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IN RE INTEREST OF C.D.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.R.C. AND N.J.C., APPELLANTS.

455 N.W.2d 801

Filed May 25, 1990. No. 89-871.

1. **Juvenile Courts: Jurisdiction: Final Orders: Appeal and Error.** An adjudication that facts exist which give a juvenile court jurisdiction over a juvenile is a final appealable order.
2. **Parental Rights: Juvenile Courts: Jurisdiction: Time: Appeal and Error.** Once the time has expired for appealing an adjudication that facts existed which gave a juvenile court jurisdiction over a juvenile, existence of the facts upon which the adjudication was based cannot be questioned on a later appeal from an order terminating parental rights.
3. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that termination of parental rights is in the child's best interests and that at least one of the six bases provided in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists.
4. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
5. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
6. _____: _____. While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child.
7. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
8. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
9. _____. A parent may as surely neglect a child of whom she does not have possession by failing to put herself in a position to acquire possession as by not properly caring for a child of whom she does have possession.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Robert A. Laughlin, of Prince and Laughlin, for appellant J.R.C.

Wesley E. Hauptman, of Green, Hauptman & Kivett, for appellant N.J.C.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

Thomas M. Kenney, Douglas County Public Defender, and Regina T. Makaitis, guardian ad litem.

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

CAPORALE, J.

I. INTRODUCTION

Defendants, J.R.C. and N.J.C., appeal the judgment terminating their parental rights to C.D.C., a son born to them on April 12, 1986. The parents contend that the court below erred in finding that they failed to comply with the rehabilitation program established for each and that termination of their parental rights was in their son's best interests. The father further urges that the juvenile court erred in prescribing a rehabilitation program which contained provisions which were not reasonably necessary for the plan's ultimate success. The mother further argues that the juvenile court erred in finding that she had substantially and continuously or repeatedly neglected her son and refused to give him the necessary parental care and protection. We affirm.

II. BACKGROUND

The juvenile court acquired jurisdiction over the child on May 12, 1987, as a result of an adjudication that he fit within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) by virtue of having suffered a skull fracture which the parents could not explain and because the father had on several occasions spanked the then less than 7-month-old child, had on several occasions held his hand over the child's mouth to prevent the child from crying, and had physically abused the mother while the child was in their custody, and because the mother had failed to remove or protect the child from such an environment. That

adjudication being a final appealable order, *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989), from which neither parent appealed, the parents may not now question the existence of the facts on which the juvenile court asserted jurisdiction over their child. See, *In re Interest of L.B., A.B., and A.T., ante* p. 134, 454 N.W.2d 285 (1990); *In re Interest of M.B. and J.B.*, 233 Neb. 368, 445 N.W.2d 618 (1989). The juvenile court later prescribed rehabilitation plans for both parents in order to correct the conditions which led the juvenile court to assert jurisdiction.

III. ANALYSIS

We begin our analysis by recalling the rule that in order to terminate parental rights, the State must prove by clear and convincing evidence that termination of parental rights is in the child's best interests and that at least one of the six bases provided in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists. *In re Interest of C.P., ante* p. 276, 455 N.W.2d 138 (1990). Among the bases for termination of parental rights, § 43-292 includes:

> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of C.P., supra*; *In re Interest of T.E., S.E., and R.E., ante* p. 420, 455 N.W.2d 562 (1990); *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990); *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275

(1990).

1. Father's Appeal

As noted in part I above, the father contends that the record does not establish failure on his part to comply with the court-ordered plan, that several provisions of the plan are not reasonable and material, and that termination of his parental rights is not in his son's best interests. We consider each of these claims in turn.

(a) Compliance with the Plan

The juvenile court ordered the father to obtain a chemical dependency evaluation and participate in the "NOVA Therapeutic Community Substance Abuse Treatment" program, participate in a men's domestic violence group, refrain from illegal activity, maintain adequate legal employment, maintain adequate independent housing for himself and keep rent current, maintain regular visits with the child, cooperate with the persons involved in his rehabilitation, and notify the court of any change in residence or employment. At a subsequent review hearing, the court further ordered the father to abstain from all use of drugs or alcohol.

The record reveals that the father willfully failed to comply with the requirements set forth by the juvenile court. See, *In re Interest of C.N.S. and A.I.S., supra*; *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990) (in order to justify termination of parental rights based upon a failure to comply with a provision of a rehabilitation plan, the evidence must show that the parent's failure was willful). As largely established by his own admissions, the father failed to participate in any of the treatment programs prescribed by the court; was arrested and placed in prison once during the rehabilitative period; physically abused the mother on many occasions; held only occasional temporary jobs; failed to maintain his own residence or contribute to the rent the mother paid; failed to visit the child regularly, at one time not seeing the child for approximately 17 months; and used drugs and alcohol during the rehabilitative period. The father himself testified that his compliance with the plan was "more of a con than reality."

(b) Reasonableness of Plan

The father next contends that the requirements of the plan that he attend counseling at the NOVA substance abuse treatment program and maintain adequate legal employment are unreasonable and not material to the correction of the situation for which the child was previously adjudicated.

A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of C.N.S. and A.I.S., supra*; *In re Interest of J.L.M. et al., supra*. While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child. See, *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

An intake coordinator for NOVA described NOVA as a "long-term residential and out-patient and partial-care [drug and alcohol] treatment program for adolescents and adults." Based upon an interview with the father and his past history of involvement with drugs and alcohol, the coordinator recommended that the father enter the residential treatment program at NOVA in order to receive treatment for his chemical dependency and "other dysfunctional behaviors." The coordinator testified that NOVA concentrates on an individual's behavioral problems because correcting the behavioral problems leads to correction of the drug and alcohol problems. The father has a history of involvement with drugs and alcohol and admitted to the coordinator that he had difficulty with socialization and a problem with drugs and alcohol. In June 1988, the father was evaluated by an outpatient counselor at NOVA who also recommended that the father participate in inpatient treatment at NOVA.

It is apparent that the provision requiring the father to participate in NOVA is directly correlated to the plan's objective

of reuniting the father with the child and securing the health and well-being of the child. The father urges that NOVA was not appropriate for him in that NOVA uses a confrontational approach to treatment, and a Dr. Bartholow, who evaluated the father for the Division of Rehabilitation Services of the Nebraska Department of Education, recommended that the father avoid "emotional stress and pressure." Bartholow evaluated the father not for purposes of determining the type of treatment the father needed, but for purposes of determining his amenability to vocational rehabilitation. The two NOVA counselors, who evaluated the father specifically for purposes of determining what type of treatment the father needed, were of the opinion that the confrontational program at NOVA would be beneficial. Because the father repeatedly failed to involve himself in inpatient treatment, the court was unable to monitor his progress and determine whether the NOVA confrontational approach was indeed beneficial to him.

It is also apparent that the requirement that the father maintain adequate legal employment is reasonably related to the plan's objective of reuniting the father with the child and securing the health and well-being of the child. Although there is evidence in the record that the father had a back problem which inhibited his ability to work, there was also evidence that the father was employable, but simply lacked the motivation to maintain steady employment. A parent is required to provide his child with the basic necessities of life. See, *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987); *Coffey v. Coffey*, 205 Neb. 191, 286 N.W.2d 753 (1980).

In addition, the father complains that the plan failed to include a provision for mental health therapy, which provision he claims was "reasonably necessary for the plan[']s ultimate success." As noted above, the NOVA inpatient program provides treatment for behavioral problems, but because the father failed to participate, the court was unable to determine whether the treatment NOVA provided was beneficial.

(c) Child's Best Interests

Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child

require termination of the parental rights. *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275 (1990); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990). The father's unwillingness to comply with a rehabilitative program directed at reuniting him with his child and designed to secure the continued long-term health and well-being of the child compels the conclusion that termination of his parental rights to the child is in the child's best interests.

2. Mother's Appeal

The mother, as noted in part I above, contends that the record contains no evidence which substantiates noncompliance with a reasonable and material provision of the rehabilitation program the court prescribed for her, that the evidence fails to show that she has neglected her child, and that termination of her parental rights is not in the child's best interests. As we did in connection with the father's appeal, we consider each of the mother's claims in turn.

(a) Compliance with the Plan

The mother has complied substantially with the plan prescribed for her, having cooperated in the various programs offered to her and having maintained very regular visitations with the child. At issue is whether she has complied with the requirement that she "maintain a safe, violence and drug free environment for at least 3 months prior to consideration of [the child's] placement in her home."

The record establishes that the father continually moved in and out of the mother's life and that when he resided with her, he physically abused her. According to the evidence, on various occasions the father had kicked the mother, given her a black eye, hit her in the chest, threatened her with a knife, burned her by throwing a cup of hot coffee on her, and caused bruises on her legs. In addition, once when "quite angry," the father had broken the mother's radio and television and thrown things around her apartment. On another occasion, again when the father was angry, he had dragged the mother by her hair across

a parking lot.

Although the mother tried several times to leave the father, she always returned to him. Twice she filed for divorce but, at the time of the termination petition and judgment, had reconciled with the father. The mother told one of the rehabilitation counselors for the Mental Health Center at Immanuel Medical Center that she was aware she was choosing the father over her son.

The rehabilitation counselor, who had provided therapy to the mother for 3 years, stated that when the father was absent from the mother's life, the mother was able to recognize the danger involved in the father's abusive behavior but that when the father returned, the mother would delude herself into believing that he was not abusive. According to the counselor, the mother was "unable to maintain a realistic appraisal of [the father] for any length of time." In the counselor's opinion the mother had not shown good judgment in protecting herself from the father, and the counselor was of the further opinion that the mother was unable to keep the child safe. According to the counselor, it is not healthy for a child to grow up in an environment where one parent abuses the other. The counselor acknowledged that the mother could be a good parent if she would disassociate herself from the father.

A social worker for the Nebraska Department of Social Services held similar views that the mother did not realize the danger posed by the father's abusive nature and was as yet unable to sever the relationship with the father. The social worker opined that the parents, as a couple, were unable to provide a safe and stable home for the child.

The record establishes that although the mother completed participation in the "Women Against Violence" program and the "Women Who Love Too Much" support group, she was nevertheless unable to sever her ties with the father, end the abusive relationship, and provide her child with a healthy environment. A parent seeking to avoid termination of her parental rights must do more than merely comply with the court-ordered rehabilitative efforts; she must gain understanding of her problem and make progress in efforts toward changing her behavior. *Dutchess Cty. Dept. of Soc. S. v.*

Mr. G., 141 Misc. 2d 641, 534 N.Y.S.2d 64 (1988). We conclude, as did the lower court, that the mother's inability to provide her child with an environment devoid of abusive behavior constitutes a willful failure to "maintain a safe, violence and drug free environment for at least 3 months prior to consideration of [the child's] placement in her home." Children have the right to grow up in a wholesome and healthful atmosphere, free of fear of abuse or injury. *In re Interest of K.C. and C.C.*, 227 Neb. 84, 416 N.W.2d 24 (1987).

(b) Neglect

We further conclude that the mother's continued relationship with the abusive father constitutes substantial and continuous or repeated neglect and a refusal to give her child the parental care and protection which is necessary. We have stated that a parent may as surely neglect a child of whom she does not have possession by failing to put herself in a position to acquire possession as by not properly caring for a child of whom she does have possession. *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986). By continuing to live in an environment where she is physically abused by the father, the mother has failed to place herself in a position for the child to be returned to her.

(c) Child's Best Interests

The record contains clear and convincing evidence which establishes that despite efforts by the court, the mother is unable to terminate the abusive relationship she has with her husband and is therefore unable to provide a healthy, loving, and safe environment for her child. We therefore conclude that termination of the mother's rights in the child is in his best interests.

IV. DECISION

Since the record fails to sustain any of the father's or mother's assignments of error, the judgment of the juvenile court is affirmed as to each parent.

AFFIRMED.

STEVE EMME, APPELLEE, V. STACEY EMME, APPELLANT.
455 N.W.2d 808

Filed May 25, 1990. No. 89-1160.

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

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

Leo J. Eskey for appellee.

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

PER CURIAM.

Respondent mother appeals from the judgment of the trial court which found, on her petition to modify custody, that there had been no material change in circumstances, that the petitioner father was not unfit to have custody of the parties' minor child, and that the best interests of the minor child did not require a change of custody.

The ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990).

We have reviewed the record de novo, as we are required to do, and have determined that the trial court did not abuse its discretion. *Helms v. Helms, supra*. The judgment of the district court is affirmed. No attorney fees are awarded.

AFFIRMED.

WHITE, J., dissents.

IN RE INTEREST OF A.M., C.M., AND L.M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. V.M., APPELLANT.

455 N.W.2d 572

Filed May 25, 1990. No. 89-1304.

Indian Child Welfare Act: Proof. A party to a proceeding who seeks to invoke a provision of the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. §§ 43-1501 et seq. (Reissue 1988), has the burden to show that the act applies in the proceedings.

Appeal from the County Court for Custer County: ROBERT E. WHEELER, Judge. Affirmed.

Ronald A. Ruff, Custer County Public Defender, for appellant.

William Steffens and, on brief, George Rhodes, Custer County Attorney, for appellee.

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

WHITE, J.

This is an appeal directly to this court, pursuant to Neb. Rev. Stat. § 43-2,106 (Reissue 1988), by the natural mother, V.M., from the judgment of the county court for Custer County, Nebraska, terminating the parental rights of the natural parents to A.M., C.M., and L.M. The natural father does not appeal that judgment. We affirm.

The court found that the natural father had failed to provide support for the minor children and had abandoned them. The court further found that the natural parents had failed to provide necessary care and protection, necessitating prolonged foster care placement.

The court also found that

> [the natural parents] are each unfit by reason of habitual use of intoxicating liquor and their conduct is seriously detrimental to the health, morals or well-being of their children. They are frequently incapable of caring for their children due to their intoxication. But more specifically in this case there is evidence that while they are intoxicated

> the children have in fact been put in danger of their health and welfare. This has happened on repeated occasions.

The court further found that

> [the natural mother] has the ability to love and care for her children and she does love her children and she cares about them. But she does not demonstrate caring for her children and it is because primarily of her alcohol abuse.
>
> The Court specifically finds that reasonable efforts have been made by the Department of Social Services; not only reasonable efforts, but in fact the Court notes that extraordinary efforts have been made by the Department.

A single error is assigned, which states that "[t]he order terminating the parental rights of Appellant was contrary to law as no expert testimony was offered by the State, there was no evidence that serious emotional or physical damage was likely to result to the children, and the trial court's findings were not beyond a reasonable doubt."

The assigned error divides into two parts. The first part discussed is whether the juvenile court erred in not applying the more stringent standard of proof beyond a reasonable doubt in termination proceedings involving Indian children, as required by the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. §§ 43-1501 et seq. (Reissue 1988).

A party to a proceeding who seeks to invoke a provision of the Nebraska Indian Child Welfare Act has the burden to show that the act applies in the proceedings. See *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

No pleadings are included in the transcript that raise the issue of the status of the minors as Indians. Further, the parents did not appear at the hearing, and the only evidence of the status of the minors as Indians is an oblique reference in a social service report and a reference to a notice to an Indian tribe of the proceedings. Appellant has failed to carry the burden imposed upon her and, thus, this portion of the assignment has no merit.

In addressing the second part of the assigned error, counsel have not cited any cases holding that the State's burden of establishing by clear and convincing evidence that termination of parental rights is in the best interests of the minor children must be established by expert testimony, nor have we

discovered any.

Rather than engage in a discussion of whether the Child Protective Services worker was an expert or a person whose lay opinion was of particular value to the trier of fact, we will point out only that the evidence of extended neglect, alcohol abuse, and unhealthy living conditions has overwhelmingly been established. The court had no alternative but to conclude that no real prospect of parental rehabilitation existed and that by clear and convincing evidence the parents' rights should be terminated. In our de novo review we agree with the court's judgment, and it is affirmed.

AFFIRMED.

PROFESSIONAL RECRUITERS, INC., APPELLANT, V. JAMES H. OLIVER ET AL., APPELLEES.

456 N.W.2d 103

Filed June 1, 1990. No. 88-443.

1. **Appeal and Error.** The factual findings of the trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong.
2. **Contracts.** To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point and that nothing be left open for a future arrangement.
3. **Contracts: Quantum Meruit: Words and Phrases.** A quasi-contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another.
4. **Contracts: Equity: Quantum Meruit.** Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.
5. **Corporations.** Knowledge of the board of directors, officers, or agents of a corporation is imputed to the corporation.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded for a new trial on the issue of damages.

Daniel W. Ryberg for appellant.

Kenneth C. Fritzler, of Ross, Schroeder & Fritzler, for appellees.

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

WHITE, J.

This is an appeal from a judgment of the district court for Hall County for the defendants, dismissing the plaintiff's petition. We reverse the judgment and remand for a new trial on damages only.

This matter has previously been before this court. In *Professional Recruiters v. Oliver*, 226 Neb. 16, 409 N.W.2d 304 (1987), we reversed and remanded for a new trial after we determined the trial court erroneously instructed the jury that personal services contracts are governed by the Nebraska Uniform Commercial Code statute of frauds.

On retrial, a jury was waived and the parties submitted for the court's consideration the record from the previous trial. The evidence shows the plaintiff, Professional Recruiters, Inc., is an employer-paid professional search firm. On December 2, 1983, Barbara Connelly, an employee of Professional Recruiters, contacted Larry McMaster regarding a possible opening at a bank other than the banks which are parties to this action. McMaster expressed his interest in that opening. At that time McMaster was working for a bank in Wisner, Nebraska. On December 8, Connelly contacted George Wanitschke of the Bank of Doniphan, Inc. (Doniphan), inquiring as to whether his bank had an opening for a bank officer. Wanitschke is Doniphan's president. He indicated he was looking for someone to fill an officer position. Connelly forwarded Wanitschke a copy of Professional Recruiters' service agreement, including a fee structure; a company brochure; the candidate's resume; and a candidate referral sheet. Wanitschke acknowledged receipt of these materials and testified that based on the fee schedule, Doniphan would owe Professional Recruiters $9,000 if McMaster was hired. However, Wanitschke testified he was not willing to pay that amount and the proper amount would need to be negotiated.

On December 20, Wanitschke interviewed McMaster for the

position at Doniphan, but also wanted James H. Oliver, the chairman of Doniphan's board of directors, to interview McMaster. Oliver is also on the board of directors of The Ravenna Bank, Inc. (Ravenna). McMaster and Oliver met for a second interview on January 6, 1984. At that meeting Oliver mentioned to McMaster that Ravenna's executive vice president had resigned the day before and therefore that position might be available. Oliver testified that he did not urge McMaster to select one position over the other. McMaster acknowledged that Oliver mentioned the Ravenna opening at this meeting, but that Oliver did not encourage him to accept or interview at Ravenna.

Oliver phoned Dale Pohlmann, Ravenna's president, and asked him if he would like to meet with McMaster that afternoon. McMaster traveled to Ravenna later that day and had an informal interview with Pohlmann. Neither McMaster nor Oliver indicated to Pohlmann that McMaster was involved with Professional Recruiters. McMaster was hired by Ravenna on January 25 and began work on or about February 13. Professional Recruiters sent Pohlmann a statement for $9,000 for their services. Pohlmann testified that this was the first time he became aware of Professional Recruiters' involvement. Ravenna, Doniphan, and Oliver refused to pay Professional Recruiters for its services, maintaining that none of them had an agreement with Professional Recruiters.

Professional Recruiters brought suit in the Hall County District Court against Oliver, Ravenna, and Doniphan. The second amended petition alleged fraudulent inducement, interference with business relationship or, alternatively, unjust enrichment, and misappropriation of confidential information. The defendants' answer denied the existence of any contract, oral or written. On remand the case was tried by the court without a jury. The trial court rendered a general verdict for the defendants and dismissed Professional Recruiters' petition. Professional Recruiters has appealed to this court, contending that the verdict is contrary to law and fact.

Initially, defendants argue that this court's standard of review is limited. They contend that because Professional Recruiters did not file a motion for new trial as required by

Neb. Rev. Stat. § 25-1142 (Reissue 1989), this court can only review the record to determine whether the judgment is supported by the pleadings. Defendants rely principally on *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977), and *Nebraska State Bank v. Dudley*, 203 Neb. 226, 229, 278 N.W.2d 334, 336 (1979), where we stated, "In a law action where no motion for new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings." Defendants argue that their answer to the second amended petition, considered as a pleading, constitutes a complete defense to Professional Recruiters' second amended petition, and therefore fully supports the judgment of the trial court.

This contention is without merit. Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1989) was enacted subsequent to the cases relied upon by defendants. This section provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." In light of this section, the cases relied upon by defendants are of questionable continuing validity. Professional Recruiters' failure to file a motion for new trial does not limit this court's review in this case.

This court has often stated that the factual findings of the trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989).

In its second amended petition Professional Recruiters alleged that the defendants were unjustly enriched when Ravenna hired McMaster but refused to pay Professional Recruiters for its services. "The doctrine of quasi-contracts has been supplanted in modern times by the doctrines of 'unjust enrichment' and 'restitution,' but, in essence, is the same." *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 833, 326 N.W.2d 182, 184 (1982). Although Doniphan's demurrer was sustained with respect to this cause of action, it remains viable as to Oliver and Ravenna.

Under the unjust enrichment cause of action in its second amended petition, Professional Recruiters incorporated by

reference 11 paragraphs set forth under the "fraudulent inducement" cause of action. These paragraphs, in sum, alleged the existence of an express agreement between Professional Recruiters and the defendants. Professional Recruiters' petition therefore alleged express and quasi-contract theories of recovery.

In *Siebler Heating & Air Conditioning v. Jenson, supra*, the plaintiff brought suit against defendant to recover upon an express contract ostensibly made between plaintiff and a company owned in part by defendant. Plaintiff did not allege quasi-contract as a theory of recovery. Both the plaintiff and the defendant agreed that a contract existed, but disputed with whom the contract was made. The trial court dismissed the petition. On appeal plaintiff argued for the first time that a quasi-contract existed between plaintiff and the named defendant. We refused to find such a contract, stating, "Having pled and proved the existence of an express contract to pay a specific amount based upon time and material [plaintiff] is precluded from now seeking to have the court, on appeal, create a quasi-contract in lieu of the express contract upon which recovery was originally sought." *Id.* at 833, 326 N.W.2d at 184. We further stated, "We likewise believe that one may not plead an express contract and then, as here, over objection of [defendant], seek to prove at trial or argue on appeal for the creation of a quasi-contract." *Id.* at 834, 326 N.W.2d at 184-85.

In *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988), plaintiff brought suit against defendant, alleging the existence of an express contract and, in addition, alleging grounds for recovery based on a theory of quantum meruit for "extra work" not covered by the express contract. The trial court found in favor of plaintiff on both theories. On appeal the defendant argued that "a party cannot plead an express contract and then prove and recover on quantum meruit, because an express contract precludes the existence of a contract implied by law or a quasi-contract." 228 Neb. at 768, 424 N.W.2d at 347. We acknowledged that, unlike in *Siebler*, plaintiff added a quantum meruit theory "to *supplement* an express contract theory, not to act as a *substitute* for it." 228 Neb. at 769, 424 N.W.2d at 348. We stated:

> The central issue then becomes whether the alleged "extra work" was encompassed in the plaintiff's cause of action for the balance claimed due under the contract it had allegedly substantially performed. For if the extra work was required by the contract, the plaintiff cannot seek to be compensated under the idea of quantum meruit.

Id. at 770, 424 N.W.2d at 348. We held that "an implied contract on a point not covered by an express contract is not superseded by the express contract, and if [both] arise out of the same transaction, they may be pleaded and tried together." *Id.* at 772, 424 N.W.2d at 350. The evil sought to be avoided in *Associated Wrecking* was permitting a plaintiff to recover damages under a quasi-contract theory when those same damages were recovered under an express contract theory. The plaintiff in *Associated Wrecking* could therefore recover on both theories because the subject matter of both contracts was different.

The petition in the present case alleged both express contract and quasi-contract theories. The trial court rendered a general verdict for defendants, implicitly finding that no express contract existed. We agree that no express contract exists between Professional Recruiters and the defendants. As we stated in *Zimmerman v. Martindale*, 221 Neb. 344, 347-48, 377 N.W.2d 94, 97 (1985):

> "To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. [Citations omitted.]
>
> Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement."

The evidence established that the defendants did not unconditionally accept Professional Recruiters' offer. Wanitschke did not agree on the price to be paid to Professional Recruiters if McMaster was hired, and, further, all the defendants have consistently maintained that they never contracted with Professional Recruiters. This case is therefore distinguishable from *Siebler* because Professional Recruiters failed at trial to prove an express contract, but has alleged a

quasi-contract theory of recovery and has presented it to the trial court. Therefore, Professional Recruiters is *not* "precluded from now seeking to have the court, on appeal, create a quasi-contract in lieu of the express contract upon which recovery was originally sought." This case is also distinguishable from *Associated Wrecking*, in that there is no express contract; therefore, the reasonable value of Professional Recruiters' services sought to be recovered under the quasi-contract theory has not been recovered in whole or in part under the express contract theory.

In its second amended petition Professional Recruiters alleged unjust enrichment, or quasi-contract, in the alternative to its express contract theory. A plaintiff is permitted to plead both express contract and quasi-contract in the same petition. As we stated in *Associated Wrecking, supra* at 770-71, 424 N.W.2d at 349:

> Although this court has not specifically dealt with "extra work," Nebraska clearly recognizes cases based on causes of action on both a quantum meruit theory and an express contract. In the case of *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976), we endorsed the practice of joining the two theories of recovery in a single petition. As authority for the proposition that Vantage should have joined its two theories in its original petition, we illustrated that "[s]ection 25-701, R.R.S. 1943, specifically provides: 'The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in any of the following classes: (1) The same transaction or transactions connected with the same subject of action; (2) contracts, express or implied; * * *.' This court has consistently held that an action in quantum meruit may be joined in a petition with an action on an express contract, and a judgment based on either will satisfy the liability as to both claims where they have their origin in the same transaction. Rodgers v. Jorgensen, 159 Neb. 485, 67 N.W.2d 770 (1954); Umberger v. Sankey, 154 Neb. 881, 50 N.W.2d 346 (1951); Stout v. Omaha, L. & B.

> Ry. Co., 97 Neb. 816, 151 N.W. 295 (1915)." 196 Neb. at 674, 244 N.W.2d at 680.
>
> Although the *Vantage* holding concerned the application of the doctrine of res judicata to the use of the two theories in two separate lawsuits, the basis of the ruling was that where the facts arise out of the same transaction, an action on an express contract may be joined with an action for quantum meruit. See, also, *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

It remains to be determined whether the trial court erred in failing to find that Ravenna and Oliver were unjustly enriched. In *McIntosh v. Borchers*, 201 Neb. 35, 37-38, 266 N.W.2d 200, 203 (1978), this court stated that

> [c]auses of action relying on principles of unjust enrichment and quasi-contract do exist in this state. Ladenburger v. Platte Valley Bank of North Bend, 180 Neb. 167, 141 N. W. 2d 766 (1966); Bush v. Kramer, 185 Neb. 1, 173 N. W. 2d 367 (1969); Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870 (1975).

" 'A quasi contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another.' " *Haggard Drilling, Inc. v. Greene*, 195 Neb. 136, 142, 236 N.W.2d 841, 845 (1975). We stated in *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 69, 416 N.W.2d 216, 219 (1987), "It has been said that where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value."

In the present case, Oliver testified that he learned through Wanitschke that McMaster was available for hiring. Oliver testified his "first real confirmed knowledge" of Professional Recruiters' involvement came around January 21. McMaster was hired on January 25. He also testified, on cross-examination, that he is familiar with employment agencies such as Professional Recruiters, that he was aware

these agencies are employer-paid agencies, and that these fees are usually based on a percentage of the candidate's first year's salary, should the candidate be hired.

Likewise, Pohlmann, Ravenna's president, contends he was not aware Professional Recruiters expected a fee until after McMaster was hired. He testified that he learned through Oliver on January 6 that McMaster was available for employment. After the initial interview on January 6, Oliver contacted Pohlmann and suggested that " 'the gray hair [McMaster] might fit on your staff.' " Pohlmann took this as a subtle positive encouragement. Pohlmann testified that he was somewhat familiar with employer-paid search agencies.

Connelly testified that, after the January 6 interview, she made several phone calls to Oliver to inquire about the status of McMaster and to explain the search firm's nature. She was able to speak with Oliver on January 9. In that call she identified herself, identified the firm, and began to ask about McMaster and Ravenna, but was "abruptly cut off." Oliver acknowledged receiving this call, but explained that he abruptly ended the conversation because it was a "nuisance" call. Connelly also testified that she called Pohlmann twice and spoke with him January 12. In this call she again identified herself, identified the firm, and began to ask about McMaster and the Ravenna interview. Pohlmann interrupted and referred her to Oliver, ending the conversation. Pohlmann acknowledged the call and acknowledged referring Connelly to Oliver.

Although it appears that by Connelly's phone calls Pohlmann may have had independent actual knowledge of Professional Recruiters' involvement prior to hiring McMaster, the evidence is clear Oliver had actual knowledge of its involvement prior to the time McMaster was hired. Oliver is on Ravenna's board of directors, and as a director he receives as monthly compensation $3,000. We also note Ravenna is owned by a holding company, which in turn is also majority owned by Oliver and his family. As a director, Oliver's actual knowledge of Professional Recruiters' involvement is imputed to Ravenna. See, *Federal Sav. and Loan Ins. Corp. v. Morque*, 372 N.W.2d 872 (N.D. 1985) (knowledge of the board of directors, officers, or agents of a corporation is imputed to the corporation); *Regal*

Ins. Co. v. Summit Guar. Corp., 324 N.W.2d 697 (Iowa 1982) (generally, knowledge or notice of an officer-director of a corporation is imputed to the corporate entity even if it is never actually disclosed to the corporation); 10 Am. Jur. 2d *Banks* § 163 (1963) (where a director or officer has knowledge of material facts respecting a proposed transaction, which his relations to it as representing the bank have given him, it becomes his official duty to communicate that knowledge to the bank, and he will be presumed to have done so and his knowledge will be imputed to the bank, and this presumption cannot be rebutted by showing that the knowledge of such facts was not actually transmitted to the bank). Oliver's and Pohlmann's knowledge regarding the nature of employer-paid search firms would also be imputed to Ravenna.

