bar officials having discretion to investigate complaints and either dismiss or file disciplinary charges. Drawing an analogy to a criminal prosecution, as to which the U.S. Supreme Court in *Linda R. S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973), stated that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," the *Doyle* court concluded: "The fact is that the only one who stands to suffer direct injury in a disciplinary proceeding is the lawyer involved. Doyle has no more standing to insert himself substantively into a license-based discipline system than he has to compel the *issuance* of a license." (Emphasis in original.) 998 F.2d at 1566-67.

The same rationale was applied in *Fitzgerald v. State*, No. CIV. 96-2207-PHX-SMM, 1997 WL 579193 (D. Ariz. July 9, 1997) (unpublished opinion), *aff'd* 133 F.3d 926 (9th Cir. 1997). In that case, the plaintiff contended that his federal civil rights were violated by a delay on the part of state bar officials in processing a disciplinary complaint against a lawyer, which allegedly prejudiced civil actions for damages which he had filed against the lawyer. Fitzgerald also claimed that bar officials violated Arizona Supreme Court rules by failing to immediately provide him with a copy of the lawyer's response to his complaint and failing to immediately inform him of the findings of the disciplinary hearing committee. In granting the bar officials' motion to dismiss, the court followed the rationale of *Doyle, supra*, and held that Fitzgerald had no standing to assert

a claim based upon alleged procedural violations in an attorney discipline proceeding.

Two cases involving the power of federal courts to impose discipline upon attorneys are also pertinent to our analysis of standing. In *Starr v. Mandanici*, 152 F.3d 741 (8th Cir. 1998), an attorney appealed from an order denying his ethics grievance against a special prosecutor. Relying on its holding in *Mattice v. Meyer*, 353 F.2d 316 (8th Cir. 1965), that informants of ethics grievances lack standing to commence a formal action in federal district court, the court concluded that "Mandanici's role begins and ends with the filing of his ethics grievance" and, thus, that he lacked standing to seek formal judicial adjudication of the grievance. *Starr v. Mandanici*, 152 F.3d at 748. Also relying on *Mattice*, the court in *Ramos Colon v. U.S. Atty. for D. Puerto Rico*, 576 F.2d 1 (1st Cir. 1978), held that an individual who filed a disciplinary complaint against a federal prosecutor based upon allegations that the prosecutor had filed criminal charges against him in bad faith lacked standing to challenge the court's decision not to impose disciplinary sanctions against the prosecutor.

We have found no authority holding that one who files a disciplinary complaint against an attorney has standing to bring an action against NSBA officials that challenges their processing or disposition of the complaint. While our disciplinary rules provide that a complainant shall receive notice and an opportunity to be heard at various stages of the disciplinary process, they do not constitute a means by which the complainant may seek personal redress against the attorney whose misconduct is alleged. The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995); *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995). Thus, when a citizen files a disciplinary complaint, there are two possible outcomes: either some form of discipline is assessed against the attorney or no discipline is assessed. Neither result confers any legally cognizable benefit or causes any legally cognizable injury to the complainant who initiated

the proceeding. Stated another way, one who files a disciplinary complaint against an attorney has no personal stake in the outcome of the proceeding other than whatever personal satisfaction or disappointment he or she may derive therefrom. The disposition of the disciplinary action does not deprive the complainant of any civil remedy he or she may have against the attorney who was the subject of the complaint.

Our system for disciplining attorneys exists for the protection of the public and not as a means of redress for one claiming to have been personally wronged by an attorney. Thus, any dereliction of duty on the part of the Counsel for Discipline or his or her staff that results in the failure to discipline an attorney who should have been disciplined poses a risk of injury to the general public, not to a particular individual. Generally, sufficient standing as a party in litigation may not be based merely on a general interest common to all members of the public. *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). We therefore conclude that Cotton did not have standing to assert a claim against Steele and Carlson based upon their alleged mishandling of his disciplinary complaint and, accordingly, that the district court did not err in sustaining the demurrer and dismissing the action.

Our determination that Cotton lacks standing to maintain a civil action against the Counsel for Discipline or members of his staff does not mean that such persons are not required to carry out their duties in accordance with all applicable rules or that they are not accountable for any proven failure to do so. This court is responsible for seeing that the disciplinary rules are fairly and correctly administered, both for the benefit of the general public whose interest they protect and for the benefit of the attorneys whose conduct they regulate. Any violation of or departure from the rules by those responsible for their administration and implementation will result in appropriate corrective action by this court.

AFFIRMED.

WHITE, C.J., not participating.

# ROBERT K. McBEE, APPELLANT AND CROSS-APPELLEE, v. GOODYEAR TIRE AND RUBBER COMPANY, INC., APPELLEE AND CROSS-APPELLANT.

587 N.W.2d 687

Filed January 8, 1999. No. S-97-1140.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Nebraska Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. The findings of fact made by a workers' compensation court trial judge are not to be disturbed upon appeal to a workers' compensation court review panel unless they are clearly wrong on the evidence or the decision was contrary to law.
3. ____: ____. Findings of fact made by the Nebraska Workers' Compensation Court after review have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
5. ____: ____: ____. If the record contains evidence to substantiate the factual conclusions reached by the Nebraska Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
6. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
7. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.
8. **Workers' Compensation: Attorney Fees: Words and Phrases.** A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
9. **Workers' Compensation: Testimony.** Under the test in *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987), when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the Nebraska Workers' Compensation Court. As such, this indicates the presence of a reasonable controversy.

10. **Workers' Compensation: Proof.** A workers' compensation claimant bears the burden to establish a causal relationship between the alleged injury and the employment.
11. ____: ____. Until an employee presents the employer with competent medical evidence that he or she is entitled to workers' compensation benefits, a reasonable controversy may exist regarding the employer's liability notwithstanding the fact that the employer has voluntarily paid benefits to the employee.
12. **Workers' Compensation: Liability.** Voluntary payments of workers' compensation benefits do not constitute an admission of liability by an employer.
13. **Workers' Compensation: Penalties and Forfeitures.** The fact that an employer voluntarily pays workers' compensation benefits does not in all cases permit the employer to cease payment of benefits without being subject to penalties if the cessation of benefits was not justified.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Gordon Peterson, of Orton, Thomas, Peterson & O'Connell, for appellant.

Anne E. Winner, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

Robert K. McBee, appellant, was injured in an accident arising out of and in the course of his employment on September 30, 1992, and claimed certain benefits under the Nebraska workers' compensation laws. Up through August 1995, all of McBee's benefits were paid to him voluntarily by his employer, Goodyear Tire and Rubber Company, Inc., appellee. After August 1995, Goodyear refused to pay McBee any further temporary total disability benefits, based on McBee's medical records and specifically on an entry concerning a basketball injury. McBee brought this claim before the Nebraska Workers' Compensation Court. The trial court held that Goodyear was not justified in refusing to pay McBee further benefits, because there was no reasonable controversy on medical causation. It also found that Goodyear had a duty to inquire and to investigate the compensability of McBee's claim. The trial court ordered Goodyear to pay a 50-percent penalty payment, attor-

ney fees, interest, and costs. Goodyear filed an application for review, and the review panel found there was a reasonable controversy regarding medical causation and reversed the award of the 50-percent penalty payment, attorney fees, interest, and costs. The review panel further found that Goodyear did not have a duty to inquire and to investigate McBee's claim. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We affirm.

## BACKGROUND

McBee was injured in an accident arising out of and in the course of his employment with Goodyear when he struck his right elbow. Soon after the injury, McBee sought medical care and was referred to Dr. William Garvin, whom McBee saw for the first time in October 1993. The original diagnosis was lateral epicondylitis of the right elbow. Garvin continued to be McBee's main treating orthopedic physician through the time of trial. McBee and Goodyear agreed that McBee was entitled to temporary total disability from November 26, 1993, through April 4, 1994, and from August 29 through September 14, 1994, which Goodyear voluntarily paid. The parties have stipulated that all temporary total disability benefits due prior to August 9, 1995, have been paid.

On June 6, 1995, McBee went to see Garvin and mentioned in this visit that he had jammed his right elbow while playing basketball. Up to and including this visit, Garvin's diagnosis of McBee's condition continued to be chronic lateral epicondylitis. However, at this visit, McBee was also diagnosed with ulnar nerve irritation on the right elbow. In August or September 1995, Tom Booth, who supervises workers' compensation cases for Goodyear; Burt Metzger, of Travelers Insurance Company, which administers Goodyear's self-insured plan; and Anne Winner, Goodyear's attorney in this case, met to discuss several pending workers' compensation cases, including McBee's. Based on the medical records from Garvin, especially the entry concerning the basketball incident, and on the recommendation of Winner, Goodyear decided not to pay any further temporary total disability benefits to McBee.

McBee filed a petition in the compensation court. Goodyear filed an answer in the form of a general denial. In September 1996, McBee's attorney took the deposition of Garvin for use at trial. In his deposition, Garvin stated that the lateral epicondylitis was caused by McBee's original work injury on September 30, 1992. On direct examination, Garvin related the ulnar nerve irritation to the 1992 injury, but on cross-examination, indicated the injury to the ulnar nerve might be from the basketball incident. Sometime after Garvin's deposition was taken, the parties stipulated that Goodyear owed McBee past temporary total disability benefits for the dates August 10, August 24, and August 25, 1995, and from August 29, 1995, up to and including August 19, 1996, a period of 360 days or 51⅘ weeks, at the maximum temporary total disability rate of $265 per week. The parties further stipulated that Goodyear tendered checks to McBee on October 18 and November 25, 1996, in payment of the past due temporary total disability benefits. McBee does not claim a penalty payment based on untimely payments after the date of Garvin's deposition.

The trial court concluded there was no reasonable controversy regarding the causation of McBee's injury from and after June 6, 1995, and awarded McBee past temporary total disability (which Goodyear had already paid) and a 50-percent penalty payment for the previously unpaid benefits for the period between August 10, 1995, and August 19, 1996; attorney fees; interest; and costs. The trial court also found that Goodyear had a duty to inquire and to investigate the compensability of McBee's claim, which it failed to do.

Goodyear appealed. The review panel reversed the trial court's decision on the issue of whether or not there was a reasonable controversy, concluding there was a reasonable controversy on medical causation. It also reversed the trial court's award of a 50-percent penalty payment, attorney fees, interest, and costs. The review panel further reversed the trial court's finding that Goodyear had a duty to affirmatively inquire and to investigate the compensability of McBee's claim.

## ASSIGNMENTS OF ERROR

McBee assigns that the review panel erred in (1) finding that the trial court was clearly wrong when it found there was no

reasonable controversy about medical causation, (2) reversing the trial court's finding that Goodyear had a duty to perform an ongoing investigation of the medical facts of this case, and (3) reversing the trial court's award of a 50-percent penalty payment, attorney fees, interest, and costs.

Goodyear cross-appeals, asserting that if this court reverses the review panel's decision, we should not reinstate the trial court's award of a $5,000 attorney fee, as that sum represents fees and costs incurred in the entire representation of McBee at the trial court level.

## STANDARD OF REVIEW

Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a compensation court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998).

The findings of fact made by a workers' compensation court trial judge are not to be disturbed upon appeal to a workers' compensation court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

Findings of fact made by the compensation court after review have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous. § 48-185; *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998); *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997).

In testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

If the record contains evidence to substantiate the factual conclusions reached by the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

## ANALYSIS

McBee suffered injury to his right elbow as a result of an accident arising out of and in the course of his employment with Goodyear, when he struck his right elbow. At this stage in the litigation, neither of the parties contests these facts. The only issues in contention are whether McBee is entitled to a 50-percent penalty payment, attorney fees, interest, and costs as part of his award and whether Goodyear had a duty to perform an ongoing investigation of the medical facts of this case.

As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation. *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Whether a reasonable controversy exists pertinent to § 48-125 is a question of fact. *Starks v. Cornhusker Packing Co., supra*; *U S West Communications v. Taborski, supra*. In *Mendoza v. Omaha Meat Processors, supra*, this court adopted guidelines to aid courts in determining whether a reasonable controversy exists. A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *U S West Communications v. Taborski, supra*; *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Mendoza v. Omaha Meat Processors, supra*. Under the *Mendoza* test, when there is some conflict in the medical testi-

mony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court. As such, this indicates the presence of a reasonable controversy. *Kerkman v. Weidner Williams Roofing Co., supra.* See, also, *Tlamka v. Goodyear Tire & Rubber Co.*, 225 Neb. 789, 408 N.W.2d 291 (1987) (no reasonable controversy existed when all medical testimony agreed that claimant's condition was probably caused by his industrial accident).

After McBee was initially injured, Goodyear voluntarily paid workers' compensation benefits to McBee until August 1995. Before Garvin's deposition was taken in September 1996, McBee presented no evidence of a causal relationship between his injury and his employment. A workers' compensation claimant bears the burden to establish a causal relationship between the alleged injury and the employment. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998).

The review panel, after reviewing the evidence, concluded that there was no evidence establishing a causal relationship between the alleged injury and the employment prior to Garvin's deposition on September 17, 1996, and that a reasonable controversy existed up to that point. Goodyear's payments for temporary total disability were made within 30 days of Garvin's deposition, and the review panel correctly determined that penalties pursuant to § 48-125 should not have been imposed by the trial judge.

Until an employee presents the employer with competent medical evidence that he or she is entitled to workers' compensation benefits, a reasonable controversy may exist regarding the employer's liability notwithstanding the fact that the employer has voluntarily paid benefits to the employee. Voluntary payments of compensation do not constitute an admission of liability by the employer. The fact, however, that an employer voluntarily pays benefits does not in all cases permit the employer to cease payment of benefits without being subject to penalties if the cessation of benefits was not justified.

### Duty to Investigate

McBee assigns as error the review panel's holding that Goodyear did not have a duty to investigate the compensability

of McBee's claim. We conclude that on the facts of this case, where the payments are voluntary, Goodyear did not have an affirmative duty to investigate, and we affirm the review panel's holding on this issue.

GOODYEAR'S CROSS-APPEAL

Goodyear cross-appealed, asserting that if this court were to reverse the review panel's decision, we should not reinstate the trial court's award of a $5,000 attorney fee, as that sum represents all the fees and costs incurred in the entire representation of McBee at the trial court level. We do not need to address Goodyear's cross-appeal, as we are affirming the review panel's holding, and therefore, McBee is not entitled to an award of any attorney fees.

AFFIRMED.

HENDRY, C.J., not participating.

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STAN SMITH, APPELLEE, V. PAOLI POPCORN CO., A NEBRASKA CORPORATION, FORMERLY KNOWN AS MORMAC POPCORN COMPANY, APPELLANT.
587 N.W.2d 660

Filed January 8, 1999. No. S-97-1218.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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. ___: ___. In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
3. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
4. **Trial: Juries: Evidence: Time.** When there is no precise rule of law which governs, the question of what, under the circumstances of a particular case, is a reasonable amount of time is usually a question for the jury.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

Robert E. Wheeler for appellant.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

This is an action for damages arising from the alleged wrongful rejection of goods. The trial court granted summary judgment for the plaintiff on the issue of liability, finding that the defendant had ineffectively rejected the goods. The case proceeded to trial on damages, but prior to submitting the case to the jury, the trial court granted a directed verdict in the amount of $28,542.37.

## SCOPE OF REVIEW

In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998).

In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

## FACTS

Stan Smith (Smith) and Paoli Popcorn Co. (Paoli) entered into a contract in which Paoli agreed to purchase popcorn grown by Smith in the 1994 season for 10 cents per pound. The contract provided in relevant part:

> When the Crop is fully matured, Grower [Smith] will harvest it in a good husbandlike manner, and will shell the Crop. . . . Grower will deliver the Crop to Buyer [Paoli] during normal business hours on any business day at . . . F.O.B. Grower's bin located at Lamar NE. . . . All Crop delivered by Grower under this contract will be FREE FROM FOREIGN MATTER, FIELD CORN AND FROM

> MOLDY, DAMAGED OR IMMATURE POPCORN, AND IN A GOOD MARKETABLE CONDITION, AND WILL CONTAIN 16% MOISTURE OR LESS. . . . Buyer may discount at least $1.00/cwt or reject any of the Crop delivered or tendered for delivery under this contract that does not comply with all of the conditions, specifications and requirements set forth in this contract. Buyer may reject in full any delivery or tendered delivery of the Crop made or tendered under this contract if more than 10% of the Crop in such delivery or tendered delivery does not conform to the conditions, specifications and requirements set forth in this contract.

Smith harvested the popcorn either the last week of September or the first week of October 1994. During harvest, it began to mist, and Smith's son Steven Smith noticed smut attached to the last load of the harvested popcorn. At that time, an agent of Paoli, Thomas Harmon, visited the grain bins where the popcorn was being stored. Harmon obtained samples of the popcorn, noticed the smut, and spoke with Smith's son Rob Smith about the smut. Later, when Harmon was asked whether he had intended to reject the popcorn when he first noticed the smut, he responded that it was his intention to try to find a market for the popcorn so he would not have to officially reject it.

After the harvest, Harmon spoke with Steven Smith over the telephone and told him that he did not know if Paoli would be able to use the popcorn. Harmon denied specifically rejecting the popcorn during that telephone call.

In January 1995, Harmon spoke with Smith directly and told Smith that he was having difficulty finding a market for the popcorn. Harmon showed Smith a sample of good, marketable popcorn that satisfied the contract and a sample of Smith's popcorn for comparison. According to Harmon, the difference in quality was obvious. Harmon informed Smith that Paoli was trying to find a market where the popcorn could possibly be used and that he was checking into polishing the popcorn to remove the smut. Harmon told Smith that he would send out some samples of the popcorn in an effort to find a market, but to that point in time, there had been no interest in popcorn of such low quality. Harmon claimed he told Smith that he did not

know if Paoli could even use the popcorn at all and stated that Smith responded, " 'Yeah, I was kinda afraid of that.' "

Steven Smith did not think that the smut posed a "serious threat" to the marketability of the popcorn. He indicated that Harmon's comments that the popcorn would be difficult to market did not concern him, since "all processors . . . say that." According to Steven Smith, he was not informed that there might be any problem marketing the popcorn until at least 1 month after the harvest. Steven Smith denied that any negotiation of damages took place before April 1995.

The parties had conflicting opinions as to whether the smut could be cleaned from the popcorn. Smith believed that the popcorn could be cleaned prior to market and, consequently, that he was entitled to be paid the 10 cents per pound agreed upon in the contract. Harmon did not believe that the popcorn could be cleaned.

On April 4, 1995, Harmon called Smith and told him that Paoli was not going to be able to market the popcorn as premium popcorn because of the smut and that Paoli needed to officially reject it. In a letter dated April 6, Paoli rejected the popcorn in writing.

After the formal rejection, Paoli offered to buy the popcorn at a price of 8 cents per pound. Smith rejected this offer and made plans to sell the popcorn on the open market and then sue Paoli for damages. The popcorn market was poor at that time, and Smith had only received a quote of 5 cents per pound, but he still did not want to sell Paoli the popcorn for 8 cents per pound unless Paoli acknowledged that Smith was entitled to sue for the difference between the 8 cents currently offered and the 10 cents agreed upon in the contract.

Smith sued Paoli in October 1995 and alleged that Paoli had failed to seasonably, or within a reasonable time, notify Smith that the popcorn was rejected. Smith alleged that as a direct and proximate result of the breach of the contract, he had suffered general, special, and consequential damages, including the sale of the popcorn at a reduced price, storage fees, and lost interest. Smith died in September 1996, and the action was subsequently revived by Steven Smith, the personal representative of Smith's estate.

In June 1997, Smith filed a motion for summary judgment, claiming there were no issues of material fact as to the inadequacy of Paoli's rejection and revocation of acceptance of the tendered popcorn, which failure constituted an acceptance. Paoli filed a cross-motion for summary judgment, claiming it was entitled to judgment as a matter of law because it had given timely notice of its rejection of the tendered goods.

The trial court found that the following facts were not in dispute:

> 1. The plaintiff and the defendant entered into a written contract on March 31, 1994, for the defendant to purchase popcorn which was to be grown by the plaintiff on certain real estate. Among other things, the contract set out that delivery was to be F.O.B., the plaintiff's grain bin. Harvest of the popcorn occurred in late September or early October of 1994, and the popcorn harvested by the plaintiff was placed in the plaintiff's grain bin at harvest.
>
> 2. The defendant inspected the popcorn within a day or two of the harvest and delivery of the popcorn to the plaintiff's bin. At the time of that inspection, the defendant noticed that there was a "smut" problem . . . . The defendant knew at that time that the "smut" problem could not be corrected, but the defendant did not reject the popcorn and indicated to the plaintiff that the defendant was going to try to find a market for the popcorn and not officially reject it.
>
> 3. The defendant later informed the plaintiff through his son that the defendant did not know if the defendant would be able to market the popcorn or even if the defendant would be able to use it. The defendant again at that time did not reject the popcorn.
>
> 4. In January of 1995, the plaintiff stopped by the defendant's office to talk about the popcorn. The plaintiff wanted to know what the defendant might be able to do. The defendant again did not reject the popcorn at that time and again told the plaintiff that [it] was trying to find an outlet to allow the defendant to possibly use the popcorn. In addition, at that time, the defendant stated that it was checking into a polisher to better clean up the popcorn.