Oliver, and therefore Ravenna, was aware of Professional Recruiters' involvement with McMaster. Oliver and Ravenna were also aware of the nature of professional search firms like Professional Recruiters. Both parties therefore knew or should have known that Professional Recruiters expected a fee if McMaster was hired. Moreover, Professional Recruiters conferred a benefit upon Oliver and Ravenna by providing McMaster's name to be considered for a vacant position which was eventually filled by McMaster. Both Oliver and Pohlmann admitted at trial that Ravenna decided to employ McMaster and retain the benefit of that employment. Under these circumstances it would be unjust and inequitable to allow Oliver and Ravenna to retain the benefit of McMaster's employment without paying Professional Recruiters the reasonable value of its services in providing McMaster's name. The trial court therefore erred as a matter of law in failing to find that Oliver and Ravenna were unjustly enriched.

Because of our ruling on this issue, it is unnecessary to consider the remaining causes of action. We cannot say with certainty that $9,000 is the reasonable value of Professional Recruiters' services. That amount appears to be in dispute. Accordingly, the judgment is reversed and the cause is remanded for a new trial on damages only.

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

IN RE ESTATE OF ADELLA KRUEGER, DECEASED. EUGENE BREDEHOFT, APPELLEE, V. RONALD L. CHRISTENSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF ADELLA KRUEGER, DECEASED, APPELLEE; GLENDORIS A. KRUEGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER KRUEGER, DECEASED, APPELLANT.

455 N.W.2d 809

Filed June 1, 1990. No. 88-497.

1. **Decedents' Estates: Claims: Appeal and Error.** The judgment of a trial court determining whether a claimant may be reimbursed for services provided a decedent during the decedent's lifetime will not be set aside on appeal unless clearly wrong.
2. _____: _____: _____. In an action at law, an appellate court views the evidence in the light most favorable to the prevailing party. An appeal from the allowance of a claim in probate is tried as an action at law.
3. **Jurisdiction: Appeal and Error.** An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken lacked jurisdiction.
4. **Judgments: Courts: Appeal and Error.** Probate judgments of the county court may not be brought to the district court for review by a petition in error.
5. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
6. **Rules of Evidence: Hearsay.** A statement is not hearsay if the statement is offered against a party and is his own statement, in either his individual or representative capacity.
7. **Decedents' Estates: Claims: Proof.** The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services.
8. **Contracts: Equity: Quantum Meruit.** Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.
9. **Decedents' Estates: Claims: Presumptions.** When there is a family relationship between a decedent and a claimant seeking compensation for services rendered the deceased, the claimant must rebut by competent evidence the presumption that the services were rendered gratuitously. The presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed.
10. **Actions: Quantum Meruit.** An action based on quantum meruit for labor and materials provided is grounded upon an implied promise to pay the reasonable value thereof.
11. **Actions: Quantum Meruit: Value of Goods: Proof.** Since there is no specific standard by which the reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made when a reasonable inference of such

value flows from the evidence adduced.

12. **Claims: Evidence.** When the nature and rendition of services has been shown, the claimant's testimony concerning his or her opinion as to the value of the services is sufficient evidence.

Appeal from the District Court for Polk County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Polk County, ALAN G. GLESS, Judge. Judgment of District Court affirmed.

Brian F. Beckner for appellant.

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

Robert L. Mills, of Mills, Mills & Papik, for appellee Christensen.

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

FAHRNBRUCH, J.

This is an appeal from the allowance of a $9,000 claim filed by decedent's nephew for farm work and the handling of his aunt's cow-calf operation from February 1984 until the aunt died on September 28, 1986.

We affirm the order of the district court for Polk County which affirmed the Polk County Court's allowance of the nephew's claim against the aunt's estate.

On appeal, the personal representative of the estate of the decedent's brother, in whose name the appeal of decedent's brother has been revived, assigns several errors, which combine to claim that the court erred in (1) admitting hearsay testimony, (2) finding that the evidence was sufficient to meet the claimant's burden of proof, and (3) entering judgment of $9,000, which was excessive and not supported by the evidence.

The judgment of a trial court determining whether a claimant may be reimbursed for services provided a decedent during the decedent's lifetime will not be set aside on appeal unless clearly wrong. *In re Estate of Bouma. Nehls v. Giles*, 206 Neb. 209, 292 N.W.2d 37 (1980). See, also, *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (holding that the

Supreme Court reviews probate cases for error appearing on the record).

In an action at law, an appellate court views the evidence in the light most favorable to the prevailing party. *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989). An appeal from the allowance of a claim in probate is tried as an action at law. *Gunn v. Emerald, Inc.*, 201 Neb. 635, 271 N.W.2d 334 (1978).

Prior to her death, Adella Krueger (decedent) operated a 335-acre farm in Polk County. Roughly 168 acres were used for cropland, and the remainder was used to grow hay and as pastureland. In 1978 and 1979, Eugene Bredehoft (claimant), a nephew of the decedent's, performed custom work on his aunt's farm. The work involved preparing the ground, planting and cultivating corn, and preparing and planting the wheat ground. For that labor, the claimant was paid $2,500 in 1978 and $2,000 in 1979. As of 1984, the claimant and his brother produced row crops on 168 acres of the decedent's land, distributing 40 percent of the crop to the decedent and retaining 60 percent.

It is undisputed that when the decedent became ill in February 1984, the claimant began handling the decedent's cow-calf operation. It is also undisputed that during the years 1984, 1985, and 1986, the claimant planted, cultivated, harvested, and marketed wheat crops for his aunt and that the aunt received the total sales income of $2,435.55. The record reflects that the claimant also managed the decedent's hay operation and performed other chores on his aunt's farm during the same time period.

From February 1984 until the decedent died in September 1986, her nephew received no payment from his aunt for handling her cow-calf operation; for planting, cultivating, harvesting, and marketing her wheat crops; for managing the decedent's hay operation; or for performing other farm chores during 1984, 1985, or 1986.

The decedent died intestate. Her surviving heirs were Walter Krueger (brother); Robert Krueger (grandnephew); and Eugene and Carroll Bredehoft (nephews). A petition for formal adjudication of intestacy, determination of heirs, and appointment of a personal representative was filed by the claimant on October 3, 1986. A personal representative was

appointed on October 29, 1986. After his aunt's death, the claimant nephew filed his claim for $9,000 against her intestate estate for services during a 31-month period. The personal representative disallowed the claim. On February 25, 1987, the claimant petitioned the county court for allowance of his claim in the amount of $9,000. In his petition, the claimant alleged that during the years of 1984, 1985, and 1986, he managed the decedent's cattle herd; planted, harvested, and delivered wheat; and assisted in harvesting hay. The decedent's brother filed an objection to the claim, and the matter was set for trial.

At the trial, Adella Krueger's personal representative, through his lawyer, stated that he was convinced that the claimant had performed the work for which he had made a claim. The personal representative also told the court that he was inclined to think the claimant ought to be paid. The personal representative's only reservation was whether, because of the aunt-nephew relationship, it was intended that the claimant be paid.

The county judge found that $9,000 was a reasonable amount for the services provided by the claimant to the decedent. The decedent's brother appealed to the district court for Polk County and that court affirmed the Polk County Court.

Before addressing the appellant's assignments of error, it is first necessary to determine whether the decedent's brother properly appealed the county court judgment to the district court. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken lacked jurisdiction. *In re Guardianship of Potter, ante* p. 149, 453 N.W.2d 755 (1990). The decedent's brother filed a "petition in error" listing the alleged errors of the county court and requesting that the county court's judgment be reversed by the district court. Probate judgments of the county court may not be brought to the district court for review by a petition in error. *Potter, supra*. However, in contrast to *Potter*, in this case the brother timely filed a notice of appeal with the county court prior to filing the "petition in error." In view of the timely notice of appeal filed by the brother, the pleading labeled a "petition in error" was in actuality nothing more than a listing of the

brother's assignments of error. The character of a pleading is determined by its content, not by its caption. *Stigge v. Graves*, 213 Neb. 847, 332 N.W.2d 49 (1983). A docket fee was deposited by the brother. The county court did not require a cash bond or undertaking for the appeal. See Neb. Rev. Stat. § 25-2729(4)(a) (Reissue 1989). There being compliance with § 25-2729, the district court had jurisdiction of the appeal.

In the first assignment of error, the appellant claims the trial court erred in admitting hearsay evidence. At trial, over objection, the claimant testified that the decedent asked him to care for the cow-calf herd and told him that she would pay him when she had extra money. He testified that the same arrangement existed in regard to farming the wheat land and managing the haying operation. The nephew further testified that his aunt never had sufficient funds to pay him and that it took all of her income to provide for her during her illness.

Neb. Rev. Stat. § 27-801(4) (Reissue 1989) provides in relevant part, "A statement is not hearsay if: . . . (b) The statement is offered against a party and is (i) his own statement, in either his individual or representative capacity . . . ."

Schmidt v. Schmidt, 228 Neb. 758, 424 N.W.2d 339 (1988), was an action to recover a substantial sum of money allegedly advanced to a son by his mother. The suit was instituted by the mother's conservator and upon the mother's death was pursued by her personal representative. The personal representative in his cross-appeal claimed that the trial court erred in receiving into evidence inadmissible hearsay consisting of conversations between the son and his mother. This court held that since the deceased mother was the real party in interest, her statements to her son did not constitute hearsay under § 27-801(4)(b) and were therefore admissible.

In this case, Adella Krueger was a real party in interest. Her statements requesting that the claimant provide services and promising him that she would pay him when she was able are also nonhearsay statements under § 27-801(4)(b). They were admissible under the reasoning of *Schmidt v. Schmidt, supra*. The brother's personal representative's assignment of error on this issue is without merit.

In the next assignment of error, the appellant contends that

the claimant did not sustain his burden of proving that the decedent agreed to compensate the claimant for his services.

Naturally, the burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services. *In re Estate of Haddix*, 211 Neb. 814, 320 N.W.2d 745 (1982). The uncontroverted competent evidence shows that the decedent asked the claimant to care for her cattle and that she would pay him when she was financially able to do so. There was uncontroverted evidence that the same arrangement existed for other services provided by the claimant.

The Polk County Court ruled in favor of the claimant on the theory of quantum meruit. It is the law of this jurisdiction that "where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value." *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 69, 416 N.W.2d 216, 219 (1987).

In this case, the decedent benefited from services provided by her nephew, which services she requested and for which she agreed to pay when she had funds available. Under the circumstances, it cannot be said that the trial court was clearly wrong in finding (1) that the claimant furnished services to the decedent and (2) that it would be inequitable and unconscionable to permit the estate to retain the benefit of the nephew's services without paying the reasonable value therefor.

The appellant further argues that the claimant has not rebutted the presumption that services rendered to family members are performed gratuitously. When there is a family relationship between a decedent and a claimant seeking compensation for services rendered the deceased, the claimant must rebut by competent evidence the presumption that the services were rendered gratuitously. *Haddix, supra*. It has also been said that the presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed. *Houser v. Houser*, 178 Neb. 401, 133 N.W.2d 618 (1965); *In re Estate of*

Baker, 144 Neb. 797, 14 N.W.2d 585 (1944). Here, the decedent's agreement to pay her nephew for the services he was to render rebuts the presumption of gratuitousness.

Moreover, the cases holding that a claimant performed the services gratuitously are distinguishable. First, the services in this case were of a business nature, which services are not usually performed without remuneration, whereas the cases disallowing claims involved personal, household, or domestic services for which a close relative is not normally compensated. See, e.g., *Haddix supra*; *In re Estate of Bouma. Nehls v. Giles*, 206 Neb. 209, 292 N.W.2d 37 (1980). Secondly, the nephew had provided services on his aunt's farm in the past and had been paid for that labor.

In this case, the nephew testified that he did not keep records of his services, nor does the record reflect that he ever submitted a bill to his aunt or asked her for payment. Some cases indicate that the lack of recordkeeping and demand for payment are important factors. See, *Haddix, supra*; *Hilligas v. Farr*, 173 Neb. 735, 114 N.W.2d 764 (1962). In view of all the circumstances, this case is unlike a situation where a claimant's acts are "entirely consistent with neighborliness, friendship, and the relationship which existed between the parties" and therefore determined to be gratuitous. *Hilligas, supra* at 740, 114 N.W.2d at 767. After reviewing the record for error, we cannot say that the trial court was clearly wrong in finding that the nephew's claim should be allowed.

In the final assignment of error, the appellant claims that the judgment of $9,000 is not supported by the evidence.

An action based on quantum meruit for labor and materials provided is grounded upon an implied promise to pay the reasonable value thereof. *Bosle v. Luebs*, 169 Neb. 186, 98 N.W.2d 795 (1959) (involving a claim against estate that a decedent agreed to pay for farm work but died before making payment). Since there is no specific standard by which the reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made when a reasonable inference of such value flows from the evidence adduced. *Id.*

Viewing the evidence in the light most favorable to the nephew who was the prevailing party at the trial, it cannot be

said that the trial court was clearly wrong in allowing $9,000 for the claimant's services to the decedent. While the claimant's testimony is unclear in some respects, there is evidence from which the fact finder could conclude that on the average, the claimant spent 3 hours per day for 942 days caring for decedent's cow-calf operation and performing the other services for which he submitted a claim. From the evidence, the court could find that at times, the claimant took his tractor to his aunt's farm every other day to haul large bales of hay to the cattle. It was an 11-mile round trip to his aunt's farm.

Although his brother helped him some, the claimant figured he worked about 3 hours a day doing chores alone. Claimant testified:

> That'd be an hour and a half in the morning, hour and a half in the evening. I'd wait for the tanks to get full of water when doing the chores, feeding the sheep, looking after her poultry, and what little she had, ducks. In this [$]9,000 I am also including preparing this wheat ground, planting it, harvesting it, trucking it, looking after cattle, all the cattle, and giving them their care, whatever it took, grew these cattle. And then looking after the haying operations.

The claimant checked for calving problems, inspected fences, and ensured that the cattle in the cornfield had salt and mineral blocks. At times, it was necessary for the claimant to secure the assistance of a veterinarian. He helped load the decedent's cattle and attended the sales when some of the cattle were sold at the sales pavilion in Columbus. In 1984, the claimant sold 21 head of cattle for $5,117.34; in 1985, he sold 2 bulls and 14 head of cattle for $4,050.52; and in 1986, he sold 31 head of cattle for $7,295.35, for a total of $16,463.21. After the aunt died, the herd, consisting of 38 cows, 1 bull, and 22 calves, was sold for approximately $19,500.

From 1984 until she died, the decedent received all of the proceeds from the sales of the wheat and cattle. As stated, they were used for her care during her prolonged last illness.

Obviously, the trial court accepted the claimant's testimony as to the services he performed. Based upon the claimant's testimony, the allowance of $9,000 for the claimant's work is

less than if it were calculated at the federal minimum hourly wage.

The claimant's testimony was sufficient to show the reasonable value of his services. See *Matter of Estate of Raketti*, 340 N.W.2d 894 (N.D. 1983) (holding that when the nature and rendition of services has been shown, the claimant's testimony concerning his or her opinion as to the value of the services is sufficient evidence). See, also, *Ritzau v. Wiebe Constr. Co.*, 191 Neb. 92, 214 N.W.2d 244 (1974) (determining that a contractor's testimony as to the reasonable value of services is admissible to prove the amount of the damages award). This is a case where the claimant has carried his burden to prove his claim with as much certainty as the case permits. See *Meisinger Earth Moving, Inc. v. State*, 212 Neb. 554, 324 N.W.2d 387 (1982).

In arriving at our conclusion in this case, we have not overlooked the evidence that in 1983 the decedent executed deeds naming the claimant and his brother as grantees of her farm and that she delivered the deeds to the claimant in 1984 with instructions not to record them until after her death. There appears to be no competent evidence that the work the claimant performed for his aunt from February 1984 until her death was in consideration of his and his brother's receiving the deeds. Neither is there sufficient evidence to draw that inference. It is implicit in the trial court's ruling that the work performed by the claimant had no relation with the aunt's conveyances of her farm.

It cannot be said that the trial court was clearly wrong in allowing the claim of the decedent's nephew in the sum of $9,000.

AFFIRMED.

VERNON OMER, APPELLEE, V. ROBERT TAGG, SUPERINTENDENT, NEBRASKA STATE PATROL, ET AL., APPELLANTS.

455 N.W.2d 815

Filed June 1, 1990. No. 88-615.

1. **Public Officers and Employees: Employment Contracts.** Public employee benefits to be realized at retirement are not mere gratuities but are deferred compensation.
2. **Contracts: States: Immunity: Waiver.** The State of Nebraska has waived its sovereign immunity in matters arising out of contract.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder for appellants.

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

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

WHITE, J.

This is an appeal from a judgment of the district court for Lancaster County directing appellants in their official capacities to afford appellee, a retired former member of the Nebraska State Patrol, participation in the state employees' group health insurance program so long as the appellee or his present spouse pays the premiums of the group insurance coverage.

The case was tried on stipulated facts. Appellee was hired as a member of the State Patrol on October 3, 1955, and remained a member of the patrol until his retirement on October 4, 1985, at age 55. At the time of appellee's hiring, the State of Nebraska did not provide a statutory systemwide plan of employee health insurance coverage, but the State Patrol did have such a plan for its employees.

When hired, appellee and others were told by the then superintendent of the patrol or one of his designees that upon completion of the requirements for retirement from the patrol, they would be allowed to continue to participate in the group health insurance coverage offered by the state, upon payment

by the retiree of the entire premiums.

In 1973, the Legislature enacted L.B. 516 (Neb. Rev. Stat. § 44-1620 et seq. (Reissue 1974)). Section 1 of the act provides:

> There is hereby established a program of group life and health insurance for all permanent full-time employees of this state, excluding employees of the University of Nebraska, the state colleges, and the technical community colleges. Such program shall be known as the Nebraska State Insurance Program and shall replace any current program of such insurance in effect in any agency and funded in whole or in part by state contribution excepting only those programs for which contributions by the state are required as a condition of receipt of federal funds.

L.B. 516 further provided, in § 8, that "[n]o coverages provided for by this act shall be afforded to any employee after attainment of age sixty-five." Section 9 of L.B. 516 stated that "[n]o agency shall provide for its employees any program of life or health insurance supplementary to that provided under this act, except as provided in sections 1, 5 [life insurance], and 6 of this act."

On November 30, 1973, the assistant superintendent informed retired members of the State Patrol that they would be permitted to remain in the group health insurance plan until such time as they were eligible for medicare, with all premiums after retirement to be borne by the retired employee.

Finally, in 1984, L.B. 705 was enacted, see § 44-1620(3) (Reissue 1984), which in substance provided that the participation was limited to employees who had reached the age of 56 prior to retirement. Subsequently, in 1986, the age was lowered to 51. The budget officer, having determined that appellee was not eligible to participate in the group insurance program, returned the tendered check to appellee, and appellee brought this action.

Appellants assign five errors, which can be consolidated as follows: (1) The district court lacked jurisdiction, as the State had not waived its sovereign immunity, and (2) the district court erred in determining that the opportunity to participate in the plan constituted deferred compensation and that the State's action denying the opportunity to participate was an

unconstitutional impairment of contract.

Essentially, the theory of appellee in the court below is that the promise of future benefits (i.e., right to participate in a group health plan) is deferred compensation earned in exchange for services rendered. If the appellee is correct, then the first assigned error is without merit, as Neb. Rev. Stat. § 25-21,206 (Reissue 1989) provides in part that "[t]he state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state."

Neb. Rev. Stat. § 81-2002 (Reissue 1987) provides that the superintendent of the Nebraska State Patrol "shall . . . appoint . . . patrolmen . . . . The salaries of all such appointees shall be fixed by the superintendent, with the approval of the Governor."

The position of the State that after retirement, benefits are a mere gratuity, challengeable at the whim of the Legislature, was considered and rejected in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 897-98, 320 N.W.2d 910, 913-14 (1982), where it was stated:

> Nebraska has long recognized that such pensions are not gratuities. In *Gossman v. State Employees Retirement System,* 177 Neb. 326, 331-32, 129 N.W.2d 97, 101-02 (1964), this court said: " 'The benefit of the retirement system awarded to a member thereof *who renders services under the act creating the system* after its enactment is not a grant of extra compensation after the services are rendered which the Constitution condemns because the increase in pay is granted immediately and from the date of the grant is being currently earned. . . . *It is the payment thereof alone which is deferred to a later date.*' . . . The benefits conferred are deferred compensation payable to the employee under the terms and conditions of the Act which he voluntarily agrees to by accepting the terms of employment." In *Wilson v. Marsh,* 162 Neb. 237, 75 N.W.2d 723 (1956), in holding that pension benefits are deferred compensation and not a gratuity, we cited *State v.*

> *Love*, 89 Neb. 149, 131 N.W. 196 (1911), to the effect that " 'the pension forms an inducement to the individual to enter and remain in the service of the [state], and . . . the pension in a sense is part of the compensation paid for those services.' " *Id.* at 253, 75 N.W.2d at 733. . . .
>
> . . . Since Nebraska law recognizes that public pensions are deferred compensation, *Gossman v. State Employees Retirement System, supra*, it follows that Nebraska public employees, no less than those in other states, have "reasonable expectations which are protected by the law of contracts" with regard to their pension rights. *Pineman v. Oechslin, supra.*

We conclude, as the district court did, that the promises made at the time of employment were for compensation to be enjoyed at retirement and constituted a contract enforceable against the State. All assignments of error having been found to be meritless, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF J.B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.W. AND S.W., APPELLANTS.

455 N.W.2d 817

Filed June 1, 1990. No. 89-157.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists.
3. **Parental Rights: Evidence.** An order terminating parental rights must be based on clear and convincing evidence.
4. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.

5. **Parental Rights: Evidence: Proof.** A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parents that is required.
6. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Mariclare Thomas, of Oglesby, Brown, Thomas, Peterson & Orton, for appellant B.W.

Paul M. Conley for appellant S.W.

James A. Elworth, Deputy Lancaster County Attorney, for appellee.

Larry D. Ohs, guardian ad litem.

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

FAHRNBRUCH, J.

Relying upon an insufficiency of evidence argument, B.W., the natural mother of six children, and S.W., the natural father of two of the children, appeal the termination of their parental rights.

We affirm the termination of appellants' parental rights by the separate juvenile court of Lancaster County.

The juvenile court also terminated the parental rights of the natural father of the remaining four children. He has not appealed.

After various hearings on petitions filed by the State between July 7, 1987, and November 30, 1988, the juvenile court obtained jurisdiction over all of the appellants' children pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). The

court adjudged that the children lacked proper parental care by reason of the fault or habits of their parents. Appellants, B.W. and S.W., did not appeal the adjudications in regard to J.B., R.B., C.B., J.M.B., and S.L.W., and the adjudications became final.

Although appellants set out three separate assignments of error, they collectively assert that there was insufficient evidence for the juvenile court to conclude by clear and convincing evidence that their parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292 (Reissue 1988).

> "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another."

In re Interest of C.P., ante p. 276, 277, 455 N.W.2d 138, 140 (1990) (quoting *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990)).

In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in § 43-292 exists. *In re Interest of C.P., supra*. Section 43-292 provides, in part:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or

> repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> . . . or
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of C.P., supra.*

> The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). A parent's natural right to the custody of his or her own child must yield when the two requirements of § 43-292 have been met. *In re Interest of J.S., A.C., and C.S.*, [227 Neb. 251, 417 N.W.2d 147 (1987)]. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. *Id.* Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. *Id.* "It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parents that is required." *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 766, 386 N.W.2d 877, 883 (1986).

In re Interest of C.P., supra at 284-85, 455 N.W.2d at 144.

Based on a de novo review of the record and giving weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another, the record reflects the following. On or about March 29, 1987, appellant S.W. subjected J.B. to sexual contact and struck him with a leather belt. In addition, J.B., R.B., C.B., and J.M.B. had been left alone by appellants for long periods of time. The juvenile court ordered that temporary custody of the children be placed in the

Nebraska Department of Social Services. On July 7, 1987, the juvenile court found that it had jurisdiction over J.B., R.B., C.B., and J.M.B. under § 43-247(3)(a). On February 16, 1988, the court found it also had jurisdiction over 3-month-old S.L.W., under § 43-247(3)(a).

On July 16, 1987, the juvenile court ordered an evaluation of appellant S.W. by the Child Guidance Center. B.W. was given maximum visitation with the children. S.W. was allowed supervised visits with R.B., C.B., and J.M.B. only.

Subject to specific conditions and a plan of rehabilitation, the court returned the children to the physical custody of B.W. on November 19, 1987, with legal custody being retained in the Department of Social Services. The court ordered S.W. not to be on the property of B.W. or to have unsupervised contact with the children. Both appellants were ordered to be involved in parenting classes and to provide caseworkers access to the home at any time, and S.W. was to undergo a psychological assessment.

At a review hearing, the court found that the November 19, 1987, order had been violated. S.W. was found at the home on one occasion, and on at least that occasion, he had unsupervised contact with at least one of the children. B.W. allowed such activity to occur and lied to police officers who were looking for S.W., telling them he was not in the home. S.W. also failed to give Child Protective Services access to the home. The court reiterated its earlier order and further ordered B.W. to go to the Child Guidance Center for counseling.

After a hearing on the guardian ad litem's motion for emergency placement of the children outside the appellants' home, the court found that S.W. had again had sexual contact with J.B. The court ordered that the children remain out of the family home. The court also cited from an evaluation performed on S.W. that indicated S.W. and B.W. had little motivation to seek treatment for their sexual and family troubles. The evaluation noted that individual and family counseling would not be worthwhile or effective, as both appellants denied any problems, sexual or otherwise, with their family. The doctor stated such denial was indicative of people who have a sexual interest in children. The evaluator

concluded: "Any decision to reunite father with the family should be seriously and conservatively considered . . . ." The court found it would not be in the best interests of the children to return them to B.W.

About June 22, 1988, B.W. had inappropriate sexual contact with her son J.B. Also, in June 1988, appellants exchanged graphic letters in which they planned future sexual assaults on children, including J.B. and another son, R.B. B.W. also had inappropriate sexual contact with two of her nephews. B.W. was convicted of first degree sexual assault on a child, sexual assault on a child, and incest.

On November 30, 1988, the State filed a petition in the interest of newly born J.W. After a hearing, the juvenile court found that it had jurisdiction over J.W. under § 43-247(3)(a). The appellants have not assigned that finding as error. The petition also prayed that appellants' parental rights to J.W. be terminated.

On January 17, 1989, the State filed petitions to terminate the parental rights of the appellants' five other children. The State alleged that appellants had failed to correct their neglect of the children which had previously been found to exist; that B.W. had sexual contact with children and had molested her son J.B. at the direction of S.W.; and that the appellants had exchanged letters planning sexual assaults on children, including their own.

At the termination hearing, B.W.'s young nephews testified they had sex with B.W. over an extended period of time. One of the sexual incidents was described in a letter written by B.W. to S.W. Two caseworkers testified that despite opportunities for appellants to comply with the court-ordered parental training and counseling, the appellants made no effort to begin the programs. The juvenile court terminated the appellants' parental rights to all of the children in its order filed February 1, 1989.

Having conducted a de novo review of the record, we conclude that there is clear and convincing evidence that appellants' parental rights should be terminated pursuant to § 43-292(2), (4), and (6). A detailed court-ordered plan of rehabilitation was set out by the juvenile court, but appellants

repeatedly violated the orders of the court. They did not correct the conditions of neglect and abuse. Two critical requirements of the juvenile court rehabilitation plan were that the appellants complete a parental training program and go to counseling. Despite numerous opportunities to comply with these requirements, the record reflects that neither appellant made an effort to begin either program. The parents failed to rehabilitate themselves. A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights. *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989).

Appellants' repeated neglect of their children and their failure to correct the conditions that led to the findings of neglect; their failure to comply with the court-ordered plan of rehabilitation; and their actual and anticipated sexual assaults on children, including some of the children involved here, constitute clear and convincing evidence that the termination of appellants' parental rights is in the best interests of all the children.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARY N. REHBEIN, APPELLANT.

455 N.W.2d 821

Filed June 1, 1990. No. 89-731.

1. **Postconviction: Proof: Appeal and Error.** One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the postconviction court will not be disturbed unless they are clearly wrong.
2. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction action seeking relief on the basis of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
3. _____: _____: _____. When the 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 case as a result of his attorney's actions or inactions.

4. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
5. **Postconviction: Right to Counsel: Appeal and Error.** The failure of the district court to provide court-appointed counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
6. **Postconviction.** Even assuming a proper pleading of facts in a motion for postconviction relief, a court is not required to grant an evidential hearing if 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.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
8. **Postconviction: Right to Counsel.** Where the record fails to present a justiciable issue of law and fact to the court in a postconviction action, it is not an abuse of discretion to fail to appoint counsel for an indigent.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Bernard L. McNary for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

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

PER CURIAM.

The district court denied defendant postconviction relief without an evidentiary hearing or appointment of counsel. Defendant, now with benefit of counsel, has appealed to this court.

The defendant assigns as error (1) the finding of the district court that defendant was competent to enter a plea of guilty and that the plea was knowingly, intelligently, and voluntarily made; (2) the failure of the district court to grant defendant an evidentiary hearing on his claims that he was not competent to enter his plea, that he received ineffective assistance of counsel, and that his right to appeal was denied; and (3) the refusal of the district court to appoint counsel for defendant during the

proceedings before the court. We affirm.

One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the postconviction court will not be disturbed unless they are clearly wrong. *State v. Joubert, ante* p. 230, 455 N.W.2d 117 (1990); *State v. Williams,* 234 Neb. 890, 453 N.W.2d 399 (1990).

In a postconviction action seeking relief on the basis of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Joubert, supra*; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When the 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 case as a result of his attorney's actions or inactions. See, *State v. Williams, supra*; *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989).

In order to satisfy the prejudice requirement in the context of a plea, the defendant must show there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Joubert, supra.*

> "A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) 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."

State v. Reeves, 234 Neb. 711, 755-56, 453 N.W.2d 359, 386 (1990) (quoting *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989)).