5. In January, 1995, the defendant knew that the popcorn could not be sold as premium popcorn, but again the defendant did not reject the popcorn.

6. The defendant inspected the popcorn at the plaintiff's grain bin on only one occasion after harvest even though the defendant knew that it could go to the grain bin for additional inspection at any time.

7. The popcorn was rejected verbally on April 4, 1995, and then in writing on April 6, 1995.

The trial court concluded as a matter of law that the rejection of the goods was not made within a reasonable time, and the case proceeded to trial on the issue of damages. At the close of all the evidence, Paoli's motion to dismiss was overruled. Smith moved for a directed verdict in the amount of $28,542.37, which motion was sustained, and a judgment was entered against Paoli in that amount. Paoli timely appealed.

## ASSIGNMENTS OF ERROR

On appeal, Paoli claims that the trial court erred in sustaining Smith's motion for summary judgment on the issue of effective rejection, in denying Paoli's motion for summary judgment on the issue of effective rejection, in sustaining Smith's objections to Paoli's offer of evidence relevant to material issues of good faith performance and enforcement of the contract and commercially reasonable resale, in failing to sustain Paoli's motion to dismiss, and in sustaining Smith's motion for directed verdict.

## ANALYSIS

The issue presented is whether Paoli failed to timely reject the popcorn. Neb. U.C.C. § 2-602(1) (Reissue 1992) provides: "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." See *Fabricators, Inc. v. Farmers Elevator, Inc.*, 203 Neb. 150, 277 N.W.2d 676 (1979).

Neb. U.C.C. § 2-606 (Reissue 1992) provides in part:

> (1) Acceptance of goods occurs when the buyer
>
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

> (b) fails to make an effective rejection (subsection (1) of section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Neb. U.C.C. § 1-204 (Reissue 1992) provides:

> (1) Whenever the Uniform Commercial Code requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.
>
> (2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.
>
> (3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

Prior to trial, Smith and Paoli each filed a motion for summary judgment. Smith claimed as a matter of law that Paoli's failure to adequately reject or revoke its acceptance of the tendered popcorn in a timely and unequivocal fashion constituted an acceptance of the popcorn. In response, Paoli claimed that there was no genuine issue of material fact that it had given adequate and timely notice of rejection to Smith. After reviewing the facts, the trial court found that the rejection of the popcorn had not been done in a reasonable amount of time after delivery or tender. The court specifically found that "a rejection of goods delivered in October of 1994 and finally rejected in April of 1995 is not seasonable and is completely ineffective."

In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998). We have also found that where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law

rather than submit it to the jury for determination. See *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

Although the facts in this case are largely undisputed, there is more than one inference that can be drawn as to whether Paoli rejected the popcorn within a reasonable amount of time. One inference is that there was no rejection of the goods until April 1995 and that a rejection of popcorn 6 to 7 months after delivery is, per se, unreasonable. The other inference would be that in light of the communication which ensued between the parties and considering that at all relevant times Smith knew that the popcorn contained smut and therefore was possibly not marketable, it was reasonable to delay rejecting the popcorn until all attempts to market it had failed.

Whether or not Paoli rejected the goods in a reasonable amount of time is a question of fact. What is a reasonable time depends upon the circumstances surrounding the action. In *Gustav Thieszen Irr. Co., Inc. v. Meinberg*, 202 Neb. 666, 276 N.W.2d 664 (1979), we considered whether the trial court should have determined as a matter of law, rather than submitting to the jury, the question of whether the delivery of the goods was effected within a reasonable time, since the contract in that case did not specify a delivery time. We stated that when there is no precise rule of law which governs, the question of what, under the circumstances of a particular case, is a reasonable amount of time is usually a question for the jury. See, also, *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981) (noting that general rule is that questions whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within reasonable amount of time are questions of fact subject to jury's determination); *Duplex Mfg. Co. v. Atlas Leasing Corp.*, 184 Neb. 294, 166 N.W.2d 732 (1969) (holding that it was question for jury whether buyer had been given reasonable amount of time to inspect goods to see whether they conformed with contract); *Wendt v. Beardmore Suburban Chevrolet*, 219 Neb. 775, 779, 366 N.W.2d 424, 427 (1985) (finding that whether buyer has "exercise[d] ownership" over such goods is question of reasonableness and is question of fact).

Based upon the circumstances of this case and giving all reasonable inferences to Paoli, whether Paoli rejected the goods within a reasonable time presents a material issue of fact. Thus, the district court erred in granting summary judgment on this issue.

## CONCLUSION

We reverse the summary judgment and remand the cause for further proceedings. As the reversal of the summary judgment is decisive of this appeal, we need not address the other errors assigned by Paoli.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## STATE OF NEBRASKA, APPELLEE, V. DANIEL STROHL, APPELLANT.

587 N.W.2d 675

Filed January 8, 1999. No. S-97-1250.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous.
2. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.
4. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion.
5. **Intercepted Communications.** The Nebraska intercepted communications statutes make it unlawful to deliberately intercept through the use of any electronic, mechanical, or other device, any oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception.
6. ____. In order for a statement to fall within the protection of the intercepted communications statutes, the conversation must first be determined to be an oral communication.
7. **Intercepted Communications: Words and Phrases.** An oral communication is defined as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.
8. ____: ____. For a statement to fall within the definition of oral communication found in Neb. Rev. Stat. § 86-701(12) (Reissue 1994), the communication must be uttered

by a person (1) who has a subjective expectation of privacy and (2) whose expectation is objectively reasonable under the circumstances.

9. ____: ____. In order for a face-to-face conversation in a jail visiting room to be considered an oral communication under Neb. Rev. Stat. § 86-701 et seq. (Reissue 1994 & Cum. Supp. 1996), the person making the statement must have a subjective expectation of privacy which is objectively reasonable under the circumstances.
10. **Due Process: Evidence: Prosecuting Attorneys.** 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.
11. **Evidence.** There is no duty to disclose evidence that is inculpatory.
12. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on the evidence.
13. **Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
14. **Venue: Due Process.** To warrant a change of venue due to pretrial publicity, mere exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process.
15. **Venue.** Press coverage which is factual in nature cannot serve as the basis for change of venue.
16. **Trial: Juries.** Except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine venirepersons out of the presence of all other venirepersons.
17. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
18. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information that may be used in determining the kind and extent of the punishment to be imposed.

Appeal from the District Court for York County: MICHAEL OWENS, Judge. Affirmed.

James R. Mowbray and Robin W. Hadfield, of Nebraska Commission on Public Advocacy, for appellant.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

The present action involves Daniel Strohl's appeal from his conviction and sentence for criminal conspiracy to commit the

crime of escape and the crime of use of a deadly weapon during the commission of a felony. See Neb. Rev. Stat. § 28-202 (Reissue 1995). Strohl was found guilty and sentenced to a term of not less than 20 nor more than 30 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 1995). We affirm.

## I. FACTUAL BACKGROUND

In December 1996, Strohl was being held in the York County jail awaiting sentencing in relation to his conviction for first degree murder in the death of Pamela Kelly. Raymond Avila, Virginia Jarrell, and Denise Hanson were also incarcerated during this time period. Jarrell's cellmate was Hanson, and Strohl's cellmate was Avila. Even though Strohl and Jarrell were housed in separate cellblocks, their cells were directly adjacent to each other. Given the proximity of the cells, Strohl and Jarrell were able to speak to each other through openings in the jail doors where food trays were given to inmates.

On December 30, 1996, Strohl's cellmate, Avila, sent the York County sheriff, Dale Radcliff, a note asking to talk to him. Avila informed Radcliff that Strohl had arranged for his "girlfriend" to bring a weapon to the law library and that she was going to leave the weapon in the same location where she had been leaving cigarettes. In an attempt to verify Avila's statements, Radcliff and his deputy went to the law library to conduct a search and found two packs of cigarettes hidden behind various books. Radcliff reported the incident to the county attorney and then contacted the Nebraska State Patrol to have a surveillance camera installed in the library. Radcliff spoke with Avila again on December 30; Avila told Radcliff that Strohl had written a letter to "some woman." Radcliff went to the jail mailroom to verify what Avila had told him and retrieved an outgoing letter sent by Strohl addressed to Jarrell, who had been released from custody on December 15. Radcliff did not open the letter but merely photographed the envelope and allowed the letter to be mailed. The next day, Radcliff saw Jarrell enter the sheriff's office and hand an envelope to the dispatcher. Radcliff retrieved the envelope, opened it and photocopied the letter, and sent it on to Strohl. Based on the contents of the letter, Radcliff and two State Patrol officers again searched the library and

found additional cigarettes. That same day, Avila informed Radcliff that Strohl was going to meet with "this woman" during visitation the next day to arrange for a weapon to be brought to the law library.

Based on the information obtained from Avila and the evidence found in the law library, Radcliff had a microphone placed in the jail visiting room to intercept the face-to-face conversations between Strohl and Jarrell. The jail visiting rooms at the York County jail are concrete block, approximately 5 feet wide by 6 feet long on either side of a pane of glass that separates the visitor and the inmate. Below the glass is an area of approximately 6 to 8 inches which is solid except for a stainless steel grate in the middle. The microphone was placed in this stainless steel grate. The microphone receiver was placed in the sheriff's office, where it was monitored by a State Patrol drug investigator.

This procedure was followed four times. Because the sufficiency of the evidence is not at issue, we find it unnecessary to provide a factual recitation of the events that transpired after the initial interception. This court merely notes that the transcript of the intercepted communications reveals that an escape plan was being formulated.

On February 12, 1997, an information was filed against Strohl, charging him with criminal conspiracy to commit the crime of escape and the crime of use of a deadly weapon during the commission of a felony. Strohl filed an amended motion to suppress, seeking to exclude any intercepted oral communications or evidence derived from the allegedly illegal interception. Strohl argued the communications were intercepted in violation of Neb. Rev. Stat. § 86-701 et seq. (Reissue 1994 & Cum. Supp. 1996). The district court overruled the motion and determined the communications in question were not "oral communications" as defined by § 86-701(12), because neither Strohl nor Jarrell exhibited either an objective or a subjective expectation of privacy. Strohl also filed a motion for change of venue and argued the pretrial publicity regarding his prior murder conviction would effectively deny him his constitutional right to a fair trial. This motion was overruled, and the case proceeded to trial.

## II. ASSIGNMENTS OF ERROR

Strohl contends the district court erred in (1) failing to sustain his motion to suppress, because the jail visiting-room conversations were intercepted in violation of the Nebraska intercepted communications statutes, § 86-701 et seq.; (2) overruling his motion for a mistrial because the State failed to provide exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (3) failing to sustain certain motions to strike, which in turn forced him to use peremptory challenges; (4) overruling his motion to change venue; and (5) imposing an excessive sentence which was predicated on the court's receipt of a letter from Kelly's family as part of the presentence report.

## III. STANDARD OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

A motion for change of venue is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *State v. Jacob, supra.*

A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

## IV. ANALYSIS

### 1. "Oral Communication"

In Strohl's first assignment of error, Strohl claims the district court erred in failing to sustain his motion to suppress, because

the jail visiting-room conversations were intercepted in violation of the Nebraska intercepted communications statutes, § 86-701 et seq.

In *State v. Hinton*, 226 Neb. 787, 794, 415 N.W.2d 138, 143 (1987), we stated that the Nebraska intercepted communications statutes make

> it unlawful to . . . deliberately intercept . . . through the use of any "electronic, mechanical, or other device," any . . . oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception.

In order for a statement to fall within the protection of these statutes, however, the conversation must first be determined to be an " 'oral communication.' " *State v. Weikle*, 239 Neb. 157, 159, 474 N.W.2d 486, 488 (1991). An oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." § 86-701(12). In *State v. Weikle, supra* (citing *United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978)), we stated that for a statement to fall within the statute's definition, the communication must be uttered by a person (1) who has a subjective expectation of privacy and (2) whose expectation is objectively reasonable under the circumstances.

In *State v. Weikle*, 239 Neb. at 160, 474 N.W.2d at 489, we determined there is no reasonable expectation of privacy within the confines of a " 'jail cell.' " We cited with approval *In re Joseph A.*, 30 Cal. App. 3d 880, 106 Cal. Rptr. 729 (1973), for the proposition that there is no reasonable expectation of privacy as to oral communications within a "police station or jail facility." *State v. Weikle*, 239 Neb. at 161, 474 N.W.2d at 489. However, this court has never before been presented with the question of whether an inmate has a reasonable expectation of privacy in a face-to-face conversation in a "jail visiting room." Because the Nebraska intercepted communication statutes are patterned after title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. (1994), we look to

federal law in interpreting the provisions of the Nebraska intercepted communications statutes. See, *State v. Weikle, supra*; *State v. Hinton, supra*.

In *Lanza v. New York*, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962), the U.S. Supreme Court addressed a situation where the police recorded a jail visiting-room conversation between Lanza and his jailed brother. Lanza later refused in a hearing before a legislative investigating committee to answer questions based on the secret recording. After upholding Lanza's conviction on independent grounds, the Supreme Court added that in any case, Lanza could not rely on the Fourth Amendment in refusing to answer the committee's questions, because the location of the recorded conversation, a jail visiting room, was not a protected area. The Court stated:

> [T]o say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here.

370 U.S. at 143-44.

Similarly, in *People v. Santos*, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972), the court determined that the federal wiretap statute was inapplicable to a jail visiting-room conversation,

because the parties did not have an expectation of privacy, i.e., the conversation was outside the definition of an "oral communication." In *Santos*, the defendant and his wife spoke on an intercom system in the jail visiting room. In an attempt to suppress the statement at trial, the defendant argued he intended to communicate with his wife in confidentiality; the court rejected this contention. On appeal, the defendant alleged the trial court erred in refusing to grant the motion to suppress, because the monitoring violated the federal wiretap law, 18 U.S.C. §§ 2510 through 2520. The court rejected this argument, stating that the conversation was outside the statutory definition of an "oral communication" because the defendant did not possess a subjective expectation of privacy, and that an expectation of privacy under such circumstances would have been unreasonable. The defendant further alleged the monitoring violated his 4th and 14th Amendment rights. The court rejected his argument, citing *Lanza, supra*, and stated that "[i]t has repeatedly been held . . . that electronic surveillance of conversations between jail inmates and their visitors does not transgress the constitutional prohibition against unreasonable searches and seizures." 26 Cal. App. 3d at 402, 102 Cal. Rptr. at 681. See, also, *People v. Von Villas*, 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (1992) (holding that there is no expectation of privacy in jail visiting area and that federal wiretap statute does not apply in such situations); *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980) (holding that there is no right of privacy in jail visiting room conversations under Fourth Amendment or federal wiretap law).

However, in *Katz v. United States*, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court declared that "the Fourth Amendment protects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Based on the holding in *Katz* and the fact that *Lanza v. New York*, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962), epitomized the "protected areas" analysis, a few courts have intimated moving away from *Lanza*'s total rejection of privacy in favor of a position limiting eavesdropping to situations where a showing of institutional security has been made. See, e.g., *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *cert. denied* 435 U.S.

932, 98 S. Ct. 1507, 55 L. Ed. 529 (1978); *Donaldson v. Super. Ct. of Los Angles Cty.*, 35 Cal. 3d 24, 672 P.2d 110, 196 Cal. Rptr. 704 (1983). The greater weight of authority, however, has consistently followed *Lanza* and upheld the admission of monitored conversations in police stations, jail visiting rooms, or jail cells. For instance, in *United States v. Paul*, 614 F.2d 115, 116 (6th Cir. 1980), the Sixth Circuit stated:

> It still appears to be good law that so far as the Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor. This was the ruling in *Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962)[,] and it appears to have survived *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

See, e.g., *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied* 435 U.S. 1000, 98 S. Ct. 1656, 56 L. Ed. 2d 90; *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972).

Strohl argues he had an expectation of privacy in the jail visiting room because the room is surrounded by concrete block walls; the room has steel doors which are closed during visitation; there are no intercoms or devices for jail staff to communicate with, listen to, or monitor conversations in the visiting room; and there is only a small window on the visitor's side of the room where jail staff can observe the inmate and visitor. The State concedes the evidence is divided as to whether Strohl exhibited a subjective expectation of privacy. However, the State argues that a subjective expectation of privacy is not enough; the expectation of privacy must also be objectively reasonable. We agree and so held in *State v. Weikle*, 239 Neb. 157, 474 N.W.2d 486 (1991).

We find the Fourth Amendment principle in *Lanza v. New York, supra*, and the holdings in *People v. Santos*, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972); *People v. Von Villas, supra*; and *People v. Blehm, supra*, persuasive and conclude that Strohl's subjective expectation of privacy in his face-to-face conversations with Jarrell in the jail visiting room was not objectively reasonable under the circumstances. As such, the conversations were not oral communications protected under

§ 86-701 et seq. We therefore hold that the district court's decision to overrule the motion to suppress was correct.

2. FAILURE TO PROVIDE EXCULPATORY EVIDENCE

In Strohl's second assignment of error, Strohl claims the district court erred in overruling his motion for a mistrial based on the prosecution's failure to provide exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Strohl's argument centers on a series of statements made by Hanson regarding her ability to obtain a gun for Jarrell.

From December 4, 1996, to April 7, 1997, Hanson was incarcerated in the York County jail and for at least part of this time was a cellmate of Jarrell's. During their incarceration together, Jarrell asked Hanson to help her get Strohl out of jail. After Jarrell was released, she came to visit Hanson in jail. Jarrell asked Hanson if she could obtain a gun for her from her boyfriend. Hanson initially stated in a pretrial deposition that she never talked to her boyfriend about obtaining a gun for Jarrell. During trial, however, Hanson recanted and admitted writing a letter to her boyfriend about obtaining a gun.

The recantation occurred during cross-examination on the fourth day of trial. Defense counsel asked Hanson whether she talked to her boyfriend about obtaining a gun, and Hanson responded, "I told you guys I didn't, but I did. I didn't want to get him in trouble." Upon further cross-examination, Hanson stated that she had informed the prosecution of the inconsistency on Monday, the first day of trial. Hanson stated that after she informed the prosecution of the inconsistency, the prosecution "told me to explain it in Court and that's what I'm doing." Strohl's attorney moved for a mistrial. The district court denied the motion but granted the defense's request for further cross-examination on the subject. Strohl claims he was prejudiced by not being informed until the fourth day of trial that Hanson had recanted, when the prosecution was aware of the discrepancy 4 days prior.

In *Brady v. Maryland*, 373 U.S. at 87, the Supreme Court held that "the suppression by the prosecution of evidence favor-

able 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." In *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes. The Court further noted that regardless of request, favorable evidence is "material," and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result in the proceeding would have been different." 473 U.S. at 682. See, e.g., *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998); *Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995). In *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the Court clarified the *Bagley* materiality standard and stated that a "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"

The difficulty this court has with Strohl's contention is that *Brady* applies only to "favorable" evidence. See *United States v. Bagley*, 473 U.S. at 675 (stating that "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused"). The Eighth Circuit emphasized this point in *U.S. v. Flores-Mireles*, 112 F.3d 337, 339 (8th Cir. 1997), where the court held that under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), "[t]here is no duty to disclose evidence that is . . . inculpatory . . . ." Several other federal circuits have ruled in a similar fashion. See, e.g., *U.S. v. Arias-Villanueva*, 998 F.2d 1491, 1506 (9th Cir. 1993) (holding that *Brady* does not apply to evidence which "tends to inculpate, not exculpate"); *U.S. v. Polland*, 994 F.2d 1262, 1267 (7th Cir. 1993) (holding that *Brady* does not apply to evidence "which is more inculpatory than exculpatory"). Moreover, in *U.S. v. Willis*, 997 F.2d 407 (8th Cir. 1993), the Eighth Circuit also ruled that *Brady* does not apply to inculpatory evidence even if the evidence contains a few seemingly inconsistent statements which defendant could have further used to impeach the witness.

In *U.S. v. Willis*, Steve Ettles, Charles Hopp, and Steven C. Willis were indicted on federal bank fraud charges. On appeal, Willis claimed a *Brady* violation had occurred in that the government failed to turn over FBI routine investigation reports concerning conversations that agents had with Ettles. Willis' claim arose from statements made by FBI agents at Ettles' sentencing hearing. In response to a question by the prosecutor concerning one of Ettles' objections to his presentence report, the agent stated that Ettles had told him during an interview that Willis had come up with the idea for one of the bank fraud schemes, but that Ettles admitted discussing the idea with his two partners. The Eighth Circuit rejected Willis' *Brady* violation claim, saying:

> This statement shows that Ettles directly inculpated, rather than exculpated, Willis. Accordingly, even if the [FBI routine investigation reports] contained a few seemingly inconsistent statements with which Willis could have further impeached Ettles, we are confident that the reports as a whole were not material under *Bagley* because they directly inculpated Willis. Willis has failed to show how these reports undermine confidence in the trial's outcome.

997 F.2d at 414.

The same is true in the case at bar. Strohl's defense against the conspiracy charge was that the escape plan was never serious and there was never an overt act in furtherance of the escape. To support this argument, the defense was using Hanson's statements that she never contacted her boyfriend. However, Hanson's recantation undermined the defense's theory. The evidence that Hanson contacted her boyfriend about securing a gun demonstrates that Jarrell was serious about obtaining a weapon in furtherance of the escape and that the plan was moving forward. As such, the evidence of Hanson's recantation served to inculpate rather than exculpate Strohl. Therefore, the evidence of Hanson's recantation could not be considered material under *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), and the district court was correct in overruling Strohl's motion for mistrial.

### 3. Motions to Strike Members of Venire

In Strohl's third assignment of error, Strohl claims the district court erred in failing to sustain certain motions to strike, which in turn forced him to use peremptory challenges.

The record shows that several members of the general venire admitted reading newspaper articles regarding Strohl's prior murder conviction. The voir dire transcript reveals that 19 of the original 29 venirepersons had heard or read something regarding this case or the prior case. During voir dire, the defense moved to strike 10 of 29 venirepersons for cause. The district court sustained three of those challenges and denied the other seven. Strohl complains the district court erred in overruling these seven motions to strike, which in turn forced him to use his peremptory challenges.

The law does not require that a juror be totally ignorant of the facts and issues; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on the evidence. *State v. Lotter, ante* p. 456, 586 N.W.2d 591 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Jacob, supra*; *State v. Rice*, 231 Neb. 202, 435 N.W.2d 889 (1989). The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Lotter, supra*; *State v. Jacob, supra*; *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

Even though the record reveals that several venirepersons possessed knowledge of Strohl's prior conviction, the record, taken as a whole, adequately demonstrates that each juror either had formed no opinion regarding Strohl's guilt or innocence or could set aside any opinions and decide the case based on the evidence. We therefore find the district court did not abuse its discretion in denying Strohl's motions to strike.

Strohl's additional complaint that the district court's failure to sustain his motions to strike denied him due process by forcing him to use peremptory challenges is without merit. In *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), the Court explained that whether the wrongful denial of a challenge for cause violates due process because a peremptory

challenge must be used to eliminate that venireperson is a question for each state court. In *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990), we stated that in any event, there can be no question whether a challenge for cause has been wrongfully denied if the denial was not erroneous. Because the district court did not abuse its discretion in denying the motions to strike, this argument is meritless. See *id.*

### 4. Motion to Change Venue

In Strohl's fourth assignment of error, Strohl claims the district court erred in overruling his motion to change venue. In essence, Strohl claims that the pretrial publicity regarding the murder of Kelly made it impossible for him to receive a fair trial in his present case.

To warrant a change of venue due to pretrial publicity, mere exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. *State v. Jacob*, *supra*. Rather, to warrant a change of venue a defendant must show the existence of pervasive misleading pretrial publicity. *Id.*; *State v. McHenry*, *supra*; Neb. Rev. Stat. § 29-1301 (Reissue 1995). A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. McHenry, supra*. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. McHenry, supra*; *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

A number of factors must be evaluated in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which the publicity circulated in areas to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of

challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Bowen, supra*; *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993).

The crux of Strohl's argument is that the pretrial publicity regarding his prior murder conviction made it impossible to receive a fair trial in his present case. However, as discussed earlier, the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions and render a verdict based upon the evidence presented in court. *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); *State v. Bradley, supra.*

Strohl concedes that venirepersons were asked whether they could put aside their knowledge and follow the court's instructions, and many said they could. Strohl contends, however, that the level of their knowledge regarding his earlier murder conviction and the unique circumstances of the case required that the trial be moved to another county or that a jury from another county be seated in York County. In support of this contention, Strohl introduced three newspaper articles dated December 22, 1995; May 11, 1996; and January 31, 1997. Based on these articles, Strohl argues that the length of time between the dissemination of the publicity complained of (January 1997) and the date of jury selection (September 1997), 8 months, was "a relatively short time frame." Brief for appellant at 26. We disagree.

This court has repeatedly held that news accounts appearing within a time period less than 8 months before trial could not serve as a basis for a change of venue. See, e.g., *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (ruling that abuse of discretion did not occur where only five newspaper articles appeared within 4 months of jury selection); *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992) (ruling that news coverage was too distant where the most recent article appeared within 3 months of trial). Moreover, Strohl failed to show how the articles actually prejudiced him. In *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), we stated that mere exposure to news accounts does not presumptively deprive a

defendant of due process; rather, there must be a showing of pervasive misleading pretrial publicity. Strohl has made no such showing.

In addition, the nature of the publicity does not support Strohl's contention. The December article included nothing more than a factual recitation of the events, describing the murder victim, how she was found, and a chronological narrative leading to Strohl's apprehension. The May article merely contained a story about the victim's mother, and the January article simply discussed how Pamela Kelly died and highlighted Strohl's apparent remorse. We have consistently held that press coverage which is factual in nature cannot serve as the basis for change of venue. *State v. Williams, supra*; *State v. Bradley, supra*. See, also, *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990) (stating that news accounts which are factual and do not reveal hostility or animosity to defendant do not serve as factual basis for change of venue); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987) (stating that factual news accounts reporting occurrence of crime, one defendant's call for ambulance, charging of defendants, and appointment of special prosecutor did not furnish basis for change of venue). The content of the publicity further undermines Strohl's claim, considering the fact that the articles were unrelated to his present charge for conspiracy to escape but pertained only to his prior murder conviction.

Strohl also alleges that the sheer time which voir dire took to complete, approximately 5 hours, indicates the jury panel was prejudiced. However, in other cases where voir dire took a similar or longer time to conduct, we did not find a change of venue was warranted. See, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992) (4 hours); *State v. Jacobs, supra* (1 day); *State v. Ell*, 196 Neb. 800, 808, 246 N.W.2d 594, 599 (1976) ("2 full days").

Finally, Strohl argues that venue should have been changed because the trial court denied his request for leave to question four additional individuals out of the presence of the other venirepersons. However, we have stated that except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine venirepersons out of the presence of all other venirepersons. *State v. Thompson*, 244

Neb. 375, 507 N.W.2d 253 (1993). Strohl has shown no prejudice. In *State v. Bradley*, 236 Neb. at 387, 461 N.W.2d at 537, the defendant argued that he was unable to ask the " 'searching questions' " required under the circumstances, just as Strohl now argues. We found the record in *Bradley* to be "replete with questions regarding pretrial publicity and whether such publicity had caused anyone to form an opinion as to Bradley's guilt or innocence." *Id.* at 387, 461 N.W.2d at 537. We also find the record in Strohl's case replete with questions regarding the effects of pretrial publicity.

Based on our review of the record, the voir dire transcript, and all the pertinent factors, we cannot say that the trial court abused its discretion in denying the change of venue.

### 5. Inclusion of Letter from Kelly's Family in Presentence Report

In Strohl's final assignment of error, Strohl claims the district court erred by imposing an excessive sentence predicated on the court's receipt of a letter from Kelly's family as part of the presentence report.

A sentence imposed within statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998); *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997). As the district court's sentence was within the statutory limit, see §§ 28-202 and 28-105(1), our inquiry is limited to reviewing for an abuse of discretion.

An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Hill, supra*; *State v. Pattno, supra*; *State v. Chojolan, supra*. In this regard, the sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). Additionally, a sentencing court has broad discretion as to the source and type of evidence and information that may be used in determining the kind and extent of the punishment to be imposed. *Id.* In

*State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648 (1969), we stated:

> Highly relevant, if not essential, to [a judge's] determination of an appropriate sentence is the gaining of knowledge concerning the defendant's life, *character*, and *previous conduct*. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including [the judge's] own observations of the defendant.

(Emphasis supplied.)

The letter contained information regarding Strohl's prior murder conviction and a request by Kelly's family that Strohl receive the maximum sentence available for the charge of conspiracy to escape. We determine the letter from Kelly's family members is relevant to Strohl's "character" and his "previous conduct." We further determine that the district court did not abuse its discretion by including the letter in the presentence report and that the sentence imposed was not excessive.

## V. CONCLUSION

Having considered all of the defendant's assignments of error, we affirm the district court's order in all respects.

AFFIRMED.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN R. O'HANLON, RESPONDENT.

587 N.W.2d 700

Filed January 8, 1999. No. S-98-1267.

Original action. Judgment of disbarment.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Respondent, John R. O'Hanlon, was admitted to the practice of law in the State of Nebraska on February 28, 1972.

Based on information received by the Counsel for Discipline, a preliminary review of respondent's trust account records was

commenced by the Counsel for Discipline on September 22, 1998. Based on the review of respondent's trust account records by the Counsel for Discipline, respondent was notified on November 6 that he was under investigation. As of November 6, the investigation centered on respondent's handling of four estates: the Larry Kuhr estate, the George Campbell estate, the Katherine Rathjen estate, and the Ruth M. Blanchard estate. The notice of investigation to respondent stated that it was alleged that respondent used client funds for unintended purposes, that the balances in respondent's trust accounts fell below the amounts which should have been in the accounts representing client funds, and that respondent commingled personal funds with client funds.

On December 3, 1998, respondent filed a "Voluntary Surrender of License" to practice law. Therein, respondent admits that a disciplinary complaint was filed against him on November 6. Respondent further states that for purposes of his voluntary surrender of license, he does not desire to contest the allegations surrounding the Rathjen estate, which allegations state that on February 18, 1998, $25,722.98 was deposited into respondent's Washington County Bank attorney trust account on behalf of the Rathjen estate, and that by March 31, the account balance was $5,278.27, even though no funds had been paid out of the account on behalf of said estate.

Respondent admits that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (6), and Canon 9, DR 9-102(A)(1) and (2), of the Code of Professional Responsibility. Respondent has freely and voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, or hearing prior to entry of such an order.

The court hereby accepts respondent's surrender of his license to practice law and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

# DENNIS GALE NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE. LUANN NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE.

587 N.W. 2d 867

Filed January 15, 1999. Nos. S-97-560, S-97-561.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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 proper 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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **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.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for further proceedings.

David B. Latenser, of Latenser & Johnson, P.C., for appellants.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## BACKGROUND

On August 2, 1991, appellant Dennis Gale Nicholson was injured in a motor vehicle accident when a motor vehicle owned and operated by Herbert G. Theobald collided with Dennis' vehicle. Theobald was covered under an automobile liability policy issued by Union Insurance Company for $50,000 per accident. Union Insurance subsequently paid the entire $50,000

to Dennis in exchange for its release. At the time of the accident, Dennis was operating a vehicle owned by his employer, R.S. Stover Company. The vehicle was insured under a policy of motor vehicle insurance issued by Royal Insurance Company. That insurance policy provided underinsured motorist coverage up to a limit of $500,000 for bodily injury caused by any one accident. Dennis and his wife, appellant LuAnn Nicholson, also had their own policy of automobile insurance with appellee, General Casualty Company of Wisconsin, which provided underinsured motorist coverage up to $300,000 per accident. On March 10, 1995, Dennis made a claim against the underinsured motorist coverage provided under the General Casualty policy, requesting payment of the limit of coverage. LuAnn filed a separate action, seeking to recover benefits for loss of consortium under the same policy provisions. General Casualty refused to pay the claims of the Nicholsons. The Nicholsons filed this consolidated action to recover for their loss from the underinsured motorist provisions of the General Casualty policy. The parties stipulated that Dennis' and LuAnn's separate actions be consolidated for all purposes.

The case was heard on General Casualty's motion for summary judgment and the Nicholsons' motions for summary judgment on the issue of liability and for fees taxed as costs. The trial court granted General Casualty's motion for summary judgment and denied the Nicholsons' motions. The Nicholsons timely appealed. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## ASSIGNMENTS OF ERROR

The Nicholsons assign that the trial court erred in (1) failing to hold that under the revised version of Neb. Rev. Stat. § 60-578 (Reissue 1993), an insured's own carrier must compensate the insured to the limit of the carrier's underinsured motorist coverage if, after payments by any other legally liable person or organization pursuant to Neb. Rev. Stat. § 60-580 (Reissue 1993), the insured still has not been fully compensated for his or her injuries; (2) failing to hold that the amount for which the insured's own carrier can be liable for underinsured coverage is

no longer the difference between the limit of the carrier coverage and amounts already paid to the insured by legally liable persons or organizations, but, instead, that it is the difference between the damages sustained by the insured and the amounts already paid to the insured by any legally liable person or organization, with the condition that the maximum liability of the insured's own carrier cannot exceed the liability limit for underinsured coverage set out in the insured's policy; (3) improperly overruling the Nicholsons' motion for fees taxed as costs pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998); and (4) improperly dismissing the Nicholsons' petitions against General Casualty, the excess underinsured coverage carrier, where no payment was made to the Nicholsons by Royal Insurance, the primary underinsured coverage carrier.

## STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

Summary judgment is proper 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. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998); *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, *ante* p. 303, 583 N.W.2d 774 (1998); *Fitzke v. City of Hastings*, *ante* p. 46, 582 N.W.2d 301 (1998).

## ANALYSIS

At the time of the August 2, 1991, motor vehicle accident from which the Nicholsons' claims arise, the following statutes were in effect. Section 60-580 states:

> (1) In the event an insured is entitled to underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) When multiple policies apply, payment shall be made in the following order of priority, subject to the limit of liability for each applicable policy:
>
> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> (b) A policy covering a motor vehicle which came into contact with the insured while a pedestrian; and
>
> (c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

Section 60-578 states:

> The maximum liability of the insurer under the underinsured motorist coverage shall be the amount of damages for bodily injury, sickness, disease, or death sustained by the insured less the amount paid to the insured by or for any person or organization which may be held legally liable for the bodily injury, sickness, disease, or death, but in no event shall the maximum liability of the insurer under such coverage be more than the limits of the underinsured motorist coverage provided.

The trial court relied on § 60-580 in granting General Casualty's motion for summary judgment, reasoning that because Royal Insurance was second in the order of payment priority, the Nicholsons would receive the maximum $500,000 as determined by § 60-580(1) before any claim against their General Casualty coverage could arise.

The Nicholsons argue that § 60-578 requires an insured's own underinsured motorist carrier to compensate the insured to the limit of its coverage if the insured has not been fully compensated for his or her injuries by payments received from other carriers pursuant to § 60-580. We disagree. Although § 60-578 deals generally with the maximum *liability* of an insurer providing underinsured motorist coverage, § 60-580 establishes the maximum *recovery* of an insured in the specific circumstances

where he or she is entitled to coverage under more than one underinsured motorist policy and, further, establishes the priority by which payments under such policies are to be made. Dennis is an insured under both the $500,000 underinsured motorist coverage issued by Royal Insurance to his employer and the $300,000 underinsured motorist coverage contained in his General Casualty policy. Under the plain language of § 60-580(1), his maximum underinsured motorist recovery would be $500,000, the highest limit of the two applicable policies. Under § 60-580(2), Royal Insurance's underinsured motorist coverage would be primary to that of General Casualty. Thus, if Dennis' damages were not fully compensated by payments from the tort-feasor's liability insurer (Union Insurance), Royal Insurance's underinsured motorist coverage would apply. If receipt of all or part of that coverage resulted in full compensation of his personal injury claim, he would have no basis for any additional claim under the General Casualty coverage. Moreover, even if payment of the full amount of the Royal Insurance coverage did not result in full compensation, Dennis would have no right to recover under the General Casualty coverage because he would have already received the maximum underinsured motorist recovery permitted under § 60-580, i.e., the highest limit of the two applicable policies.

However, this does not resolve the appeal. As the party moving for summary judgment, General Casualty had the burden to show that no genuine issue of material fact existed and to produce sufficient evidence to demonstrate that it was entitled to judgment as a matter of law. See, *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998). Therefore, General Casualty was required to demonstrate that under the facts of this case, it could not have liability under its underinsured motorist coverage for claims arising from the August 2, 1991, accident. If Dennis were the only person seeking damages for injuries sustained in that accident, we agree that General Casualty would be entitled to judgment as a matter of law for the reasons stated above. However, the record reflects that LuAnn has asserted claims against both Royal Insurance and General Casualty for loss of consortium sustained as a result of Dennis'

injuries. Although there is evidence that Union Insurance tendered its liability insurance limits of $50,000 "in exchange for Releases from Plaintiffs," the record does not establish what portion of this payment LuAnn received or whether she has been fully compensated by such payment. Nor does the record reflect whether payments have been made by Royal Insurance to either Dennis or LuAnn under its underinsured motorist coverage. There is no evidence of the total damages sustained by each of the Nicholsons, and the record is silent as to whether persons other than the Nicholsons have pending or settled claims against Royal Insurance arising from the August 2 accident.

On the basis of this record, it cannot be said as a matter of law that General Casualty has no liability to the Nicholsons. For example, if each received 50 percent of the Royal Insurance underinsured motorist policy limit and still had uncompensated damages, each would have a right to seek recovery from General Casualty for his or her uncompensated damages or the remaining $250,000 of their maximum underinsured motorist recovery permitted under § 60-580(1), whichever is less, subject to the maximum limits of the General Casualty policy as provided by § 60-578. Thus, the record does not contain uncontroverted facts establishing that General Casualty is entitled to judgment as a matter of law, and summary judgment was therefore improper. We reverse, and remand to the district court for further proceedings consistent with this opinion.

## CONCLUSION

For the reasons stated above, the summary judgment in favor of General Casualty is hereby reversed, as is the denial of the Nicholsons' motion for fees to be taxed as costs, and this cause is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# EDWARD KAISER, APPELLANT, AND NOLL TEMPORARY SERVICES, APPELLEE, V. MILLARD LUMBER, INC., A NEBRASKA CORPORATION, APPELLEE.

587 N.W.2d 875

Filed January 15, 1999. No. S-97-857.

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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
4. **Employer and Employee.** When a general employer, like a labor broker, loans an employee to another for the performance of some special service, that employee may become the employee of the party to whom his or her services have been loaned.
5. **Workers' Compensation: Contracts: Liability.** When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation.
6. **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 it is entitled to judgment as a matter of law.
7. ____: ____. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
8. ____: ____. If the movant has shown a prima facie case for summary judgment, the burden of producing evidence to show a genuine issue of material fact shifts to the party opposing the motion for summary judgment.
9. **Workers' Compensation: Words and Phrases.** A finding that one party is an "employer" under Neb. Rev. Stat. § 48-114 (Reissue 1993) and a finding that the other relevant party is an "employee" under Neb. Rev. Stat. § 48-115 (Reissue 1988) are necessary to engage Neb. Rev. Stat. § 48-109 (Reissue 1993), which binds the parties to the compensation schedule of the Nebraska Workers' Compensation Act.
10. **Employer and Employee: Contracts.** Whether a contract of hire is established is ordinarily a question of fact.
11. ____: ____. A court may find a contract of hire established as a matter of law only when but one inference can reasonably be drawn from the facts.

12. **Contracts: Parties: Intent.** The term "implied or inferred contract," also sometimes called an implied in fact contract, refers to that class of obligations which arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.
13. ____: ____: ____. The determination of the parties' intent to make a contract is normally a question of fact.
14. **Employer and Employee: Contracts: Parties: Intent: Proof.** Relevant evidence to prove or disprove that an implied contract of hire was created is objective manifestations that could reasonably infer either party did or did not intend to enter into a contract of hire.
15. **Summary Judgment: Employer and Employee: Contracts: Intent: Proof.** A movant for summary judgment, in order to be entitled to a judgment that an implied contract of hire was created, has the initial burden to produce evidence which reasonably infers that both parties intended to enter a contract of hire.
16. **Employer and Employee: Contracts: Evidence.** Evidence that a special employer is not the immediate provider of wages and benefits does not preclude a finding of an implied contract of hire as a matter of law.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Henry C. Rosenthal, Jr., of The Law Offices of Ronald J. Palagi, P.C., on briefs, for appellant.

Jerry W. Katskee and Todd W. Weidemann, of Katskee, Henatsch & Suing, for appellee Millard Lumber.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Appellant, Edward Kaiser, brought a negligence action against appellee Millard Lumber, Inc., for injuries he received on Millard Lumber's premises. The district court granted summary judgment for Millard Lumber, determining that Kaiser could not assert a negligence action against Millard Lumber because Millard Lumber was an employer of Kaiser. We affirm.