The failure of the district court to provide court-appointed counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988).

On or about September 5, 1981, defendant, then 27 years of age, broke into Carl R. Fisher's apartment in Omaha with the intention of robbing him and ended up striking Fisher with a hatchet, which caused his death. Defendant was arrested and charged with killing Fisher "during the attempt to perpetrate a robbery, or purposely and with deliberate and premeditated malice . . . ."

Pursuant to a plea bargain, defendant changed his plea to guilty, in exchange for which the State amended the information by striking from it the alternative premeditation charge.

The record of defendant's plea acceptance hearing on May 5 and 6, 1983, shows complete and meticulous compliance with the requirements set forth in *State v. Walker, ante* p. 85, 453 N.W.2d 482 (1990) (applying *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986)).

The record of the plea proceedings covers 32 pages of the bill of exceptions. The trial court carefully and fully explained to the defendant his constitutional rights, including the right to a jury trial, the right to confront witnesses, the presumption of innocence, the privilege against self-incrimination, and the range of penalties. The court inquired of the defendant on at least nine different occasions whether there had been any threat, intimidation, or undue pressure used against him and whether the plea he entered was freely and voluntarily given. All of the defendant's responses supported the district court's finding that the guilty plea was freely and voluntarily entered.

A sufficient factual basis for accepting the plea is found in the record, including a rather detailed admission by the defendant himself as to what happened on the night of the murder.

When asked by the court if he was under the influence of any alcohol, drugs, narcotics, or other pills, defendant responded that he was taking the medication Mellaril. At that point, defendant told the court that his counsel would be better able than he to provide further information about that drug. Counsel stated that defendant was taking 800 milligrams of that drug daily. Counsel further stated that he had spoken with Dr. Gutnik, defendant's treating psychiatrist, about whether the drug would affect defendant's ability to enter a plea and was told that defendant would understand and comprehend what was going on; that he would know the nature and quality of the proceedings, as well as the consequences of entering a plea; and that he could tender a plea knowingly and intelligently.

The sentencing hearing was held on May 23, 1983. This was also a rather exhaustive hearing, which covered some 40 pages of the bill of exceptions. There were various medical reports introduced at that hearing, covering treatment and diagnoses from periods before the commission of the crime. In addition, Dr. Gutnik testified, as did the defendant's 62-year-old father. Dr. Gutnik stated that in his opinion the defendant was capable of entering a voluntary and intelligent plea of guilty on May 5 and 6, 1983, to the crime of felony murder. He also testified that the defendant knew the difference between right and wrong and was in good touch with reality. He further stated that he was not able to say that the defendant was insane on the date of the crime.

Upon consideration of the record made at the sentencing hearing, the trial judge made exhaustive findings as provided for in Neb. Rev. Stat. § 29-2522 (Reissue 1989), concluded that a sentence of death would not be appropriate, and sentenced the defendant to life imprisonment.

Defendant's petition for postconviction relief is a rambling 16-page document containing numerous statements of alleged facts, inferences, and conclusions of law. The district court denied an evidentiary hearing. It also refused to appoint counsel, but announced that counsel would be appointed should the defendant elect to appeal. The court made extensive findings which denied defendant any relief. Defendant elected to appeal and is now represented by counsel, although the

record does not disclose whether such counsel is appointed or retained.

Defendant's first assignment of error relates to defendant's claim of his lack of competency to enter a plea and the claimed involuntary nature of the plea.

As to the first contention, defendant relates the fact that he was admittedly under daily medication of 800 milligrams of Mellaril and points to the fact that Dr. Gutnik testified at the sentencing hearing that 800 milligrams is a very high dosage, sufficient to "knock the Fifth Army out." However, Dr. Gutnik went on to testify that

> if someone who does not need it takes it, it basically will knock them out; they will be unconscious in doses of anywhere from 50 to 75 milligrams a day. When someone needs it for its antipsychotic effects, rather than knocking the individual out it allows them to think more clearly and be more aware of the difference between fantasy and reality.

As previously related, Dr. Gutnik gave as his opinion that defendant was perfectly competent to enter a plea at the critical time. In addition, in the dialogue between the court and the defendant, the defendant successfully answered questions relating to time and place and the identity of the first and the then present President of the United States, and successfully answered other questions demonstrating defendant's competency.

In any event, the allegations made by defendant in his petition relating to this subject disclose no facts which would require a hearing on that subject. He alleged that counsel failed to show to the court that he was on 800 milligrams of tranquilizer per day. He related that Dr. Gutnik and others had the knowledge to enlighten the court that defendant was not able to understand the nature of the proceedings because of his medication. As demonstrated by the portions of the record previously referred to, this is absolutely not true.

Defendant further alleged that he was kept in isolation in the Douglas County jail, where he was mistreated, and that defense counsel "had defendant enter a plea promising him that defendant would get out of the problems of the isolation cells

that the Jail was putting him in." In other words, defendant alleged that his plea was not free and voluntary because of threats or promises. Again, the record made at the time of the plea is directly contrary to those assertions.

The proceedings at which the plea was taken were commenced and later interrupted and adjourned until the next day to give the defendant an opportunity to discuss certain matters with his counsel. Upon resuming the proceedings, the court inquired:

> Q. . . . All right. Mr. Rehbein, has anybody connected with law enforcement or anyone else made any threat, direct or indirect, or used any force or held out any promises or inducements to you to get you to waive these rights that we discussed yesterday; that is, your right to trial by jury, your right to be confronted by the witnesses against you, your right to subpoena witnesses, your right to remain silent, and your right not to incriminate yourself?
>
> A. No.
>
> . . . .
>
> THE COURT [addressed to defense counsel]: And do you believe that Mr. Rehbein is waiving his rights freely, voluntarily, knowingly and intelligently?
>
> MR. CORRIGAN: I do, Your Honor.

The interrogation by the court continued:

> Q. Are you satisfied with the job that Mr. Corrigan has done for you?
>
> A. Yeah.
>
> Q. Do you feel that he's competent; that is, that he knows what he's doing?
>
> A. Yeah.
>
> Q. Do you feel you've had enough time to discuss the case with Mr. Corrigan?
>
> A. Yes.

The court continued to explain the consequences of a guilty plea to the defendant. The court then explained how at the sentencing hearing he would weigh the aggravating and mitigating circumstances and impose a sentence which might be death or life imprisonment. The court then continued:

> Q. . . . Now, Mr. Rehbein, has anyone connected with law enforcement or anyone else made any threat, direct or indirect, or used any force or held out any promises or inducements to you other than the plea negotiations which have been mentioned to get you to plead guilty to the crime of felony murder as set out in the Information?
>
> MR. CORRIGAN: Well, no one's made any promises to get you to plead guilty, have they?
>
> THE DEFENDANT: No.

Defense counsel then explained to the court that the defendant had felt that there were promises made to him to get a statement that was taken by the police on October 18, 1982, and that was the reason for the overnight continuance that had been granted. The defendant then, by question and answer, stated that he concluded to waive any question as to the statement and realized that by pleading guilty he was in fact waiving any later attack on that statement.

Defense counsel asked the following question:

> [Q.] Okay. But no one has promised you anything with regard to get you to plead today, have they?
>
> THE DEFENDANT: No.
>
> Q. (By the Court) Let me say it again to you. Has anyone connected with law enforcement or anyone else made any threat, direct or indirect, or used any force or held out any promises or inducements to you to get you to plead guilty to felony murder.
>
> A. No.
>
> Q. I'm sorry?
>
> A. No.
>
> Q. Okay. Are you pleading guilty freely and voluntarily to felony murder?
>
> A. Yeah.

A factual basis was then obtained, which included a description in detail by the defendant as to what he had done. The court then asked:

> Q. . . . Mr. Rehbein, are you pleading guilty to felony murder solely and only because of the reason that you did, in fact, do the things charged in the Information as they relate to felony murder?

A. Yeah.
Q. Do you still want to plead guilty?
A. Yes, sir.

Even assuming a proper pleading of facts in a motion for postconviction relief, a court is not required to grant an evidential hearing if " '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.' " *State v. Reeves*, 234 Neb. 711, 756, 453 N.W.2d 359, 386 (1990) (quoting *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989)). It would be hard to imagine a case where the trial court more painstakingly covered the issues of noncoercion, voluntariness, and mental competency in the taking of a plea than did the trial judge in this case. To ignore the repeated assertions made and the answers given 6 years ago in favor of a story which has been developed following 5 years behind bars would make a mockery out of our judicial proceedings.

> If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

State v. Scholl, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988). The findings made by the trial court in denying relief certainly were not clearly wrong.

Having concluded that defendant's plea was knowingly, intelligently, and voluntarily made while he was competent to do so, we rule out any claim of ineffective assistance of counsel.

We also hasten to point out that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988). See, also, *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). The question of defendant's competence and whether his plea was coerced by the promises of his counsel could have been raised on direct appeal and

cannot be the basis for postconviction relief. See, *State v. Painter, supra*; *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989).

We are not unmindful of the allegation by defendant that "because of the missleading [sic] information on the defendant the defendant was forced to go to an isolation cell upon his entry of the Diagonistic And evaluation center [sic] at Lincoln, Nebraska for 90 days and this violated the right for direct appeal." As pointed out by the postconviction court, the defendant has not alleged that he wanted to appeal his sentence, and, for that matter, there is nothing in the allegation which sets forth a factual basis from which it could be concluded that his confinement in isolation would prevent him from taking an appeal.

Where the record fails to present a justiciable issue of law and fact to the court in a postconviction action, it is not an abuse of discretion to fail to appoint counsel for an indigent. *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988). In any event, the record does not show that the defendant requested counsel until he proceeded with his appeal to this court, and he was represented by an attorney here.

We find no merit to the errors assigned by the defendant, and the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF L.K.Y. AND A.L.Y., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.S., APPELLANT.

455 N.W.2d 828

Filed June 1, 1990. No. 89-763.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the

witnesses and acceptance of one version of the facts rather than another.

2. **Parental Rights: Juvenile Courts.** The juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code.
3. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights.
4. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the children.
5. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate herself within a reasonable time, the best interests of the children require termination of the parental rights.
6. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Joseph Lopez Wilson for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

Robert L. Freeman, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., guardian ad litem.

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

BOSLAUGH, J.

The appellant is a mother whose parental rights to her two daughters, born September 25, 1977, and April 11, 1979, were terminated by an order of the separate juvenile court of Douglas County, Nebraska, on June 13, 1989. She contends that the trial court erred in finding that she failed to comply with the court-ordered rehabilitation plan and that the termination was in the best interests of the minor children.

The father's parental rights were terminated in 1985. His parental rights are not involved in this appeal.

On April 7, 1982, a petition was filed alleging that the

children were lacking proper parental care by reason of the faults or habits of their parents, as provided in Neb. Rev. Stat. §§ 43-202(2)(b) and 43-209(2) (Reissue 1978). The children had been taken into custody by law enforcement authorities because they had been left alone and locked in a bathroom of a downtown Omaha hotel for a prolonged period of time. The petition alleged that the children had been left alone on numerous occasions; that the appellant had failed to provide a permanent and stable residence for herself and the children; that the appellant had failed to provide adequate food supplies and regular meals for herself and the children; that the children had been observed in dirty and inadequate clothing and with their bodies in need of bathing; and that the appellant and the children had been observed residing in a house found in a complete state of disarray. At the adjudication hearing on May 27, 1982, the mother admitted to most of the allegations of the petition, and the court found the children to be within the meaning of §§ 43-202(2) and 43-209(2).

The children were placed together in foster care on April 2, 1982, and their temporary legal custody was awarded to Douglas County Social Services, and it has remained with social services throughout these proceedings.

Following the disposition hearing on July 12, 1982, the mother was ordered to comply with a plan of rehabilitation which required her to (1) undergo scheduled psychiatric evaluations and subsequent treatment indicated by the evaluation; (2) obtain and maintain a stable living environment for herself and her children which includes adequate housing, furnishings, and food; (3) obtain employment; (4) attend parenting classes; (5) be granted reasonable rights of visitation as arranged by Douglas County Social Services; (6) notify the court within 24 hours of a change of residence; and (7) cooperate with the workers involved in the case. Further review hearings with some adjustments in the rehabilitation plans which were ordered were held on October 19, 1982; January 19, April 19, and October 19, 1983; March 1, September 12, and December 12, 1984; March 26, 1985; August 28, 1987; and January 21, July 19, and November 21, 1988. All of the plans generally included the provisions required in the plan of July

12, 1982.

The record shows that the appellant generally exercised her visitation with the children, but failed to fully comply with those provisions of the plan directed at correcting the situation which led to the court's involvement with her children. The record shows that she did not successfully complete any psychiatric therapy she participated in and that although she participated in a parenting program through August 1984, her attendance was sporadic, and the program facilitator felt there was an indefinite need for the mother to attend. She worked with an in-home parenting assistant from May 1 to June 12, 1984, when the assistant discontinued involvement because of noncooperation from the mother. She moved 14 times from April 1982 to June 1985. Until she obtained employment as a receptionist for a fencing company in June 1984, the mother was unable to maintain a stable source of income. The service personnel involved in the case experienced problems with the mother's cooperation in the services and advice they provided.

In late 1984, the mother had maintained the same residence and held the same job for several months, and extended visits were authorized. On January 2, 1985, the children were returned to the mother's home.

During the time the children lived with their mother, the social workers continued to monitor the placement. The record shows that the mother lost her job and had difficulty in managing with the children. In June 1985, the mother admitted that she could not properly care for her children and decided to relinquish custody of them.

The mother signed relinquishments, and both children were placed with their preadoptive family.

In August 1986, the mother changed her mind about the adoption and revoked the relinquishments. She contends that she only signed the relinquishments and consents to adopt because she thought it would be an open adoption.

From June 1985 until December 1988, the mother continued to visit her children; however, she was unable to maintain a stable residence or stable employment. She also confronted the children about their feelings and discussions with psychologists, social workers, and their foster family.

In December 1988, the mother moved to New York City, has not seen the girls since then, and does not plan to return to Omaha.

On April 4, 1989, the county attorney filed a motion for an order terminating the mother's parental rights to the children on the ground that reasonable efforts, under the direction of the court, failed to correct the conditions leading to the determination that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). Following a 2-day hearing on the motion to terminate, the trial court found that the allegations of the motion, as amended, were true; that the children were within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1988); and that it was in the best interests of the children that the parental rights of the mother be terminated.

As recently stated in *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 407-08, 451 N.W.2d 275, 277 (1990):

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. [Citations omitted.]
>
> The juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code. [Citations omitted.] A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights. [Citations omitted.]
>
> A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed

> to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the children. [Citations omitted.]

Although the mother has a high school education and some postsecondary education or training, she has been unable to maintain steady employment. Her own troubled childhood may have contributed to her inability to adequately parent her children; however, despite numerous psychiatric evaluations, parenting classes, an in-home parenting program, group counseling, and individual therapy, the mother lacks the fundamental understanding of what is necessary to be an adequate parent for her children. During the course of these proceedings, she had at least 34 residence changes.

The mother has been under rehabilitation plans since 1982 to correct the conditions which led to the State's involvement in this case. " 'Where a parent is unable or unwilling to rehabilitate herself within a reasonable time, the best interests of the children require termination of the parental rights.' " *In re Interest of C.C. and E.C.*, 234 Neb. 218, 226, 450 N.W.2d 392, 397 (1990) (quoting *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989)).

The evidence shows that the mother has not been able to stabilize her living and employment situation and that she lacks insight into the needs of her children. " 'Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " 234 Neb. at 226, 450 N.W.2d at 397 (quoting *J.H., supra*).

The children have now been in foster care with the same family since June 1985. That family is willing to permanently adopt the children, and the children already consider themselves part of that family and want to remain with them. The children testified in chambers that they did not want to leave their foster family, even if it meant they would never see their mother again.

The children need the security of a permanent home and the opportunity to have a better life than the mother can provide. The evidence clearly and convincingly establishes that it is in the best interests of the children that the parental rights of the

appellant to her two children be terminated.

The judgment is affirmed.

AFFIRMED.

ARTHUR D. SKALAK AND BERNICE M. SKALAK, APPELLEES, V. JAMES J. WALKER AND RUTH ANN WALKER, APPELLANTS.

456 N.W.2d 109

Filed June 8, 1990. No. 88-159.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge, upon the recommendation of the Appellate Division of the District Court, REAGAN, ENDACOTT, and OLBERDING, District Judges. Reversed and remanded for a new trial on the issue of damages.

Robert V. Dwyer, Jr., and Richard D. Cimino, of Dwyer, Pohren, Wood, Heavey & Grimm, for appellants.

Richard F. Norris for appellees.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we find that the evidence supports a judgment in favor of the plaintiffs for misrepresentation, but that because of a failure of proof and error of law, the judgment of the district court is reversed with directions to reverse and remand the cause to the county court for a new trial on the issue of damages.

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

JANET FUGLSANG, APPELLEE, V. BLUE CROSS OF WESTERN IOWA AND SOUTH DAKOTA, AN IOWA CORPORATION, ET AL., APPELLANTS.

456 N.W.2d 281

Filed June 8, 1990. No. 88-520.

1. **Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion.
2. **Expert Witnesses.** Expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability.
3. **Insurance: Words and Phrases.** A disease, condition, or illness exists within the meaning of a health insurance policy excluding preexisting conditions only at such time as the disease, condition, or illness is manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Paul D. Lundberg, of Shull, Cosgrove, Hellige, Kudej & Du Bray, for appellants.

David A. Domina, of Domina, Gerrard, Copple & Stratton, P.C., for appellee.

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

WHITE, J.

The defendants (hereafter Blue Cross) appeal from a jury verdict for $29,410.60 in favor of the plaintiff, Janet Fuglsang, in her action to recover benefits under a major medical health insurance policy. The district court for Madison County also awarded plaintiff attorney fees in the amount of $10,884.82.

Fuglsang was diagnosed on July 1, 1986, as suffering from myasthenia gravis, a disease which affects different muscle groups of the body and results in weakness, but not in sensory loss or pain. Blue Cross contends that Fuglsang's condition existed prior to her effective coverage date, and it therefore denied coverage under the following policy language:

> Until a person to whom service is rendered has been a Member for eleven consecutive months immediately prior thereto, covered services to be paid for by The Plan(s)

shall not be available for:

A. Any illness or injury or other condition existing prior to said person becoming a Member or which progressed or developed from or was a complication of or secondary to any illness or injury or other condition existing prior to said person becoming a Member; or

B. Any illness or injury or other condition for which medical or surgical treatment or advice was rendered within one (1) year prior to said person becoming a Member.

The parties dispute the effective coverage date of the policy, which Fuglsang obtained through her employer in Yankton, South Dakota. Fuglsang contends that coverage began in February 1986, while Blue Cross argues that the policy became effective in June 1986. Whether coverage commenced in February or June makes little difference in this case, for Blue Cross argues that Fuglsang's condition existed and was capable of diagnosis as early as January 1986, prior to both of the asserted coverage dates.

On January 9, 1986, Fuglsang saw Dr. Tom Surber, a family physician in Norfolk. She complained of difficulty with swallowing, chewing, and moving her tongue, and weakness of the muscles of the arms and legs. Dr. Surber knew that Fuglsang was taking a thyroid medication which was necessitated by the removal of her thyroid some years earlier. A series of tests indicated that there was not enough thyroid in her body, so Dr. Surber adjusted her medication and advised Fuglsang to let him know if she did not feel better.

Fuglsang testified that she felt fine from February through May, but that symptoms similar to those mentioned above returned in June, so she contacted Dr. Surber on June 27. Dr. Surber referred her to Dr. Simons, an ear, nose, and throat specialist in Omaha. Dr. Simons hospitalized her and referred her to a neurologist, Dr. Goldner. Upon seeing Fuglsang on July 1, 1986, and noting the symptoms that she displayed, Dr. Goldner's diagnosis was that she had myasthenia gravis. He administered a Tensilon test, which is used to prove the diagnosis, and the result was markedly positive.

At trial the deposition testimony of Dr. Goldner was read

into the record. Blue Cross asked several questions of Dr. Goldner designed to elicit his opinion of whether Fuglsang's myasthenia gravis existed or could have been diagnosed on January 9, 1986. The trial court sustained several of Fuglsang's objections to these questions, and, thus, Dr. Goldner was not allowed to answer them.

The central issue in the trial was whether the myasthenia gravis was in fact a preexisting condition which relieved Blue Cross from liability under the terms of the policy.

Blue Cross filed a motion for new trial after the entry of the verdict and judgment. The motion was denied, and this appeal was taken. Blue Cross assigns error to the district court in (1) excluding expert medical testimony of whether Fuglsang suffered from myasthenia gravis prior to the effective coverage date of the policy and whether the condition could have been diagnosed prior to the coverage date, (2) tendering an erroneous instruction to the jury, (3) overruling its motion for new trial, (4) overruling its pretrial motion for summary judgment, and (5) awarding Fuglsang attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988).

EXPERT TESTIMONY

Blue Cross assigns error to the trial court's exclusion of certain expert medical testimony by Drs. Goldner and Koob. A trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion. *Aetna Cas. & Surety Co. v. Nielsen*, 222 Neb. 92, 382 N.W.2d 328 (1986); *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984).

Blue Cross attempted to elicit Dr. Goldner's testimony by asking him to rest his opinion on the question "on a 50/50 basis, is it more likely than not that . . . ?" We have encountered medical testimony in workers' compensation cases regarding causation of injury where the expert's opinion is offered in terms of "more likely" (than not).

In *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), we said that a physician's opinion, which amounted to no more than a statement that it was "more

likely" the injury occurred on the date of the accident than when the worker was at bed rest following the accident, lacked the definiteness and certainty necessary for it to be the basis for a compensation award (citing *Camarillo v. Iowa Beef Processors, Inc.*, 201 Neb. 238, 266 N.W.2d 917 (1978), and *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974)). In *Husted* we held that "[a] workmen's compensation award cannot be based upon possibility or speculation. If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. An award cannot be based upon conflicting inferences of equal degrees of probability." 210 Neb. at 113-14, 313 N.W.2d at 251.

In this case Dr. Goldner would have testified, if allowed, that myasthenia gravis possibly could have been diagnosed in January 1986; that there was a possibility that Fuglsang's condition was related to her thyroid problem, which could, to some extent, mimic symptoms of myasthenia gravis; and that Fuglsang probably did have myasthenia gravis then, but one could not be certain and could also suspect other things such as hypothyroidism.

The conflicting inferences raised by Dr. Goldner's testimony must render any opinion "on a 50/50 basis . . . more likely than not" as speculative and lacking in the requisite definiteness and certainty. Just as a workers' compensation award cannot be based on speculative evidence, neither should a jury be allowed to base a verdict on such expert testimony. We cannot say that the district court abused its discretion in excluding certain opinions of Dr. Goldner's, nor was it an abuse of discretion to exclude the opinion of Dr. Koob as speculative and lacking foundation.

In our ruling today, we reaffirm the standard that expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability, and we decline to extend that standard further. See, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981); *Marion v. American Smelting & Refining Co., supra*; *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965).

JURY INSTRUCTION

Blue Cross also assigns error to the trial court in submitting instruction No. 11 to the jury, which in pertinent part reads: "A 'disease', 'condition' or illness exists within the meaning of a health insurance policy excluding pre-existing conditions only at such time as the 'disease', 'condition' or illness becomes known to the insured or is capable of being diagnosed by a physician." Blue Cross objects to the instruction on the bases that (1) "known to the insured" is not an accurate statement of the law and (2) it was not allowed to offer any evidence on the "capable of diagnosis" part of the test.

Blue Cross argues that the law in Nebraska is that a disease exists not when it becomes known to the insured, but when it becomes *manifest*, as stated in *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 96 N.W.2d 721 (1959). The terms are actually synonymous. In *American Sun Life Ins. Co. v. Remig*, 482 So. 2d 435 (Fla. App. 1985), the following definition of "manifest" was adopted: " 'A condition, not otherwise diagnosed, is manifest when the insured *knew or should have known* of the existence of his illness because he was experiencing symptoms that would lead a reasonable person to seek a medical diagnosis.' " (Emphasis supplied.) *Id.* at 436.

The policy served by such an instruction is enunciated in *Mutual Hosp. Ins., Inc. v. Klapper et ux.*, 153 Ind. App. 555, 560, 288 N.E.2d 279, 282 (1972):

> The majority rule recognizing a disease only to be in existence when it first manifests itself or is known to the victim or is capable of being diagnosed by a physician serves the dual purpose of protecting insurers from fraudulent applicants seeking coverage for known diseases while protecting innocent premium-paying insureds from being deprived of benefits for pre-existing conditions of which they have no knowledge. *Ray* v. *Hospital Care Ass'n.* (1952), 236 N. C. 562, 73 S. E. 2d 475; *Randa* v. *Bear* (1957), 50 Wash. 2d 415, 312 P. 2d 640.

It was, in fact, the symptoms that Fuglsang was experiencing which led her to seek diagnosis from Dr. Surber on January 9, 1986. It happened that Dr. Surber's diagnosis and treatment were for her thyroid condition. Blue Cross' objection to

instruction No. 11 as an incorrect statement of law merely because it contained the words "known to the insured" as opposed to "manifest" is without merit.

Blue Cross' objection to the "capable of diagnosis" part of the test is also without merit. An instruction should be given only on issues which are pled and find support in the evidence. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). The capability of diagnosis of myasthenia gravis was put in issue by Dr. Surber's testimony. Blue Cross' objection to that part of the instruction because its medical testimony was excluded simply amounts to an objection to the trial court's evidentiary rulings, which we have just affirmed.

All jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Denesia v. St. Elizabeth Comm. Health Ctr., ante* p. 151, 454 N.W.2d 294 (1990); *Crewdson v. Burlington Northern RR. Co., supra*; *Dotzler v. Tuttle, supra.* In order to establish reversible error upon a trial court's giving of a certain instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Denesia v. St. Elizabeth Comm. Health Ctr., supra; Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

The evidence presented required the jury to find whether Fuglsang's symptoms on January 9, 1986, were a result of a preexisting, undisclosed condition or disease, and the verdict indicates a finding that they were not. We find no prejudice necessitating a reversal.

While we determined that instruction No. 11 was not an incorrect statement of the law, we note here that our review of the applicable case law indicates that a better statement of the rule is: A disease, condition, or illness exists within the meaning of a health insurance policy excluding preexisting conditions only at such time as the disease, condition, or illness is manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy

diagnose the disease. See, e.g., *Mutual Hosp. Ins., Inc. v. Klapper et ux., supra*; *Bishop v. Capitol Life Ins. Co.*, 218 Kan. 590, 545 P.2d 1125 (1976); *Southrds v. Central Plains Ins. Co.*, 201 Kan. 499, 441 P.2d 808 (1968); *American Family Ins. Group v. Blake*, 439 N.E.2d 1170 (Ind. App. 1982); *Dowdall v. Commercial Travelers Mutual Accident Association*, 344 Mass. 71, 181 N.E.2d 594 (1962).

ATTORNEY FEES

Blue Cross assigns error to the trial court's order approving Fuglsang's application for attorney fees in the amount of $10,884.82.

Blue Cross argued in its special appearances that it is an unauthorized insurer, and in its brief claims that the applicable statute regarding attorney fees is Neb. Rev. Stat. § 44-137.07 (Reissue 1988), which allows for a reasonable attorney fee not to exceed 12½ percent of the plaintiff's recovery if it appears to the court that the insurer's refusal to pay was vexatious and without reasonable cause.

Fuglsang claims in her brief that she was entitled to an award of attorney fees under § 44-359, which states:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

We first note that the special appearances of Blue Cross were overruled by the trial court, and the propriety of that ruling is not assigned as error on appeal.

It is clear that Blue Cross is a foreign corporation. Whether it is an unauthorized insurer within the meaning of Neb. Rev. Stat. § 44-137.01 (Reissue 1988) is simply not to be ascertained from the record. The record is silent. We note further that even if Blue Cross is a foreign, unauthorized insurer, jurisdiction is granted to the district courts of this state by the specific terms of Neb. Rev. Stat. § 44-137.02 (Reissue 1988).

In order for Blue Cross to prevail on its contention that it is entitled to the more favorable attorney fee provisions of § 44-137.07, it must be clear that it qualifies under that statute. It did not so establish that applicability.

CONCLUSION

The trial court correctly applied the provisions of § 44-359. The order allowing attorney fees is affirmed.

The appellee is allowed a further award of $2,500 for services of her attorney in this court.

AFFIRMED.

DARYL SHIPP, CONSERVATOR OF SHELLY SHIPP, A PROTECTED PERSON, APPELLEE, V. LINDA JOHNSEN, APPELLANT.

456 N.W.2d 110

Filed June 8, 1990. No. 88-869.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, upon the recommendation of the Appellate Division of the District Court, WARREN, COADY, and RILEY, District Judges. Appeal dismissed.

Michael K. High, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Douglas D. DeLair, of DeLair & DeLair, for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we determine that the order of the district court requiring an accounting was not a final order, and therefore the appeal is dismissed.

APPEAL DISMISSED.

C. MICHAEL ANDERSON, APPELLANT, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

456 N.W.2d 286

Filed June 8, 1990. No. 89-388.

1. **Habeas Corpus: Prisoners: Sentences.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
2. **Constitutional Law: Death Penalty.** The "Right to Bear Arms" amendment to Neb. Const. art. I, § 1, does not abolish the death penalty in Nebraska.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Alan G. Stoler for appellant.

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

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

PER CURIAM.

In *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), this court affirmed the first degree murder conviction and death sentence of C. Michael Anderson. Postconviction relief was later denied to Anderson. See *State v. Anderson*, 216 Neb. 521, 344 N.W.2d 473 (1984). After the aforementioned proceedings, Anderson filed a petition for a writ of habeas corpus, but was denied habeas corpus relief by the district court for Lancaster County. Denial of habeas corpus relief is the subject of Anderson's present appeal to this court.

In his habeas corpus action, Anderson contended at trial and contends on appeal that the "Right to Bear Arms" amendment to Neb. Const. art. I, § 1, which was adopted at the general election on November 8, 1988, prevents execution of his death sentence, since the constitutional amendment guarantees Anderson the inalienable right to life and, therefore, abolishes the death penalty in Nebraska.