## BACKGROUND

Kaiser applied for work through appellee Noll Temporary Services (Noll) in November 1991. Noll provided businesses temporary labor for light-industry work. Noll subsequently

hired Kaiser and first assigned him in May 1992 to Able Professional Movers. He worked approximately 3 weeks and then asked Noll's placement coordinator to reassign him, complaining that he did not enjoy the job and that the work hours he received were too inconsistent. Noll next assigned him to perform general labor tasks at Millard Lumber. Millard Lumber hired temporaries from several labor agencies in Omaha, Nebraska.

Noll provided a number of temporary workers for Millard Lumber through a longstanding arrangement. However, Noll and Millard Lumber had no written contract. The negotiated agreement provided that Millard Lumber could call Noll and request laborers, stating what type of work needed to be done, and that Noll would provide them at $6.40 per hour. The loaned employees, like Kaiser, received pay of $4.25 per hour. Noll paid workers' compensation insurance, made payroll deductions, and paid advertising expenses. In Kaiser's case, Millard Lumber called Noll's placement coordinator, JoAngela King, requesting people for "general labor," which King describes as customer service and lumber stacking. Kaiser was told he would stack lumber and help make deliveries. Kaiser had the option to reject the assignment, but he accepted it.

When Kaiser reported to work, a Millard Lumber foreman directed him to stack lumber. He continued to stack lumber on his first and second days on the job, and he also assisted with deliveries. On Kaiser's third day at Millard Lumber, the foreman assigned him to work with a particular Millard Lumber employee, Walter Root, in the company's north "saw house." Root was operating a power saw and told Kaiser to take 4-by-4 posts that had been sawed and place them in a cart.

On his fourth day, Kaiser reported to the same location at Millard Lumber as on the 3 previous days, and the Millard Lumber foreman again assigned him to help Root in the north saw house. Root told Kaiser to stand on one end of a saw, catch the cut boards as they came off the saw, and stack them. At some point, the space underneath the saw blade filled with sawdust due to a plugged vacuum system, causing the saw to spit out sawdust from the top. Root shut down the saw, removed a vacuum hose, and used a small stick to move the sawdust under-

neath the saw blade so that the vacuum system could pick it up. When Root turned on the saw, Kaiser had his hand underneath the saw blade, and the blade partially amputated three fingers and the thumb of Kaiser's right hand. Kaiser admits he was not asked to help clear out the sawdust.

Root stated he told Kaiser, on the days Kaiser worked with him, to keep all body parts and clothing away from the saw blade. Kaiser denies this. Kaiser received no other safety training from either Noll or Millard Lumber. The record reflects Millard Lumber conducted monthly safety meetings for its employees, with each foreman holding a separate meeting. Kaiser did not attend any of these meetings. However, the record does not indicate whether such a meeting was held when Kaiser worked at Millard Lumber. Millard Lumber's operations director, Ricard C. Baker, testified that the company has videos concerning the operation of saws and testified that it does not show them to loaned temporary employees. However, Baker also testified in a second deposition when asked a similar question that loaned employees may have seen the videos if they attended a monthly safety meeting.

Kaiser received a workers' compensation settlement from Noll. Millard Lumber was not a party to the settlement. Kaiser then filed the instant negligence action against Millard Lumber. In its answer, Millard Lumber asserted, inter alia, that Kaiser failed to state a cause of action and had exhausted his exclusive remedy of workers' compensation benefits. Millard Lumber subsequently moved for summary judgment.

In granting Millard Lumber's motion for summary judgment, the district court relied upon our recent opinion *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997). Applying the *Daniels* three-prong analysis to determine if a loaned servant is an "employee" of the borrowing company, the court determined that "[b]y [voluntarily] accepting the assigned temporary work with Millard and attempting to perform it, there is no question that Kaiser entered into at least an implied contract of hire with Millard." The court additionally determined that the facts undisputedly indicated that the work Kaiser did was essentially that of the special employer and that Millard Lumber undisputedly had the right to control the details of the work per-

formed by Kaiser. Thus, the court found that Kaiser was an employee of Millard Lumber within the meaning of the Nebraska Workers' Compensation Act, precluding Kaiser from suing Millard Lumber in tort for a work-related injury, and therefore granted Millard Lumber summary judgment.

## ASSIGNMENTS OF ERROR

Kaiser assigns, summarized, the district court erred in its grant of summary judgment by concluding that no genuine issue of material fact existed regarding whether (1) Kaiser entered into an employment relationship with Millard Lumber, (2) Millard Lumber exercised control over Kaiser once Noll assigned Kaiser to work for Millard Lumber, (3) Millard Lumber considered Kaiser its employee, and (4) an agreement existed between Kaiser, Noll, and Millard Lumber as to the type of work Kaiser would be performing at Millard Lumber.

## SCOPE OF REVIEW

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. *Stiver v. Allsup, Inc., ante* p. 687, 587 N.W.2d 77 (1998); *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

In reviewing a summary judgment, an appellate 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. *Stiver v. Allsup, Inc., supra*; *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998).

## ANALYSIS

Kaiser asserts that the facts presented, and reasonable inferences therefrom, create genuine issues of material fact regarding whether he and Millard Lumber entered into an employer-employee relationship for purposes of the Nebraska Workers' Compensation Act. Millard Lumber argues that the district court's application of *Daniels v. Pamida, Inc., supra*, was

proper because the relevant facts of this case are materially indistinguishable from those in *Daniels*. Accordingly, the ultimate issue is, Was an issue of material fact raised as to whether Kaiser became an employee of Millard Lumber?

In *Daniels*, as in this case, a labor broker employed the plaintiff, Daniels, and it then assigned Daniels to work for the defendant client, Pamida, Inc. Daniels was injured on Pamida's premises when a Pamida employee allegedly operated machinery negligently. Daniels settled a workers' compensation claim against the labor broker, in which Pamida was not a party. Daniels then filed a negligence action against Pamida. Pamida answered by asserting that it was an employer of Daniels and thus that Daniels' exclusive remedy was found within workers' compensation. The trial court granted summary judgment to Pamida on that assertion.

On appeal to this court, we first noted in our analysis that the Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997); *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). We also stated that when a general employer, like a labor broker, "loans an employee to another for the performance of some special service, then that employee . . . may become the employee of the party to whom his services have been loaned." *Daniels v. Pamida, Inc.*, 251 Neb. at 927, 561 N.W.2d at 571-72. If such is the case, then the employee is simultaneously the employee of both the labor broker and the party to whom his services were loaned, and thus workers' compensation would be the sole remedy for the employee as to either employer. We then restated the relevant test for determining whether one is an employer within the meaning of the Nebraska Workers' Compensation Act as follows:

> "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
>
> "(a) the employee has made a contract of hire, express or implied, with the special employer;
>
> "(b) the work being done is essentially that of the special employer; and

"(c) the special employer has the right to control the details of the work.

"When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation."

*Id.* at 928, 561 N.W.2d at 572. See Neb. Rev. Stat. §§ 48-114 (Reissue 1993) and 48-115(2) (Reissue 1988). We then concluded, based upon the evidence presented, that Pamida was an employer vis-a-vis Daniels as a matter of law, and thus Daniels' exclusive remedy was workers' compensation benefits.

Kaiser does not dispute the district court's use of the *Daniels* test to determine whether Millard Lumber was entitled to summary judgment. Rather, Kaiser argues that additional facts in this case, not discussed in *Daniels*, factually distinguish this case from *Daniels* and raise genuine issues of material fact as to two of the three elements of the *Daniels* test.

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. *Stiver v. Allsup, Inc.*, *ante* p. 687, 587 N.W.2d 77 (1998); *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Stiver v. Allsup, Inc., supra*; *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). If Millard Lumber has shown a prima facie case for summary judgment, the burden of producing evidence to show a genuine issue of material fact shifts to Kaiser, the party opposing the motion for summary judgment. See *Kramer v. Kramer, supra*. Accordingly, our analysis will focus upon, first, whether Millard Lumber has presented facts proving a prima facie case for summary judgment in its favor, and, second, whether Kaiser has presented contradictory evidence which raises a genuine issue of material fact.

### Express or Implied Contract of Hire

Kaiser's first and third assignments of error contest the district court's finding that Kaiser entered into at least an implied

contract of hire with Millard Lumber. Both the *Daniels* test and relevant statute require such a finding to provide Millard Lumber immunity from Kaiser's negligence lawsuit. Section 48-114 states that "every person, firm, or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession . . . and who has any person in service under any contract of hire, express or implied, oral or written" constitutes an employer subject to the Nebraska Workers' Compensation Act. Section 48-114 determines whether Millard Lumber is an "employer," but not whether it is Kaiser's "employer." Section 48-115 determines whether Kaiser is an "employee" under the act, stating: "The terms employee and worker . . . shall be construed to mean: . . . . (2) Every person in the service of an employer who is engaged in any trade, occupation, business, or profession . . . under any contract of hire, expressed or implied, oral or written . . . ."

The determination that Kaiser is an "employee" pursuant to § 48-115 is necessary to engage the exclusivity language of Neb. Rev. Stat. § 48-109 (Reissue 1993), which states: "If *both* employer and employee become subject to the Nebraska Workers' Compensation Act, both shall be bound by the schedule of compensation provided in such act . . . ." (Emphasis supplied.)

Whether a contract of hire is established is ordinarily a question of fact. *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d 891 (Iowa 1994); *Polk County v. Steinbach*, 374 N.W.2d 250 (Iowa 1985). Compare *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980) (stating that determination of whether party is employee is question of fact). A court may find a contract of hire established as a matter of law, as in *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997), only when but one inference can reasonably be drawn from the facts. In *Daniels*, this court stated the following facts as determinative in finding that an implied contract of hire was established as a matter of law:

> The evidence demonstrates that A-Help paid Daniels' wages and provided all payroll services such as withholding taxes and Social Security contributions. A-Help directed Daniels to report to the customer of its choice.

> However, Daniels had the right to refuse to report to any assignment as well as the right to terminate any assignment given. Daniels voluntarily went to work for Pamida and performed the tasks assigned to him. There is no question that Daniels had made at least an implied contract of hire with Pamida, and, therefore, part (a) of the three-factor test has been satisfied.

251 Neb. at 928, 561 N.W.2d at 572.

Kaiser, however, asserts that he has raised additional facts not raised in *Daniels* which indicate that there was no implied contract of hire between him and Millard Lumber. Those facts are as follows: (1) Kaiser was treated differently than Millard Lumber's regular employees in that he did not receive the same safety training, (2) he was treated differently in that he had to pay for his own hardhat, (3) Noll intended to remain Kaiser's sole employer, and (4) Noll set up his pay schedule and was the provider of all his benefits. He asserts this evidence raises a genuine issue of material fact regarding whether he and Millard Lumber created an implied contract of hire.

"The term implied or inferred contract, also sometimes called an implied in fact contract, refers to that class of obligations which arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words." 1 Samuel Williston, A Treatise on the Law of Contracts § 1:5 at 20 (Richard A. Lord 4th ed. 1990). This court has stated: "An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract." *Acton v. Schoenauer*, 121 Neb. 62, 63, 236 N.W. 140, 141 (1931). See *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991) (stating that evidence of mutual intent is necessary to prove existence of implied contract). The determination of the parties' intent to make a contract is normally a question of fact. 75A Am. Jur. 2d *Trial* § 795 (1991). Such intent is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances surrounding the transaction. *Cowan v. Mervin Mewes, Inc.*, 546 N.W.2d 104 (S.D. 1996). See, *James Hardie*

*Gypsum, Inc. v. Inquipco*, 112 Nev. 1397, 929 P.2d 903 (1996); *Fairchild v. Fairchild*, 176 Neb. 95, 125 N.W.2d 191 (1963). Testimony regarding subjective, secret intentions or understandings is not probative evidence. *Walker v. U.S. General, Inc.*, 916 P.2d 903 (Utah 1996); *Mullen v. Christiansen*, 642 P.2d 1345 (Alaska 1982); *Fairchild v. Fairchild, supra.* Compare *Cowan v. Mervin Mewes, Inc.*, 546 N.W.2d at 108 (stating " 'if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind' ").

Thus, evidence of objective manifestations that could reasonably infer that either Kaiser or Millard Lumber did not intend to enter into a contract of hire would present a genuine issue of material fact. We note that the Iowa Supreme Court, which requires the same showing of an express or implied contract of hire to determine if a loaned employee has become an employee of the special employer, follows a similar analysis. See, *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d 891 (Iowa 1994) (outlining whether any facts indicated loaned employee or special employer intended not to enter into contract of hire, in order to determine whether summary judgment for special employer should be reversed); *Bride v. Heckart*, 556 N.W.2d 449 (Iowa 1996) (citing *Parson* for proposition that determining whether employment relationship exists can be accomplished by looking at intention of parties).

The relevant facts stated in *Daniels* to prove an implied contract of hire focused solely upon the *employee's* intent. Those facts are that the loaned employee (1) had the right to refuse an assignment by the labor broker, (2) voluntarily went to work for the special employer, and (3) performed the tasks assigned to him by the special employer. However, facts were present which reasonably inferred Pamida, the special employer, intended to consider Daniels, the loaned employee, as its employee. Specifically, evidence that Pamida personnel were Daniels' exclusive supervisors and controlled all details of Daniels' work on its premises indicated Pamida intended to enter an implied contract of hire with Daniels. See, *Swanson v. White Consol. Industries, Inc.*, 30 F.3d 971 (8th Cir. 1994); *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d at 895-96 n.2 (Iowa 1994)

(stating that evidence that special employer has "right to control the details of the work" and is " 'the responsible authority in charge of the work' " infers special employer's consent to enter employment relationship with loaned employee).

In order to meet the first element of the *Daniels* test, Millard Lumber had the initial burden to produce evidence supporting an intent of both Kaiser *and* itself to enter a contract of hire. See, *Stiver v. Allsup, Inc., ante* p. 687, 587 N.W.2d 77 (1998); *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). Millard Lumber met that burden. Here, the facts show that while Noll paid Kaiser's wages, provided all payroll services, and directed Kaiser to report to the customer of its choice, Kaiser had the right to refuse or terminate any assignment given. Kaiser understood this right. The evidence undisputedly shows he exercised that right when he requested to be removed from the Able Professional Movers assignment. The evidence undisputedly indicates Kaiser voluntarily went to work at Millard Lumber and performed the tasks Millard Lumber assigned to him each day. Millard Lumber presented evidence regarding its intent to enter an implied contract of hire by showing that its personnel were Kaiser's sole supervisors and solely controlled every detail of his work on its premises. Thus, Millard Lumber met its burden of producing evidence on the *Daniels* test's contract-of-hire element, and the burden shifts to Kaiser to present evidence that shows a genuine issue of material fact. See *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). Thus, we now consider Kaiser's arguments on the implied contract-of-hire element of the *Daniels* test.

Kaiser argues that Millard Lumber treated loaned Noll employees materially differently than its own employees, raising a genuine issue of fact as to Millard Lumber's intent to enter an implied contract of hire with Kaiser. Specifically, Kaiser argues that evidence showing that Millard Lumber did not provide his hardhat and that temporary employees could not attend monthly safety meetings that were mandatory for regular Millard Lumber employees reasonably infers that Millard Lumber did not intend to enter a contract of hire with Kaiser.

Some courts have determined that in particular circumstances, a difference in treatment indicates a special employer

does not consider a loaned employee its own employee and thus manifests an intent not to enter a contract of hire. See, *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d 891 (Iowa 1994) (stating that when loaned employees are required to use separate break rooms, are prohibited from using cafeteria and locker room, and are prohibited from joining company labor association, these facts infer special employer did not intend to enter contract of hire with loaned employee); *Kowalski v. Shell Oil Co.*, 23 Cal. 3d 168, 588 P.2d 811, 151 Cal. Rptr. 671 (1979) (stating that jury verdict finding employment relationship was not created between special employer and loaned employee could be upheld in part by evidence that loaned employee's primary employer provided him with almost all necessary tools and equipment, including hardhat); *Barajas v. USA Petroleum Corp.*, 184 Cal. App. 3d 974, 984, 229 Cal. Rptr. 513, 518 (1986) (stating that jury verdict finding two loaned employees did not become employees of special employer could be upheld in part on evidence of "the differences in the treatment of workers"). We recognize the possibility that certain differences in treatment between a special employer's regular employees and a loaned employee might reasonably infer in certain circumstances that the special employer intended to not enter into a contract of hire with the loaned employee. However, without attempting to define or set out what particular differences in treatment would raise a reasonable inference, we conclude that Kaiser does not present sufficient evidence to show he was actually treated differently than Millard Lumber's regular employees.

Kaiser presented uncontroverted evidence that Noll provided his hardhat and that the cost was deducted from his wages. Kaiser argues that the fact that he had to pay for his own hardhat from Noll infers Millard Lumber intended not to enter into a contract of hire. King, Noll's placement coordinator, testified that she believed Millard Lumber supplied hardhats to its regular employees. However, she stated, "I don't know if they had them payroll deducted." The record contains no documents or testimony from Millard Lumber personnel on whether Millard Lumber in fact paid for the hardhats provided to its regular employees. With the record silent on the issue, no conclusion

can be made that Millard Lumber treated Kaiser any differently, because Millard Lumber may have required its regular employees to purchase hardhats. The burden rested upon Kaiser to present sufficient evidence to raise a reasonable inference, and Kaiser has failed to do that.

Likewise, Kaiser argues that the evidence indicates that Noll employees who worked at Millard Lumber were not included in monthly safety meetings that Millard Lumber regular employees, doing the same work, attended. Kaiser asserts that difference in treatment indicates Millard Lumber did not intend to enter a contract of hire. Each foreman in a particular area held a monthly safety meeting for the group of employees he or she supervised. Attendance was mandatory. Kaiser presented evidence showing that safety meetings were held for the area in which he worked, the main yard. Kaiser did not attend any monthly safety meeting. We note, however, and Kaiser's counsel conceded at oral argument, that the record is silent as to whether such a safety meeting was held on any of the 4 days Kaiser worked at Millard Lumber. Thus, Kaiser presented insufficient evidence to show that he was treated differently in regard to the safety meetings. Kaiser nonetheless argues that the record proves that Noll employees generally were excluded from such meetings. However, we find the record does not support that argument.

Kaiser next argues that a statement in the application Kaiser signed with Noll raises a genuine issue of material fact regarding whether an implied contract of hire was created. The pertinent sentence in the application stated: "If asked by a client of Noll Temporary Services to complete an employment application or other related materials, I agree to immediately contact Noll Temporary Services." That statement indicates only Noll's desire for Kaiser to remain its employee exclusively. Noll's intent is irrelevant to the determination of whether Kaiser and Millard Lumber established an implied contract of hire, and thus no reasonable inference can be drawn from this evidence in Kaiser's favor on this issue.

Kaiser next argues that the fact that Noll set up the pay schedule and was the immediate provider of all benefits to Kaiser raises a genuine issue of material fact. This fact was pre-

sent and considered in *Daniels*, but did not preclude this court from finding an implied contract of hire as a matter of law. Other courts have also determined that evidence that the special employer is not the immediate provider of wages and benefits does not preclude a finding of an implied contract of hire as a matter of law. *Pettaway v. Mobile Paint Mfg. Co., Inc.*, 467 So. 2d 228 (Ala. 1985); *Wright v. Habco, Inc.*, 419 S.W.2d 34 (Mo. 1967). As in *Daniels*, we reject this argument.

### CONTROL

Kaiser's second assignment of error, that the district court erred in concluding that no genuine issue of material fact existed regarding whether Millard Lumber exercised control over Kaiser once Noll assigned Kaiser to work for Millard Lumber, apparently contests the district court's finding that Millard Lumber had the right to control the details of Kaiser's work.

Millard Lumber presented evidence which showed that Millard Lumber exclusively supervised Kaiser once Kaiser was on Millard Lumber's premises. In his deposition, Kaiser states that he reported to a specific location each morning and a Millard Lumber foreman told him where or to whom he was to report each day. Kaiser testified that once he so reported, he was then told by a Millard Lumber employee exactly what work needed to be done. The record reflects Millard Lumber controlled the times when Kaiser could take breaks. Kaiser took breaks at the same time as the Millard Lumber employees with whom he worked. Noll did not supervise him at the jobsite, as contrasted with the case in *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d 891 (Iowa 1994), where the labor broker did have supervisors at the jobsite. Rather, consistent with *Daniels*, evidence that the special employer was the sole provider of supervision at the jobsite is sufficient to find that the special employer had the right to control the details of the loaned laborer's work. Kaiser presented no evidence contradicting Millard Lumber's evidence on this issue, and thus this argument fails.

### AGREEMENT AMONG PARTIES

Finally, Kaiser assigns as error a finding that there was no agreement between Kaiser, Noll, and Millard Lumber as to the

type of work Kaiser would be performing at Millard Lumber. The district court made no such finding. Such a finding is not necessary as part of the *Daniels* three-prong analysis; thus, we fail to see how this assignment of error is relevant to the summary judgment order before this court. Therefore, we decline to consider this assignment of error.

We affirm the district court's grant of summary judgment.

AFFIRMED.

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AG SERVICES OF AMERICA, INC., AN IOWA CORPORATION, APPELLEE, V. DARRELL E. EMPFIELD, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND C.M.R., INC., A NEBRASKA CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE.

587 N.W.2d 871

Filed January 15, 1999. No. S-97-1097.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Property: Security Interests: Conversion.** When property is subject to a security interest, an exercise of dominion or control over the property that is inconsistent with the rights of the secured party constitutes, as to that secured party, a conversion of the property.
3. **Uniform Commercial Code: Security Interests.** Under Neb. U.C.C. § 9-312(5) (Reissue 1992), the secured party who is first to perfect or file his or her security interest will have priority over all unperfected security interests even though such party had actual or constructive knowledge of a prior unperfected security interest.
4. **Debtors and Creditors: Unjust Enrichment.** A party cannot recover for unjust enrichment until the allegedly inequitable benefits have been received and retained.
5. **Pleadings: Appeal and Error.** An affirmative defense must be pleaded to be considered in the trial court and on appeal.

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

W. Gerald O'Kief for appellant.

Tim W. Thompson, of Kelley, Scritsmier & Byrne, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

Ag Services of America, Inc. (Ag Services), brought this action for conversion against Darrell E. Empfield after Empfield sold certain corn crops that were stored on his property. The crops were grown on Empfield's land by C.M.R., Inc., a debtor of Ag Services. Ag Services claimed its security interest in the corn crops was superior to Empfield's claim pursuant to a lease agreement with C.M.R. The trial court granted Ag Services' motion for summary judgment, and Empfield appeals.

## SCOPE OF REVIEW

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Zimmerman v. FirsTier Bank, ante* p. 410, 585 N.W.2d 445 (1998).

## FACTS

On November 18, 1994, Ag Services loaned C.M.R. the principal sum of $240,000. Contemporaneously, C.M.R. gave Ag Services a security agreement covering, but not limited to, all of C.M.R.'s farm products, inventory, annual and perennial crops, and stored or harvested crops.

On December 19, 1994, Ag Services filed financing statements in the office of the Brown County clerk, which statements listed C.M.R. as the debtor and Ag Services as a secured party and described real estate owned by Empfield as the land upon which C.M.R.'s crops were growing or were to be grown.

On April 5, 1995, C.M.R. leased certain farmland located in Brown County from Empfield for the amount of $53,541, which was payable in two installments. The written lease agreement specified that to secure performance of the terms and conditions of the lease, Empfield had a right to a chattel mortgage upon all or any part of the crops growing or gathered on the premises during the term of the lease. The record does not show that

Empfield ever made a filing in the office of the Brown County clerk concerning the lease agreement.

Following the corn harvest in late November or early December 1995, C.M.R. placed the corn in bins owned by Empfield. According to Clark Keim, the president and sole shareholder of C.M.R., some of the 1994 crop was still stored in Empfield's bins. C.M.R. paid Empfield the first rental installment, but failed to pay the second installment in the amount of $27,750. On December 23, 1995, in order to pay the defaulted rent and other amounts allegedly due, Empfield sold the corn harvested by C.M.R. that was stored in bins located on Empfield's property. Empfield received $32,175 from the sale.

C.M.R. was unable to fully pay the balance due on the promissory note to Ag Services, and the balance was carried forward to a 1996 operating note, which was executed March 26, 1996, in an amount greater than $32,175. On August 7, Ag Services commenced suit against Empfield, alleging, inter alia, that Empfield had unlawfully converted the corn in which Ag Services had a perfected security interest superior to any interest of Empfield's. At the time the action was commenced, there was due and owing from C.M.R. to Ag Services $133,217.45 plus interest.

The trial court entered summary judgment in favor of Ag Services, and Empfield appeals.

## ASSIGNMENT OF ERROR

Empfield claims that the trial court erred in entering summary judgment in favor of Ag Services.

## ANALYSIS

This is a conversion action brought by Ag Services against Empfield. When property is subject to a security interest, an exercise of dominion or control over the property that is inconsistent with the rights of the secured party constitutes, as to that secured party, a conversion of the property. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). In its first theory of recovery, Ag Services alleged that it had a perfected security interest by virtue of its promissory note and security agreement and the financing statements filed in the

office of the Brown County clerk; that Empfield did not have a perfected security interest in the corn; and that Empfield's interest, if any, was subordinate to Ag Services' interest. In its second theory of recovery, Ag Services alleged that Empfield's interest, if any, was subordinate by virtue of a subordination agreement allegedly signed by Empfield.

Ag Services' first theory of recovery relies on article 9 of the Nebraska Uniform Commercial Code (U.C.C.). Neb. U.C.C. § 9-312(5) (Reissue 1992) states that unless governed by a special priority under another subsection, priority between conflicting security interests in the same collateral shall be determined according to the following rules:

> (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
>
> (b) So long as conflicting security interests are unperfected, the first to attach has priority.

Section 9-312(5) is a "pure race" type statute. See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982). Under § 9-312(5), the secured party who is first to perfect or file his or her security interest will have priority over all unperfected security interests even though such party had actual or constructive knowledge of a prior unperfected security interest. *Todsen v. Runge, supra.* Section 9-312(5) was adopted to promote certainty in commercial transactions by placing reliance on the filing records. It requires a secured party to exercise diligence to perfect his or her security interest. If a party fails to perfect, then the party runs the risk of having his or her interest subordinated. *Todsen v. Runge, supra.*

In *Todsen*, we determined that § 9-312(5) governed the priority between the tenant farmer's creditor and the farmer's landlords. We explicitly held that a contractual landlord's lien must comply with the filing requirements of article 9 of the U.C.C. in order to perfect a security interest. Because the creditor in that case was first to file and perfect its security interest, it had priority over the landlords' lien. See, also, *McCoy v. Steffen*, 227

Neb. 72, 416 N.W.2d 16 (1987) (security interest of tenant farmers' creditor had priority over interest of tenants' landlord where creditor's financing statement was filed earlier).

Similarly, in *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988), a landlord leased farmland to a tenant for the purpose of growing crops. The lease agreement provided that the landlord would have a security interest in the crops to be grown on the land. The landlord did not file the agreement in the appropriate place and manner. In order to obtain certain goods and services necessary to produce crops, the tenant subsequently entered into an agreement with a fertilizer company. The company provided certain goods to the tenant, and the tenant provided the company with a security interest covering all crops and proceeds of crops to be grown on the subject property. The company filed a financing statement and a security agreement.

We held that in the absence of an agreement to the contrary, the priority of competing interests in the landlord and the fertilizer company was determined by article 9 of the U.C.C. The landlord argued that despite his failure to file a financing statement, he was entitled to an equitable lien under the terms of the lease, citing Neb. U.C.C. § 1-103 (Reissue 1980), which provided that unless displaced by particular provisions, equity principles supplement the U.C.C. We concluded that even assuming the landlord was entitled to an equitable lien, it would still be an unperfected security interest under the U.C.C. and that, therefore, the company's security interest took priority over the landlord's interest.

It is undisputed that on January 10, 1994, Ag Services made a filing covering the corn grown on Empfield's land and that the filing complied with Neb. U.C.C. § 9-402 (Supp. 1993). It is also undisputed that Empfield never made a filing which covered his interest in the crop. Thus, it is clear that under § 9-312(5), Ag Services' interest has priority over Empfield's unperfected interest.

Empfield does not deny that under § 9-312, Ag Services' interest takes priority over his unperfected interest. Rather, he argues that this court should recognize his rights as superior under the principles of equity and fairness in order to avoid

unjust enrichment. Generally, unjust enrichment is not argued as a defense to an action because a party cannot recover for unjust enrichment until the allegedly inequitable benefits have been received and retained. See, *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990); *Professional Recruiters v. Oliver*, 235 Neb. 508, 456 N.W.2d 103 (1990). Empfield argues that the trial court erred in granting Ag Services summary judgment because the court should have recognized that to do so would result in unjust enrichment. In other words, Empfield attempts to use the doctrine of unjust enrichment as an affirmative defense. See *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998) (essence of affirmative defense is to concede that while plaintiff otherwise may have good cause of action, cause of action no longer exists because some statute or rule permits defendant to avoid liability for acts alleged). An affirmative defense must be pleaded to be considered in the trial court and on appeal. *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). Empfield did not plead unjust enrichment, and thus, this argument has been waived.

Empfield also asks this court to reconsider relevant law because "it is only reasonable and fair that he should be entitled to satisfy his claim for unpaid rent by selling crop which was harvested on his land, placed in his possession and stored there." Brief for appellant at 10. The priorities in this case are governed by statute. While in other circumstances Empfield may have been entitled to satisfy his claim for rent by selling the crops on his property, he is not entitled to do so where another party has a prior perfected security interest in the crops.

Finally, Empfield argues that summary judgment was inappropriate because there remains an issue of fact as to whether he signed an agreement subordinating his interest in the crop to the interest of Ag Services. This issue is not material to the case because under § 9-312(5), the security interest of Ag Services is superior regardless of whether there was a signed subordination agreement.

## CONCLUSION

We find that Empfield's assignment of error is without merit, and we affirm the summary judgment entered by the trial court.

AFFIRMED.

# JANE DOE TWO, APPELLEE, V. YARON ZEDEK, M.D., APPELLANT.

587 N.W.2d 885

Filed January 15, 1999. No. S-97-1200.

1. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.
3. **Summary Judgment: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. Otherwise, the denial of a summary judgment motion is neither appealable nor reviewable.
4. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law.
5. **Summary Judgment: Appeal and Error.** After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
6. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
7. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
8. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
9. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
10. **Expert Witnesses.** Where the character of an alleged injury is not objective, but, rather, subjective, the cause and extent of the injury must be established by expert medical testimony.
11. ____. Subjective injuries may be inferred only from their symptoms and, consequently, require medical expert testimony to determine the cause and extent thereof.
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.

13. **Malpractice: Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
14. ____: ____: ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.
15. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.
16. **Trial: Evidence: Juries.** Before evidence is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed.
17. **Trial: Evidence: Juries: Appeal and Error.** Where there is no basis for recovery under the evidence adduced at trial, submission to the jury constitutes error.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions to dismiss.

John R. Douglas and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Blaine T. Gillett, of Ruff, Nisley & Lindemeier, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

## INTRODUCTION

In this appeal, Dr. Yaron Zedek, appellant, challenges the Lincoln County District Court's denial of his motion for a directed verdict. This is a medical malpractice action originally filed by "Jane Doe Two" (Doe), appellee, against North Platte Nebraska Hospital Corporation, doing business as Great Plains Regional Medical Center (Great Plains), and Zedek.

Doe was admitted to Great Plains by Zedek for psychiatric treatment and was a patient at the time she was sexually

assaulted by an employee of the hospital. The case against Zedek was tried on a theory of professional negligence, and in accordance with the jury verdict, judgment was entered in favor of Doe. The main issue on appeal is whether Doe satisfied her burden of establishing Zedek's negligence as a proximate cause of her alleged injuries of mental suffering.

## FACTUAL AND PROCEDURAL BACKGROUND

Doe is a mildly retarded, 52-year-old female who has an IQ of 64. Prior to hospitalization, Doe had been suffering from recurrent, nonpsychotic major depressive episodes. Doe was admitted to the psychiatric unit at Great Plains on September 8, 1993, pursuant to the recommendation of Zedek. On September 27, Doe left the hospital on a day pass with her caseworker, Jean Risseeuw. During this excursion, Doe told Risseeuw that Doe had had sex with someone at the unit. Upon their return to the hospital, Risseeuw informed the nursing staff of what Doe had told her. The next day, during morning report, Zedek was notified of what Doe had reported to Risseeuw. After morning report, Zedek and the nurse manager met with Doe privately and discussed the incident. Doe told Zedek that approximately 8 days earlier a "black man" had come into her room to take her vital signs. Doe alleged that this man took her into the bathroom and had sex with her. At trial, Doe testified that what she had meant by a black man was a man dressed in "black pants and a black shirt."

Zedek testified that he did not believe Doe for many reasons. Zedek believed that Doe was probably relating a dream, because she was on antidepressant medications. He also testified that he believed the sexual assault was highly unlikely because Doe had a roommate, she was in a locked psychiatric unit, she was checked every 10 to 15 minutes by the staff, and there were no black employees or patients on the unit. Although Zedek did not believe Doe, he told the nurse manager to notify the appropriate sources to investigate the matter. The police were notified the same day and began an investigation. The investigation eventually revealed a suspect who was an employee of the hospital, and charges were filed against him.

After Zedek learned of Doe's assault, he continued to see Doe every day during her hospitalization. During these visits,

Zedek would ask Doe general questions about how she was doing and if she had any concerns. In response to these questions, Doe never mentioned the sexual assault. After Doe's discharge from the hospital on October 6, 1993, she continued to see Zedek on an outpatient basis for another year. Based on hospital records, nurses' notes, and Zedek's own notes, Doe never asked for, nor was she ever offered, psychiatric counseling or therapy to treat any potential trauma or harm she may have experienced from the assault. After hospitalization, Doe did receive professional counseling for the sexual assault from Mary Muller, a therapist with a master's degree in clinical psychology. This therapy, however, was independent of any offered by Zedek or Great Plains.

On May 17, 1995, Doe filed this action against Great Plains and Zedek. Great Plains settled with Doe and was dismissed from the litigation. Zedek then filed a motion for summary judgment, which was denied. A jury trial followed, and the case against Zedek was tried on the theory that he was professionally negligent in failing to properly evaluate and treat Doe after she informed him of the sexual assault and that, as a result, Doe experienced mental suffering.

At the end of Doe's case, Zedek moved for a directed verdict on several grounds, most notably the reason that there was no competent evidence that Doe sustained any damage as a result of any of Zedek's alleged acts of negligence. The motion was overruled, and the trial proceeded. At trial, Zedek presented evidence that he had not been negligent in the care of Doe, after which he renewed his motion for a directed verdict on the same grounds. The jury returned a verdict against Zedek in the amount of $100,000. Zedek then filed a motion for judgment notwithstanding the verdict or in the alternative a new trial. The district court denied both motions, and this appeal followed. We removed the case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Zedek contends, rephrased and summarized, that the district court erred in (1) denying his motion for summary judgment;

(2) denying his motion for a directed verdict; (3) denying his motion for judgment notwithstanding the verdict; (4) denying his motion for a new trial; (5) failing to give a requested jury instruction; (6) failing to instruct the jury regarding the settlement with Great Plains, pursuant to Neb. Rev. Stat. § 25-21,185.11 (Reissue 1995); and (7) failing to reduce the verdict against Zedek by the amount of the settlement between Doe and Great Plains.

## STANDARD OF REVIEW

A denial of a motion for summary judgment is not a final order and therefore is not appealable. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993). Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

## ANALYSIS

### SUMMARY JUDGMENT

Zedek's first assignment of error challenges the trial court's denial of his motion for summary judgment. It is Zedek's contention that the trial court's denial of his motion for summary judgment is both appealable and reviewable on appeal. We disagree. We have repeatedly stated that a denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998); *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998); *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998); *American Family Ins. Group, supra*; *Whalen, supra*; *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996); *Randall v. Erdman*, 194 Neb. 390, 231 N.W.2d 689 (1975). The only exception we have fashioned to this general rule is that when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Zimmerman, supra*; *Pettit, supra*; *Strom, supra*; *Vowers & Sons, Inc., supra*; *American Family Ins. Group, supra*; *Farmers & Merchants Bank, supra*; *Elliot, supra*; *Randall, supra*. This limited exception is not applicable under the record in this case.

Absent the above-stated exception, the denial of a summary judgment motion is neither appealable nor reviewable. Zedek admits that he is cognizant of this court's holding regarding the denial of summary judgment, but contends he is permitted to reserve the issue for appeal and raise it after the case has reached final judgment. We disagree. As we stated in *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 572-73, 500 N.W.2d 828, 832 (1993), "The law is clear. We need not consider the trial court's denial of appellant's motion for summary judgment." This is so

because whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits. See, *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994); *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997). The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. *Whalen, supra.*

After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. The rationale for this principle was aptly stated by the Ninth Circuit:

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial.

*Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987). Zedek's first assignment of error is without merit.

### DIRECTED VERDICT

In his second assignment of error, Zedek claims the district court erred in denying his motion for a directed verdict. A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Martin v. Roth*, 252 Neb. 969, 568 N.W.2d 553 (1997); *Ethanair Corp. v. Thompson*, 252 Neb. 245, 561 N.W.2d 225 (1997); *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997). Zedek asserts that there was no competent evidence that Doe sustained any damage as a proxi-

mate result of any of his alleged acts of negligence and that, therefore, he was entitled to judgment as a matter of law. Doe contends that she presented competent expert testimony establishing that Zedek's failure to believe her and failure to treat her for the psychological effects of the sexual assault greatly contributed to her mental suffering and sense of helplessness.

In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Saporta v. State*, 220 Neb. 142, 368 N.W.2d 783 (1985). The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence. A defendant's negligence is, therefore, not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997); *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974). In other words, proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Saporta, supra*. See, *Kozicki, supra*; *Sacco, supra*; *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992).

In this case, Doe is alleging that she experienced mental suffering and a sense of helplessness as a proximate result of Zedek's negligence. Mental suffering and a sense of helplessness are injuries which are not plainly apparent and are demonstrated primarily by complaints of the victim. Such injuries are, therefore, subjective in nature and effect. See *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991). We have stated that where the character of an alleged injury is not objective, but, rather, subjective, the cause and extent of the injury must be established by expert medical testimony. *Storjohn v. Fay*, 246 Neb. 454, 519 N.W.2d 521 (1994); *Turek, supra*; *Tarvin, supra*; *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988). See *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990). Expert testimony is necessary

because subjective injuries may be inferred only from their symptoms. *Eiting, supra.* Consequently, medical expert testimony is required to determine the cause and extent thereof. *Id.*

Doe concedes that her injuries are subjective in nature and incapable of objective measurement. However, Doe contends that expert testimony is not necessary to "establish a causal connection between the Appellant's total lack of care and the Appellee's mental suffering." Brief for appellee at 13.

While it may be true that Doe experienced mental suffering, the causation of such injury is not within the common knowledge of a person lacking medical training. Additionally, the fact that Doe had a prior psychiatric history of depression and had been sexually assaulted further complicated the issue of causation. Whether Doe's subjective injuries stemmed from Zedek's claimed malpractice presented medically complicated questions requiring expert testimony. See, *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997); *Turek, supra*; *Carmichael v. Carmichael*, 597 A.2d 1326, 1329 (D.C. App. 1991) (stating "[t]he issue of whether appellee's problems stemmed from appellant's malpractice, as opposed to other factors, 'present[s] medically complicated questions due to multiple and/or preexisting causes,' requiring expert testimony on the issue of causation"). Accordingly, the cause and extent of Doe's injuries must be substantiated by expert testimony.

Doe contends that four individuals testified to the causal connection between Zedek's failure to believe and treat her and the damages she suffered as a result. 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. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997); *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996).

The first witness that Doe claims provided competent evidence on the issue of causation is Risseeuw. Risseeuw, as stated

previously, is Doe's caseworker. At trial, Risseeuw's employment and acquaintance with Doe were established. While Risseeuw may have given descriptive testimony of Doe's subjective symptoms, our review of the record fails to disclose Risseeuw's expressing any opinion that such symptoms were caused by Zedek's claimed malpractice.

Doe next asserts that Doris Payovich was qualified as an expert to give testimony regarding the causation of Doe's injuries. Payovich is the executive director of Keya Paha and Cherry Counties Mental Health Services. Payovich testified that she had been employed in that capacity for 11 years and that through her employment, she has known Doe "for a number of years." Payovich also testified to her education, which consisted of an associate's degree from Twenty-Nine Palms College and a bachelor of science degree from Eastern Montana College. Payovich did not, however, elaborate on the major course of study for either of these degrees. This was the extent of Payovich's expertise. Payovich's attempt to give her "conclusion" as to why Doe "was full of anger and frustration" was objected to by Zedek, and the objection was sustained by the trial court. Doe does not challenge this evidentiary ruling on appeal.

The third witness Doe asserts as competent to give expert testimony regarding the cause of her damages is Muller. Muller provided counseling for Doe from October 1993 through April 1994. At trial, Muller testified that she had obtained a master's degree in clinical psychology from Emporia State in Kansas in 1983. She explained that she is licensed to provide counseling and therapy "for anyone who needs it" and is qualified to perform "some limited testing." Muller testified that to maintain her license and certificate in counseling, she is required to participate in 32 hours of continuing education every 2 years. When Muller was asked if she had a specialty, she replied, "No, I don't."