Neb. Const. art. I, § 1, as amended by the Right to Bear Arms amendment, provides:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, *and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.* To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

(Emphasis supplied regarding the language of the Right to Bear Arms amendment to Neb. Const. art. I, § 1.) In the Right to Bear Arms amendment, Anderson focuses on the language: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness . . . and such rights [life, liberty, pursuit of happiness, and bearing arms] shall not be denied or infringed by the state or any subdivision thereof." According to Anderson, the preceding language in the amendment to Neb. Const. art. I, § 1, guarantees Anderson the absolute right to life, which cannot be taken away by the State of Nebraska.

> "To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose."

Rust v. Gunter, 228 Neb. 141, 142, 421 N.W.2d 458, 459 (1988) (quoting *Hawk v. Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946)). " 'The availability of habeas corpus in Nebraska is restricted. . . . We have consistently held that to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. . . .' " *Rust v. Gunter, supra* at 142, 421 N.W.2d at 460 (quoting *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979)).

Recently, in *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990), we construed the Right to Bear Arms amendment in

relation to a defendant's conviction for violation of a Nebraska statute which prohibited possession of a statutorily specified type of firearm, i.e., a short or sawed-off shotgun. Rejecting the contention that the Right to Bear Arms amendment authorized a citizen's absolute right to possession of certain types of firearms, we concluded in *LaChapelle* that a statute which prohibited possession of a particular type of firearm "is not vitiated by the Right to Bear Arms amendment of 1988, is a valid exercise of the State's police power in reasonable regulation of certain firearms, and does not contravene Neb. Const. art. I, § 1." 234 Neb. at 462-63, 451 N.W.2d at 691. A similar conclusion was also reached in *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989), in which this court recognized, notwithstanding the Right to Bear Arms amendment, the validity of Nebraska statutes prohibiting a felon's possession of a firearm with a barrel less than 18 inches in length and possession of a firearm with the manufacturer's identification marks or serial numbers removed, defaced, altered, or destroyed. In *Comeau*, we noted that

> "courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens."

Id. at 910, 448 N.W.2d at 597 (quoting *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

At the outset in Anderson's present appeal, we note that the death penalty is, and at the time of Anderson's conviction and sentence was, statutorily authorized in Nebraska for a conviction of first degree murder, a Class I felony. See, Neb. Rev. Stat. § 28-105(1) (Reissue 1989) (penalty for first degree murder); Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1989) (procedure for imposition of the death penalty). The death penalty for the crime of murder in the first degree is not a per se violation of constitutionally required due process. See, *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d

346 (1972); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *overruled on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In *Gregg*, the U.S. Supreme Court stated: "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." 428 U.S. at 187. Thus, Anderson does not suggest that the death penalty for a conviction of certain crimes is a form of punishment outside a state's appropriate police power.

We find nothing in the Right to Bear Arms amendment to the Nebraska Constitution which expresses an intent to abolish the death penalty. Further, in construing the Right to Bear Arms amendment, we conclude that the constitutional amendment does not abolish the death penalty. Rather, under present Nebraska law, a citizen has the right to life so long as the citizen does not engage in criminal conduct which is condemned by the Nebraska Criminal Code and is punishable by the death penalty, all as a part of the valid police power of the State of Nebraska. Therefore, Anderson's contention that the Right to Bear Arms amendment abolishes the death penalty is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARREN E. WRIGHT, APPELLANT.

456 N.W.2d 288

Filed June 8, 1990. No. 89-853.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Judgments: Appeal and Error.** A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding.
3. **Criminal Law: Proof.** The burden is on the State to prove all essential elements of the crime charged.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, ALBERT C. WALSH, Judge. Judgment of District Court affirmed.

Michael L. Munch, Assistant Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Wynn Clemmer for appellee.

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

FAHRNBRUCH, J.

Contending the evidence was insufficient to sustain his conviction for first degree trespass, Darren E. Wright appeals a district court for Sarpy County order that affirmed his Sarpy County Court conviction. We affirm.

In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to

support them. *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990).

Taking the view most favorable to the State, the evidence reflects the following. Bellevue police were called to a disturbance at a residence at 1406 Wilshire Drive in Bellevue, Nebraska, on December 11, 1988, where the defendant's estranged wife was visiting. Defendant went to the residence to see his wife. Michael Barksdale, the defendant's brother-in-law, testified that the defendant was banging on the door of the Wilshire Drive residence. When Barksdale opened the door, Wright barged into the residence uninvited. According to Barksdale, Wright, with his hand underneath his clothing, proceeded to threaten some of the occupants, stating, "I got a bullet for you." Four witnesses testified that Wright was told to leave. The defendant refused to leave and had to be forcibly removed from the residence. Wright attempted to reenter the residence, but was prevented from doing so only through the efforts of Barksdale and at least one other person. Wright was subsequently arrested and charged with first degree trespass, a Class I misdemeanor.

After a bench trial to the Sarpy County Court, Wright was found guilty, sentenced to 18 months' probation and 6 days in the Sarpy County jail, and fined $100 plus court costs. Contending the evidence was insufficient to sustain his conviction, defendant appealed to the district court for Sarpy County. The district court affirmed Wright's conviction and sentence.

A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding. *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

The burden is on the State to prove all essential elements of the crime charged. *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988). In order to convict Wright of first degree trespass, it was incumbent upon the State to prove beyond a reasonable doubt that the defendant (1) entered or secretly remained in a building or occupied structure (2) with knowledge that he was not licensed or privileged to do so. See Neb. Rev. Stat. § 28-520(1) (Reissue 1989). Defendant barged his way into the

Wilshire Drive residence uninvited, refused to leave when requested to do so, and had to be forcibly removed from the residence.

The evidence is sufficient to support Wright's conviction of first degree trespass.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. VANDERKUUR, APPELLANT.

456 N.W.2d 473

Filed June 8, 1990. No. 89-1226.

Drunk Driving: Prior Convictions: Proof: Right to Counsel: Waiver. In order to prove a prior driving while under the influence of alcohol conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had counsel or knowingly, voluntarily, and intelligently waived the right to counsel.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, RANDALL L. REHMEIER, Judge. Judgment of District Court affirmed.

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

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

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

CAPORALE, J.

Defendant, William J. Vanderkuur, appeals the district court's affirmance of his county court conviction for third-offense driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). He asserts as error the district court's failure to find that the county court erred by receiving in evidence certain exhibits which

combine to attest that Vanderkuur had, within the 10 years preceding the subject conviction, pled guilty to and was convicted of other like offenses. We affirm.

Section 39-669.07, among other things, specifies the consequences of having twice before, within the 10 years prior to the date of the current conviction, been convicted of driving while under the influence of alcohol. Since neither the validity of the current conviction nor the propriety of the sentence imposed as a result is at issue, we concern ourselves only with the evidence received by the county court to support its finding that Vanderkuur's history of convictions of driving while under the influence of alcohol is such that the current offense was at least his third such offense.

Vanderkuur asserts that evidence of the first of the prior convictions cannot be used for enhancement purposes because the record of it shows that he was not represented by counsel until the plea was entered and does not clearly establish that his constitutional rights were explained to him at the time he entered his plea. However, the established rule is that in order to prove a prior driving while under the influence of alcohol conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had counsel or knowingly, voluntarily, and intelligently waived the right to counsel. *State v. Anderson*, 232 Neb. 349, 440 N.W.2d 257 (1989); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). The record of the prior conviction in question establishes that Vanderkuur was represented and accompanied by counsel at the time he entered his plea of guilty. Such a showing is sufficient for the first prior conviction to be used for purposes of enhancement. See *State v. Wakeman, supra*.

In regard to the second of his prior convictions, Vanderkuur urges that the record reveals "he was not advised of his rights at all" at the time he entered his plea. Brief for appellant at 4. Again, the State's burden is met by showing that Vanderkuur had or waived counsel. The court's journal entry declares that when Vanderkuur pled guilty, he "was present in court with his retained attorney . . . ." Elsewhere the entry recites that "[t]he Court then asked the Defendant if he understands that by

entering a plea of Guilty he is waiving his rights to an attorney" and that "[t]he Defendant replied that he understands that he is waiving these rights." The court then makes a finding that "Defendant voluntarily, knowingly, and intelligently waived his right to have an attorney present at this hearing . . . ." It is clear from those recitations that Vanderkuur either had counsel when he pled or knowingly, voluntarily, and intelligently waived the right to counsel. Thus, the foregoing two prior conviction records are sufficient to establish that the current conviction is at least Vanderkuur's third.

Nonetheless, we consider Vanderkuur's complaint that the record of the remaining prior conviction at issue "shows no voluntary, intelligent or knowing waiver of counsel prior to or after the defendant's plea." Brief for appellant at 4. The record of this third prior conviction reveals that Vanderkuur was not represented by counsel at any stage of the proceedings but that he made a voluntary, intelligent, and knowing waiver of his right to counsel at the time he entered his plea. By showing the waiver of counsel, this record, too, is sufficient to establish a prior conviction.

Vanderkuur's contentions therefore have no merit. Because the State has established two prior convictions in which Vanderkuur was either represented by counsel or knowingly, voluntarily, and intelligently waived his right to counsel, the State met its burden of proof, and the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. BERNARD G. PHELPS, APPELLEE.

456 N.W.2d 290

Filed June 8, 1990. No. 90-045.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Maria R. Leslie for appellant.

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

SHANAHAN, J.

In its information, the State charged Bernard G. Phelps with first degree sexual assault. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989). Phelps filed a motion to suppress his custodial statements. See Neb. Rev. Stat. § 29-115 (Reissue 1989) (suppression of a defendant's statement). Because the district court for Douglas County sustained Phelps' suppression motion, the State appeals to obtain review by a judge of this court, pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1989).

Sgt. Michael Cavanaugh, an Omaha police officer assigned to criminal investigations, received information regarding occurrence of a sexual assault. Later that same day, Cavanaugh spoke with the victim at a hospital, where the victim indicated that Bernard Phelps was her assailant. Cavanaugh proceeded to the Phelps home and told Phelps that he wanted to ask some questions regarding an alleged sexual assault. In the course of this meeting, Cavanaugh arrested Phelps on "suspicion of sexual assault" and transported Phelps to police headquarters for further questioning.

On arrival at police headquarters, Phelps was taken to an interrogation room, where Cavanaugh advised him of his *Miranda* rights. Phelps stated that he understood his rights and that he was willing to speak with Cavanaugh regarding the alleged assault. Phelps was not under the influence of alcohol or drugs and spoke freely with Cavanaugh, but appeared nervous. Only Phelps and Cavanaugh were in the interrogation

room.

Initially during the questioning, Phelps denied any contact with the victim. However, about 10 to 15 minutes into the interrogation, Cavanaugh stated that the victim had described Phelps' clothing and that Phelps' clothing at the time of the interview matched exactly the description of the clothing worn by the victim's assailant. Further into the interview, Cavanaugh said that Phelps might have to submit to a penile swab with a "Q-tip." A penile swab is performed to determine, through laboratory analysis, if an assailant's penis bears any secretions originating from contact with the victim and is obtained pursuant to Neb. Rev. Stat. §§ 29-3301 et seq. (Reissue 1989) ("identifying physical characteristics act," which prescribes a procedure for obtaining certain physical data from an individual for identification purposes). Questioning at the suppression hearing provides details of Cavanaugh's conversation with Phelps concerning the penile swab:

> Q. At what point in time did you talk to him about taking a—a—a sperm sample or using a Q-tip to get a sperm sample?
>
> A. It was during the interview.
>
> Q. OK, this is while he was still denying it?
>
> A. Ummm, yes.
>
> Q. OK. Basically you were telling him that you did not believe him, that he didn't have any sexual encounter with her, and that you could use a—a test to determine whether he—whether his semen matched with what you found in the victim—or what the doctors found in the victim?
>
> A. Yes, I did explain the test would—would match up the semen and would be pretty conclusive.
>
> Q. OK. And you told him that before you told him anything about this clothing that she described?
>
> A. I don't know which I told him first. You know, they—they both were mentioned. I—I don't know which one was mentioned first.
>
> Q. And you told him—Did he seem concerned about the—the test?
>
> A. Yeah, he did.
>
> Q. What did he ask you?

A. Well, he—he—He wanted to know how it was done. I—I think he might have been a little concerned that—you know, how accurate it was, and he also asked if it was painful.

Q. So he was concerned about not how it was done but how actually the—the test was taken—how they were going to get sperm from his penis, correct?

A. Well, I—I think he was concerned about, I think, how incriminating it would be to him, how accurate it would be, and also he did have some concern about the pain, yes.

Q. Did you tell him how the test would be done?

A. Ummm, generally, yeah. I—I—At the time I'd only observed probably two prior tests of this—of this type, so I—You know, I told him basically they use a Q-tip and, you know, swab the—the exterior and—and the inside of his penis.

Q. Did you tell him, Sergeant Cavanaugh, if he admitted to this, it wouldn't be necessary to have this swabbing test?

A. I don't think I told him that in so many words. I don't think I—I—I told him it would probably be done to try to establish the fact that it happened, uh, but I don't think I said in so many words, "Hey, if you confess to it, we won't do it." I wouldn't have worded it that way.

Q. What was the reason for bringing—for bringing it up? It was an interrogation technique, correct?

A. Yes, it was.

Q. So what you were trying and to—By the technique, what you were trying to get across to him is that "We will do this test if you don't admit to it"?

A. Yes.

Q. Did you ever tell—tell him that the Q-tip itself is going to be stuck inside the penis in order to get the—the sample?

A. When he asked me how the test was done, I—I did tell him they did insert it, and they also do it on the—on the outside as well. When he asked me how it was done, you know, I tried to explain it, you know, as best a layman

can, I guess.

Q. And when he asked whether it hurt or not, you told him you didn't know?

A. I said I think it does hurt. I said I think there is some discomfort.

Q. And why did you tell him that?

. . . .

A. Because the people that I had seen undergo this test before have shown some discomfort and pain.

After Cavanaugh's description regarding the penile swab, Phelps orally admitted that he had had sexual intercourse with the victim, but claimed that the victim had consented. Phelps also gave a written statement to Cavanaugh in which Phelps, in substance, admitted that the victim and he had engaged in consensual sexual intercourse. In view of those statements during the interrogation, which lasted 35 minutes, Phelps was "booked" and later charged with first degree sexual assault.

Phelps filed a motion to suppress his statements obtained during the interrogation process and asserted that his statements were involuntary and the product of coercion "by threats and promises." At the suppression hearing, Phelps argued that Cavanaugh's description of the painful penile swab precluded voluntariness in Phelps' statements, which are, therefore, constitutionally inadmissible. Based on Cavanaugh's testimony and description of the penile swab procedure, the district court concluded that

> the detailed discussion about the insertion of a stick enlarged by a piece of cotton into the opening in the tip of the defendant's penis (allowing him to imagine how deep the insertion might be), coupled with the Officer's assurance that the procedure would be painful, constituted a threat which renders [Phelps'] admissions involuntary,

and that "the defendant's oral admissions and written statement [are] involuntary. The defendant's motion to suppress is granted, and the oral and written statements are suppressed."

The State contends that Phelps' statements are voluntary

and not the result of any coercion. The State further argues that Cavanaugh's statements regarding the penile swab merely communicated to Phelps an "intent to do an act permissible under law," brief for appellant at 8, that is, the State's right to obtain physical data pursuant to the identifying physical characteristics act, and did not amount to coercive conduct in violation of Phelps' constitutional rights.

STANDARD OF REVIEW

"In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Copple*, 224 Neb. 672, 689, 401 N.W.2d 141, 154 (1987).

"In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon*, 222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986).

VOLUNTARINESS OF PHELPS' STATEMENTS

The admissibility of a defendant's custodial statements depends on all the circumstances under which the statement is made. "[T]o be admissible, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight." *State v. Robertson*, 219 Neb. 782, 787, 366 N.W.2d 429, 433 (1985). See, also, *State v. Dixon, supra*; *State v. Bodtke,* 219 Neb. 504, 363 N.W.2d 917 (1985). This court examined voluntariness of a defendant's statement in *State v. McCurry,* 228 Neb. 841, 846-47, 424 N.W.2d 364, 368 (1988), and stated:

> As we observed in *State v. Bodtke*, 219 Neb. 504, 510, 513, 363 N.W.2d 917, 922-23 (1985): "As expressed by Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961): 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession

> the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' . . .
>
> ". . . Use of an accused's involuntary statement . . . so offends due process and fundamental fairness in a criminal prosecution, because one acting with coercion, duress, or improper inducement transports his volition to another who acts in response to external compulsion, not internal choice. With voluntariness as the ultimate test regarding an accused's statement, the focal point of inquiry into voluntariness is whether the statement is 'the product of a rational intellect and a free will.' [Citations omitted.]
>
> ". . . .
>
> ". . . To be admissible, a statement or confession must have been freely and voluntarily made. [Citations omitted.]"
>
> In *State v. Norfolk*, 221 Neb. 810, 819, 381 N.W.2d 120, 127 (1986), we stated: "The State bears the burden of proving that a defendant's statement was voluntarily made, before that statement is admissible as evidence against the defendant. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984). In determining whether the State has satisfied its burden, a court examines the totality of the circumstances to ascertain whether the defendant's statement 'is "the product of a rational intellect and a free will." ' [Citation omitted.]"

See, also, *State v. Dixon, supra.*

A law enforcement officer's communication to a defendant which expresses the officer's intention to take a course of conduct permissible under the law is not, by itself, coercion preventing voluntariness of the defendant's statement in response to the officer's communicated intention. *State v. McCurry, supra.* However, under the circumstances surrounding the interrogation of Phelps, the trial court concluded that Cavanaugh's statements reasonably indicated a

physical procedure which would subject Phelps to pain and trauma and that the imminent prospect of the procedure prevented Phelps' statements from being " ' "the product of an essentially free and unconstrained choice . . . ." ' " *State v. McCurry, supra* at 846, 424 N.W.2d at 368. Although seeking to characterize sensation from a Q-tip inserted into the urethra as rather minor "discomfort or slight pain," brief for appellant at 11, the State, nonetheless, stands on Cavanaugh's description of the penile swab and its consequent pain. The district court concluded that pain, to render a defendant's statement involuntary, need not be of such nature or degree that would have resulted in recoil by Tomás de Torquemada of the Spanish Inquisition. In view of the circumstances surrounding Phelps' statements in question, the State has failed to satisfy the burden of proving that Phelps' statements were voluntarily made, " ' "the product of a rational intellect and a free will." ' " *State v. Norfolk*, 221 Neb. 810, 819, 381 N.W.2d 120, 127 (1986).

The district court's findings and conclusions are not clearly erroneous. Therefore, the district court's suppression order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOEL R. EVANS, APPELLANT.

456 N.W.2d 739

Filed June 15, 1990. Nos. 43863, 43868, 43869, 43870.

1. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.
3. **Trial: Joinder: Indictments and Informations.** Two or more offenses may be charged in the same information if the offenses charged are of the same or

similar character or are based on the same act or transaction. If it appears a defendant would be prejudiced by a joinder of offenses, the trial court may order an election for separate trials of counts in the information.

4. **Trial: Joinder: Appeal and Error.** Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant.
5. _____: _____: _____. A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial.
6. **Trial: Joinder: Proof.** The right to separate trials is statutory and depends upon a showing that prejudice will result from a joint trial. The defendant bears the burden of proving that prejudice will result from a joint trial.
7. **Trial: Joinder: Indictments and Informations.** Two or more informations may be consolidated for trial if the offenses involved could have been joined in a single information.
8. **Trial: Joinder: Evidence: Appeal and Error.** Joinder or consolidation is not prejudicial error where evidence relating to both offenses would have been admissible in a trial of either offense separately.
9. **Rules of Evidence.** Evidence of other crimes, wrongs, or acts is admissible for the purpose of establishing identity or a particular method of operation.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These cases are direct appeals by the defendant, Joel R. Evans, from convictions for robberies, use of a firearm in the commission of felonies, and possession of a firearm by a felon. The robberies were all committed in Omaha, Nebraska, over a period of 12 days in 1980. The sentences imposed amount to imprisonment for 45 to 80 years. The facts surrounding the three cases in which the defendant was convicted after trial are detailed in *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984) (*Evans II*).

The evidence of guilt in each case is overwhelming. In each

appeal the issues, generally, are procedural in nature. This is the fourth time these cases have been before this court.

On July 8, 1981, the judgments were summarily affirmed pursuant to former Neb. Ct. R. of Prac. 20A(8) (rev. 1977) on direct appeal when motions to withdraw by defense counsel were sustained under former Neb. Ct. R. of Prac. 1e(1) (rev. 1977) (*Evans I*). A request by the defendant to proceed pro se was denied on July 28, 1981.

A judgment denying postconviction relief was affirmed December 21, 1984. See *Evans II*.

A second judgment denying postconviction relief was affirmed on October 31, 1986, in *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986) (*Evans III*).

On February 14, 1989, in *Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989), in an appeal from the U.S. District Court for the District of Nebraska, the U.S. Court of Appeals for the Eighth Circuit ordered that the defendant be released unless the defendant's previous direct appeals were reinstated and counsel appointed to represent him. As a result of that opinion and the subsequent judgment of the U.S. district court, the defendant's direct appeals to this court (*Evans I*) were reinstated and the public defender of Douglas County, Nebraska, was appointed to represent him. New briefs were filed, and the causes were heard on April 30, 1990.

The opinion in *Evans v. Clarke, supra* at 270-71, stated that the defendant's federal habeas petition, as summarized by the magistrate, included the following claims:

> 3. Petitioner's trial counsel rendered constitutionally ineffective assistance of counsel, in violation of the Sixth Amendment, in refusing to call petitioner's brother-in-law as an alibi witness in the trial concerning the robberies at Jack & Mary's Restaurant.
>
> . . . .
>
> 5. Petitioner's right to a fair trial under the Sixth and Fourteenth Amendments were violated when the prosecutor—outside the presence of the judge, the petitioner, and his counsel—allegedly communicated with the jury inside the jury room, just prior to the returning of the verdicts in the trial of the Village Inn Pancake House

and Gorat's Steak House robberies.

6. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment were violated because the presentence report prepared by the probation office and used by the trial court in sentencing petitioner purportedly contained false, inaccurate, and misleading information.

The opinion in *Evans v. Clarke, supra* at 271, later stated:

> Claims Nos. 3, 5, and 6, however, are unaffected by this analysis. The state appellate court has not yet considered them after full briefing by appointed counsel. So, insofar as these claims are concerned, the District Court was correct in provisionally granting the writ of habeas corpus. We shall affirm its judgment, but modify it so as to provide as follows: the writ will be granted unless, within such reasonable time as the District Court may fix, the Supreme Court of Nebraska reinstates Evans's direct appeal and appoints counsel to brief for him (a) claims 3, 5, and 6 above; (b) any other claims counsel believes to be arguable—for example, questions of state law raised by the record, questions that would necessarily not be included in the list of 7 set out above, because that list includes only claims that would directly justify habeas relief; but not including (c) claims 1, 2, and 4, which the Nebraska Supreme Court has already fully considered and decided.
>
> If Evans loses this reinstated appeal, he is free to prosecute the pending habeas petition, including each of claims 1 through 6 above, subject, of course, to any claim of procedural default that the State might urge. To this end, we direct the District Court, after it modifies its order granting the writ as indicated above, to hold this petition on its docket for further proceedings as and when appropriate.
>
> The judgment is affirmed, as modified in this opinion, and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Claim No. 3 relates to the defendant's contention that trial counsel was ineffective due to his alleged refusal to call the defendant's brother-in-law as an alibi witness in case No. 43863.

That case involved the robberies at Jack and Mary's Restaurant on April 27, 1980. This claim is based on information not contained in the record related to this direct appeal.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Grell*, 233 Neb. 314, 444 N.W.2d 911 (1989).

According to a signed statement or letter to the defendant, attached to the motion filed in the defendant's second postconviction action, *Evans III*, the defendant's brother-in-law, Alfred Cosentino, allegedly would have testified that he and the defendant were playing pool some time prior to the robberies at Jack and Mary's Restaurant. This testimony, the defendant maintains, would have proved that it was difficult, if not impossible, for him to have committed the robberies, given the distance involved.

Due to the unique posture of this case, we have again reviewed the postconviction record in *Evans III* and determine that the defendant's assignment of error is without merit. The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990); *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989); *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

The effect of Cosentino's testimony would have been to corroborate the defendant's own story regarding his actions and the money in his possession just prior to the April 27 robberies. Cosentino's signed statement relates that he was waiting outside the courtroom to be called as a witness, but that trial counsel became upset with Cosentino when counsel saw him speaking with an old friend who was a juror in a different case. Because the witness was speaking with the juror, counsel refused to call him to testify.

Given the several eyewitness identifications of the defendant

and his possession, upon arrest, of a large sum of money and a gun similar to that used in the robberies, Cosentino's cumulative testimony would not, with reasonable probability, have changed the result in this case. Accordingly, the defendant has failed to show that trial counsel was ineffective in failing to call Cosentino as a witness.

In claim No. 5, the defendant contends that he was denied a fair trial in cases Nos. 43868 and 43870 because the prosecutor allegedly communicated with the jury—outside the presence of the judge, the defendant, and his counsel—inside the jury room, just prior to the return of the verdicts. The defendant contends that this alleged misconduct of the prosecutor violated his rights under U.S. Const. amends. VI and XIV.

Since there is nothing in any of the records before us to substantiate such a claim, the defendant's assignment is wholly without merit.

In claim No. 6, the defendant claims that his rights under the due process clause of U.S. Const. amend. XIV were violated in all of the cases because the presentence report contained false, inaccurate, and misleading information.

The defendant objects to information in the presentence report that he was arrested for crimes in which there was no prosecution, the charges were dropped, or he was not represented by counsel. Our further review of the sentencing hearing shows that the court was well aware that some of the previous charges were either dismissed or not prosecuted. As in *Evans III*, the defendant fails to explain how the alleged absence of legal representation in any of those cases resulted in false, misleading, or inaccurate information in the report.

The defendant also complains that the report contained information concerning his lack of employment history when, in fact, he had worked at construction and other jobs. The report shows that the defendant was employed by his father from 1973 to 1979 and had worked at numerous jobs since his divorce in 1979. The defendant was not prejudiced by the failure to mention his construction work, especially in light of his own testimony during the trial in case No. 43863 that he was not working regular jobs and was unemployed on the date of the Jack and Mary's robberies.

As to the defendant's assertion that he did not admit to the probation officer that he committed the robberies, contrary to the information contained in the report, it is difficult to understand how this alleged inaccuracy could have prejudiced the defendant. Apart from the fact that the defendant had been found guilty by unanimous jury verdicts in three of the robberies and pled guilty to the fourth robbery, the defendant stated to the court during the sentencing hearing that "[i]f I would have used my head, it probably never would have happened." During the sentencing hearing, the defendant did not deny committing the crimes, but instead acknowledged his guilt. Again, it is difficult to see how the defendant was prejudiced by the allegedly false admissions contained in the presentence report.

In addition to the three claims which have been discussed, the defendant has made other assignments of error. In case No. 43863, involving the robberies at Jack and Mary's Restaurant, the defendant was charged with two counts of robbery, two counts of use of a firearm in the commission of a felony, and one count of possession of a firearm by a felon. The jury found the defendant guilty on all counts.

In this appeal, the defendant alleges (1) trial counsel was ineffective because he failed to make a proper probable cause challenge to the defendant's arrest on April 27, 1980; (2) the trial court committed reversible error when it overruled the motion to sever the felon in possession charge; and (3) trial counsel was ineffective because he failed to dispute the factual allegations in the presentence report.

The test for probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense. *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), *cert. denied* 484 U.S. 924, 108 S. Ct. 285, 98 L. Ed. 2d 246; *Evans III*; *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985); *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980).

The arresting officer, a Douglas County deputy sheriff, testified that he originally stopped the defendant after the

defendant was observed walking in a field near the Papio Creek, an area which was being watched by authorities for the suspect in the armed robberies at Jack and Mary's Restaurant. The defendant met the description of the robbery suspect aired in the police broadcast. A pat-down search revealed that the defendant was carrying a handgun and $147.88 in cash, including "wads" of $1 and $5 bills and almost $10 in change. The defendant's pants were muddy, although it was a dry evening. The defendant was taken to the robbery scene and was separately identified as the robber by two eyewitnesses, approximately 45 minutes after the crime occurred. There was probable cause to arrest the defendant at that time, and trial counsel cannot be said to have acted ineffectively in failing to raise a meritless issue.

The record shows that prior to trial, defense counsel moved to sever the charge of felon in possession of a firearm because the charge reflected the fact that the defendant had a previous felony record. The motion was overruled. At the end of the State's case, the parties stipulated that if the clerk of the Douglas County District Court were called, he would testify as to the authenticity of a certified copy of judgment and sentence regarding a felony burglary conviction of the defendant. The copy was then admitted as an exhibit. After the State rested, the defendant moved for a mistrial for the reason that the motion to sever should have been granted before the jury was informed of the prior conviction because it "comment[ed] on the Defendant's credibility without him ever having taken the stand . . . ." After the motion for mistrial was overruled, the defendant chose to testify and admitted on cross-examination that he had been twice convicted of a felony and that he had a loaded weapon in his possession on the date of the robberies.

Neb. Rev. Stat. § 29-2002(1) (Reissue 1989) provides that two or more offenses may be charged in the same information if the offenses charged are of the same or similar character or are based on the same act or transaction. Section 29-2002(4) provides that if it appears a defendant would be prejudiced by a joinder of offenses, the trial court may order an election for separate trials of counts in the information.

This court has held that severance is not a matter of right,

and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Similarly, in *State v. Andersen*, 232 Neb. 187, 201, 440 N.W.2d 203, 214 (1989), we said:

> A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial. Neb. Rev. Stat. § 29-2002 (Reissue 1985). The right to separate trials is statutory and depends upon a showing that prejudice will result from a joint trial. The defendant bears the burden of proving that prejudice will result from a joint trial.