This was the extent of Muller's qualifications as developed in the record. Without passing on whether these credentials are sufficient to qualify Muller as an expert witness competent to render an opinion on the causal relationship between psychiatric malpractice and a subjective injury, we find that the record

reveals that no such opinion was elicited. The only testimony given by Muller regarding the cause of Doe's injuries related to "what happened to [Doe] at the hospital." Nothing in her testimony distinguished any of Doe's injuries as being caused by Zedek's claimed malpractice as opposed to other causal factors.

The fourth witness and the only physician called by Doe was Dr. Richard Clary. Clary received his medical degree in 1970. From 1983 to 1986, Clary completed a residency program in psychiatry through Ohio State University. At the time of trial, Clary was board certified in the field of psychiatry and was the chair of the department of psychiatry at Mount Carmel Medical Center Hospital in Ohio.

Clary testified as to the generally recognized medical standard of care for the specialty of psychiatry. Clary testified that the psychiatric standard of care is a nationwide standard which does not differ from the local Nebraska standard. Clary further testified that in his opinion, within a reasonable degree of medical certainty, the care administered by Zedek to Doe did not meet that standard.

From our review of the record, Clary's testimony was competent evidence to meet Doe's burden of proof regarding the establishment of the generally recognized medical standard of care and a deviation from that standard by Zedek. See *Saporta v. State*, 220 Neb. 142, 368 N.W.2d 783 (1985). However, as we stated in *Saporta*, the plaintiff must also prove that any such deviation was a proximate cause of the plaintiff's alleged injuries.

Doe contends that Clary provided competent evidence to establish proximate cause. The only testimony given by Clary in the record which touches on the causation issue is as follows:

> Q: Based upon your experience and your training and expertise in the psychiatric field, would it be *possible* and could you expect that a person such as [Doe] may have some residual effects resulting from what happened to her at the hospital?
>
> . . . .
>
> A: Yes. I think it is very likely that that could happen.
>
> Q: Okay. And, based—again, based upon your experience in treating patients similar to this, would it be

unusual for such a patient to be fearful of being in a hospital again?

A: Yes. After an event like that it would certainly be—would not be unusual to be fearful or afraid of hospitalization, especially—a patient like that would assume that the hospital would probably be the—should be the safest place for them, and I think this would be very stressful for them.

. . . .

Q: Furthermore, it's—another note on the 25th would say requested a one-on-one with staff, expressed delusions and thoughts, tearful, expresses fear, reassured patient of safety on unit. Would an expression of fear be consistent with someone who has been sexually assaulted in the unit?

A: Yes, it could be.

Q: As a treating psychiatrist, would it be of interest to you that now this other nurse has another expression of delusion, the patient is tearful and obviously expressing fear? Would that be of relevance to you?

A: Yes. That would need to evaluated to see what the source is.

. . . .

Q: . . . [B]ut I note here, September 30th, 1993, we're still on a 15-minute suicide check?

A: Yes.

Q: Would that indicate that there are still some problems with this patient that evidently they feel that suicide check should be maintained?

A: Yes. There must be something that's causing them to worry about her safety to keep her on the checks, yes.

. . . .

Q: And again on October 5th, 1993, I see a statement that the plaintiff again reassured of her safety. I assume she's—we could speculate that she was concerned about her safety and had to be reassured. Would that be correct?

A: Yes. From that note she must have had some kind of concern or question for her safety.

(Emphasis supplied.)

The above-recited testimony of Clary fails to meet Doe's burden on the issue of causation for two reasons. First, the term

"possible" does not encompass either "reasonable medical certainty" or "reasonable probability," i.e., more likely than not. "Possible" is mere speculation, which is not sufficient. Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. See, *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998); *Shahan v. Hilker*, 241 Neb. 482, 488 N.W.2d 577 (1992). Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). It is evident from a careful review of Clary's entire testimony that proximate causation was never established, probable or otherwise.

Second, Clary's testimony, which was objected to by Zedek, addresses residual effects "resulting from what happened to [Doe] *at the hospital*." (Emphasis supplied.) What happened to Doe at the hospital, i.e., the sexual assault, was not the basis of any claimed malpractice by Zedek. The record is devoid of any testimony which relates any of Doe's claimed damages to the malpractice of Zedek, as alleged by Doe.

Clary never distinguished the damages caused by Zedek's claimed malpractice from the damages caused by other factors, such as the sexual assault itself. See *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997) (stating that in legal malpractice action brought against plaintiff's attorney, subjective declarations alone, without competent medical evidence tending to prove that any of plaintiff's ills were proximately caused by attorney's conduct and were not simply aftermath of recently concluded tumultuous marriage, were insufficient to withstand attorney's motion for directed verdict). Clary even admitted, at trial, that while it would not be unusual for someone who had been sexually assaulted to experience tearfulness, fear, and delusions, it would still be necessary to evaluate the patient to discover the source of those symptoms. At the time of his testimony, Clary had never examined Doe. Doe even conceded at oral argument that Clary

was in no position to establish proximate cause because he never saw her and that, therefore, the people in the best position to testify to proximate cause were the people who saw her every day. Based on this record, it is as likely as not that all of Doe's injuries were caused by the sexual assault in and of itself.

Resolving every controverted fact in favor of Doe and affording her the benefit of every reasonable inference deducible from the evidence, we find the record void of any expert testimony indicating that Zedek's negligence was a proximate cause of Doe's injuries or a proximately contributing cause. Consequently, the jury could only speculate as to the causation of Doe's injuries. The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995); *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989).

Doe failed to meet her burden of proof on the issue of causation, and therefore, the district court erred in denying Zedek's motion for a directed verdict. Before evidence is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed. *Richardson, supra*; *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980). Where there is no basis for recovery under the evidence adduced at trial, submission to the jury constitutes error. See *Richardson, supra.*

## CONCLUSION

We find the foregoing analysis dispositive and, therefore, find it unnecessary to address Doe's other assignments of error. Accordingly, the judgment of the district court is reversed, and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

# NEAL J. KRATOCHVIL, APPELLANT, V. MOTOR CLUB INSURANCE ASSOCIATION, ALSO KNOWN AS MOTOR CLUB UNDERWRITERS, INC., ALSO KNOWN AS AAA OF NEBRASKA, APPELLEE.

588 N.W.2d 565

Filed January 22, 1999. No. S-97-865.

1. **Summary Judgment.** Summary judgment is proper 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Limitations of Actions: Statutes.** The determination of what constitutes a reasonable time following a legislative shortening of a statutory limitation period is a question of law.
5. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Statutes: Legislature: Intent: Time.** Legislative acts affecting substantive matters operate only prospectively unless the legislative intent of retrospective operation is clear.
7. **Statutes: Time.** Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect.
8. ____: ____. Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
9. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the right, would not entitle one to recover. A procedural right, on the other hand, is considered to simply be the method by which an already existing right is exercised.
10. **Limitations of Actions: Statutes.** Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights.
11. **Limitations of Actions: Legislature.** Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date.
12. **Insurance: Motor Vehicles: Time.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 1998) of the Uninsured and Underinsured Motorist Insurance Coverage Act operates on all proceedings instituted after its passage.

13. **Limitations of Actions: Contracts.** Generally, absent a more specific statute, actions on written contracts may be brought within 5 years, pursuant to Neb. Rev. Stat. § 25-205 (Reissue 1995).
14. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
15. **Limitations of Actions: Legislature.** It is competent for the Legislature to change statutes prescribing limitations to actions, and the one in force at the time suit is brought is applicable to the cause of action.
16. ____: ____. The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.
17. **Limitations of Actions: Due Process.** Statutes of limitations, being procedural, are normally retroactively applied to accrued causes of action; but the court must inquire whether, in a given case, that retrospective application may violate due process by, in effect, eliminating the plaintiff's right.
18. **Limitations of Actions.** A reasonable time for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

L.J. Karel, of Karel & Seckman, for appellant.

Michael A. England, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

## INTRODUCTION

Neal J. Kratochvil filed an action against his insurer, Motor Club Insurance Association (Motor Club), to recover uninsured motorist benefits provided for in his automobile liability insurance policy. The primary issue on review is whether an insured's claims against an insurer for uninsured motorist benefits are barred by Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 1998) when the cause of action arose prior to passage of the 1994 Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA), Neb. Rev. Stat. § 44-6401 et seq.

(Reissue 1993 & Cum. Supp. 1994), but was not filed until after the legislation became operative.

## FACTUAL BACKGROUND

On May 15, 1991, Kratochvil suffered personal injuries in an automobile accident with an uninsured motorist. Kratochvil was a passenger in the automobile which was driven by his mother. At the time of the accident, Kratochvil was insured by two automobile liability policies, both of which contained uninsured motorist coverage issued by Motor Club. Within 4 months of the accident, Kratochvil received a $500 payment from Motor Club for ambulance and transportation services rendered to him at the scene of the accident. Kratochvil was also given notice that Motor Club would be unable to pay anything further on his claim.

During this same time period, Kratochvil was also negotiating a settlement for uninsured motorist benefits with his father's insurer. In compliance with Motor Club's policy, Kratochvil contacted Motor Club on December 12, 1991, seeking its consent to a settlement offer from his father's insurer. The purpose of the consent was to avoid exclusion of any future claims Kratochvil may have had against Motor Club. On January 14, 1992, Motor Club informed Kratochvil that its consent was unnecessary to the settlement with his father's insurer. Motor Club explained that its policy required only consent to settlements paid directly under its own policies. Nothing in the record indicates that there was any further communication between the parties until Kratochvil filed this suit.

## PROCEDURAL BACKGROUND

On May 14, 1996, Kratochvil filed suit in the Platte County District Court against Motor Club for uninsured motorist coverage benefits. Motor Club answered Kratochvil's petition and alleged that it was contractually bound to pay Kratochvil only those benefits that he would be " 'legally entitled to recover from the owner or operator of an uninsured motor vehicle.' " Motor Club also alleged that any claim Kratochvil would have against the uninsured driver was barred by Neb. Rev. Stat. § 25-207 (Reissue 1995).

Motor Club filed a motion for summary judgment and alleged that Kratochvil's claim against the uninsured motorist was barred by the statute of limitations pertaining to tort actions and that, therefore, the claim against Motor Club was barred pursuant to § 44-6413(1)(e). A hearing on the motion for summary judgment was held, and on June 30, 1997, the district court sustained Motor Club's motion for summary judgment. The court found that Kratochvil's claim was precluded by § 44-6413(1)(e) because the applicable statute of limitations for Kratochvil's claims against the uninsured driver had expired. The court reasoned that § 44-6413(1)(e) applied because it was the specific statute of limitations in effect at the time Kratochvil's claim was filed.

Kratochvil filed a motion for new trial and alleged that the district court's decision was contrary to law and that the UUMICA should not apply retrospectively to his claim. The district court denied the motion, and Kratochvil thereafter appealed to the Nebraska Court of Appeals. We removed the case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Kratochvil contends, rephrased and summarized, that the district court erred in (1) determining that § 44-6413(1)(e) rather than Neb. Rev. Stat. § 60-509.01 (Reissue 1993) governed his claim for uninsured motorist benefits and (2) finding that § 44-6413(1)(e) governed without determining whether a "reasonable time" had been allowed in which to file his claim, as required by due process.

## STANDARD OF REVIEW

Summary judgment is proper 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. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998); *Houghton v. Big Red Keno*, 254 Neb.

81, 574 N.W.2d 494 (1998). In reviewing a summary judgment, an appellate 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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998). In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

The determination of which statute of limitations applies is a question of law. *Jorgensen v. State Nat. Bank & Trust, ante* p. 241, 583 N.W.2d 331 (1998); *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997). Similarly, the determination of what constitutes a reasonable time following a legislative shortening of a statutory limitation period is also a question of law. See, e.g., *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

## ANALYSIS

Before reaching the merits of the case, a brief discussion of the UUMICA is warranted. On April 6, 1994, the Nebraska Legislature passed the UUMICA, which became operative on January 1, 1995, and is codified at § 44-6401 et seq. The UUMICA provides, in pertinent part:

> (1) The uninsured and underinsured motorist coverages provided in the Uninsured and Underinsured Motorist Insurance Coverage Act shall not apply to:
>
> . . . .
>
> (e) Bodily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist.

§ 44-6413(1)(e). In essence, § 44-6413(1)(e) created a specific limitation period as to when actions against insurers for uninsured motorist benefits could be maintained. Prior to passage of the UUMICA, uninsured motorist coverage was governed by § 60-509.01, which was repealed in 1994 and did not contain any reference to a limitation period.

If § 60-509.01 governs this action, as Kratochvil asserts, then we must determine which limitation period applies. However, if § 44-6413(1)(e) is the governing statute, then Kratochvil's claim would have been time barred upon filing, and we must then determine whether he was allowed a reasonable amount of time in which to file his action. Therefore, the issue before this court is which statute applies when the cause of action in question accrued prior to the passage of the UUMICA but was not filed until after the legislation became operative.

### Substantive Versus Procedural Legislation

In Kratochvil's first assignment of error, he argues that § 60-509.01 is the statute applicable to his claim and that § 44-6413 is inapplicable because his cause of action accrued before the passage of the UUMICA. See § 44-6401 et seq. In turn, Kratochvil argues that because § 60-509.01 did not contain any reference to a limitation period, the general statute of limitations applying to written contracts, Neb. Rev. Stat. § 25-205 (Reissue 1995), should control. Under § 25-205, the statute of limitations would be 5 years from accrual of the cause of action and, consequently, Kratochvil's claim would have been timely filed.

Kratochvil acknowledges that a change in a statute of limitations which alters only the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. However, Kratochvil attempts to support his argument that § 44-6413(1)(e) should not be applied retrospectively to his claim by asserting that it is substantive legislation. Kratochvil argues that the UUMICA, as a whole, was substantive because it involved the enactment of rights, duties, and obligations never before available with regard to uninsured motorist benefits. Kratochvil reasons that because § 44-4613(1)(e) is merely a small portion of

the UUMICA, it cannot be parsed out as separate legislation, and that, therefore, it is also substantive.

In response, Motor Club contends that § 44-6413(1)(e) was merely a procedural legislative change and therefore applied to already accrued causes of action. Any claim that Kratochvil would have had against the uninsured motorist would have been a tort claim. Tort claims are governed by § 25-207, which requires that actions for injuries be brought within 4 years of accrual of the cause of action. Section 44-6413(1)(e) would, therefore, bar Kratochvil's claim because his cause of action would have been filed outside the statute of limitations on his tort claim against the uninsured motorist. Motor Club argues that it is common for legislative acts to affect multiple issues and that, accordingly, the only logical manner to judge whether a particular issue is substantive or procedural is to examine the effect of its application. Motor Club contends that § 44-6413 affects only the remedy whereby uninsured motorist coverage is obtained and should therefore be treated as procedural.

To determine whether § 44-6413(1)(e) should be applied retrospectively to Kratochvil's claim, we must first determine whether § 44-6413(1)(e) is substantive or procedural. This is necessary because legislative acts affecting substantive matters operate only prospectively unless the legislative intent of retrospective operation is clear. See *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). Contrary to Kratochvil's contention, the UUMICA, however, is not entirely new legislation. While the UUMICA involves some substantive changes in uninsured motorist law, much of the legislation incorporated into the UUMICA is a compilation of previously enacted legislation which has been modified into a more consistent version of the law regarding underinsured and uninsured motorists. See, Neb. Rev. Stat. § 60-571 et seq. (Reissue 1993) (Underinsured Motorist Insurance Coverage Act); Neb. Rev. Stat. §§ 60-509.01 to 60-509.03 (Reissue 1993).

Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect. *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995); *Dairyland Power Co-op v. State Bd. of Equal.*, 238

Neb. 696, 472 N.W.2d 363 (1991); *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979). In this instance, § 44-6413(1)(e) is part of a statute that has been repealed and substantially reenacted. See § 60-582. Section 44-6413(1)(e) is therefore treated as an amendment to the uninsured motorist laws.

While it is true that § 44-6413(1)(e) was enacted as part of the UUMICA, that in itself does not entitle it to substantive treatment. Kratochvil's assertion that we must look at the UUMICA as a whole and cannot parse its individual statutes for analysis is incorrect. We have often had to deal with new amendments to existing legislation in order to establish whether the amendment applied retroactively to the case in question. See, *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Smith v. Fremont Contract* Carriers, 218 Neb. 652, 358 N.W.2d 211 (1984); *Denver Wood Products Co., supra*; *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974). The critical question has always turned on whether the amendment was substantive or procedural, not whether the act or new legislation as a whole was substantive or procedural. Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. See, *Oviatt, supra*; *Haiar v. Kessler*, 188 Neb. 312, 196 N.W.2d 380 (1972). Accordingly, § 44-6413(1)(e) must be evaluated independently to determine whether it is a substantive or procedural amendment in order to determine whether it is applicable to Kratochvil's claim.

In *Behrens, supra*, we stated that

> "a *substantive right* is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. . . . A *procedural right*, on the other hand, is considered to simply be the method by which an *already existing right is exercised*."

228 Neb. at 25, 421 N.W.2d at 17 (quoting *Smith v. Fremont Contract Carriers, supra* (Krivosha, C.J., concurring)). Moreover, "laws prescribing the time within which particular rights may be enforced [generally] relate to remedies only and not substantive rights." *Whitten v. Whitten*, 250 Neb. 210, 212,

548 N.W.2d 338, 340 (1996). Accord *Denver Wood Products Co., supra.*

Section 44-6413(1)(e) does not serve to create or change the right to a remedy for uninsured motorist benefits. Therefore, § 44-6413(1)(e) should not be considered a substantive right, but, rather, a procedural change that merely relates to the remedy. Section 44-6413(1)(e) limits the insured's remedy by limiting the insurer's liability to the period of time during which the insured still has a viable claim against the uninsured motorist. This in essence limits the insured to a torts limitation period for filing a claim on the policy. Statutes of limitations are defined as "such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or *within which certain rights may be enforced.*" (Emphasis supplied.) Black's Law Dictionary 835 (5th ed. 1979). Although § 44-4613 does not prescribe a specific time period in which an insured may bring an action on the policy, it does limit the time in which such a right may be enforced. We therefore determine that § 44-4613(1)(e) operates as a statute of limitations.

Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date. See, e.g., *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Denver Wood Products Co., supra*; *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). As a legislative change of a procedural limitation period, § 44-6413(1)(e) operates on all proceedings instituted after its passage. *Schendt, supra.*

### General Versus Specific Statute of Limitations

Motor Club argues that the general statute of limitations for written contracts should not control where a specific limitation on uninsured motorist coverage exists. That is, Motor Club claims that § 44-6413(1)(e) is the applicable statute to Kratochvil's claim because it is a specific statute of limitations and therefore supersedes § 25-205, a general statute of limita-

tions. In this regard, the district court found that § 44-6413(1)(e) controlled because it was specific to uninsured motorist coverage.

Generally, absent a more specific statute, actions on written contracts may be brought within 5 years, pursuant to § 25-205. See, e.g., *Grand Island School Dist. #2, supra.* In the instant case, however, the Nebraska Legislature has directly addressed the limitation on uninsured motorist coverage. See § 44-6413(1)(e). This is significant given our holding that "[a] special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject." *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 278, 481 N.W.2d 422, 426 (1992).

The adoption of § 44-6413(1)(e) makes it clear that the Legislature chose to limit the time period in which a claim could be filed against an insurer, rather than leave it to a generally applicable limitation period. Moreover, it is well settled that it is competent for the Legislature to change statutes prescribing limitations to actions and that the one in force at the time suit is brought is applicable to the cause of action. *Schendt, supra*; *Grand Island School Dist. #2, supra.* Therefore, § 44-6413(1)(e) should control, since it is a specific expression of the Nebraska Legislature's will concerning uninsured motorist coverage and it was in force at the time Kratochvil brought his action.

### Reasonable Time

In Kratochvil's second assignment of error, he argues that even if § 44-6413(1)(e) is procedural and is the applicable statute of limitations, he must be allowed a "reasonable time" in which to bring his action. Kratochvil's assertion is correct. The Legislature may shorten a limitation period for commencement of a cause of action and the change may be made applicable to existing claims, so long as a reasonable time is allowed to bring such action. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984). More specifically, the Legislature may constitutionally shorten limitation periods fixed by previously existing statutes or establish new limitation periods where none

existed before, provided that such new statutes are not made applicable to existing causes of action in such a way as would preclude any opportunity to bring suit. See, e.g., *Schendt, supra*; *Macku, supra*; *Grand Island School Dist. #2, supra*; *Mammel, O., S., H. & S., Inc., supra*. See 51 Am. Jur. 2d *Limitation of Actions* § 37 (1970 & Cum. Supp. 1998).

The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Macku, supra*; *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). With regard to the aforementioned "reasonable time" restriction, there is a constitutional concern that is aptly articulated by the California Court of Appeals:

> The doctrine of retrospectivity of limitations statutes is one of constitutional dimension. In California, statutes of limitations, being procedural, are normally retroactively applied to accrued causes of action; but the court must inquire whether, in a given case, that retrospective application may violate due process by in effect eliminating the plaintiff's right. If the time left to file suit is reasonable, no such constitutional violation occurs, and the statute is applied as enacted. If no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all. . . . Further, the issue is one of law for appellate resolution.

*Aronson v. Superior Court (Matthew A.)*, 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347, 349 (1987). See, also, *Schendt, supra*. Therefore, the question before this court is whether Kratochvil was denied due process; that is, whether the time afforded Kratochvil in which to file his claim was "reasonable" in that no such constitutional violation occurred.

"[A] 'reasonable time' for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the

courts for enforcement of the rights on which the statute of limitations operates." *Macku*, 216 Neb. at 182, 343 N.W.2d at 62. In this case, however, Kratochvil fails to argue why the time period in which he had to file his action was insufficient. He simply asserts that a liberal construction of uninsured motorist law in a case involving serious bodily injury would allow a period of at least 2 years from the effective date of the new legislation in which to file a claim. If we were to entertain that suggestion, however, we would in essence be extending the statute of limitations even beyond what Kratochvil asserts he was entitled to under § 25-205. Moreover, such an act would effectively constitute judicial legislation, which we will not do. See, *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573, 46 L. Ed. 804 (1902); *Kendall v. Keith Furnace Co.*, 162 F.2d 1002 (8th Cir. 1947).

In *Mammel, O., S., H. & S., Inc., supra*, we addressed a similar issue in which the statute of limitations for professional negligence was shortened after the cause of action accrued. In *Mammel, O., S., H. & S., Inc., supra*, the new statute of limitations expired prior to the effective date of the legislation. *Id.* In that case, the plaintiff waited an additional 11 months after the effective date of the act before filing his claim. We pointed out that the period of less than 4 months between the passage of the act and its effective date was not an unreasonable period of time to bring an action. *Id.* Here, Kratochvil urges this court to adopt a "reasonable time" of at least 2 years from the effective date of the UUMICA. However, Kratochvil has not alleged any facts that would distinguish his claim from *Mammel, O., S., H. & S., Inc., supra*, to merit such an adoption.

In *Ewing v. State Farm Mut. Auto. Ins. Co.*, 402 So. 2d 779 (La. App. 1981), a Louisiana appellate court addressed a similar situation where the plaintiff had filed a claim after the statute of limitations for uninsured motorist benefits had been shortened by the legislature from 10 years to 2 years. The Louisiana court held that a period of 10 months following enactment to the effective date of the statute allowed a reasonable period of time to permit those persons affected to assert their claims. Likewise, Kratochvil had more than 10 months after passage of the UUMICA until the act became operative. In addition, Kratochvil's claim had not expired upon the operative date of

§ 44-6413(1)(e). Kratochvil had an additional 4½ months before the applicable statute of limitations ran in which to file his claim after the UUMICA became operative. Kratochvil filed this action on May 14, 1996, approximately 25 months after passage and 16½ months after the legislation became operative. Therefore, based on the record in this case, it cannot be said that the time allowed Kratochvil in which to file his claim was so manifestly insufficient that it constituted a denial of justice.

## CONCLUSION

The greater weight of authority supports Motor Club's position that § 44-6413(1)(e) is the applicable statute of limitations to Kratochvil's claim. Kratochvil was afforded a sufficient opportunity to resort to the courts, and the time allowed in which to file his claim was not "unreasonable." We agree with the district court's finding that § 44-6413(1)(e) governed the action because it was a specific statute of limitations and it was in force when the claim was filed. For these reasons, we affirm the judgment of the district court in all respects.

AFFIRMED.

WRIGHT, J., concurring.

I concur in the result because under the language of Kratochvil's policy, Motor Club is not contractually bound to Kratochvil for uninsured motorist coverage benefits. Kratochvil's policy with Motor Club provided that it would pay damages which a covered person "is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of bodily injury."

In *Carpenter v. Cullan*, 254 Neb. 925, 940, 581 N.W.2d 72, 82 (1998), we explained that where the insured failed to bring an action against the underinsured motorist within the statute of limitations, the insured never attained the status of one "legally entitled to collect," as described in the insured's underinsured motorist policy. See, also, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981) (defining phrase "legally entitled to recover as damages" to mean insured must be able to establish fault on part of uninsured motorist which gives rise to damages).

Kratochvil suffered personal injuries in an accident with an uninsured motorist on May 15, 1991. Thus, when Kratochvil brought this action against Motor Club on May 14, 1996, his action against the uninsured motorist was barred by the applicable 4-year statute of limitations. For this reason, in accordance with *Carpenter*, Kratochvil failed to qualify as a person "legally entitled to collect" from the uninsured motorist. Therefore, Kratochvil does not have a claim under his policy with Motor Club, and I concur in the result.

CONNOLLY AND MCCORMACK, JJ., join in this concurrence.

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STATE OF NEBRASKA, APPELLANT, V.
VERMA J. HARRISON, APPELLEE.
588 N.W.2d 556

Filed January 22, 1999. No. S-97-1152.

1. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
2. **Sentences: Appeal and Error.** It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.
3. **Sentences.** The sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. If the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason, and evidence, it has abused its discretion.
5. **Sentences: Appeal and Error.** When applying the criteria enumerated in Neb. Rev. Stat. § 29-2322 (Reissue 1995), which authorizes an increase of sentence on appeal, the inquiry is whether the trial court's decision was clearly untenable, unfairly deprived a litigant of a substantial right, and denied a just result. Thus, so long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that a trial court has abused its discretion. Such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result.

6. **Sentences: Probation and Parole: Appeal and Error.** The trial court has the opportunity to observe the defendant throughout the judicial process and is in a better position than an appellate court to determine whether the defendant is suited for probation. Moreover, a sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed.
7. ____: ____: ____. In determining where probation may be imposed, an appellate court must consider Neb. Rev. Stat. § 29-2260 (Reissue 1995), whether reviewing a sentence for excessiveness, pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1995), or for leniency under Neb. Rev. Stat. § 29-2322 (Reissue 1995).
8. **Sentences.** A sentence should fit the offender and not merely the crime.
9. ____. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.
10. **Sentences: Probation and Parole.** Justice may certainly be served by a sentence of probation. Whether justice is so served is a matter that is, in the first instance, properly left to the trial court.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Cheyenne County, JOHN D. KNAPP, Judge. Judgment of Court of Appeals reversed and remanded with directions.

Paul B. Schaub, Cheyenne County Attorney, for appellant.

James R. Mowbray, of Nebraska Commission on Public Advocacy, and, on brief, Robin W. Hadfield for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and WITTHOFF, D.J.

CONNOLLY, J.

The appellee, Verma J. Harrison, was convicted of two counts of motor vehicle homicide and sentenced to consecutive terms of probation by the district court. The Nebraska Court of Appeals reversed Harrison's sentences as excessively lenient, pursuant to Neb. Rev. Stat. § 29-2322 (Reissue 1995), and imposed consecutive sentences of imprisonment. *State v. Harrison*, 7 Neb. App. 350, 583 N.W.2d 62 (1998). We reverse the judgment of the Court of Appeals, concluding that the trial court did not abuse its discretion in imposing probation.

## BACKGROUND

### COLLISION

Harrison was driving a GMC van on Interstate 80, near Sidney, Nebraska, at approximately 7:30 a.m. when the van she was driving collided with a Chrysler Town and Country van being driven by Joseph Nicolich, age 65. Joseph Nicolich's wife, Janice, age 60, was in the front passenger seat, and their granddaughter, Robyn Griffiths, age 11, was in the rear seat. The impact of the collision killed Robyn and Janice.

A Nebraska State Patrol officer determined that Harrison was intoxicated at the time of the collision. Harrison stated that she had been drinking in Ogallala until about 3 a.m., had slept a couple of hours in a motel, and was in a hurry to get to Cheyenne, Wyoming. Six motels located at the Ogallala interchange were contacted, and none had any record of Harrison's being registered on the relevant date.

Joseph Nicolich stated that at the time of the collision, he was traveling on I-80 and had passed a motorist who was stopped on the side of the road. He decided to pull over to offer assistance. He had pulled onto the shoulder and slowed down to approximately 25 miles per hour, when his vehicle was struck in the rear by Harrison's vehicle. According to an accident reconstructionist, Harrison was driving on the shoulder at the time of impact at a speed of approximately 65 to 75 miles per hour. It appeared that Harrison made no attempt to avoid the collision. Harrison stated that she thought she had fallen asleep at the wheel.

### ARRAIGNMENT

Harrison was charged with two counts of motor vehicle homicide, pursuant to Neb. Rev. Stat. § 28-306(1) (Reissue 1995), for allegedly causing the deaths of Janice and Robyn, unintentionally, while engaged in the operation of a motor vehicle. Harrison pled guilty in the district court to both counts after being informed of her rights by the court. The State recited the factual basis for the charges, which Harrison admitted. The trial court found that Harrison had freely, intelligently, and voluntarily entered each plea and accepted them. The trial court then ordered a presentence investigation.

SENTENCING

Because we are faced with a sentencing issue, we will discuss the facts contained in the presentence report and those presented at the sentencing hearing in some detail.

The presentence report indicates that Harrison's life had been filled with abuse. Her father, who had been a uranium miner, died from lung cancer in 1971. After her father died, her mother had an affair with Harrison's married uncle, who also molested Harrison and her sister. The community later discovered her mother's adulterous relationship, and their family became outcasts. Harrison married an alcoholic in 1988 when she became pregnant, and she was divorced in 1994. Two of Harrison's children were from this marriage. The other child was the result of a relationship with a man who physically abused Harrison. Harrison was 32 years old at the time of sentencing.

Harrison was convicted of public intoxication in 1994 and driving under the influence of alcohol in 1995. Harrison participated in an 8-hour alcohol abuse course as a result of her 1995 conviction, but did not complete it. She had been fined for child neglect in 1992, which was also attributable to alcohol. Harrison began drinking regularly at age 15 and was drinking twice a week by her senior year in high school.

The presentence report contained numerous letters, some in support of and some in opposition to Harrison's receiving the maximum sentence. The letters in support of Harrison's receiving the maximum sentence were adequately characterized by the trial court during the pronouncement of sentence, which statement is set forth below. The letters in support of Harrison's receiving probation, particularly those from the director of the Laramie Head Start Program, the principal of the elementary school attended by Harrison's children, the pastor of Harrison's church, and a counselor and instructor for the AAA DUI Offender Program, indicated that Harrison was a responsible parent, was heavily involved in the community, and was making significant progress toward conquering her alcoholism. According to these letters, Harrison's attempt at rehabilitation was sincere and was likely to be successful.

At the sentencing hearing, the trial court asked Harrison whether she had anything she wanted to say. Harrison stated:

> Yes, I would like to tell everybody in this courtroom today and say that there is [sic] no words for the depth of the remorse that I feel. The depth of the remorse that I feel, and I will never forget and I won't, Your Honor, for the rest of my life. I have learned so many valuable lessons in this whole thing. For the rest of my life I dedicate myself to my sobriety and then to helping others who are headed down the same way, because I never intended to hurt anybody.

Joseph Nicolich testified on behalf of the State:

> I would like to say that I hope Verma Harrison receives the maximum jail time or prison time with no good time off for good behavior or probation.
>
> . . . .
>
> I would think that now Mrs. Harrison is trying to show the authorities how good she can morally and religiously be. I feel she would shake hands or marry the devil if it meant her getting off the charges against her.

The trial court also had before it a letter handwritten by Cindy Griffiths, Robyn's mother, at the mother's request:

> October 7, 1997
>
> Dear Justice Knapp,
>
> My name is Cindy Griffiths, my husband's name is Bill Griffiths. We are the parents of Robyn Griffiths (DOB 12/12/84) and the daughter and son-in-law of Janice Nicolich. Robyn and my mother, Janice, were brought to their deaths while driving through Sidney on June 28, 1996. My father, Joe Nicolich, was there too, as he was the driver.
>
> I am writing to you today in regards to Verma Harrison, who was driving the vehicle that crashed into my parents' car on I 80. I understand her sentencing date is approaching quickly, and we wanted to let you know our thoughts.
>
> It's a little hard for me to know where to begin. To try to describe the agony of losing our precious daughter and mother is not something we can easily do, for the pain runs so very deep. It's beyond anything we've ever experienced. It's as though a major tidal wave—a tsu nami—has crashed down upon us and sent us tumbling and spinning in blackness—agonizing blackness. I described it at one

point to someone as being tortured unceasingly without the repose of death. I prayed and asked God a number of times to just please, please take my entire family in our sleep so we wouldn't have to live the nightmare anymore. Obviously my prayers have gone unanswered—this time—and for good reasons, I'm confident.

My daughter, Robyn, who was born on my birthday nearly 13 years ago, is the second of six children and the first of two girls (my youngest, now five yrs. old, is a girl). She was—it is difficult to write "was" when referring to her—but she was a very special young lady who graced the lives of many with her gentle, caring spirit. She was mature for her 11½ years: helping with household duties and with caring for the little ones. She'd intervene when her brothers didn't get along and she helped to create an atmosphere of peace. She'd offer comfort to a sibling who felt misunderstood. And she'd be found every day playing mom to her baby sister (who was three at [the] time we lost Robyn) by playing with her, reading her stories and the like. In our family of six children we teach the older ones to help with and care for the younger children. Robyn rarely complained. In fact, there was little else she preferred over spending time with her baby sister. All of her siblings loved her dearly, so naturally they suffer—unnaturally. We suffer because we love. I've told them this. It hurts so much because we loved so much, and we still love so much.

The shock of my daughter's sudden and violent death has reverberated throughout our families and our local and church communities. Robyn had several close friendships, but we've learned that a large number of girls considered her to be their "best" friend. She had a very loving way about her that caused her to seek to include others, especially the ones that were shy or on the peripheral. And Robyn and I were very close. I am not going to describe my relationship with her except to say that I don't think it gets any better than what we had.

I have to admit that I am tempted to go on and on about this child because I cannot see her sweet freckled face any

longer. My eyes are now denied their maternal right to watch the sunlight dance on the blonde highlights of her brown hair, or the wind tease her flowing locks. I cannot feel her in my arms any longer, yet I remember her soft skin and wonderful hugs. I do not hear her playing with her brothers and sister, and our piano seems to sit in a sullen silence, wondering why her gentle songs have ceased. Where other moms can talk to their 12 yr. old daughters, I now can only talk about my memories of mine.

And then there's my mother. We were very close. She was not just my mother, but my friend. Always, it seemed, giving, loving, and laughing. She was wonderful to me and my brothers and our children. She had many interests and even had a special "something" for Native Americans. She loved their art (definitely their jewelry) and sympathized with their history. I find it interesting that Verma Harrison is 100% Native American.

Well, I felt the need to share these things. Now, I want to focus on Ms. Harrison. Although we despise what has happened at the hands of Verma Harrison, we do not despise the person, Verma Harrison. I cannot remember if it was the first or second day when we learned the driver had been intoxicated with a blood alcohol level of 1.9, but I remember thinking, "My God, what happened to this woman that left her with no sense of self-worth, self-respect, self esteem? What happened in her life that caused her to think so irrationally and behave so irresponsibly? What has driven her?" I felt from the beginning that she probably had alot of problems and needed alot of help. I knew I was going to write to her to see if I could help. Knowing that God hears when we call upon Him in truth, I fasted and prayed for three days asking God to give me insight into Ms. Harrison, so that my letter would be effective.

Early in November of '96 I wrote to her to tell her that I didn't hate her, but wanted to help her. I explained to her my reasons for my perspective and my forgiveness; for

they are found in the Bible and are the fruits of a relationship with the Lord, Jesus Christ, and by faith in His word.

Ms. Harrison wrote back to me—to all of our family. She wrote a very long letter. A letter which confirmed my impressions of her while writing my first letter to her. Indeed, she suffered much abuse at the hands of irresponsible adults during her growing up years, including sexual and alcohol-influenced abuse. Now, I am a believer that we need to take responsibility for our actions. We need to make choices for good or for evil, for life or for death, in all our daily actions. There are many people, I think, who love to blame their parents, their siblings, their teachers, babysitters or the lack of enough candy in their Christmas stockings for their depressions and woes in life. I've been one of them. These folks need to get a grip—it's true—and start making lemonade with those lemons. However, they need to be loved and helped along the way to hopefully reach that point. And then they still need to be loved. And I believe love never fails.

Some have said we are foolish for taking this stand. Some say she's carefully scheming with her lawyer to pull our heartstrings for the very purpose of my writing these things to you. Yet I say 1) it was I who wrote to her first, 2) we've made contact twice with her pastor. She's been in attendance since the crash at a local church, and we've contacted the pastor to discuss her actions and faith, and 3) even if her story weren't true, I would still have the satisfaction of knowing that I did the right thing in case it were true.

In her letters, I've received and sent several now, she has expressed remorse for what she's done. I think it is not only remorse for the consequences of whatever might be coming to her, but remorse over the injury she has caused this family. We believe it is real. We believe she is waking up and trying to make steps towards a better way of living. As I stated previously, we've made contact with her pastor who confirmed what she had written to us and more. What we've learned is that she's been in counseling 2 x per week

at the minimum, she's been in an intensive discipleship/ rehab program with a group called Overcomers Outreach, which is an offshoot of their church, and she has been ACTIVELY involved in reaching out to others who have addictions, telling them of her life, telling them what happened on June 28, 1996, telling them of love and forgiveness and healing and hope. We don't want any of this to end! She wrote and told me how she was about to graduate college with a degree in business, but wants to change that so she can counsel women. She believes she has something to give now. We want her to have the chance to give it away.

We've been warned that those awaiting sentencing are on their best behavior because they are very scared. And while we can believe that, we still have reason to believe that Ms. Harrison's rehabilitation is genuine, and that her desire to counsel other women who are suffering with the abuses she's received or inflicted upon herself, is real, too.

I've attended several MADD meetings. They did not seem to like my point of view, in fact some began to get argumentative. When I suggested that if she's telling the truth, she may be able to reach other alcoholics before they kill someone's loved one, the folks at the meeting saw that maybe some good could come out of it.

Justice Knapp, there's been an awful lot of pain and suffering: my husband and me and our children, my brothers and their families, my dear father, who's been a very broken, hurting man, and the many, many others in Janice's and Robyn's spheres of influence. If any good could come of this—we are all for it. We want to see Ms. Harrison have the chance to make good with her life and the lives of her children, and we want to see her reach out to help heal those hurting women she calls "my people."

I don't claim to know all she needs right now. She broke the laws of our land and I don't know what's in store for her because of this. We want you to know that we consider her an ally and not an enemy if she is going to pursue what is good and right. If she does this, she'll be fighting the true enemy with us—which is evil itself. And that battle is

won one heart at a time. Let her influence others so that perhaps even one other mother and father, daughter & son-in-law will not have to weep the bitter tears we've wept.

Thank you very much for letting us have our say and for considering our thoughts.

Respectfully,
/s/ Cindy Griffiths
/s/ Bill Griffiths

The trial court sentenced Harrison to 5 years' probation on each count, which sentences were to be served consecutively. The conditions of her probation included random alcohol and drug testing and counseling. In rendering sentence, the trial court stated:

> I am deeply touched by the letter from Mr. and Mrs. Griffiths, they express a forgiveness and a relationship with God that is difficult, I think, for most of us to understand. The more understandable emotions are those expressed by other members of the family, which are quite simply, punish her as stringently, as severely as possible. And if I did that, it might give them some temporary sense of relief or some sense that our loved ones lives had been vindicated to some small, small degree.
>
> . . . .
>
> . . . Were it not for the letter from Mr. and Mrs. Griffiths, I think I would have, beyond a doubt, sentenced you to prison, but in the face of their expressed forgiveness and their belief in you, Ms. Harrison, which I certainly hope is not in vain, I feel that probation is appropriate in this particular instance.

The State appealed, contending that the trial court abused its discretion by rendering excessively lenient sentences. *State v. Harrison*, 7 Neb. App. 350, 583 N.W.2d 62 (1998). The Court of Appeals stated that according to its "examination of all the factors," it was "of the opinion that a period of incarceration is required to meet the requirements of a proper sentence under the facts of this case." *Id.* at 359, 583 N.W.2d at 68. The Court of Appeals did not hold that the trial court had abused its discretion. Nonetheless, the Court of Appeals vacated Harrison's sentences of probation and remanded the cause for imposition

of two sentences of 20 months' to 5 years' incarceration, to be served consecutively. Harrison now appeals from that decision.