In overruling the defendant's motion to sever, the district court properly noted that the charge of felon in possession of a firearm was based on the same act or transaction resulting in the other counts in the information, which consisted of the two armed robbery counts and the two use of a firearm counts from the Jack and Mary's Restaurant robberies on April 27, 1980. The defendant contends, however, that it was "inherently prejudicial to be defending himself on two counts of robbery and at the same time allowing evidence of previous felony convictions before the jury." Brief for appellant in case No. 43863 at 18.

A similar question was considered in *State v. Fournier*, 554 A.2d 1184 (Me. 1989), where the defendant was convicted by a jury of murder and possession of a firearm by a felon. Fournier claimed on appeal that the trial court abused its discretion in refusing to sever the possession of a firearm by a felon count from the murder count. In affirming Fournier's convictions, the Supreme Judicial Court of Maine stated:

> Two or more offenses may be framed in one indictment if the offenses charged "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions which are connected or which constitute parts of a common scheme or plan." M.R.Crim.P. 8(a). Here the murder charged in Count I

> was committed with the firearm that is the subject of Count III. The two charges thus meet the "connected in any reasonable manner" standard necessary to satisfy the joinder requirements of M.R.Crim.P. 8(a). . . .
>
> Even though the charges may be sufficiently connected to allow joinder in one indictment under M.R.Crim.P. 8(a), the court has discretion to order a severance of charges "[i]f it appears that a defendant ... is prejudiced by a joinder of offenses in an indictment or information...." M.R.Crim.P. 14. In making a Rule 14 determination, the court should balance the policy favoring trials of more than one offense against the potential prejudice to the defendant that may result. . . .
>
> . . . In this case, where both charges arose out of the same transaction, the killing of David Mooers with a firearm, severance of the charges would require, in part at least, duplication of evidence at both trials. . . . The record on appeal does not demonstrate any prejudice other than a claimed general prejudice. Although the charge of possession of a firearm by a felon has the potential for great prejudice to a defendant who is also accused of murder with a firearm, we cannot say as a matter of law, on the basis of the record presented to us, that the court abused its discretion in denying Fournier's motions to sever.

State v. Fournier, supra at 1186-87.

In *State v. Thompson*, 55 Wash. App. 888, 781 P.2d 501 (1989), the defendant was charged with two counts of assault in the second degree and one count of unlawful possession of a firearm by a felon. Before trial, Thompson moved to sever the assault counts from the felon in possession charge, claiming that the admission of a prior felony conviction, necessary to prove the felon in possession count, violated his right to remain silent in the assault counts. On appeal, Thompson argued that the State should only be able to introduce his prior conviction if he decided to testify and that by trying the three counts together, he no longer had a meaningful opportunity to remain silent and keep his prior conviction from the jury.

In concluding that the trial court did not abuse its discretion

in denying Thompson's motion to sever, the court said:

> In *State v. Tully*, 198 Wash. 605, 608, 89 P.2d 517 (1939), our Supreme Court held that a felon in possession count could be joined in the same information with other counts and that the prior conviction necessary to prove the felon in possession count was properly before the jury at the trial on the joined counts. In a later case, *Pettus v. Cranor*, 41 Wash.2d at 568, 250 P.2d 542, the court rejected the argument that admitting evidence of the prior conviction necessary to prove a felon in possession count compelled a defendant to give evidence against himself. The court reasoned that the argument was foreclosed by *State v. Tully*, 198 Wash. at 608, 89 P.2d 517, 41 Wash.2d at 568, 250 P.2d 542.
>
> We are bound by the holding of the court in *Pettus v. Cranor*, which is directly on point, and must thus reject Thompson's constitutional claim. *Accord State v. Conley*, 3 Wash.App. 579, 581, 476 P.2d 544 (1970); *see also U.S. v. Daniels*, 770 F.2d 1111 (D.C.Cir.1985); *United States v. Silva*, 745 F.2d 840, 843 (4th Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1404, 84 L.Ed.2d 791 (1985); *United States v. Valentine*, 706 F.2d 282, 290 (10th Cir.1983); *United States v. Aleman*, 609 F.2d 298 (7th Cir.1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); *United States v. Roe*, 495 F.2d 600 (10th Cir.), *cert. denied*, 419 U.S. 858, 95 S.Ct. 107, 42 L.Ed.2d 92 (1974).
>
> Our holding does not establish a rule that severance of a felon in possession count is never required. We simply reaffirm the rule that failure to do so in such cases is not a per se constitutional violation. As in all severance cases, the essential issue remains whether the joinder of counts unduly embarrasses or prejudices the defendant. [Citations omitted.] Thus, where a defendant shows that undue prejudice would result from trying the counts together, the trial court will grant a properly made motion to sever.

State v. Thompson, supra at 892-93, 781 P.2d at 504.

In the present case, the jury was separately instructed on the elements of each count. With respect to the defendant's prior

felony convictions, the jury was instructed that such evidence could be considered only in assessing the credibility of the defendant's testimony, and not as establishing the truth or falsity of the charges against him, except that the evidence of prior felonies could be considered as establishing an element of the separate charge of felon in possession of a firearm.

The defendant has made no showing of actual prejudice, and the joinder of the felon in possession count with the other counts was not "inherently prejudicial." His assignment of error is without merit.

With respect to the defendant's contention that trial counsel was ineffective in failing to dispute the factual allegations contained in the presentence report, in view of the defendant's failure to establish error in regard to alleged inaccuracies in the presentence report, trial counsel cannot be said to have acted ineffectively or to have prejudiced the defendant's case by failing to raise issues related to the presentence report.

In cases Nos. 43868 and 43870, the cases involving the robberies at Gorat's Steak House and the Village Inn Pancake House, the defendant contends (1) the trial court erred in consolidating the cases for trial; (2) the trial court erred in denying his motion for a mistrial after the note used in the robberies at Jack and Mary's Restaurant had been shown to a witness; (3) trial counsel was ineffective in failing to object to the offer of the note and its reception in evidence; and (4) his rights under U.S. Const. amend. V were violated when the prosecutor allegedly commented on the defendant's failure to testify.

The defendant first challenges the consolidation of these cases for trial pursuant to § 29-2002. Section 29-2002(3) allows consolidation of two or more informations if the offenses involved could have been joined in a single information. Two or more offenses may be joined in a single information pursuant to § 29-2002(1) if they are of the same or similar in character. See, also, *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). In this case, although the offenses were not joined in one information, the State made a proper motion to consolidate prior to trial.

There is no question but that the Gorat's and Village Inn robberies were of "the same or similar character." The two robberies occurred within a period of 8 days. In both instances, the descriptions of the robber were similar and the robber utilized written notes containing virtually identical statements, such as "I have a gun," "don't do anything stupid," or "don't be stupid." The handwriting on the notes was similar. In both cases, the robber had the victims place the money in a paper bag and fled on foot. The informations were properly consolidated for trial pursuant to § 29-2002(3).

The defendant claims he was unfairly prejudiced by the consolidation of the informations in contravention of § 29-2002(4), in that "[t]he only result of ordering the robberies joined in this case was to allow the jury to hear separate accusations of robbery toward the Defendant, thus inferring that the Defendant must have committed the crimes charges [sic] because the State surely couldn't be wrong twice." Brief for appellant in cases Nos. 43868 and 43870 at 21.

Joinder or consolidation is not prejudicial error where evidence relating to both offenses would have been admissible in a trial of either offense separately. *State v. Porter, ante* p. 476, 455 N.W.2d 787 (1990); *State v. Thompson, supra*; *State v. McGuire, supra*; *State v. Walker,* 200 Neb. 273, 263 N.W.2d 454 (1978).

Based on the reasoning of *Porter*, *Thompson*, *McGuire*, and *Walker*, evidence of either robbery in this instance would have been admissible at a separate trial of the other robbery to establish the defendant's identity and method of operation. Therefore, the defendant was not prejudiced by the consolidation, and the district court did not abuse its discretion in granting the State's motion to consolidate the charges for trial.

The defendant next claims that the district court erred in denying his motion for mistrial because in the trial of the Village Inn robbery, the prosecutor showed a witness a note purportedly written by the defendant and admitted in evidence in the Jack and Mary's trial. This note, which was written on a small piece of white paper, was admitted in evidence in the consolidated trial as exhibit 2 and states: "This Is a Robbery I

Have a Gun Don't Get stupid."

The record shows that the victim of the Village Inn robbery testified that the robber approached him and gave him a note written on a piece of brown paper which said, "I have a gun, don't do anything stupid." Over a foundational objection, this witness was allowed to testify that the penmanship of the note marked as exhibit 2 was exactly the same as in the note used in the Village Inn robbery. Exhibit 2 was subsequently identified by the Gorat's cashier as the note the defendant "slid across to me" when he robbed the restaurant. The note was then received in evidence without objection.

The defendant appears to contend that evidence of the note was irrelevant to the Village Inn and Gorat's robberies for the reason that it was admitted in evidence in the prior Jack and Mary's trial, and claims that trial counsel was ineffective in failing to object to the admission of the note in evidence.

It is not clear from the record that exhibit 2 was the same note that was admitted as exhibit 1 in the Jack and Mary's trial. Assuming, arguendo, that the exhibit was the same note, the defendant's assignment is still without merit. The Gorat's robbery occurred 2 days before the robberies at Jack and Mary's, and the cashier from Gorat's identified exhibit 2 as the note the defendant gave her. There is nothing in the record to preclude the conclusion that the same note was used in both crimes.

Furthermore, Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1979), allows the admission of evidence of other crimes, wrongs, or acts for the purpose of establishing identity or a particular method of operation. Even if the note received as exhibit 2 in this trial was the same as that received as exhibit 1 in case No. 43863, the note would have been admissible on this basis alone, in view of the identity of circumstances present in each of these cases.

The district court did not err in failing to grant the defendant's motion for mistrial, and the defendant has shown no prejudice arising from trial counsel's failure to object to the admission of the note in evidence.

In *Evans II*, the defendant claimed, as he does in this appeal, that the prosecutor committed misconduct of constitutional

proportions by purportedly commenting on the defendant's failure to testify. In *Evans II*, we concluded that "[t]here is nothing in the record to support the defendant's claim that the prosecutor commented on the defendant's right to remain silent," 218 Neb. at 852, 359 N.W.2d at 793, and noted that the assignment of error was not discussed in the defendant's first postconviction brief.

The assignment is discussed in the defendant's current brief. The only citation to the record made by the defendant to support his assertion of prosecutorial misconduct concerns testimony in which the prosecutor, during cross-examination of a victim of the Gorat's robbery, objected to defense counsel's request to have the defendant stand next to the witness to enable her to make certain physical observations as to the defendant's teeth. The objection was overruled, and the defendant was allowed to display his physical features to the witness and the jury. We again determine that the record does not support the defendant's claim that the prosecutor commented on his right to remain silent.

In case No. 43869, the defendant pled guilty to one count of robbery and one count of use of a firearm in the commission of a felony in the robbery of the Ozko Drug store in Omaha, Nebraska, on April 16, 1980. The factual basis for the pleas was that the defendant entered the store at 4 or 5 p.m. on April 16. Using a loaded .22-caliber handgun, the defendant forced an employee to place approximately $100 in a paper sack. The defendant showed the employee a note telling her it was a robbery and to put the money in the sack. He fled the scene on foot.

In exchange for the defendant's pleas of guilty, 10 additional felony charges against the defendant were dismissed. The defendant's assignments of error in this case relate only to errors allegedly committed during sentencing.

The only error assigned in this case which has not been discussed is the contention that the sentences imposed were excessive. The same assignment was made in all of the other cases.

In case No. 43863, involving the robberies at Jack and Mary's Restaurant, the defendant was sentenced to

imprisonment as follows: count I (robbery)—10 to 15 years; count II (use of firearm)—5 to 10 years, to be served consecutive to the sentence in count I; count III (robbery)—10 to 15 years, to be served concurrently with the sentence in count I; count IV (use of firearm)—5 to 10 years, to be served consecutive to the sentence in count III, but concurrently with the sentence in count II; and count V (felon in possession)—5 years, to be served concurrently with the sentence in count IV.

In case No. 43868, the Village Inn robbery, the defendant was sentenced to imprisonment as follows: count I (robbery)—5 to 10 years, to be served consecutive to any sentences imposed in case No. 43863; and count II (use of firearm)—5 to 10 years, to be served consecutive to the sentence imposed in count I.

In case No. 43870, the Gorat's robbery, the defendant was sentenced to a term of 5 to 10 years' imprisonment, to be served consecutive to all sentences previously imposed.

In case No. 43869, the robbery of the Ozko Drug store, to which the defendant pled guilty, the defendant was sentenced to imprisonment as follows: count I (robbery)—10 to 15 years, to be served consecutive to all sentences previously imposed; and count II (use of firearm)—5 to 10 years, to be served consecutive to the sentence imposed in count I.

Robbery is a Class II felony, punishable by a term of 1 to 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-105 (Reissue 1985) and 28-324 (Reissue 1989). Using a firearm to commit a felony is a Class III felony, punishable by a term of 1 to 20 years' imprisonment, a $25,000 fine, or both. See § 28-105 and Neb. Rev. Stat. § 28-1205 (Reissue 1989). Possession of a firearm by a felon is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. See § 28-105 and Neb. Rev. Stat. § 28-1206 (Reissue 1989).

All the sentences imposed are within the statutory limits. This court has repeatedly held that a sentence imposed within the limits prescribed by statute will not be disturbed on appeal absent an abuse of discretion. *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990).

Although the defendant claims otherwise, the sentences imposed can in no way be characterized as an abuse of

discretion. As to the charges for use of a firearm in the commission of a felony, § 28-1205(3) requires that the sentences imposed be served consecutively to the primary charges. The robberies for which the defendant was convicted involved the use of a loaded firearm and threats made upon the victims. The fact that none of the victims were injured or killed is merely fortuitous. The defendant was convicted of multiple armed robberies, and as a result of a plea bargain, 10 other felony charges against the defendant were dismissed. The defendant's prior criminal record included two felony convictions. Under the circumstances, it cannot be said that the sentences imposed were excessive.

The judgment of the U.S. district court, dated May 9, 1989, directed that the following claims be briefed by counsel appointed for the defendant:

> e. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment were violated when the trial court admitted the in-court and out-of-court identifications of the petitioner by the various witnesses, given the impermissibly and unnecessarily suggestive pretrial identification procedures.
>
> f. Petitioner's trial counsel rendered constitutionally ineffective assistance of counsel, in violation of the Sixth Amendment, in failing to raise a proper due process challenge to the identification testimony elicited at the trials.
>
> g. Petitioner's rights under the Fifth Amendment were violated when, during the trial of the Gorat's Steak House robbery, the prosecutor committed misconduct of constitutional proportions by purportedly commenting on a failure to testify on the part of the petitioner.

In the opinion in *Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989), these claims were not designated as claims which this court must consider in deciding the reinstated appeals because they had been considered in *Evans II*, and only g., which has been discussed, was assigned as error in any of the defendant's briefs. However, in compliance with the judgment of the U.S. district court, we have again considered claims e. and f. as set out above and find that they are without merit for the reasons

stated in *Evans II*.

The judgments of the district court are again affirmed.

AFFIRMED.

CENTRAL STATES HEALTH & LIFE COMPANY OF OMAHA, APPELLEE, V. MIRACLE HILLS LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT.

456 N.W.2d 474

Filed June 15, 1990. No. 88-458.

1. **Appeal and Error.** In an action at law, where a jury has been waived and evidence is in conflict, the Supreme Court, in reviewing the judgment, will presume that controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong; it is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence.
2. _____. On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
3. **Contracts.** As a general rule, a contract for an illegal purpose is void and unenforceable.
4. **Leases.** Ordinarily, if premises are leased for a purpose prohibited by law, the lease is void and unenforceable by either party thereto against the other.
5. **Leases: Zoning.** When a lease restricts the use of the premises to a single purpose, a prohibition in the zoning regulations against such use terminates the lease and generally relieves the parties of all obligations thereunder.
6. **Contracts.** When the parties are asserting rights founded upon an illegal and void contract, the court leaves the parties to such a situation just where they placed themselves and as the court found them.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed in part, and in part reversed and dismissed.

James F. Fenlon, of Harris, Feldman Law Offices, for appellant.

Gregory J. Benak, of Hotz, Kizer & Wintz, P.C., for appellee.

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

HASTINGS, C.J.

This action involves a lease agreement which was rendered nonperformable because of a then-existing zoning regulation prohibition. Central States Health & Life Company of Omaha (Central States), the lessee, filed an action against Miracle Hills Limited Partnership (Miracle Hills), the lessor, to recover prepaid rent and a security deposit and seeking reimbursement for utilities expenses and money spent to improve the leased premises for their intended use. Miracle Hills counterclaimed for the money it had expended in preparing the property for the tenancy of Central States and for the rent which Miracle Hills lost as a result of Central States' failure to perform under the lease. Miracle Hills appeals the judgment of the district court awarding Central States the amount of $8,348.19 and dismissing Miracle Hills' counterclaim.

On September 9, 1985, Miracle Hills and Central States entered into a written lease agreement for four bays in the Miracle Hills shopping center in Omaha for a term of 3 years. Paragraph 3 of the lease agreement provided that Central States would use the premises for "printing and storage of related items and no other purpose." The same paragraph provided that Central States "shall not use the premises nor permit them to be used for any unlawful business or purpose whatsoever." Paragraph 12 of the lease provided:

> Lessee shall keep the premises and operate his business therein in a manner which shall be in compliance with all applicable laws, ordinances, rules and regulations of the city, county, state and federal government and any department thereof, will not permit the premises to be used for any unlawful purpose, and will protect the Lessor and save Lessor and the premises harmless from any and all fines and penalties that may result from or be due to any infractions of or non-compliance with such laws, ordinances, rules and regulations.

As provided by the lease, each party made and paid for certain improvements and modifications to the premises.

Before Central States moved in, the parties learned in December 1985 that the city of Omaha would not grant Central States a certificate of occupancy because the premises were zoned first commercial (C-1) and the use intended by Central States was not allowed in a C-1 zone.

The intended use of the premises communicated by Central States to Miracle Hills was for a printshop and storage. The lease which the parties executed provided at paragraph 3: "USE: The Lessee shall use and occupy the premises for printing and storage of related items and no other purpose. The Lessee shall not use the premises nor permit them to be used for any unlawful business or purpose whatsoever."

After execution of the lease agreement, each party spent certain sums of money adapting the premises to the use for which Central States intended to use the premises. The parties stipulated that Central States spent $5,629 for improvements to the premises, $2,383.33 for prepaid rent and a security deposit, and $335.86 for utilities. Miracle Hills spent $18,569.23 for improvements to the premises.

Central States was never able to move into the premises. It received a letter dated December 6, 1985, from the city of Omaha's planning department, stating that the "property is zoned First Commercial which does not allow a print shop or storage use unless approved by the Zoning Board of Appeals." Miracle Hills filed an application with the zoning board of appeals requesting a variance to permit Central States' intended use of the premises. At a hearing held on December 19, 1985, which was attended by representatives of both Central States and Miracle Hills, the request for a variance was denied. That decision was not appealed to the district court by either party.

On January 22, 1986, Central States wrote a letter to Miracle Hills attempting to rescind the lease from its inception. Central States requested $8,068.88 as a refund for expenses incurred, including rent, security deposit, improvements, and utilities. On April 3, 1986, Miracle Hills responded, demanding full performance by Central States of its obligations under the lease, i.e., payment of $9,100 for improvements made by Miracle Hills and $5,729.15 for rent due from December 1985 through April 1986. A replacement tenant entered the premises

in April 1986.

Central States filed suit against Miracle Hills on November 13, 1986, alleging that Miracle Hills represented that the premises were fit for Central States' intended use and that Miracle Hills knew or should have known of the C-1 zoning that would prohibit Central States from making use of the premises. Central States prayed for damages of $8,348.19, covering the prepaid security deposit and rent, utilities expenses, and improvements.

In its answer, Miracle Hills alleged that it made no representations to Central States and that under the provisions of the lease agreement, Central States assumed the obligation of determining that the business it wished to conduct on the premises was lawful and permitted by the ordinances of the city of Omaha. Miracle Hills counterclaimed for $16,224.98 in rent and $9,100 for reimbursement for certain improvements to the premises.

Although the pleadings do not specifically so allege, it is apparent that the parties tried this case on the theory of rescission and restitution. The trial court determined that the landlord (Miracle Hills) was in a better position to determine at the outset whether a contemplated use is violative of zoning regulations. Accordingly, following a waiver of a jury, trial was held and the court entered a judgment in favor of Central States in the amount of $8,348.19 and dismissed Miracle Hills' counterclaim.

On appeal, Miracle Hills assigns as error (1) the entry of judgment in favor of Central States, (2) the dismissal of the counterclaim of Miracle Hills, and (3) the overruling of Miracle Hills' motion for a new trial.

There is little, if any, disagreement on the facts. Central States told Miracle Hills or its representative that it wanted the premises for a printshop and storage. The lease agreement recites that purpose. An agreement was reached as to what improvements each party would make to the premises. Central States did not know of the zoning and the prohibition as to its use of the premises until after the lease was made and it was getting ready to move in. The representative of Miracle Hills testified that prior to the denial of the certificate of occupancy

by the city of Omaha, he did not know that the use intended to be made of the premises by Central States was prohibited under the Omaha city ordinances.

In an action at law, where a jury has been waived and evidence is in conflict, the Supreme Court, in reviewing the judgment, will presume that controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong; it is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence. *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 439 N.W.2d 789 (1989).

On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990).

It is fundamental that a contract for an illegal purpose is void and unenforceable. See, *Homami v. Iranzadi*, 211 Cal. App. 3d 1104, 260 Cal. Rptr. 6 (1989); *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959) (if an act is prohibited by statute, an agreement in violation of the statute is void). It is also fundamental that if premises are leased for a purpose prohibited by law, the lease is void and unenforceable by either party thereto against the other. See, *Naseef v. Cord, Inc.*, 90 N.J. Super. 135, 216 A.2d 413 (1966); *Carhart v. Lapetina*, 137 N.J.L. 531, 61 A.2d 49 (1948); *American Postal Workers v. U. S. Postal Service*, 682 F.2d 1280 (1982); *Young v. Texas Company*, 8 Utah 2d 206, 331 P.2d 1099 (1958); Annot., 37 A.L.R.3d 1018 § 2[a] (1971).

If premises are leased for a particular purpose not permitted because of a zoning restriction, are the premises leased for a purpose prohibited by law, thereby rendering the lease void and unenforceable? Stated another way, the issue of this appeal is whether a lessee is relieved of liability for obligations under the lease when the leased premises cannot be used for the purpose or purposes for which they were leased due to zoning restrictions.

This appears to be a case of first impression in Nebraska. The result reached by other courts which have addressed this issue depended on the rule followed by the particular court.

There seem to be four general rules applicable in situations

such as this. (1) The lease is unenforceable where the contemplated use of the leased premises is prohibited by a zoning regulation. See, *Shontz Co. v. Laffay*, 225 A.D. 263, 232 N.Y.S. 614 (1929) (although occupation was unlawful, lease was not unlawful at inception because of possibility that necessary permit could be obtained, therefore lessee could recover security deposit); *Ober v. Metropolitan Life Insurance Co.*, 157 Misc. 869, 284 N.Y.S. 966 *award denied on reargument* 157 Misc. 872, 284 N.Y.S. 966 (lease void and unenforceable, therefore lessor not entitled to rent and lessee not entitled to use and occupancy). (2) The lease is valid where a serviceable use of the premises remains which is consistent with the limitations of the lease, see *Warshawsky v. American Automotive Prod: Co.*, 12 Ill. App. 2d 178, 138 N.E.2d 816 (1956); the lease is not valid if a serviceable use does not remain, see *30th St. Corp. v. Straub Delivery Co.*, 41 Misc. 2d 948, 246 N.Y.S.2d 455 (1963), *aff'd* 44 Misc. 2d 78, 253 N.Y.S.2d 18 (1964). (3) The lease is not necessarily void and unenforceable where the zoning authorities have the power to grant a variance or the continuance of a conforming use. See *Verschell v Pike*, 85 A.D.2d 690, 445 N.Y.S.2d 489 (1981). However, the lease is void and unenforceable if the party seeking to have the lease declared void and unenforceable because of a zoning restriction has made a diligent effort to obtain a variance which would allow the contemplated use and was unsuccessful. See *Schlesinger v. Levine*, 28 Misc. 2d 654, 212 N.Y.S.2d 904 (1961). (4) The lease is enforceable because the lessee is presumed to have known about the zoning restrictions and in executing the lease assumed the risk that a variance would not be granted. See *Pioneer Trust & Savings Bk. v. Zonta*, 74 Ill. App. 3d 614, 393 N.E.2d 548 (1979).

The rule which we find to be the most practicable and reasonable under these circumstances is a modification of the first rule articulated, i.e., when the lease restricts the use of the premises to a single purpose, a prohibition in the zoning regulations against such use terminates the lease and relieves the parties of all obligations thereunder. See, *Walker v. Southern Trucking Corporation*, 283 Ala. 551, 219 So. 2d 379 (1969); *Hyland v. Parkside Investment Co., Inc.*, 10 N.J. Misc. 1148,

162 A. 521 (1932).

Although the trial court found that the landlord was in a better position to determine whether the contemplated use was violative of the zoning requirements and therefore permitted the recovery of damages by Central States, we do not agree. Both parties had equal access to the zoning regulations of the city of Omaha and could have determined whether they permitted the contemplated use of the premises. Neither party was *excusably* ignorant of the facts affecting the use of the premises and neither party is entitled to restitution. See Restatement (Second) of Contracts § 198 (1981). When the parties are asserting rights founded upon an illegal and void contract, the court leaves the parties to such a situation just where they placed themselves and as the court found them. See, *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956); *Webber v. Spencer*, 148 Neb. 481, 27 N.W.2d 824 (1947).

The judgment of the district court in favor of Central States on its claim for restitution is reversed and dismissed, and the judgment in favor of Central States on the counterclaim of Miracle Hills is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

WHITE, J., concurring.

I agree that sophisticated lessors and lessees may equitably be left in the circumstances that they created. However, I am not prepared to state that given different facts, the harsh rule here applied should uniformly obtain. The holding would best be interpreted to apply to the facts in this case only.

FAHRNBRUCH, J., joins in this concurrence.

BELVA J. MARTIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF WAYNE M. MARTIN, DECEASED, APPELLANT, V. JOSEPH DAVID, APPELLEE.

456 N.W.2d 294

Filed June 15, 1990. No. 88-835.

Appeal from the District Court for Madison County, RICHARD P. GARDEN, Judge, upon the recommendation of the Appellate Division of the District Court, HAMILTON, KNAPP, and QUIST, District Judges. Reversed and remanded for a new trial.

William A. Wieland, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

Thomas J. Shomaker and Craig W. Feil, of Sodoro, Daly & Sodoro, for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we find that the trial court abused its discretion in the admission of opinion testimony, and therefore the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM MICHAEL ZARITZ, ALSO KNOWN AS MICK ZARITZ, APPELLANT.

456 N.W.2d 479

Filed June 15, 1990. No. 89-240.

1. **Convictions: Appeal and Error.** A criminal conviction will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for

mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion.

3. **Trial: Prosecuting Attorneys: Motions for Mistrial.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
4. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
5. **Rules of Evidence: Witnesses: Testimony: Proof.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness.
6. **Trial: Evidence: Presumptions.** In a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant.
7. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
8. **Convictions: Testimony: Proof.** A defendant's conviction of a crime may be based on uncorroborated testimony of an accomplice.
9. **Confessions: Proof: Corroboration.** A confession, standing alone, is insufficient to prove that a crime has been committed.
10. _____: _____: _____. Where the crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confessed responsibility did in fact occur and that some person was criminally culpable. There need be no link, outside the confession, between the injury and the confessor.
11. **Sentences: Appeal and Error.** A sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
12. **Sentences.** It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively.

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

Winfield J. Scott for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

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

FAHRNBRUCH, J.

William M. Zaritz appeals his three bench trial felony convictions and sentences for conspiracy to commit a theft, for theft of a $77,800 truck, and for failing to appear in court for his scheduled trial.

The defendant was sentenced to concurrent 6- to 20-year prison terms on the conspiracy and theft charges and fined $10,000 on each count. For failing to appear at his scheduled trial, Zaritz received a prison term of not less than 20 nor more than 60 months, that sentence to run consecutively to the other sentences. We affirm the judgment of the district court for York County.

Zaritz sets forth several assignments of error, which may be consolidated to allege that the trial court erred in (1) failing to grant a mistrial for prosecutorial misconduct, (2) allowing the prosecutor to ask the alibi witness during cross-examination if he had ever hauled drugs for the defendant, (3) finding that the evidence was sufficient to prove Zaritz guilty beyond a reasonable doubt, (4) convicting the defendant solely upon his own admissions without corroborating independent evidence, and (5) imposing excessive sentences.

A criminal conviction will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Badami, ante* p. 118, 453 N.W.2d 746 (1990). Taking the view most favorable to the State, the evidence shows the following.

From September 1984 through July 1986, the Federal Bureau of Investigation (FBI) conducted an undercover investigation which targeted dealers and purchasers of stolen heavy equipment. A confidential informant was employed by the FBI to introduce an undercover FBI agent to individuals who stole trucks, cars, and construction equipment. After the undercover agent was introduced to dealers of stolen property, the agent and the informant were to purchase the property and to obtain introductions to other sellers of stolen merchandise. Agent Dennis Mattes was the assigned undercover agent.

During the investigation, the informant came in contact with Noel Gene Amerman. Amerman acted as a broker arranging meetings between sellers and buyers of stolen property.

Amerman apprised the informant that Roger Southard was the leader of a group of truck thieves operating around Saint James, Missouri.

On August 28, 1985, Amerman introduced Mattes to Southard in Saint James as an individual who was looking for and willing to pay money for stolen equipment and trucks. Southard informed Mattes that he had some of the best thieves in the business working for him and that they would go into a dealership carrying their own fuel, start a truck, and drive it away. At the conclusion of this meeting, Mattes told Southard that he wanted either a new or low-mileage Kenworth or Peterbilt truck and that he was willing to pay $10,000. In conversations after the initial meeting, Southard, Mattes, and the informant discussed the theft of trucks and construction equipment and the price to be paid for the stolen property. On October 22, 1985, Southard and Mattes agreed that if Southard could provide a new Peterbilt or Kenworth truck, Mattes would buy it.