## ASSIGNMENTS OF ERROR

Harrison asserts that the Court of Appeals erred in failing to properly apply the standard of review, in finding that the sentences are excessively lenient, and in vacating the sentences and remanding the cause for imposition of two consecutive sentences of 20 months' to 5 years' incarceration.

## SCOPE OF REVIEW

When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

## ANALYSIS

In her petition for further review, Harrison argues that the Court of Appeals improperly applied the standard of review in evaluating her sentences, as it did not make any determination as to whether the trial court had abused its discretion in imposing sentences of probation.

In *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984), we held that the same scope of review applies in the lenient sentence context as applies in the excessive sentence context. See, also, *State v. Hoffman*, 246 Neb. 265, 517 N.W.2d 618 (1994) (indicating that such is constitutionally required). Thus, regardless of whether an appellate court is reviewing a sentence for its leniency or for its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears an abuse of the trial court's discretion. *State v. Jallen, supra.* See *State v. Detweiler, supra.*

It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993). The sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness

of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993).

In *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993), this court addressed the abuse of discretion standard in the excessive sentence context. In *Philipps*, the defendant had stolen approximately $10,000 from her employer and was found guilty on three misdemeanor counts. The defendant had attempted to make restitution by paying back the employer, was under financial pressure when the theft occurred, had no prior criminal record, was remorseful, and was 29 years old and pregnant at the time of sentencing. Nonetheless, the trial court sentenced the defendant to the maximum imprisonment, 1 year on each count, with the sentences to be served concurrently. The Court of Appeals concluded that the sentences were excessive and reduced the sentences to probation. This court reversed the Court of Appeals' judgment, holding that the sentences did not constitute an abuse of discretion, even though a mechanical application of the statutory factors would suggest that imprisonment was unnecessary. See *State v. Philipps*, 242 Neb. at 904, 496 N.W.2d at 881, Shanahan, J., dissenting (noting that "6 of the 11 factors in [Neb. Rev. Stat. § 29-2260 (Reissue 1995)] favoring probation over imprisonment" were present).

We have long held that a judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. See, e.g., *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998). In *Pettegrew v. Pettegrew*, 128 Neb. 783, 788, 260 N.W. 287, 289 (1935), we stated: " 'If the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason and evidence, it has abused its discretion.' " Quoting *State v. District Court*, 213 Iowa 822, 238 N.W. 290 (1931). Accordingly, when applying the criteria enumerated in § 29-2322, which authorizes an increase of sentence on appeal, the inquiry is whether the trial court's decision was clearly

untenable, unfairly deprived a litigant of a substantial right, and denied a just result. See *State v. Rittenhouse*, 1 Neb. App. 633, 510 N.W.2d 336 (1993). Thus, so long as the trial court's sentence is within the statutorily prescribed limits; is supported by competent evidence, see, *State v. Philipps, supra*; *State v. Foral*, 236 Neb. 597, 462 N.W.2d 626 (1990); and is not based on irrelevant considerations, see *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998) (holding trial court abused discretion by relying on personal religious views), an appellate court cannot say that a trial court has abused its discretion. Such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result.

The question, then, is whether the trial court in the instant case abused its discretion by sentencing Harrison to probation. In conducting this analysis, we are mindful that " '[t]he trial court has the opportunity to observe the defendant throughout the judicial process and is in a better position than this court to determine whether the defendant is suited for probation.' " *State v. Stastny*, 227 Neb. 748, 751, 419 N.W.2d 873, 875 (1988), quoting *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). Moreover, a sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed. *State v. Pattno, supra.*

The Court of Appeals applied § 29-2322 in determining that Harrison's sentences were excessively lenient. Section 29-2322 states in relevant part:

> [T]he appellate court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having regard for:
>
> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the appellate court deems pertinent.

However, the Court of Appeals did not consider the elements contained in § 29-2260. When determining whether to impose probation, the trial court must consider the factors set forth in § 29-2260. Thus, on appeal, an appellate court must likewise consider § 29-2260 in determining whether probation may be imposed, whether reviewing a sentence for excessiveness pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1995), see *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993), or for leniency under § 29-2322, see, *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984); *State v. Hoffman*, 246 Neb. 265, 517 N.W.2d 618 (1994). Section 29-2260 states in relevant part:

[T]he court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:

(a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

In the instant case, there was competent evidence received by the trial court during sentencing that supports the imposition of probation under § 29-2260. Harrison's testimony, the letters from her community, and the Griffiths' letter indicate that (1) Harrison is unlikely to commit another crime, (2) Harrison is likely to respond affirmatively to probationary treatment, and (3) imprisonment would entail excessive hardship to Harrison's children, all of which are factors that weigh in favor of probation. See § 29-2260(i), (j), and (k). The above facts likewise support the imposition of probation considering § 29-2322(3)(b) and (4).

The State argues that the Griffiths' letter is nothing more than a letter of forgiveness and, thus, that the trial court relied on irrelevant evidence in imposing Harrison's sentences of probation. Assuming without deciding that a victim's forgiveness is a relevant circumstance, we note that the Griffiths' letter expresses more than the Griffiths' forgiveness; it is evidence that "Harrison's rehabilitation is genuine." Thus, the letter is clearly relevant, and we cannot say that the trial court abused its discretion in considering such.

The State also notes that the Court of Appeals concluded that "[t]he protection of the public from further crimes by Harrison

cannot be assured under the conditions of probation . . . imposed . . . ." *State v. Harrison*, 7 Neb. App. 350, 359, 583 N.W.2d 62, 67 (1998). This conclusion was apparently based on Harrison's prior problems with alcohol and gave little credence to the evidence concerning Harrison's subsequent progress toward rehabilitation. However, as we have already stated, an appellate court may not review sentences de novo, but, rather, is bound by the abuse of discretion standard. In light of the competent evidence indicating that Harrison was making significant progress toward rehabilitation, we cannot say that the trial court's determination in this regard was an abuse of discretion.

Finally, the State notes that the Court of Appeals concluded that Harrison's sentences of probation did not reflect the seriousness of the offense, promote respect for the law, or provide just punishment, which factors constitute an element under § 29-2322(3)(c). Although the seriousness of the crime may weigh in favor of imprisoning Harrison, it does not, by itself, indicate that the trial court abused its discretion. Obviously, the offenses in the instant case were quite serious, and that fact should not be diminished. However, a sentence should fit the offender and not merely the crime. *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). Indeed, this court has repeatedly recognized the importance of probation to our system of criminal justice, stating that " '"[a] sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.". . .' " *State v. Javins*, 199 Neb. 38, 40-41, 255 N.W.2d 872, 874 (1977), quoting *State v. Shonkwiler*, 187 Neb. 747, 194 N.W.2d 172 (1972). Thus, "justice" may certainly be served by a sentence of probation. Whether justice is so served is a matter that is, in the first instance, properly left to the trial court.

Were our standard of review de novo, we may have agreed with the Court of Appeals and reached a different result than the trial court. Nonetheless, based on the foregoing analysis, we conclude that the trial court did not abuse its discretion in sentencing Harrison to probation and, thus, that Harrison's sentences are not excessively lenient. Therefore, we reverse, and

remand the cause with directions to reinstate the sentences of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., not participating.

WRIGHT, J., dissents.

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STATE OF NEBRASKA, APPELLEE, V.
PATRICK A. CLARK, APPELLANT.
588 N.W.2d 184

Filed January 22, 1999. No. S-98-086.

1. **Rules of Evidence.** In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
6. **Criminal Law: Intent.** The mental process of forming an intent to kill may be proved circumstantially or by direct evidence.
7. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.
8. **Hearsay: Words and Phrases.** Hearsay is defined as a statement other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Martin A. Cannon for appellant.

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

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

Patrick A. Clark appeals his convictions for second degree murder and use of a firearm in the commission of a felony. We affirm.

## STATEMENT OF FACTS

The wounded body of Leroy Fowler was discovered in the parking lot of the Kingswood Apartments near 132d and West Center Road in Omaha shortly after noon on March 12, 1997. Fowler had been shot four times with a .22-caliber revolver. The parking lot in which the shooting occurred adjoins a busy strip-mall shopping center, and two witnesses saw Clark shoot Fowler, then run from the scene. Fowler was alive when police and rescue personnel arrived at the scene shortly after the shooting. He died the following day. Fowler was known to police and others as a dealer of illegal drugs.

Clark is a 42-year-old, divorced, unemployed carpenter addicted to methamphetamine. Clark had met Fowler 7 months prior to the shooting, in August 1996, in connection with a drug transaction. Clark began to buy methamphetamine regularly from Fowler, and his debt to Fowler rapidly increased. According to Clark, in late 1996, Fowler insisted that Clark work for him, apparently as security for the unpaid drug debt. In return for Fowler's "fronting" drugs to Clark without immediate payment, Clark worked for Fowler nearly every day without pay. Clark's debt to Fowler was not diminished by the services he provided to Fowler. The uncontroverted evidence showed that Fowler imposed usurious "interest" and that Clark's debt continued to increase.

Clark's jobs for Fowler included carpentry and cleaning at Fowler's home in North Omaha. Fowler's home was unusually fortified with security precautions, including video cameras mounted outside the house to provide constant surveillance of

the grounds. Clark also drove Fowler around Omaha two or three times per week to collect money from drug sales. Clark testified that Fowler often gave Clark Fowler's gun to carry as the two made these nighttime rounds to collect Fowler's drug money. Fowler could not lawfully carry a gun, since he was a convicted felon. Clark testified that Fowler used intimidation, threats, and violence to collect money due to him for illegal drug sales.

Clark testified that he was dependent on the methamphetamine he got from Fowler, but that he could not pay for it. Clark said he felt increasingly frightened by Fowler's intimidation of him, including threats to injure or kill Clark, his young children, and Clark's parents. It was uncontroverted that Fowler was a bigger, heavier person than Clark. Clark stated that he felt he could not challenge Fowler because Fowler supplied him with methamphetamine to feed his addiction and Clark believed that Fowler would follow through on his threats to harm Clark or Clark's family because of the unpaid drug debt.

In the week preceding the March 12, 1997, shooting, Clark testified that he had worked for Fowler continuously for nearly 3 days without a break, including moving a large cache of Fowler's weapons, ammunition, and drugs. The weapons included hand grenades and automatic weapons. Clark testified that at approximately 7 p.m. on Friday, March 7, after moving Fowler's cache to a storage unit, Clark told Fowler that he had to get some sleep. According to Clark, Fowler grudgingly agreed to a few hours, telling Clark, "You come down to my house at 10 o'clock or I'm going to chase you down." Clark went to his parents' home, where he lived, to sleep. Contrary to Fowler's instructions, Clark did not return to Fowler's home.

Clark avoided Fowler's attempts to reach him until the following Wednesday, March 12. Fowler arrived at the Clark home in a rage at approximately 8:40 a.m., soon after Clark had awakened. Joseph Clark, Clark's brother, encountered Fowler as Fowler arrived at the Clark home and Joseph Clark was leaving for work. Joseph Clark had never before met Fowler. Fowler gave Joseph Clark "a dirty, dirty glare — like he could beat somebody up."

Once inside the Clark home, Fowler demanded that Clark leave with him. He took many of Clark's possessions, including clothes, tools, and three houseplants, which were later found in the back of Fowler's car. Fowler did not expressly mention Clark's unpaid drug debt, but Clark testified, "I knew that's what this was about" and "I knew he was going to kill me and I knew he had the potential."

Clark testified that he believed that Fowler was carrying a gun underneath his jacket. Fowler threatened to blow up the home of Clark's parents, who were in the upper level of the house. Clark testified that he was very scared that Fowler, who looked "more wicked this time than ever," would carry through with his threat. Clark believed that he could not communicate with his parents to call police, so he agreed to leave with Fowler, to get him out of the house. Clark surreptitiously grabbed a .22-caliber revolver which he owned and slipped it into his pants before he left with Fowler.

Clark and Fowler left in Fowler's car, with Fowler driving. Clark said he knew a place in west Omaha where he could get $2,000 to pay Fowler. Clark testified that he was trying to direct Fowler to the Omaha police station in Millard. Fowler became increasingly suspicious and angry as they drove toward Millard. Clark testified that Fowler suddenly turned the car into a parking stall in the Kingswood Apartments parking lot, saying, "Bullshit. This is it."

Without fully stopping the car, Fowler leaped out of the driver's side. Clark testified that he was "petrified" and that he was sure that Fowler planned to come around the car and kill him. Clark jumped out of the car, pulled out his gun, and began firing at Fowler across the roof of the car. Clark saw Fowler go down and testified that he thought Fowler was ducking down to avoid the gunfire. Clark testified that when he saw Fowler go down, he ran from the scene, believing that he could outrun Fowler.

Clark took the gun with him when he ran. He buried it beneath a bush in a flowerbed at a house located several blocks away. He then walked to the Walgreen's drugstore in the nearby shopping center adjoining the Kingswood Apartments parking

lot, and he called a friend, Tonya Odell, to pick him up. Odell did so, returning Clark to his home between 2 and 3 p.m.

Meanwhile, rescue personnel took Fowler to St. Joseph Hospital for medical care. At the hospital, police interviewed Fowler's girl friend about the shooting, and she identified some of the personal property found in Fowler's car as belonging to Clark.

Police contacted Clark at his parents' home at approximately 12:25 a.m. on Thursday, March 13. Under questioning at police headquarters, Clark initially denied any involvement in the shooting of Fowler. When confronted with the identification of his property in Fowler's car, Clark began crying and confessed that he had shot Fowler. Police officers taped Clark's statement, which was played for the jury at trial. The officers to whom Clark gave his confession testified that Clark appeared nervous and afraid and that he told them that he was scared of Fowler. The officers testified that they believed Clark told them the truth and that they found him cooperative. The officers testified that the information which Clark gave them regarding the location of the gun used in the shooting, as well as Fowler's cache of weapons and drugs, was accurate.

Clark was charged with first degree murder and use of a firearm in the commission of a felony. He testified in his own defense at trial. Clark maintained that he shot Fowler in self-defense and that he did not intend to kill Fowler. In addition to the facts set forth above, Clark stated that Fowler's behavior had become increasingly erratic and violent in the weeks preceding the shooting and that Fowler had physically beat him on several occasions.

At trial, the prosecution introduced the testimony of Jerry W. Jones, M.D., a forensic pathologist who performed an autopsy upon Fowler. Jones stated that Fowler was shot twice on the left side of his chest, once in his lower right abdomen, and once on the left side of the back of his head. Jones opined that the head wound caused Fowler's death. The other gunshot wounds were nonfatal. Jones concluded that the shots which wounded Fowler were fired from a distance of 24 inches or more at Fowler. Toxicology tests revealed the presence of cocaine and methamphetamine in Fowler's body at the time of his death. There was

evidence that the amount of methamphetamine in Fowler's body was five times greater than any amount which would conceivably be prescribed for a therapeutic purpose and that at such a concentration, the methamphetamine could have caused Fowler to be anxious, restless, and delusional. Additional trial evidence is discussed below as needed.

The jury was instructed regarding first degree murder, second degree murder, manslaughter, and self-defense. The jury found Clark guilty of second degree murder and use of a firearm in the commission of a felony. Clark was sentenced to life imprisonment on the murder conviction, and a consecutive term of 10 years' imprisonment on the use conviction. He appeals.

## ASSIGNMENTS OF ERROR

Clark claims that the trial court erred in admitting a photograph of Fowler and his daughters over Clark's objection. Clark asserts that the trial court erred in failing to sustain his motions to dismiss made at the close of the State's evidence and at the close of all the evidence, and in failing to grant his motion for a new trial. Clark assigns as error the trial court's exclusion of evidence which he offered to prove Fowler's violent disposition. Clark also claims that he received an excessive sentence.

## STANDARD OF REVIEW

In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

In a criminal case, a motion for new trial 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. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

## ANALYSIS

*Admission of Photograph.*

Clark objected to the admission of a photograph of Fowler and his daughters and argues on appeal that the receipt into evidence of this photograph was reversible error. Although we conclude that the admission of the photograph was error, we find its admission to be harmless error.

The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). This is particularly so where the photographs are gruesome or explicit. *Id.* In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *Id.* See, also, *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

In the instant case, the photograph of Fowler and his daughters was not offered for a proper purpose and its relevance is imperceptible. The admission of the photograph was error.

The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *McBride, supra.* In the instant case, the photograph is small, the images in the photo are blurred, and the facial features of Fowler and his daughters are scarcely distinguishable. The photograph appears to have been taken with a Polaroid-type camera. The impact of the photograph is innocuous.

Having reviewed the record as a whole, we determine that the evidence properly admitted overwhelmingly establishes Clark's guilt beyond a reasonable doubt. We, therefore, conclude that error in admitting the photograph did not materially influence the jury in reaching its verdict and was harmless beyond a reasonable doubt. The assigned error is without merit.

*Denial of Motions to Dismiss Charges and Motion for New Trial.*

Clark testified that he shot Fowler in self-defense and that he did not intend to kill Fowler. Clark moved to dismiss the

charges at the end of the State's presentation of evidence and at the conclusion of all the evidence, claiming that the State had failed to prove his intent, a material element of the crime with which he was charged. This was also the basis of Clark's motion for new trial.

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998). A motion for new trial 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. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). We have reviewed the trial proceedings, and we conclude that the trial court properly denied Clark's motions to dismiss the charges and his motion for new trial.

With respect to Clark's claim that the record lacks evidence of intent, we note that Clark's denial of his intent to kill Fowler was not the sole evidence of intent offered at trial. A criminal defendant's mental process of forming the intent to kill is not always susceptible to proof by direct evidence, and it may be proved by circumstantial evidence. *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994). For example, in *Lyle*, a first-degree murder case, this court found that Lyle's act of intentionally aiming the gun up and down the victim's body as the gun was fired could reasonably be interpreted as circumstantial evidence of Lyle's intent to kill.

In the instant case, eyewitnesses testified that they saw and heard Clark fire multiple shots, even as Fowler was falling to the ground. This and other evidence could reasonably be found to be circumstantial evidence of Clark's intent to kill Fowler. The interpretation of the evidence was a matter of fact which precluded a directed verdict against the State and which was properly left to the jury to determine. The trial court did not err in overruling Clark's motions to dismiss and the motion for new trial on this basis. These assigned errors are without merit.

*Exclusion of Larsen Testimony.*

Clark unsuccessfully attempted at trial to introduce the testimony of Robert Larsen, an agent of the State of Iowa's division of criminal investigations. Larsen is assigned to patrol the Ameristar Casino in Council Bluffs, Iowa. The State's objection to Larsen's testimony was sustained, and Clark made an offer of proof outside the presence of the jury.

If allowed to testify, Larsen would have stated that he arrested a drug dealer named Arthur Hernandez at the casino on January 27, 1997. According to Larsen, Hernandez was "paranoid" and feared for his life when he approached Larsen. Hernandez told Larsen that some drug deals he made with Fowler had gone awry and that Fowler had contracted with others to murder Hernandez. Hernandez gave Larsen methamphetamine which Hernandez possessed, in order to be arrested and gain safety from Fowler. Larsen stated that he had never before encountered such a situation and that on the basis of this encounter, he formed an opinion that Fowler possessed violent propensities because "I don't know why else anybody [such as Hernandez] would hand over drugs so blatantly to a police officer."

The trial court rejected Larsen's testimony on the bases that it was hearsay and that Larsen's opinion was not based upon sufficient foundation. The trial court's ruling was correct.

In the instant case, on the record before us, Clark's trial counsel tendered his offer of Larsen's testimony as lay opinion evidence. Clark proffered no evidence that Larsen had or acquired knowledge about Fowler's tendencies other than that conveyed by Hernandez, which served as the basis for his opinion that Fowler possessed violent propensities. Larsen did not investigate the veracity of Hernandez' assertions. Opinion evidence which is unsupported by appropriate foundation is not admissible. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). On this record, the trial court correctly excluded Larsen's testimony as lacking foundation.

In excluding the proposed testimony of Larsen, the trial court correctly noted that Hernandez' statements made to Larsen were hearsay and therefore excluded. Hearsay is defined as a statement other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the

matter asserted. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). The record fails to show that Hernandez' statements to Larsen were otherwise admissible under any exception to the hearsay rule. We, therefore, conclude that the proffered testimony was properly excluded and that this assignment of error is without merit.

Clark contends that he received an excessive sentence. Clark was sentenced to life imprisonment for the second degree murder conviction, plus a consecutive term of 10 years' imprisonment on the use of a firearm conviction.

We have stated that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.* We have carefully reviewed the trial evidence, and on this record, we find no abuse of discretion.

## CONCLUSION

For the reasons set forth above, we affirm.

AFFIRMED.

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