At approximately 9 p.m. on October 23, Southard called Mattes and told him that he had found a Kenworth truck. The parties agreed on a price of $12,000 for the truck and to meet at a truckstop in either Sioux City or Council Bluffs.

It is uncontradicted that sometime after 5:30 p.m. on October 23, 1985, a new Kenworth truck with a retail value of $77,800 was taken from a truck dealership lot near York. At about 3 a.m. on October 24, Southard called Mattes from a rest stop and informed him that he had a new truck and was 70 miles from a truckstop in Council Bluffs where the parties were to meet between 5 and 5:30 a.m.

During the early morning hours of October 24, a scale officer for the Nebraska State Patrol on duty near Wahoo, Nebraska, pursued a truck which did not stop at the scales. The officer observed a maroon and white vehicle following the truck just before it arrived at the scales. It was later determined that the maroon and white car belonged to Southard's mother and was driven by Southard. When the officer reached the truck, it was parked by the side of the highway. The truck's engine was running, and no one was found in the vicinity. It was later determined that the truck was the Kenworth taken from the

dealership near York. While the officer was parked, Southard, who had been following the officer, drove past him.

A dent puller, which Southard testified is a device that can be used to remove a lock from a door of a truck, and a "line sheet," which described the truck and identified the customer as "Sahling KW-Kearney," were recovered from the truck. Sahling was a truck dealership with offices in Kearney and York. Two sets of footprints in mud, one made by cowboy boots and the other by tennis shoes, led from the passenger side of the truck into a nearby field. With the aid of police dogs, the footprints were followed, but no suspects were located. No identifiable fingerprints could be found anywhere on the truck. A Wahoo police officer observed Southard's automobile parked in the parking lot of a convenience store in Wahoo at about 4:55 on the morning of October 24. The officer testified that the sole occupant of the vehicle appeared to be asleep. Shortly after 6 a.m., an officer with the Saunders County sheriff's office saw Southard's car parked near a phone booth in Mead. Southard was alone in the car and informed the officer that he was in the area looking at some tractor-trailers.

Mattes, along with the confidential informant, arrived at the truckstop in Council Bluffs between 5:30 and 6 a.m. At 8:05 a.m., an FBI agent conducting surveillance at the truckstop observed Southard's vehicle pull into a parking space next to Mattes' car. The agent watched Southard and the defendant exit the car and enter the restaurant together.

Mattes and the informant met with Southard and Zaritz in the truckstop's restaurant. Zaritz was dressed in damp cowboy boots. The legs of his grass-stained bib overalls were wet from the hems upward for about 1 foot. The defendant explained that his pants were wet because he had run through a cornfield. Southard identified Zaritz as his driver. When Southard reached the booth, he stated, "We lost the truck." Southard told Mattes that he had dropped two drivers off at a dealership, where they stole a truck; that the truck then was driven on Highway 92 toward Omaha; and that when the truck passed a weigh scale, it was pursued by the officer. Southard said he was following the truck in his mother's car. He passed the truck and the officer. Southard said that the drivers escaped into a

cornfield, that he parked his car in a small town and was sleeping when he was awakened and questioned by a local police officer, that he eventually picked up Zaritz when he came out of a cornfield, and that the other driver remained in the cornfield. Southard said he and Zaritz then drove to the prearranged meeting in Council Bluffs. Zaritz also conversed with Mattes and the informant, and his version of the events matched that of Southard.

When Southard assured Mattes and the informant that another truck would be stolen, Zaritz commented that no one could do it as well as he could. Zaritz made a call from the telephone located at the booth to determine if the other driver had been located. After the defendant ended his phone conversation, he and Southard discussed how to find the other driver. The defendant also assured Mattes that if the other driver was captured, he would not implicate Mattes. When the meeting was concluded, Zaritz and Southard left the parking lot in the vehicle driven by Southard.

Upon arriving at the dealership's office near York on the morning of October 24, the general manager discovered that one of the dealer's trucks was missing and that a chain used to lock the fence gate had been cut. No one had been authorized to remove the truck from the premises during the time in question. A truck with the same serial number as the missing truck was returned from Wahoo to the York dealership on approximately October 28. The ignition lock cylinder and left door lock had been pulled, and a vent window was broken.

On March 28, 1988, the defendant was charged with theft by unlawful taking, over $1,000, and, on May 9, 1988, with conspiracy to commit theft by unlawful taking, over $1,000. Zaritz appeared for his arraignments on April 5 and June 21, 1988. The two charges, contained in separate informations, were consolidated for trial. The trial for the two consolidated charges was scheduled for August 29. The defendant was released on bond pending trial.

Zaritz' attorney received notice that Zaritz' trial for the theft and conspiracy charges would begin on August 29, 1988. It is uncontradicted that on at least two occasions, Zaritz was made aware of his trial date by his attorney. Early in the morning of

August 29, Zaritz' wife informed his attorney by phone that she had suffered an insect bite and would not be able to accompany the defendant to his trial. Zaritz' attorney advised her that it was necessary for her husband to attend the trial. On that same morning, the defendant's wife also called the clerk of the court and informed her that she could not make it to the trial. The clerk advised her that her husband's presence was required. The defendant's wife testified that she and her husband were aware of the trial date.

The defendant failed to appear on August 29. No additional continuance was requested by the defendant. A bench warrant was issued by the trial court on September 7, 1988. The defendant was additionally charged with felony failure to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1989). Zaritz waived his right to a jury trial. After a bench trial which began December 14, 1988, Zaritz was found guilty on all three counts with which he was charged.

Section 29-908 provides in pertinent part, "Whoever is charged with a felony and is released from custody under bail . . . and willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter, shall be guilty of a Class IV felony . . . ." Zaritz raises no assignment of error regarding his conviction on the failure to appear count. The uncontradicted evidence demonstrates that Zaritz was released from custody under bail, that he was aware of his trial date and that his presence at trial was required, that he was not excused from attending the trial, and that he failed to appear.

ALLEGED PROSECUTORIAL MISCONDUCT

Upon defense counsel's motion to sequester the witnesses, the trial court ordered that all witnesses remain outside the courtroom until called. After the first witness completed his testimony, the trial court indicated that witnesses were not to discuss their testimony after they finished testifying. Sam Settles, the defendant's alibi witness, stayed outside the courtroom before testifying. An FBI agent, pursuant to the prosecuting attorney's request, asked Settles for his name, other identifying information, and his date of birth. The information

was entered into a computer to determine if Settles had a criminal record. Settles did not have a record in Nebraska, and the FBI computer did not disclose any criminal history. Alleging that the prosecutor's conduct was inappropriate, Zaritz moved for a mistrial. The trial court overruled the motion, which ruling the defendant assigns as error.

The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985).

The FBI agent's acts in no way violated the sequestration order. Assuming for purposes of argument that the prosecuting attorney's conduct was improper and that the sequestration order was violated, Zaritz was not harmed by this conduct. No adverse information regarding Settles or the defendant was obtained or used at trial due to the FBI agent's actions. Clearly, no substantial miscarriage of justice has been shown as a result of the alleged prosecutorial misconduct. Because the trial court did not abuse its discretion in refusing to grant a mistrial, this assignment of error is without merit.

IMPROPER CROSS-EXAMINATION

During cross-examination, the prosecuting attorney asked Settles if he had ever hauled drugs from California to Missouri for the defendant. After defense counsel's objection was overruled, Settles denied ever transporting drugs for Zaritz. The defendant alleges that it was error for the district court to allow the State to question Settles regarding the transportation of drugs for the defendant.

The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Hankins, supra*. In relevant part, Neb. Rev. Stat. § 27-608 (Reissue 1989) provides:

> (2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . .

> may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness....

In *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976), the defendant and William Jungwirth conspired to make it appear that a service station which the defendant managed had been robbed. Jungwirth testified for the State after he pleaded guilty to a charge of grand larceny. On cross-examination of Jungwirth, the defendant's counsel asked him if he had ever beaten his niece. The State's objection was sustained, and on appeal, the defendant argued that the evidence was admissible to show Jungwirth's credibility. Relying on § 27-608, this court upheld the trial court, reasoning that whether Jungwirth had beaten his niece was not probative of his untruthfulness.

State v. Bittner, 188 Neb. 298, 196 N.W.2d 186 (1972), *cert. denied* 409 U.S. 875, 93 S. Ct. 123, 34 L. Ed. 2d 127, involved a prosecution for possession of a forged instrument. The State's principal witness was asked on cross-examination if she was a prostitute. This court indicated that, ordinarily, a prostitution offense does not substantially impugn credibility, since such conduct does not necessarily entail dishonesty or false statement and, therefore, is not probative of untruthfulness.

Applying the foregoing to this case, it is concluded that the question at issue was improper because transportation of drugs is not an offense entailing dishonesty or false statement and, therefore, is not probative of Settles' untruthfulness. See *State v. Williams*, 219 Neb. 587, 365 N.W.2d 414 (1985) (reciting that an offense which does not substantially impugn credibility may not be used for impeachment purposes under § 27-608). The prosecutor's question alleging unsubstantiated misconduct was an attempt to smear the witness by innuendo. However, in this bench trial case, any error in posing the question was harmless error beyond a reasonable doubt. See *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990). In a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. *State v. Methe*, 228 Neb. 468, 422

N.W.2d 803 (1988). This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

Although the defendant did not testify, he presented an alibi defense through the testimony of Settles. Settles testified that Zaritz helped drive his truck from Missouri to Toronto. Though Settles could not recall the date involved, he implied that Zaritz was with him when the truck at issue was stolen. Settles further testified that when he and the defendant arrived at the truckstop in Council Bluffs en route from Toronto to California, Zaritz informed him that he had met a friend of his that had some kind of situation at a weigh scale and that he would be going home with him.

The following reflects Southard's testimony regarding the events in question. Sometime after Mattes and Southard met, Zaritz and Southard agreed that Southard would drive a car and two other persons would steal a truck and drive it. After Zaritz and another proposed accomplice had a disagreement, Southard and Zaritz discussed who would go in that person's place. Zaritz later informed Southard that his friend Skip would be accompanying them. At Zaritz' home, a dent puller and tools for the theft were obtained. On October 23, Southard, Zaritz, and Skip arrived in York and decided that it would be easy to steal a Kenworth truck from there. A plan was devised for stealing the truck. According to the plan, Zaritz and Skip were to clip the chain used to lock the fence gate with boltcutters, yank the locks out of the truck's door, and steal the truck. The trio further agreed that Skip would receive $2,000 and Zaritz and Southard would split the remainder.

Southard dropped Zaritz and Skip off near a Kenworth truck dealership near York on the evening of October 23. The defendant and Skip took the dent puller, boltcutters, and screwdriver with them. Southard parked across the highway from the truck dealership, acting as a lookout. Southard observed Zaritz and Skip enter a truck and back the truck out of the dealer's premises. Southard followed the truck eastward toward the Omaha-Council Bluffs area.

The defendant argues that in view of Settles' alibi testimony, Southard's testimony was insufficient to prove Zaritz' guilt

beyond a reasonable doubt. Zaritz contends that Southard's testimony should be disbelieved because he is a convicted felon and his testimony at trial conflicted with that given at the preliminary hearing.

> "In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Johns, 233 Neb. 477, 478, 445 N.W.2d 914, 916 (1989). As this court stated in *Johns, supra* at 480, 445 N.W.2d at 917, "The defendant is essentially asking this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, and weigh the evidence. Such is not the province of the Supreme Court but, rather, the province of the fact finder . . . ." Zaritz is asking us to do the same. It is obvious from the verdict that the trial court did not find Settles' testimony credible in light of the entire record. Though a defendant's conviction of a crime may be based on uncorroborated testimony of an accomplice, see *State v. Loveless,* 234 Neb. 463, 451 N.W.2d 692 (1990), Southard's testimony was corroborated in this case by circumstantial evidence and by the admissions of Zaritz to an FBI agent and the confidential informant.

It is undisputed that the truck was stolen and that it was recovered by the weigh scale officer near Wahoo. The scale officer observed a car matching the car driven by Southard following the truck. Two other law enforcement officers also saw a maroon and white vehicle in the vicinity where the truck was recovered. Zaritz arrived at the prearranged meeting place with Southard dressed in damp cowboy boots and wet, grass-stained overalls, corroborating Southard's account of this accomplice's flight through a cornfield. From the evidence before it, a court could find beyond a reasonable doubt that Zaritz "[took], or exercise[d] control over, movable property of another with the intent to deprive him or her thereof." See Neb. Rev. Stat. § 28-511 (Reissue 1985). Neb. Rev. Stat. § 28-202

(Reissue 1989) provides:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them . . . shall cause . . . the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy . . . .

Southard's testimony, together with the circumstantial evidence and Zaritz' admissions, provides a sufficient basis for a court to find beyond a reasonable doubt that Zaritz, with the intent to promote the commission of a felony, agreed with at least Southard to steal a truck and did so. This assignment of error is meritless.

CORROBORATION OF ADMISSION

Relying on the proposition that a confession, standing alone, is insufficient to prove that a crime has been committed, see *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982), Zaritz next alleges that the court erred in finding that Zaritz' admissions at the truckstop were corroborated by independent evidence. Where the crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confessed responsibility did in fact occur and that some person was criminally culpable. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989) (murder); *True, supra* (aiding and abetting a burglary); *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978) (murder in the perpetration of, or attempt to perpetrate, a robbery and shooting with intent to kill, wound, or maim). There need be no link, outside the confession, between the injury and the confessor. *Hankins, supra*.

Even assuming arguendo that Zaritz' admissions at the truckstop constituted a confession, this assignment of error is meritless. The record indisputably reflects that a truck was stolen from a dealership near York and that some person was criminally culpable. Zaritz' admissions at the truckstop linked him to the crimes. As the preceding discussion demonstrates,

even without the defendant's admissions, there was more than adequate extrinsic evidence from which a trial court could find the defendant guilty beyond a reasonable doubt of theft and conspiracy. This assignment of error is without merit.

EXCESSIVE SENTENCE

Zaritz lastly contends that a term of imprisonment of 6 to 20 years on each of the counts of theft and conspiracy, plus a fine of $10,000 on each of those counts, and a term of imprisonment of 20 to 60 months on the failure to appear charge are excessive. It is well established that a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Nelson, ante* p. 15, 453 N.W.2d 454 (1990).

Both conspiracy to commit the theft of property having a value of more than $1,000 and theft of property having a value of more than $1,000 are Class III felonies. See § 28-202, § 28-511, and Neb. Rev. Stat. § 28-518 (Reissue 1989). A Class III felony carries a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Reissue 1985). Failing to appear for a trial on felony charges is a Class IV felony, carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. See §§ 29-908 and 28-105.

In this case, the sentences imposed were within the statutorily prescribed limits. The fact that the sentence for felony failure to appear was ordered to be served consecutively rather than concurrently does not constitute an abuse of discretion. See *State v. Sanders, ante* p. 183, 455 N.W.2d 108 (1990) (explaining that it is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively).

Considering (1) the defendant's comment in regard to stealing trucks that no one could do it as well as he, (2) that Zaritz was an active member of a gang of thieves that specialized in stealing expensive equipment and trucks, (3) the premeditation and deliberation surrounding the crimes of which Zaritz was convicted, (4) the magnitude of the theft, and (5) the defendant's disrespect for the law as shown by his failure

to appear for trial, it cannot be said that the trial court abused its discretion in sentencing the defendant. The sentences imposed are not excessive, and the defendant's assignment of error in that regard is meritless.

The defendant's convictions and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICK L. KUBIK, APPELLANT.

456 N.W.2d 487

Filed June 15, 1990. No. 89-805.

1. **Constitutional Law: Drunk Driving.** Driving is not a fundamental right, and drunk drivers are not a suspect class for purposes of legislative classification.
2. _____: _____. The line drawn between drivers who are drunk and drivers who are sober is one rationally related to a legitimate governmental end.
3. **Constitutional Law: Statutes: Presumptions: Proof.** Statutes are presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking the validity of the statute. Unconstitutionality must be clearly established before a statute will be declared void.
4. **Drunk Driving: Proof.** A violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987) is one offense which may be proven in different ways.
5. **Drunk Driving: Proof: Blood, Breath, and Urine Tests.** A person's breath alcohol concentration may be probative of impairment under subsection (1), as well as proof of a violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987) based solely on breath alcohol concentration pursuant to subsection (3).
6. **Constitutional Law: Drunk Driving: Blood, Breath, and Urine Tests.** Proscribing a particular concentration of breath alcohol is not wholly irrelevant to achieving the purpose of prohibiting people from driving while under the influence of drugs or alcohol. The relationship between the classification and its goal is rational.
7. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** The State is not required to demonstrate a conclusive nexus between the test result and the defendant's breath alcohol content at the precise time he was driving before the test can be admitted as prima facie evidence that the defendant was intoxicated while driving.
8. **Drunk Driving: Blood, Breath, and Urine Tests: Time: Proof.** A test exhibiting a breath alcohol content of ten-hundredths of 1 gram or more by weight per 210 liters of breath, taken within a reasonable period of time following the defendant's operation of the motor vehicle, may be prima facie evidence of the defendant's intoxication while operating the motor vehicle.

9. **Drunk Driving: Blood, Breath, and Urine Tests: Time.** Matters of delay between driving and testing go to the weight of the breath test results, rather than to the admissibility of the evidence. A valid breath test given within a reasonable time after the accused was stopped is probative of a violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987).

Appeal from the District Court for Cuming County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Cuming County, JAMES J. DUGGAN, Judge. Judgment of District Court affirmed.

Clarence E. Mock, of Johnson and Mock, for appellant.

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

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

BOSLAUGH, J.

After a jury trial, the defendant, Rick L. Kubik, was convicted of driving under the influence of alcoholic liquor, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987). This statute has since been amended. He was sentenced to 3 months' confinement in the county jail, was fined $500, and a 15-year revocation of his operator's license was ordered.

The record shows that at approximately 3:50 a.m. on June 19, 1988, the defendant was stopped by a West Point police officer within the city limits of West Point, Nebraska, after the officer observed the defendant's vehicle weaving from side to side. Both the defendant and the arresting officer exited their vehicles. The defendant appeared to have trouble with his balance, and the officer saw that the defendant's face was flushed. The officer also noticed a strong odor of alcohol about the defendant. The defendant failed three field sobriety tests and told the officer he had been drinking to the point where he wanted to stop and sleep. The defendant was arrested and taken to the West Point police station. A test of the defendant's breath was conducted at 4:33 a.m. using an Intoxilyzer Model 4011AS device. The Intoxilyzer showed a reading of .139.

The defendant was charged with "DRIVING WHILE

UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR (BREATH TEST) (Third offense)," in violation of subsections (1) or (3) of § 39-669.07. Section 39-669.07 provided in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (1) While under the influence of alcoholic liquor or of any drug;
>
> (2) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood;
>
> (3) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath; or
>
> (4) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her urine.

The defendant moved to quash the complaint, claiming that § 39-669.07 violated the equal protection clauses of the U.S. and Nebraska Constitutions. The motion was overruled, and the defendant was convicted as charged. The judgment of the county court was affirmed by the district court on July 6, 1989.

The defendant has timely appealed to this court and contends the trial court erred (1) in failing to sustain his motion to quash the complaint, (2) in admitting into evidence the results of the Intoxilyzer breath test given to the defendant after his arrest, and (3) in giving jury instruction No. 10.

I. Motion to Quash.

U.S. Const. amend. XIV, § 1, provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Neb. Const. art. III, § 18, deals with disparate treatment by special legislation. *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986).

The defendant claims that § 39-669.07(2) to (4), as applied, violated his right to equal protection under the law by arbitrarily subjecting him to a different standard of proof than other similarly situated drivers. He contends that the Legislature "has simply subjected [him] and other similarly situated persons accused of violating [§ 39-669.07(2) to (4)] to

different standards of proof and different procedural safeguards without any rational connection to prosecuting intoxicated drivers." Brief for appellant at 14. He further insists that the guilt or innocence of the driver is determined largely by the arbitrary selection of testing methods by the arresting law enforcement official.

Equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected. If the classification involves either a suspect class or fundamental rights, courts will analyze the statute with strict scrutiny. Under this test, the end the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. *Id.*

However, driving is not a fundamental right, and drunk drivers are not a suspect class for purposes of legislative classification. *State v. Michalski, supra*; *Porter v. Jensen, supra*.

> Consequently, it is not necessary that the end the Legislature seeks to effectuate with respect to drunk drivers be a compelling state interest and that the means employed to accomplish that end be such that no less restrictive alternative exists. All that is required is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose.

Porter v. Jensen, supra at 444, 390 N.W.2d at 515-16; *State v. Michalski, supra*.

In *State v. Michalski, supra* at 388, 377 N.W.2d at 516, we concluded that "the classification made in § 39-669.07 [Reissue 1984], that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate governmental end." The same is true of § 39-669.07 (Supp. 1987).

Statutes are presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking the validity of the statute. *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989). Unconstitutionality must be clearly established before a statute will be declared void. *Id.*

This court has for many years characterized a violation of § 39-669.07 or its predecessors as one offense which may be proven in different ways. See, e.g., *State v. Diesing*, 231 Neb. 132, 435 N.W.2d 190 (1989) (§ 39-669.07 (Supp. 1987)); *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988) (§ 39-669.07 (Cum. Supp. 1986)); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987) (§ 39-669.07 (Reissue 1984)); *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984) (§ 39-669.07 (Reissue 1984)); *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982) (§ 39-669.07 (Cum. Supp. 1980)); *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977), *overruled on other grounds, State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980) (§ 39-669.07 (Reissue 1974)); *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974) (§ 39-727 (Cum. Supp. 1972)).

A person's breath alcohol concentration may be probative of impairment under subsection (1), as well as proof of a violation of § 39-669.07 (Supp. 1987) based solely on breath alcohol concentration pursuant to subsection (3). See, *State v. Schwade*, 177 Neb. 844, 131 N.W.2d 421 (1964); *Vore v. State*, 158 Neb. 222, 63 N.W.2d 141 (1954); *State v. McManus*, 152 Wis. 2d 113, 447 N.W.2d 654 (1989). The defendant has not established that proscribing a particular concentration of breath alcohol is wholly irrelevant to achieving the purpose of prohibiting people from driving while under the influence of drugs or alcohol. The relationship between the classification and its goal is rational. See *State v. Brayman*, 110 Wash. 2d 183, 751 P.2d 294 (1988). The defendant's assignment of error is without merit.

II. Admission of Intoxilyzer Breath Test Result.

In his second assignment of error, the defendant contends the trial court erred in admitting the Intoxilyzer test results because the State failed to establish through expert testimony or other facts a connection between the test result and the defendant's

breath alcohol content at the time of his arrest. He complains that in this respect the county court erred in admitting the results of the Intoxilyzer test without sufficient factual basis to establish that the evidence was relevant. See Neb. Evid. R. 401 and 403 (Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1989)).

In this case, the defendant was stopped at 3:50 a.m. and was given several field sobriety tests. The Intoxilyzer test was administered at 4:33 a.m., after the 15-minute waiting period mandated by the regulations of the Nebraska Department of Health.

Neb. Rev. Stat. § 39-669.11 (Reissue 1988) provides:

> Any test made under the provisions of section 39-669.08 [the implied consent law], if made in conformity with the requirements of this section, *shall be competent evidence* in any prosecution under a state statute . . . involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle when the concentration of alcohol in the blood, breath, or urine is in excess of allowable levels, in violation of section 39-669.07 . . . .

(Emphasis supplied.) Section 39-669.11 further provides:

> Tests to be considered valid shall have been performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. The department is authorized to approve satisfactory techniques or methods and to ascertain the qualifications and competence of individuals to perform such tests and to issue permits which shall be subject to termination or revocation at the discretion of the department.

In addition to the requirements of § 39-669.11, this court has held that the State must prove the testing device or equipment was in proper working order at the time of conducting the test. *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

The record shows that the Intoxilyzer test was performed according to methods approved by the Department of Health by an individual possessing a valid permit issued by the

department for that purpose and that the equipment was in proper working order at the time the test was performed. The test result, therefore, was competent evidence of breath alcohol concentration under § 39-669.11 and was admissible. See, e.g., *State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987) (a test made in compliance with § 39-669.11 is sufficient to make a prima facie case on the issue of blood alcohol concentration); *State v. Tatara*, 230 Neb. 279, 430 N.W.2d 692 (1988) (Intoxilyzer test result was admissible pursuant to § 39-669.11); *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983) (a test made in compliance with § 39-669.11 is admissible and does not create a presumption of guilt, but may be sufficient to make a prima facie case on the issue of blood alcohol concentration).

In support of his argument, the defendant has cited cases from jurisdictions which require some evidence relating the results of alcohol testing back to the time of arrest. See, *State v. Ladwig*, 434 N.W.2d 594 (S.D. 1989) (in prosecution for driving with .10 percent or more of alcohol in the blood, it was not necessary for an expert witness to extrapolate for the jury; however, evidence necessary to enable the finder of fact to extrapolate was required); *State v. Dumont*, 146 Vt. 252, 499 A.2d 787 (1985) (in prosecution for driving while under the influence of intoxicating liquor, numerical results of blood alcohol content tests should be excluded unless related back to the time of operation); *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989) (a blood alcohol content of .10 percent or more at the time of testing did not establish a prima facie case of driving with a blood alcohol content of .10 percent or more where there was no attempt to relate the test results back to the time of arrest; however, the results of a blood alcohol test taken within a reasonable time after arrest were relevant and admissible without foundation relating blood alcohol content back to the time of arrest). See, also, *State v. Murphy*, 7 Ohio Misc. 2d 1, 453 N.E.2d 1304 (1983).

This court considered a similar issue in *State v. Hvistendahl, supra*. In that case, the defendant was convicted of operating or being in actual physical control of a motor vehicle when he had ten-hundredths of 1 percent or more by weight of alcohol in his body fluid, in violation of § 39-669.07 (Reissue 1984).

Hvistendahl was stopped by a Bellevue police officer while driving his automobile in Sarpy County. He was arrested and taken to the police station, where a test of his breath on an Intoxilyzer Model 4011AS produced a reading of .133 percent. Although the case was not tried before a jury, the trial court made no determination beyond a finding that the defendant operated a motor vehicle with more than ten-hundredths of 1 percent of alcohol in the defendant's body fluid.

In support of Hvistendahl's contention on appeal that there was insufficient evidence to sustain his conviction, he argued, in part, that the breath test was performed over an hour after he was stopped by the police. This court stated:

> [A] test made in compliance with Neb. Rev. Stat. § 39-669.11 (Reissue 1984) is sufficient to make a prima facie case on the issue of blood alcohol concentration. See *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983). Thus, any testimony adduced by the defendant as to the accuracy of a breath test taken over an hour after the stop is admissible for the purpose of raising the specter of reasonable doubt in the mind of the trier of fact.

Hvistendahl, supra at 319, 405 N.W.2d at 277. We determined that the testimony of the defendant's expert witness did not rise to the level of casting reasonable doubt on the defendant's guilt as a matter of law. The defendant's conviction was affirmed.

A number of jurisdictions hold that matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.

In *State v. Taylor,* 132 N.H. 314, 566 A.2d 172 (1989), the defendant was convicted of driving while under the influence of intoxicating liquor. He claimed on appeal that the trial court erred in instructing the jury that his blood alcohol level of .13 percent was prima facie evidence that he was driving under the influence of intoxicating liquor. The defendant contended that since his blood alcohol content was tested approximately 1 hour 15 minutes after he was arrested, the test results did not accurately reflect his blood alcohol content at the time he was operating his vehicle.

Taylor had been stopped after a police officer observed the

defendant's truck traveling at a fairly slow rate of speed for the time of day and the traffic conditions. The vehicle was "hugging the right side of the road," *id.* at ____, 566 A.2d at 173, as if it was beginning to pull over, and came to a stop partially in the roadway. The officer, who had approached the defendant's vehicle with the intent to offer assistance, activated his blue lights as he stopped in order to protect the safety of the defendant and himself. The defendant immediately exited his vehicle, approached the officer, and spontaneously exclaimed, " 'I know I only had two beers, but I feel too drunk to drive and I won't drive anymore.' " *Id.* The defendant's speech was slurred and his eyes were glassy and red. He appeared dazed and confused and failed some field sobriety tests. The defendant was arrested at 12:34 a.m., and the officer who transported him to the police station noticed a strong odor of alcohol coming from the defendant. A test of the defendant's blood was conducted at 1:38 a.m., after a mandatory 20-minute waiting period, and showed that the defendant's blood alcohol content was .13 percent.

In affirming the defendant's conviction, the Supreme Court of New Hampshire noted that the defendant was charged with driving while under the influence of intoxicating liquor, in violation of N.H. Rev. Stat. Ann. § 265:82(I)(a) (Cum. Supp. 1988), and that in order to convict a person under that section, the State need not prove the defendant's blood alcohol content was .10 percent or more at the time he was operating his vehicle, but need only prove impairment to any degree. Thus, the defendant could reasonably have been convicted based on the arresting officer's testimony that the defendant was unfit to drive the motor vehicle.

N.H. Rev. Stat. Ann. § 265:89 (Cum. Supp. 1988) provided, in part:

> "**Evidence**. Upon complaint, information, indictment or trial of any person charged with the violation of RSA 265:82 or 82-a, the court may admit evidence of the amount of alcohol in the defendant's blood at the time alleged, as shown by a test of his breath, blood, or urine as provided in RSA 265:84. . . . Evidence that there was, *at the time alleged*, 10/100 percent or more by weight of

> alcohol in his blood is prima facie evidence that the defendant was under the influence of intoxicating liquor."

(Emphasis supplied.)

After a 2-day trial, the jury was instructed that the test result of .13 was prima facie evidence that the defendant was under the influence, but that the jury was not required to find that the defendant was under the influence of alcohol. The defendant objected to the instruction because his driving occurred approximately 1 hour 15 minutes before the blood test was administered and the State failed to establish a temporal nexus between the alcohol in the defendant's blood at the time he was operating the vehicle and the defendant's level of blood alcohol at the time of the test.

The court held that the phrase "at the time alleged" referred to the time of the offense alleged in the complaint, which was the time the defendant was operating a motor vehicle while under the influence of alcohol. The language "at the time alleged," however, did not compel the conclusion that the State was required to prove the defendant had a .10 percent or greater blood alcohol content at the precise time he was driving before the instruction as to prima facie evidence could be given.

> Although RSA 265:89 (Supp.1988) employs the phrase "at the time alleged," we interpret a statute so as not to produce an illogical result. . . . We also examine a statute in relation to the statutory scheme. . . . With these principles in mind, we conclude that RSA 265:89 (Supp. 1988) does not require the State to demonstrate a conclusive nexus between the test result and the defendant's blood alcohol content at the precise time he was driving, before the test can be admitted as prima facie evidence that the defendant was intoxicated while driving.

State v. Taylor, 132 N.H. 314, ____, 566 A.2d 172, 174 (1989).

The court also discussed the practical difficulties which would arise if the defendant's interpretation of the statute were adopted:

> It is impossible as a practical matter for a test to reflect a defendant's exact blood alcohol content at the precise time he was driving, as there is necessarily some lag time

> between the driving and the administration of the test, during which the officer determines whether a test is necessary, and, if so, secures the driver's car and transports the driver to the test location. Furthermore, both the statute and the administrative rules pertaining to the administration of the tests for blood alcohol content require the passage of time both explicitly and implicitly. . . . Common sense indicates that the defendant may, on many occasions, have to wait for a reasonable period of time for a certified intoximeter operator to arrive at the police station to take a breath test, or for a certified health care provider to arrive at a medical facility to take a blood test. These delays are unavoidable, given the procedures established to secure accurate test results, a goal that is desired by defendants and the State alike.
>
> Since a test cannot reflect a defendant's blood alcohol content at precisely the moment he was driving, were we to follow the defendant's reasoning, no test could ever be prima facie, or stand alone as, evidence of intoxication at the time of driving, since the State would always be required to present further evidence to prove a nexus between the test result and the defendant's blood alcohol content at the moment he was driving. Such a result is contrary to RSA 265:89 (Supp.1988), which allows for evidence of blood alcohol content above a certain level, "shown by a test of . . . breath, blood or urine," to be considered prima facie evidence of intoxication.

Taylor, supra at ____, 566 A.2d at 174-75. The court interpreted the statutory phrase "at the time alleged" to allow a test exhibiting a blood alcohol content of .10 percent or greater, taken within a reasonable period following the defendant's operation of the motor vehicle, to be prima facie evidence of the defendant's intoxication while operating the motor vehicle. The court held that the 1-hour-15-minute period between the defendant's operation of his motor vehicle and the blood test was a reasonable period of time and that the trial court properly gave the instruction as to prima facie evidence.

Next, the defendant emphasized certain testimony regarding the existence of a blood alcohol curve. In response to this

argument, the court noted: "The fact that the test was administered approximately one hour and fifteen minutes after the defendant's operation of the motor vehicle, however, goes to the weight to be accorded to the test by the trier of fact." *Id.* at ____, 566 A.2d at 175.

Taylor also argued that the State should be required to provide the jury with evidence of his blood alcohol at the time he was driving by extrapolating such evidence from the results of the blood alcohol test taken at the police station. The court found that this approach would place an impossible burden on the State for two reasons:

> First, it is conceded by the State and the defendant that a driver's blood alcohol content increases for a period of time after consumption and then begins to decrease as the alcohol is eliminated, principally through metabolism. *See* 2 D. Nichols, *Drinking/Driving Litigation* § 23:01 (1985). Extrapolation, however, requires evidence that the State will rarely be able to acquire because of the defendant's constitutional right to remain silent. Extrapolation requires evidence as to when, and in what amounts, the defendant consumed the alcohol prior to driving. Without this information, which is wholly within the defendant's knowledge in the vast majority of cases, extrapolation of blood alcohol content back to the time of driving becomes an impossible task. The legislature could not have intended to place such an impossible burden on the State.
>
> Second, even if the State were able to obtain evidence as to the exact time and the precise amount of alcohol consumed by the defendant prior to his driving, conclusive evidence of the blood alcohol content at the time of driving could still not be offered to the jury in the guise of a general rule because the rate of absorption of alcohol varies considerably between individuals. One study found that the peak blood alcohol level is reached, after consumption, in anywhere from 14 to 138 minutes. *Nichols, supra* § 23:05 (Supp.1989). The extrapolation evidence is further complicated by the amount of food consumed by the defendant at the time he consumes alcohol, which affects the rate of absorption. *Nichols,*

> *supra* § 23:06. This evidence is, again, wholly within the knowledge of the defendant. The legislature could not have intended to place such impossible roadblocks in the way of the State in prosecuting DWI cases.

State v. Taylor, 132 N.H. 314, ____, 566 A.2d 172, 175-76 (1989).

The court held that where the police obtain a blood alcohol sample within a reasonable period of time after driving occurs, the results of that test may be admitted as prima facie evidence of intoxication. "The jury will then be free to give what weight they determine is appropriate to such prima facie evidence in determining whether the defendant is guilty or innocent of driving while under the influence of intoxicating liquor." *Id.* at ____, 566 A.2d at 176.

The court also announced that the same reasoning would apply with equal force to prosecutions under the per se statutes, including § 265:82(I)(b), which statute requires proof that an accused's blood alcohol content was .10 percent or more at the time he was operating his vehicle. "Hence, the State may present evidence of breath or blood tests taken within a reasonable period of time after driving occurs to indicate the presence of blood alcohol necessary for a conviction." *Taylor, supra* at ____, 566 A.2d at 176.

In *People v. Kappas*, 120 Ill. App. 3d 123, 458 N.E.2d 140 (1983), the defendant appealed his conviction by a jury of "driving while his blood alcohol concentration was at or in excess of .10%." *Id.* at 125, 458 N.E.2d at 141. In *Kappas*, the defendant was stopped after police observed his car weaving out of his traffic lane. After stopping the defendant, the officers detected the odor of alcohol and found open containers of alcohol in the defendant's car. The defendant failed several field sobriety tests, was arrested, and was taken to state police headquarters, where more physical tests were given and a Breathalyzer test was administered. The test, which was given approximately 38 minutes after the defendant was stopped, showed the defendant's blood alcohol percentage to be .11 percent.

On appeal, the defendant argued that "based on well-recognized scientific principles there is no assurance that

his [blood alcohol concentration] was the same at the time of driving as it was at the time that he was tested." *Id.* at 127, 458 N.W.2d at 142. The court noted that the officer in charge of maintenance and certification of Breathalyzers admitted that the machine only showed the breath alcohol concentration of an examinee at the time of testing and that there was no way to judge a person's breath alcohol concentration any time prior to the test. The officer had testified on cross-examination regarding his knowledge of the "blood alcohol absorption curve," which would cause the apparent discrepancy. The Appellate Court of Illinois determined that it could consider the effect of the blood alcohol absorption curve in deciding whether a 38-minute delay between the arrest and testing might render the jury's verdict improper as against the manifest weight of the evidence:

> The blood alcohol absorption curve is derived by plotting the amount of alcohol which the body absorbs against the time it takes to do so. Until absorption is complete, the blood alcohol indicator rises continually. Therefore, a breathalyzer test administered immediately after ingestion of alcohol will show a lower [blood alcohol concentration] than the same test taken somewhat later, even though the amount of alcohol consumed is exactly the same. In light of these principles, it is apparent that a breathalyzer test administered at any time other than on the scene of an arrest might likely yield different results than a test given later. The issue boils down to what degree a 38-minute wait should affect the inferences which a jury could reasonably draw from all the evidence in a case.

Id. at 128, 458 N.E.2d at 143. The court adopted the view that matters of delay between driving and testing are properly viewed as going to the weight of the breath test results and, as such, must be viewed in light of the circumstances surrounding the arrest.

> Since there was additional evidence which supports the finding that at the time he was driving defendant's [breath alcohol concentration] was at or above the level proscribed by statute, the fact that there was a 38-minute period between the time he was observed driving and the

> time he was tested by a breathalyzer should not result in a jury's verdict being overturned. The import of a 38-minute delay is reduced further by the fact that police are *required* to wait 20 minutes following arrest to administer the test. This means that the nonstatutory delay was only 18 minutes from the time defendant was stopped. During this period the defendant's car was searched, he was asked to, and did perform (poorly), field sobriety tests, and was then transported to State police headquarters. Under these circumstances we find the delay slight and totally insufficient to render the breathalyzer results nonprobative. No error.

(Emphasis in original.) *Id.* at 129, 458 N.E.2d at 144. See, also, *People v. Borst*, 162 Ill. App. 3d 830, 516 N.E.2d 854 (1987); *People v. Newman*, 163 Ill. App. 3d 865, 516 N.E.2d 667 (1987); *People v. Miller*, 166 Ill. App. 3d 155, 519 N.E.2d 717 (1988) (a delay between driving and testing goes to the weight of the evidence).

In *Com. v. Speights*, 353 Pa. Super. 258, 509 A.2d 1263 (1986), *appeal denied* 517 Pa. 594, 535 A.2d 83 (1987), the Superior Court of Pennsylvania considered the question of whether, without expert testimony, the result of a Breathalyzer test administered 2 hours 45 minutes after the defendant operated a motor vehicle constituted sufficient evidence to convict the defendant of violating 75 Pa. Cons. Stat. § 3731(a)(4). That statute provided that " '[a] person shall not drive, operate or be in actual physical control of the movement of any vehicle while . . . the amount of alcohol in the blood of the person is 0.10% or greater.' " 509 A.2d at 1267.

In *Speights*, the defendant did not contest the admissibility of the Breathalyzer test result, but claimed that because such a considerable timespan elapsed between the commission of the offense and the blood testing, expert testimony was needed to relate the test result back to the period when he was operating his vehicle. The court held that blood alcohol test results could, by themselves, without explanation by expert testimony, suffice to support a conviction, but that blood alcohol test results do not compel the trier of fact to find a defendant guilty where there is competent evidence of record challenging the test

results.

In reaching this decision the court noted that there is ordinarily a time lapse between the occurrence of an offense and the performance of alcohol testing on a motorist. Considering information published in its earlier cases, the court observed that alcohol has no effect until absorbed into the bloodstream, which occurs from 30 to 90 minutes after consumption.

> Thus, if a defendant's drinking is confined to a period immediately before arrest, a test within the first 30 minutes after arrest may show a low blood alcohol content whereas a test within 60 minutes after arrest may indicate a high blood alcohol level. [Citations omitted.]
>
> However, "the percentage of alcohol in the bloodstream diminishes rapidly after drinking ceases." [Citations omitted.] Thus, if an accused stops drinking 30 to 90 minutes before arrest, the accused's blood alcohol content will probably be falling at the time of arrest. The accused will accordingly benefit from a pre-test delay due to the "evanescent nature of the alcohol in [the] bloodstream." [Citations omitted.]

509 A.2d at 1266.

In *Com. v. Slingerland*, 358 Pa. Super. 531, 518 A.2d 266 (1986), the defendant was taken to a hospital after losing control of his motorcycle. When the investigating police officer arrived at the hospital, he detected an odor of alcohol about the defendant's person and saw that the defendant was disoriented and glassy eyed. The officer believed that the defendant was under the influence of alcohol and requested that a blood sample be drawn. The blood sample was taken 1 hour 23 minutes after the motorcycle accident and disclosed a blood alcohol content of .13 percent. The Superior Court of Pennsylvania found that the evidence supported the defendant's conviction for driving with a blood alcohol content of .10 percent or greater, notwithstanding a lack of expert testimony relating the blood test result to blood alcohol content at the time of driving. The court stated:

> A similar argument was made and rejected by this Court in *Commonwealth v. Speights*, 353 Pa.Super. 258, 509

> A.2d 1263 (1986). There, the sole evidence of the defendant's blood alcohol level was the result of a breathalyzer test administered two hours and forty-five minutes after the defendant had operated a motor vehicle and showing an alcoholic content of 0.12%. In response to the same argument made by appellant in the instant case, the Court said: "[W]e conclude that the Commonwealth is not *required* to offer evidence relating a blood alcohol test result back to the time of a vehicular offense and that the absence of expert testimony relating back a remote test result will not render the test result insufficient evidence upon which the fact-finder *may* convict a defendant of violating subsection 3731(a)(4) of the Vehicle Code." *Id.* at ____, 509 A.2d at 1266 (emphasis in original).

518 A.2d at 268-69.

The court noted that the defendant had been drinking over the course of the entire evening, had not consumed a large quantity of alcohol immediately before operating his motorcycle, and admitted that while operating his motorcycle he had been able to feel the effect of the alcohol he had consumed. The blood test result, when considered in the light of the foregoing evidence, was sufficient to permit the jury to find that the defendant had operated his motorcycle while the amount of alcohol by weight in his blood was .10 percent or greater.

In *Com. v. Boyd*, 373 Pa. Super. 298, 541 A.2d 21 (1988), the defendant was charged with driving under the influence to a degree which rendered him incapable of safe driving (count I) and with operating a vehicle while his blood alcohol content was .10 percent or greater (count II). After a jury trial, the defendant was acquitted on count I, but was convicted on count II. There was evidence that the defendant was driving in an erratic manner, smelled of alcohol, failed field sobriety tests, admitted to consuming five gin and tonics and one beer, and declared that he was drunk. The Breathalyzer test was administered one-half hour after the defendant was stopped.

The issue considered on appeal was whether the prosecution was required to present expert testimony relating the blood

alcohol test result back to the time the defendant was driving his car. The court followed the holding of *Com. v. Speights*, 353 Pa. Super. 258, 509 A.2d 1263 (1986), that the prosecution was not required to offer evidence relating a blood alcohol test back to the time of a vehicular offense and that the absence of expert testimony relating back a remote test result would not render the test result insufficient to convict a defendant. The *Boyd* court commented: "We will not overrule precedent nor invade the province of the legislature by creating a rule that imposes upon the Commonwealth a burden of relating blood alcohol content test results back to the time of the vehicular offense." 541 A.2d at 23.

In *Sullivan v. State*, 517 N.E.2d 1251 (Ind. App. 1988), the defendant was convicted by a jury of operating a vehicle with .10 percent or more by weight of alcohol in his blood. He claimed on appeal that the evidence was insufficient to show that at the time he operated the vehicle, his blood alcohol content was at least .10 percent, because the State failed to present any evidence of extrapolation or chemical test results obtained at the time of the alleged violation.

The court stated that given the factual circumstances of the case, the jury could reasonably have determined that the defendant's blood alcohol level met or exceeded .10 percent at the time of the offense without expert testimony relating the chemical test result back to the time of the violation. These facts included the defendant's testimony that on the evening of his arrest, he consumed 9 or 10 beers in a 1-hour period, slept for about 3 hours, got up, consumed a cup of coffee, got into his truck, and drove one block to a friend's house, where he was stopped by the arresting officer. Police records indicated the defendant reported at the time of his arrest that he did not know how many beers he had consumed that evening. The defendant had not eaten for over 24 hours before his arrest and did not put anything in his mouth during the ride to the police station. Breathalyzer test results obtained 25 minutes after the defendant was stopped showed a blood alcohol content by weight of .20 percent. The court stated:

> We believe it reasonable to presume the jury was aware Sullivan's blood-alcohol level could have been higher or

> lower than the level indicated by the test, at the time of the violation. In light of the fact that the undisputed evidence establishes Sullivan did not ingest any alcohol for a period of at least three hours and twenty minutes before the blood-alcohol sample was taken, and Sullivan was tested within a short time after the alleged violation, the jury could have logically reached the conclusion, based upon common sense and experience gained from everyday living, that Sullivan's blood-alcohol level was higher at the time of the alleged violation than it was when Sullivan was tested. Nonetheless, the circumstantial evidence presented, when viewed in the light most favorable to the verdict, is ample to sustain the jury's conclusion that Sullivan operated the vehicle with at least ten-hundredths percent of alcohol in his blood.

Id. at 1253.

Similarly, in *Livingston v. State*, 537 N.E.2d 75 (Ind. App. 1989), the defendant was convicted by a jury of operating a vehicle with a .10-percent or greater blood alcohol content and argued on appeal that the evidence was insufficient to sustain his conviction. In that case, the defendant was stopped after an Indiana state police officer observed him driving erratically and at speeds exceeding 80 miles per hour. The defendant's eyes were bloodshot, his pupils were dilated, and there was a strong odor of alcohol on his breath. The defendant was given an Intoxilyzer test which revealed the defendant's blood alcohol content to be .13 percent.

The defendant acknowledged the presumption set out in Ind. Code Ann. § 9-11-4-15(b) (Burns Cum. Supp. 1989), but claimed that sufficient evidence was presented to rebut the presumption. Section 9-11-4-15(b) provided:

> If, in a prosecution for an offense under IC 9-11-2, evidence establishes that:
>
> (1) A chemical test was performed on a test sample taken from the person charged with the offense within the period of time allowed for testing under section 2 of this chapter; and
>
> (2) The person charged with the offense had at least ten hundredths percent (0.10%) by weight of alcohol in the

> person's blood at the time the test sample was taken; the trier of fact shall presume that the person charged with the offense had at least ten-hundredths percent (0.10%) by weight of alcohol in the person's blood at the time the person operated the vehicle. However this presumption is rebuttable.

There was evidence that the Intoxilyzer test was given at least 29 minutes after the defendant was stopped, that a person's blood alcohol content may either be rising or falling when he is tested, and that it was medically possible for a subject to test below a .10-percent blood alcohol content and 30 to 35 minutes later test over .10 percent. Based on the foregoing, the defendant claimed that there was insufficient evidence to establish that he had a blood alcohol content of .10 percent at the time of the offense.

The court noted that the defendant himself testified that on the day of his arrest he went to a local lounge at approximately 5:15 p.m., where he consumed three beers, had dinner, drank another beer and a shot of peppermint schnapps, and then left for home at approximately 9 p.m. When he was stopped, the defendant told the police that he had five or six beers and two drinks, but nothing in the last 2 hours. The arresting officer testified that he did not see the defendant put anything in his mouth after he was stopped. The officers also followed the method approved by the State Department of Toxicology in administering the Intoxilyzer test to the defendant. This method included observing the defendant for 20 minutes prior to the test to ensure that he consumed no food or drink. The court stated:

> In this case, the jury could have determined that Livingston's blood alcohol content at the time of the alleged offense was lower than the level indicated by the test. However, given the evidence which established that Livingston did not ingest any alcohol for a period of approximately two hours and 20 minutes prior to the test, we believe the jury could reasonably have concluded that his blood alcohol content was higher at the time of the alleged offense. Nevertheless, the evidence presented was more than sufficient to sustain the jury's finding that

> Livingston operated a vehicle with a .10% or greater blood alcohol content. *See Sullivan v. State* (1988), Ind. App., 517 N.E.2d 1251.

Livingston, supra at 77.

In *State v. Miller*, 555 So. 2d 391 (Fla. App. 1989), the State appealed an order granting a motion to suppress results of a blood analysis test in a prosecution for driving while under the influence of alcohol. In that case, the defendant was given a chemical breath test 1 hour 20 minutes after he was stopped. The reading was .14 percent. In a deposition, the State's toxicologist stated that he could not testify within a reasonable degree of scientific certainty what the defendant's blood alcohol level was at the time he was driving and that the level could have been lower than .10 percent when he was driving. The defendant moved to suppress the results of the test, alleging that the reading was irrelevant and did not prove his blood alcohol level at the exact time he was driving; thus, the prejudicial effect of the chemical test outweighed its probative value.

In support of his motion, the defendant argued, and the trial court held, that the results of a blood alcohol level test would only be admissible evidence under Fla. Stat. § 316.193 (1987) for driving under the influence if the State proved the accused's actual blood alcohol level at the time he was driving and not the level some time thereafter. The Florida appellate court stated:

> Following this reasoning, before a test result would be admissible, the state would be required to present supplementary evidence relating the test result back to the time of driving in order to prove that the [blood alcohol level] was .10 per cent or higher at the time of driving. This process is termed retrograde extrapolation. In order for the state to be able to extrapolate the [blood alcohol level] at the time of driving, numerous variables, including the period of consumption, how much was consumed, and the time of the last drink, among others, must be known and assessed. However, it may be that for some reason (such as here, the defendant's invocation of his Miranda rights), the state does not know all the variables necessary to relate the test result back to the time of driving.

Miller, supra at 392. The court noted that "[i]t is noncompliance with proper [statutory] testing procedures which would render test results inadmissible," *id.* at 393, and that the adequacy of the testing procedure was not at issue. Further, the statute pursuant to which the defendant was charged provided that an accused may be convicted for driving under the influence if it was proven "*either* that the person was affected by the alcohol to the extent that his normal faculties were impaired *or* that his blood alcohol level was .10 per cent or higher." (Emphasis in original.) *Id.*

> Accordingly, the state is not necessarily required to prove that an accused's [blood alcohol level] was greater than .10 per cent at the time of driving in order to convict him of driving under the influence of alcohol. The state may prove that based on the totality of admissible evidence, including the test result, the defendant's normal faculties were impaired. Although the timing of the [blood alcohol level] test may affect its accuracy, the question of timeliness is to be left to the trier of fact in each case. Once the test result is placed in evidence, a defendant may generally attack the accuracy of the test on any relevant ground.

Id. The court then observed that various other jurisdictions have held that it is unnecessary to relate blood alcohol level test results back to the time of driving in order for the result to be admissible evidence in a drunk driving case. "Instead, the result is admissible and any time lapse in the test's administration or failure to extrapolate the result back to the time of driving goes to the weight of the evidence, not its admissibility." *Id.*

The court held: "[T]he result of a properly administered test measuring the accused's [blood alcohol level] is relevant evidence, and any failure of the state to extrapolate the result back to the time of driving goes to the weight given to the evidence rather than its admissibility." *Id.* at 393-94. Because the issue involved was of great public importance, the Florida District Court of Appeal certified the question presented to the Supreme Court of Florida. No decision has been announced in that case.

As stated above, § 39-669.07 (Supp. 1987) states one offense

which may be proven in different ways. We hold that matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence. A valid breath test given within a reasonable time after the accused was stopped is probative of a violation of § 39-669.07. See, § 39-669.11 (Reissue 1988); *State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987). In some cases, the delay may be so substantial as to render the test results nonprobative of the accused's impairment or breath alcohol level while driving. In this case, however, the breath test was given less than 1 hour after the defendant was stopped. The evidence was relevant, and the trial court did not err in admitting the Intoxilyzer test result.

III. Jury Instruction.

In his final assignment of error, the defendant claims that jury instruction No. 10 created a mandatory presumption relieving the State of its burden to prove each and every element of the crime charged beyond a reasonable doubt, in violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

Instruction No. 10 stated, in part, as follows:

> Under the complaint in this case, depending on the evidence, you may find the defendant:
>
> 1. Guilty or
> 2. Not Guilty.
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in the complaint are:
>
> 1. The defendant did operate a motor vehicle or was in actual physical control of a motor vehicle;
> 2. The motor vehicle was operated by the defendant or was in actual physical control of the defendant in Cuming County, Nebraska, on or about JUNE 19, 1988; and
> 3. While operating or being in actual physical control of the vehicle at said time and place, the defendant was (a) under the influence of alcoholic liquor, or (b) had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath *as shown by chemical analysis of his breath*.

> The State has the burden of proving beyond a reasonable doubt all of those elements necessary for conviction and this burden never shifts.

(Emphasis supplied.)

Citing *Seattle v. Gellein*, 112 Wash. 2d 58, 768 P.2d 470 (1989), the defendant complains that pursuant to the emphasized portion of the instruction, the jury was required to find that the State had proven the defendant's breath alcohol concentration at the time of driving by the only chemical analysis, the Intoxilyzer test, "shown" during the trial.

The language of the instruction, however, does not merit this interpretation. The instruction specifically states that the State has the burden of proving each element beyond a reasonable doubt and that the burden never shifts. Necessarily, element 3(b), "[w]hile operating or being in actual physical control of the vehicle at said time and place, the defendant . . . had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath as shown by chemical analysis of his breath," must be proved beyond a reasonable doubt. See *Seattle v. Gellein, supra* (Dolliver, J., dissenting). The assignment of error is without merit.

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

AFFIRMED.

WHITE, J., concurs.

JOSEPH A. HOUSKA, ALSO KNOWN AS JOE HOUSKA, JR., AND BERNICE C. HOUSKA, HUSBAND AND WIFE, APPELLANTS, V. CITY OF WAHOO, A MUNICIPAL CORPORATION, APPELLEE.

456 N.W.2d 750

Filed June 22, 1990. No. 88-444.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences that may be

drawn from the material facts, and the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, the Supreme Court views the evidence in the light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Eminent Domain: Pleadings: Appeal and Error.** It is a fundamental rule in this state that if new issues other than the assessment of damages are to be raised on appeal in a condemnation proceeding, they must be pleaded.
4. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
5. **Appeal and Error.** The Supreme Court will only consider errors that are assigned and discussed, although it may note plain error which is not assigned.
6. **Eminent Domain: Time: Jurisdiction: Appeal and Error.** The filing of a notice of appeal within the timeframe provided for by Neb. Rev. Stat. § 76-715 (Reissue 1986), unless extended by Neb. Rev. Stat. § 76-710 (Reissue 1986), is mandatory and therefore jurisdictional.
7. **Eminent Domain: Notice.** The transmission of an appraisers' report required by Neb. Rev. Stat. § 76-710 (Reissue 1986) does not require that the transmittee actually receive the notice.
8. **Statutes: Presumptions: Legislature: Intent.** In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.
9. **Eminent Domain: Notice.** If a copy of the appraisers' report required by Neb. Rev. Stat. § 76-710 (Reissue 1986) was sent to the transmittee by ordinary mail, then transmission would have been accomplished.
10. **Trial: Notice: Proof.** Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

James M. Egr, of Egr and Birkel, for appellants.

Loren L. Lindahl, of Edstrom, Bromm, Lindahl & Wagner, for appellee.

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

HASTINGS, C.J.

This is a condemnation proceeding brought by the defendant City of Wahoo. The plaintiff landowners sought to appeal to the district court the appraisers' award and now appeal to this court from the granting of summary judgment against them.

This is the second appearance in this court of this action. Our first opinion is found in *Houska v. City of Wahoo*, 227 Neb. 322, 417 N.W.2d 337 (1988).

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *State Farm Fire & Cas. Co. v. van Gorder, ante* p. 355, 455 N.W.2d 543 (1990); *Muckey v. Dittoe, ante* p. 250, 454 N.W.2d 682 (1990).

In reviewing an order granting a summary judgment, the Supreme Court views the evidence in the light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *State Farm Fire & Cas. Co. v. van Gorder, supra*; *Muckey v. Dittoe, supra*.

Houska v. City of Wahoo, supra, sets forth the factual development of this eminent domain proceeding. Therein, it is observed that the City of Wahoo filed a petition in county court to condemn certain of plaintiffs' property located in Saunders County. Thereafter, following a hearing, the appraisers filed their return or report with the county judge on August 16, 1985, which report awarded certain damages to plaintiffs.

On October 9, 1985, plaintiffs filed a notice of appeal and bond in the county court. Plaintiffs then filed a petition in the district court on October 15, 1985. In addition to alleging the taking, and praying for damages, the petition states that plaintiffs did not receive a copy of the appraisers' report until September 19, 1985, and that because of this plaintiffs were denied the right to appeal within the statutory timeframe provided for in Neb. Rev. Stat. § 76-715 (Reissue 1986).

In the present proceeding, the defendant, on March 1, 1988, filed an answer to the petition which alleges in part that

> the Return of Appraisers filed with the Saunders County Court on August 16, 1985, was mailed by the Saunders County Court to Condemnees on August 16, 1985, and the Notice of Appeal by Condemnees was not filed with the County Court until October 9, 1985, said date being more than thirty days after the Return of the Appraisers.

Along with the answer, defendant filed a counterclaim alleging the sums assessed by the appraisers were excessive and praying for a redetermination by the district court of plaintiffs' damages.

On March 30, 1988, defendant filed a motion for summary judgment "on the grounds that there is no genuine issue of material fact and this Defendant is entitled to have Plaintiffs' Petition dismissed as against it as a matter of law."

A hearing was held on April 18, 1988. In addition to the pleadings and transcript of the condemnation proceedings, three affidavits were received into evidence.

One of the defendant's affidavits was made by the then associate county judge, who recited that on August 16, 1985, she mailed a copy of the appraisers' report via United States mail, postage prepaid, in an envelope addressed to plaintiffs at R.F.D. No. 2, Wahoo, Nebraska 68066. At a later point her affidavit states that "affiant did place said aforenoted envelope in either the 'out mail' box of the Saunders County Court or the drive-up mail box of the United States Post Office adjacent to the United States Post Office, Wahoo, Nebraska, on August 16, 1985."

Plaintiffs introduced an affidavit signed by themselves stating that their address at all times material has been R.F.D. No. 2, Wahoo, Nebraska 68066 and claiming that a copy of the appraisers' report was not received until September 19, 1985, apparently after they had received a telephone call from the associate county judge about picking up their check for the condemnation award.

On May 16, 1988, the district court sustained the motion for summary judgment. Plaintiffs appeal.

Plaintiffs' four assignments of error together assert the district court erroneously sustained defendant's motion for summary judgment.

Initially, we must dispose of plaintiffs' claim of constitutional error. However, plaintiffs failed to raise any constitutional issue in either their petition, reply, or answer to defendant's counterclaim. No constitutional issue was raised in plaintiffs' written objection to the motion for summary judgment, nor does the bill of exceptions reveal the question of due process was ever an issue in the district court. Finally, the constitutional argument is beyond the scope of the assignments of error before this court.

It is a fundamental rule in this state that if new issues other than the assessment of damages are to be raised on appeal in a condemnation proceeding, they must be pleaded. *Lane v. Burt County Rural Public Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956).

A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Snyder v. IBP, inc., ante* p. 319, 455 N.W.2d 157 (1990).

This court will only consider errors that are assigned and discussed, although it may note plain error which is not assigned. *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990); Neb. Rev. Stat. § 25-1919 (Reissue 1989); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). Therefore, we do not address plaintiffs' constitutional complaints.

At the time these proceedings were commenced, Neb. Rev. Stat. § 76-710 (Reissue 1986) provided:

> After the inspection, view, and hearing . . . the appraisers shall assess the damages . . . and make and file a report thereof in writing with the county judge. . . . A copy of the appraisers' report shall be transmitted to the condemnee.
>
> The transmission shall be made by the county judge within ten days of the return of appraisers and shall be by personal delivery or the sending by ordinary mail of such copy to the condemnee . . . . Failure of transmission shall not be jurisdictional, but shall extend the condemnee's time of appeal to twenty days after such transmittal is finally made.

Under § 76-715 the notice of appeal must be filed within 30 days of the date of the filing of the appraisers' report. Without

the extension provided by § 76-710 plaintiffs' notice of appeal would be beyond the 30-day time limit. The filing of a notice of appeal within this timeframe is mandatory and therefore jurisdictional. *Houska v. City of Wahoo*, 227 Neb. 322, 417 N.W.2d 337 (1988); *Kracman v. Nebraska P. P. Dist.*, 197 Neb. 301, 248 N.W.2d 751 (1976).

Plaintiffs argue that an associate judge may not mail the notice because the statute requires it to be mailed by the county judge, the term "transmission" requires that the transmittee receive the notice, and placing an envelope into an "out box" is not equivalent to sending by ordinary mail.

Plaintiffs abandoned at oral argument their argument that an associate judge was at the time not authorized to act in place of and on behalf of the county judge in the transmitting of notices such as was involved in this case.

There is no requirement that the transmittee actually receive the notice. The statute, § 76-710, provides: "The transmission [of a copy of the appraisers' report] shall be by personal delivery or the *sending* by ordinary mail of such copy to the condemnee . . . ." (Emphasis supplied.) In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Weimer v. Amen, ante* p. 287, 455 N.W.2d 145 (1990). The provision in this case sets forth precisely what requirements must be satisfied in order to successfully accomplish "transmission." We have only to apply those requirements to the facts at hand. Applying the plain, direct, and unambiguous language of the statute, if a copy of the appraisers' report was *sent* to plaintiffs by ordinary mail, then transmission would have been accomplished.

However, does the evidence available in this case demonstrate that the report was *sent* "by ordinary mail"?

On appeal, plaintiffs contend that the placement of the envelope into an outgoing-mail box does not satisfy the ordinary mail requirement of § 76-710. This is not necessarily true.

The use of an outgoing-mail box per se does not preclude a finding that a letter was actually mailed, provided there is either direct proof that a particular letter, properly stamped and addressed, was taken from the receptacle and delivered to a

mail carrier or duly deposited in an authorized depository of the U.S. Postal Service, or sufficient competent evidence demonstrating a customary mailing procedure or practice whereby the letter would have been so mailed. See, *Hills v. McComas Rentals, Inc.*, 779 S.W.2d 297 (Mo. App. 1989); *Bruce v. James P. MacLean Firm*, 238 N.J. Super. 501, 570 A.2d 49 (1989); *Jimmy Swaggart Ministries v. Arlington*, 718 S.W.2d 83 (Tex. App. 1986); *Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., et al.*, 106 A.D.2d 725, 484 N.Y.S.2d 156 (1984); Annot., Proof of Mailing by Evidence of Business or Office Custom, 45 A.L.R.4th 476 (1986); 58 Am. Jur. 2d *Notice* §§ 46-47 (1989).

We believe the better rule to be gleaned from the above-cited authorities, absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, is that proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide. See *Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., et al., supra*. Such proof was lacking in this instance.

The record is insufficient to determine as a matter of law that the transmission requirement of § 76-710 has been fully met. Having determined that a genuine issue of material fact exists as to whether a copy of the appraisers' report was sent by ordinary mail, we conclude that the motion for summary judgment should not have been sustained.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. RODNEY J. PILLARD, APPELLANT.

456 N.W.2d 755

Filed June 22, 1990. No. 89-1156.

1. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved.
2. _____: _____: _____: _____. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account.
3. _____: _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
4. _____: _____: _____: _____. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
5. **Appeal and Error.** Assignments of error not discussed are not considered by this court.
6. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JACK B. LINDNER, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Craig L. Nelson for appellant.

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

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

WHITE, J.

Defendant, Rodney J. Pillard, appeals from an order of the

district court for Lancaster County affirming the defendant's conviction in the Lancaster County Court of driving while intoxicated, third offense (count I), and driving during suspension (count II). On count I defendant was sentenced to 6 months' imprisonment, a 15-year suspension of his driver's license, and a $500 fine; on count II defendant was sentenced to 3 months' imprisonment, a 1-year suspension of his driver's license, and a $500 fine, the sentences to be served concurrently.

The defendant assigns as error the county court's orders (1) overruling defendant's motion to suppress evidence, (2) entering a judgment of conviction when there was insufficient evidence on both counts to support a finding of guilty, and (3) imposing an excessive sentence on both counts. We affirm.

The evidence presented at the hearing on defendant's motion to suppress shows that Deputy Emanuel Bartek of the Lancaster County sheriff's office went to Merle's Tavern in Emerald, Nebraska, at approximately 3:45 p.m. on August 23, 1988, in order to conduct a followup investigation on a matter unrelated to this case. While there, Deputy Bartek noticed that there were only two customers in the bar, and he did not at first recognize either of them. One of the customers, Earl Jennings, initiated a conversation by asking if Deputy Bartek remembered him. At this point Bartek recalled that Jennings was the owner of Earl's Steak House in Denton. Jennings proceeded to tell Deputy Bartek that his license was suspended and, pointing at the customer seated next to him, said, "Pillard here is driving for me." At that point Deputy Bartek recalled that Jennings had a long history of driving while intoxicated arrests and that his driver's license was currently suspended.

Deputy Bartek testified that he had never met Pillard or seen him before this time. However, he stated that he did recognize the name Pillard through information shared among the sheriff's office, the State Patrol, and the Lincoln Police Department.

Having concluded his conversation with Jennings, Bartek resumed speaking with the bar employees. During this conversation, he noticed that Pillard left the bar area and went toward a hallway in the tavern where the restroom and the exit were located. Bartek concluded his investigation and left the

building. He did not see Pillard and became concerned that Pillard may have left in his own vehicle and that Jennings would drive on suspension. Deputy Bartek then reentered the tavern to look for Pillard, but did not see him. Bartek went back outside and looked around the building, but he still saw no sign of Pillard.

Deputy Bartek noted that there was only one vehicle parked in the lot, a blue Yugo sedan. He became concerned that Jennings did not actually have someone to drive him home. Bartek ran a radio check on the license plate of the Yugo and found it to be registered to a Jennings family in Denton, Nebraska. He also ran a check on Jennings and confirmed that his license was suspended for driving while intoxicated. A check on the name Pillard revealed no wants or warrants for anyone by that surname.

Deputy Bartek then drove his cruiser to the top of a hill west of Emerald at approximately 91st and West O Streets, where he could observe the tavern's parking lot should Jennings attempt to drive. Bartek remained there for a short time, until approximately 4:15 p.m., when he decided to terminate this surveillance because his shift was ending at 4:30. He saw no one attempt to drive the Yugo while he observed the parking lot.

Still thinking that Jennings might not have a driver, Bartek radioed Deputy Gordon Harrod, who was the deputy that would be patrolling the district, and informed Harrod of his concerns and observations regarding Jennings and the blue Yugo. Bartek then ended his tour of duty and drove to the sheriff's department garage in Lincoln.

Shortly after their radio conversation, Deputy Harrod was passing through Emerald en route to another call and observed two people in the bar parking lot standing near the blue Yugo which had been described to him by Deputy Bartek. Harrod pulled into the parking lot of a nearby business to observe whether the people would leave in the car. They did so, proceeding westbound on U.S. Highway 6 (West O Street) for about a block, and then turning south onto Southwest 84th Street, which goes into Denton. Deputy Harrod followed them for approximately 1 mile and contacted Deputy Bartek for a description of the person who he thought would attempt to

drive during suspension. Bartek gave Harrod a description of Jennings, and Harrod stated that Jennings appeared to be a passenger in the vehicle at that time. Harrod then informed Bartek that he saw no violations or erratic driving and that he was going to discontinue following the vehicle.

During or immediately following the aforesaid conversation, the Yugo pulled into a residential driveway just south of Southwest 84th and West A Streets. Harrod also informed Bartek of this occurrence and described the residence to him. Bartek told Harrod that he was familiar with the residence and the people who lived there and that he was of the opinion that Pillard and Jennings would have no business being there. Bartek then directed Harrod to continue following the vehicle. Harrod also testified that this aroused his suspicion because in his opinion Pillard was trying to avoid him.

Deputy Harrod then testified that he continued driving south for about a mile and pulled off to the side of the road "to see if there was a possibility that these people may have been just trying to lose me." After approximately 1 minute, the blue Yugo drove by, resuming its southbound course on Southwest 84th Street. Harrod continued following the vehicle for another mile when it again pulled off the road into another residential driveway, and Deputy Harrod continued down the road a short distance, and then backed his cruiser into a road which went into a cornfield on the west side of Southwest 84th Street. The Yugo again, after a minute or two, drove by headed south.

Harrod relayed this information and a description of the residence to Deputy Bartek, who responded as he did previously—that he was familiar with the residence and the person who lived there and that Pillard and Jennings had no business being there. Bartek then directed Harrod to stop the vehicle and "see what is going on."

Deputy Harrod stopped the blue Yugo in front of Earl's Steak House in Denton and subsequently arrested the defendant for driving during suspension and driving while intoxicated. Deputy Harrod testified that during the time he was following the Yugo from West O Street until he turned on his red lights to stop the vehicle, his cruiser was within sight in the Yugo's rearview mirror.

The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved. *State v. Rein*, 234 Neb. 917, 453 N.W.2d 114 (1990); *State v. Carter*, 232 Neb. 666, 441 N.W.2d 640 (1989). In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account. *State v. Rein, supra*; *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior. *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989). See, also, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

In this case, the totality of the circumstances includes the observations, knowledge, and inferences drawn by both Deputy Harrod and Deputy Bartek. It is stated in *U.S. v. De Leon-Reyna*, 898 F.2d 486, 488 (5th Cir. 1990): "The determination of 'reasonable suspicion' involves the consideration of the totality of the circumstances, including the collective knowledge of all the officers in assessing the facts. *E.g., United States v. Shaw*, 701 F.2d 367, 377 n. 4 (5th Cir.1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984)."

Deputy Bartek testified that the first driveway that the Yugo pulled into was known to him to belong to a residence on several acres of land owned by a Mr. Lewis. There were several large steel buildings on the property, and Bartek knew that Lewis raised championship Clydesdale horses. Bartek stated that he had had calls there for service in the past, reports of theft and loss, and also business checks. Bartek also testified that

Mr. Lewis has asked me to watch his residence as part of

> our neighborhood watch program, that he is retired. He's gone oftentimes in promotional business with his horses. And he's asked us to do business checks on his property for any activity that is generated on there without his presence being there.

Deputy Harrod testified that Bartek told him that it was his (Bartek's) understanding that Pillard and Lewis were not on friendly terms and that he could not think of any reason why the Yugo would be pulling in there.

The second residence was known by Bartek to belong to Steve Skillman, a county employee whom Bartek had known for 13 1/2 years. Bartek testified that he had been to the property before, that Skillman at one time ran a business on his property, and that Skillman kept "[h]igh quality body shop and mechanics tools of a professional use" on the property. Skillman had also spoken to Bartek concerning the neighborhood watch program. Since Skillman had terminated his business at his residence and now worked a day job (8 a.m. to 4:30 p.m.), he was concerned that people would still go to that residence thinking it was a business and when they found it to be vacant, he would subsequently suffer losses of his tools and equipment. Bartek also testified that Jennings and Pillard would not have any business stopping at the Skillman residence.

Bartek testified that these actions by the Yugo and its occupants caused him concern over the occurrence of criminal activity.

The totality of the circumstances provides a sufficient basis to justify Deputy Harrod's investigatory stop of the Yugo. As we have said, a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Kavanaugh, supra*; *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973). In this case, the circumstances and manner of the stop were appropriate.

Pillard's next assignment of error, that there was insufficient evidence to sustain a conviction on both counts, is not addressed because Pillard fails to discuss the issue in his brief.

Assignments of error not discussed are not considered by this court. *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990); *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989).

Pillard's final assigned error is that the sentences are excessive, and he argues in his brief that probation should have been imposed. An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Shepherd, ante* p. 426, 455 N.W.2d 566 (1990); *State v. Johnson,* 234 Neb. 110, 449 N.W.2d 232 (1989). For driving while intoxicated, third offense, a $500 fine and a 15-year license revocation are mandatory. See, Neb. Rev. Stat. §§ 28-106 (Reissue 1989) and 39-669.07 (Reissue 1988). Six months' imprisonment is the maximum sentence for count I. The sentence imposed for count II, a Class III misdemeanor, is the maximum authorized by statute. The court ordered that the sentences be served concurrently.

The sentences are within the statutorily prescribed limits, and, in view of the defendant's record, the trial court did not abuse its discretion in imposing such sentences. The judgment is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. FLOYD BEINS, APPELLANT.

456 N.W.2d 759

Filed June 22, 1990. No. 89-1194.

1. **Parental Rights: Trial.** A parent, or one standing in the relation of parent, is not liable either civilly or criminally for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable. It is a question of fact whether the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive.
2. **Assault.** A person commits the offense of assault in the third degree if he

intentionally, knowingly, or recklessly causes bodily injury to another person. Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1989).

3. **Parental Rights: Minors.** The use of force upon or toward the person of another is justifiable if the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and (1) such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct; and (2) such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation. Neb. Rev. Stat. § 28-1413 (Reissue 1989).
4. _____: _____. A person who is responsible for the general care and supervision of a minor may use such force as may be necessary for the purpose of safeguarding or promoting the welfare of a minor, including punishment of misconduct, if such force used is not designed to cause or known to create substantial risk of causing death or serious bodily harm.
5. **Convictions: Appeal and Error.** The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it.
6. **Appeal and Error.** Issues not properly presented and passed upon by the trial court may not be raised on appeal.
7. **Jury Instructions: Appeal and Error.** The failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal.
8. _____: _____. If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
9. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
10. **Appeal and Error.** The Supreme Court will not consider assignments of error which are not discussed in the brief, nor will this court consider errors not assigned.

Appeal from the District Court for Buffalo County, DEWAYNE WOLF, Judge, on appeal thereto from the County Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of District Court affirmed.

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

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

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

BOSLAUGH, J.

After trial to a jury, the defendant, Floyd Beins, was convicted of third degree assault, in violation of Neb. Rev. Stat. § 28-310 (Reissue 1989), a Class I misdemeanor. The defendant was fined $300 and sentenced to 60 days in jail. Upon appeal the judgment was affirmed by the district court.

The defendant has appealed to this court, raising 14 assignments of error, in which he claims the district court erred in affirming the judgment of the county court. Specifically, the defendant alleges that (1) there was insufficient evidence to sustain his conviction, (2) the county court erred in failing to dismiss the complaint, (3) the jury was improperly instructed, and (4) he received an excessive sentence.

The record shows that the victim, Monica Beins, is the daughter of the defendant and his wife, Myrta Beins, and was 15 years old on the date of the offense. Monica has lived with her paternal grandparents, Harvey and Anna Beins, for most of her life. Her parents' home is located on a lot next to the grandparents' house near Kearney, Nebraska.

On the evening of April 20, 1988, Monica visited her parents' house to talk to her mother. During this conversation, Monica and her parents decided to visit a third party to inquire into a job possibility for Monica. The defendant and Monica's infant brother accompanied Monica and her mother. Monica was seated in the back seat of the car, holding her brother. The defendant was in the front passenger seat, and Myrta Beins was driving.

During the trip, Monica and her parents discussed an automobile that Monica and her grandfather had looked at earlier in the day. Upon learning that the grandfather had put a downpayment on the car, the defendant became agitated and an argument followed between Monica and the defendant. Apparently, the defendant was upset that he had not been consulted about the car and began making abusive remarks about the grandfather.

The defendant then ordered his wife to drive home and, according to Monica, began verbally abusing her and threatened to slap her. Monica replied that if he did, she would call her attorney. At this point, the car came to a stop sign. The

defendant exited the car and attempted to get in the back seat with Monica. He then got back in the car, turned around in the front seat, and hit Monica in the face several times.

When they arrived home, the defendant jerked Monica out of the car and hit her two or three more times. During the struggle, both Monica and the defendant fell to the ground. He then rolled on top of her, placed his hands on her neck, and began choking her. Monica testified that when she was being choked, she could not breathe and felt that her "eyes were just going to pop out of [her] head." Monica further testified, "I thought that was it. I thought it was the end and I just closed my eyes and all I remember is just thinking to myself that I'm never going to see my grandma or my grandpa or my mom or my little brother again." The defendant eventually released Monica and ordered her into the house. A short time later, Monica fled through the front door of the house while the defendant was arguing with his father at the back door of the house.

Myrta Beins called the police. The defendant waived his *Miranda* rights and gave a statement to a Buffalo County deputy sheriff in which he admitted hitting Monica while in the car and demonstrated to the deputy the hold he had on Monica's throat. The investigating officers testified that Monica sustained cuts on the forehead and above her right eye. She also had a swollen bump in the middle of her forehead, as well as a 1/2-inch-wide continuous red bruise around her neck.

In connection with his first and second assignments of error, the defendant contends that he was merely exercising his common-law right to discipline his child and cannot be held criminally liable for committing third degree assault on his daughter. The defendant's argument is based on this court's holdings in *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951), and *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). Nothing in these cases, however, supports the defendant's claim that parents are shielded from prosecution for unlawfully assaulting their children.

In *Fisher v. State, supra*, the defendant mother was convicted of manslaughter in connection with the death of her 4-year-old son. Apparently, the child died as the result of

malnutrition and numerous disciplinary beatings. In considering Fisher's contention that the evidence was insufficient to sustain her conviction, this court said:

> An unintentional killing of a person, without malice, resulting from an unlawful assault and battery that in itself is not of a character or intended to cause death may result in the assailant being guilty of manslaughter. [Citations omitted.]
>
> The same may be true if death, without malice, is unintentionally caused by immoderate and excessive punishment, under the circumstances existing, although not such as is manifestly dangerous to life, in the correction of a child by a parent. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 [1903], states the doctrine that: "A parent, or one standing in the relation of parent, is not liable either civilly or criminally for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable. * * * It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive."

Fisher, supra at 175-76, 47 N.W.2d at 355.

In *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs., supra* at 106, 416 N.W.2d at 560, we stated that "the rule found in *Clasen v. Pruhs,* [69 Neb. 278, 95 N.W. 640 (1903)], is a restatement of the common-law rule that was later codified in the criminal defense provision of § 28-1413 of the Nebraska Revised Statutes."

Section 28-310(1)(a) provides that a person commits the offense of assault in the third degree if he intentionally, knowingly, or recklessly causes bodily injury to another person. The statute makes no distinctions as to who may be liable for committing the offense or who the victim may be.

Neb. Rev. Stat. § 28-1413 (Reissue 1989) provides, in part:

> The use of force upon or toward the person of another is justifiable if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision

of a minor or a person acting at the request of such parent, guardian, or other responsible person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation.

In *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984), the defendant was convicted of manslaughter in connection with the death of his girlfriend's 3-year-old son. The child died as the result of a kick to his epigastric region. Miner argued on appeal that the evidence was insufficient to establish the commission of the crime of manslaughter because there was no proof of the commission of an underlying unlawful assault. In affirming the defendant's conviction, this court stated:

> A person is guilty of manslaughter who causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979). It is the position of the State that the "unlawful act" committed by the defendant was third degree assault. That is defined as intentionally, knowingly, or recklessly causing bodily injury to another. Neb. Rev. Stat. § 28-310 (Reissue 1979).
>
> The defendant responds that the act which the defendant committed was privileged under the provisions of Neb. Rev. Stat. § 28-1413 (Reissue 1979), and therefore did not constitute an unlawful act. That section provides in part that a person who is responsible for the general care and supervision of a minor may use such force as may be necessary for the purpose of safeguarding or promoting the welfare of a minor, including punishment of misconduct, if such force used is not designed to cause or known to create substantial risk of causing death or serious bodily harm.

Miner, supra at 312-13, 343 N.W.2d at 902. We held that whether the act committed by the defendant was privileged or whether it constituted an unlawful assault was a question of

fact.

The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thayer, ante* p. 70, 453 N.W.2d 474 (1990). The record establishes that the defendant intentionally, knowingly, or recklessly caused bodily injury to his daughter. The jury received an instruction on justification of force pursuant to § 28-1413 and apparently resolved those issues against the defendant. The defendant's first and second assignments of error are without merit.

The defendant next contends that the trial court failed to properly instruct the jury. The record shows, however, that trial counsel was given the opportunity to review, but did not object to, any of the jury instructions. Issues not properly presented and passed upon by the trial court may not be raised on appeal. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). The failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal. *State v. Cole*, 231 Neb. 420, 436 N.W.2d 209 (1989). If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Cole, supra*. We determine that the instructions given to the jury correctly stated the law, were not misleading, and adequately covered the issues involved. The defendant's assignment is without merit.

The defendant further contends that the district court abused its discretion in denying him probation and in imposing an excessive sentence. An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989); *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989).

In denying probation and sentencing the defendant to imprisonment, the county court noted that the defendant did not recognize his own culpability, did not appear to be concerned about his daughter, and displayed "an almost

absolute disregard or absolute lack of presence of any remorse or acceptance of his own acts as having been the cause of his own problems." The defendant's record included prior convictions for assault. He also informed the court at the sentencing hearing that he did not "have a daughter" and he refused a suggestion to seek counseling.

A Class I misdemeanor is punishable by a maximum of 1 year's imprisonment, a $1,000 fine, or both. The sentence imposed was well within the statutory limits and, under the circumstances, did not constitute an abuse of discretion.

The remainder of the defendant's assignments of error are not discussed in his brief. The Supreme Court will not consider assignments of error which are not discussed in the brief. *State v. Badami, ante* p. 118, 453 N.W.2d 746 (1990); *State v. Garcia, ante* p. 53, 453 N.W.2d 469 (1990); *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990). Nor will this court consider errors not assigned. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE SCHANEMAN, APPELLANT.

456 N.W.2d 764

Filed June 22, 1990. No. 89-1346.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Mary T. Kloeckner and Sandra Frantz for appellant.

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

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

WHITE, J.

This matter is submitted to the court on briefs only, pursuant to Neb. Ct. R. of Prac. 11F(5)a (rev. 1990).

The appellant pled guilty in the district court to one count of delivery of a controlled substance, marijuana. The plea was accepted, and appellant was sentenced to a term of 2 to 3 years in the Nebraska Penal Complex, with credit for 28 days of jail time served.

The errors assigned in nine separate paragraphs and seven subparagraphs allege violations of numerous, but unspecified, sections of the U.S. Constitution and various state and federal statutes, culminating in appellant's assertions that (1) he was denied effective assistance of counsel, (2) he was entrapped, (3) his guilty plea was invalid and not voluntary, (4) exculpatory evidence was withheld from him by the State, and (5) the State's conduct was outrageous and grossly and unconscionably overreaching.

In support of all the assigned errors, we are presented with a bill of exceptions of 10 pages, consisting of the sentencing proceedings only. Nothing in that record supports any of the assigned errors.

It is the responsibility of the party appealing to have included within the bill of exceptions matters from the record which it believes material to the issues presented for review. *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984); Neb. Ct. R. of Prac. 5A(2) (rev. 1989).

The judgment of the trial court must be affirmed.

AFFIRMED.

PATRICK B. HUGHES, APPELLANT, V. CORNHUSKER CASUALTY COMPANY, APPELLEE.

456 N.W.2d 765

Filed June 29, 1990. No. 88-658.

Judgments: Appeal and Error. In reviewing the trial court's judgment in an action at law tried to the court, the Supreme Court does not reweigh the evidence but, instead, considers the evidence in the light most favorable to the successful

party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence.

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

Steven E. Achelpohl and Stephanie W. Milone, of Schumacher & Achelpohl, for appellant.

Michael A. Fortune and J Russell Derr, of Erickson & Sederstrom, P.C., for appellee.

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

GRANT, J.

This is an appeal from a judgment of the district court for Douglas County in favor of defendant, Cornhusker Casualty Company (Cornhusker), dismissing with prejudice the contract action of plaintiff, Patrick B. Hughes, for "severance pay." Hughes' petition alleged:

> As a condition to the termination of his employment, and in consideration of Plaintiff's release of any claims against the Defendant arising out of the termination of his employment, the Plaintiff and Defendant agreed that Plaintiff would be paid a total amount of $22,450, equaling six months regular pay, as severance pay.

The petition further alleged the defendant subsequently "repudiated its obligation, advising the Plaintiff that the Defendant would pay only four months severance pay and would not pay any severance pay until Plaintiff returned a signed release form so limiting the said severance pay." Hughes prayed for damages, and in addition requested attorney fees and a penalty pursuant to Neb. Rev. Stat. §§ 48-1231 and 48-1232 (Reissue 1988) of the Nebraska Wage Payment and Collection Act. Cornhusker denied the above allegations and affirmatively alleged that there was no oral or written agreement to pay severance to Hughes and that any alleged obligation owed to Hughes was not wages under the Nebraska Wage Payment and Collection Act. The parties waived a jury trial, and after trial to the court, the court found generally for

the defendant and dismissed the petition with prejudice. Hughes' motion for a new trial was overruled, and this appeal was timely perfected. We affirm.

Hughes' first assignment of error states:

> The District Court erred in dismissing Appellant's action and failing to enter judgment for Appellant because the evidence disclosed a subsidiary agreement of the parties regarding payment of severance, supported by benefit or advantage to Appellee and a detriment or loss to Appellant and, therefore, there was not a total failure of consideration for the agreement.

Hughes' other assignments of error pertain to the application of the Nebraska Wage Payment and Collection Act.

The record shows the following: Hughes was employed by Cornhusker from September 24, 1984, to September 30, 1986. The parties agree Hughes was an employee at will, and there was no severance agreement prior to September 30. At trial, Hughes testified that on September 30, the chairman of Cornhusker's board of directors, Michael Frye, and plaintiff met. Frye informed Hughes that he was terminated. Hughes further testified that Frye then "offered me at that time severance pay of four months in exchange for a release." Hughes' salary was $44,900 per year, and 4 months' salary would be $14,966.67. Frye gave Hughes a release form which provided that in settlement of all amounts owed to Hughes by Cornhusker, Cornhusker would pay Hughes in the amount of $12,418.98, which amount was stated to include all accrued wages, accrued but unused vacation days, and all other amounts owing from Cornhusker. The record does not reveal how the amount of $12,418.98 was determined. Hughes responded that the offer was insufficient.

Hughes testified that in an October 2, 1986, conversation with Frye, Frye agreed that Cornhusker would pay an amount equal to 6 months' salary. The only evidence describing what was actually said in this conversation consisted of the following testimony from Hughes: "I offered to settle the severance matter for the three to six months per year of employment to which he replied that he would go to six, meaning—and it was my understanding—that he would pay six months of severance

in exchange for a release." Hughes testified on cross-examination that he understood that the payment of severance was conditioned upon the signing of a release. During the same conversation, but apparently prior to the severance discussion, Hughes offered to consult with Cornhusker on cases he was familiar with, and did subsequently assist on some cases. Hughes further testified that these services were something he offered to do and were not mentioned in the written release. According to Hughes the only unresolved term of the contract at that point was whether the payment would be made in a lump sum, in installments, or in a lump sum in 1987 for tax reasons.

Hughes' last full pay period before he was terminated ended September 28, 1986, but he received checks from Cornhusker in his regular amount for the next two biweekly pay periods. Each of these payments was in the same format, with the stub showing regular deductions for taxes, insurance, and "Sav C Match." When he did not receive any further checks, Hughes made inquiries and was told by Frye that Cornhusker would not make any further payments until Hughes signed the release. Hughes testified that he did not sign the release form given to him because it did not reflect the 6-month agreement. He stated that he told Frye over the telephone that he would sign a release stating 6 months' severance. In response to a written demand for payment from Hughes, Frye, in a letter dated January 12, 1987, stated the following:

> At the time you left Cornhusker Casualty you were offered a severance arrangement whereby you would be paid 4 months salary. This payment would be made upon your delivery of an executed release to the Company. In our previous conversations, you acknowledged that I said in response to your concerns about obtaining suitable employment, that CCC would be willing to pay you up to six months severance. Your concerns about finding suitable employment turned out (as I expected) not to be realized and the contingency aspect of our discussion is no longer an issue.
>
> Your stated expectation of receiving 6 months of compensation is not in keeping with the offer made to

> you. To date, CCC does not have an executed release. The offer to you is in return for your written release, CCC will pay a total of 4 months severance pay. Enclosed is a release form. This offer will expire on January 31, 1987.

The release form with the letter did not state the specific amount of money offered by Cornhusker in exchange for the release, but referred to "the amount of money attached." The record does not show anything further in this regard. Hughes did not execute either of the releases. Hughes testified that he found suitable employment beginning November 3, 1986.

In reviewing these facts we are governed by the rule that in reviewing the trial court's judgment in an action at law tried to the court, the Supreme Court does not reweigh the evidence but, instead, considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence. *Preisendorf v. Mettenbrink*, 232 Neb. 558, 441 N.W.2d 203 (1989); *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989).

As reflected in Hughes' first assignment of error, the parties have concentrated their debate on whether there was sufficient "benefit to the promisor" or "detriment to the promisee" to support the contract in view of the fact that no written release was ever executed. We find that the trial court may have decided the case by finding that the offer was never accepted, by either act or promise, or that even if a contract was formed, Hughes' signing of the release was a condition precedent to Cornhusker's duty to pay which was neither performed by Hughes nor excused by the actions of Cornhusker.

The expressed intention of the parties which they manifest by their words and acts, and not their secret intention, is controlling in determining the legal effect of an offer or an acceptance. See *Fairchild v. Fairchild*, 176 Neb. 95, 125 N.W.2d 191 (1963). As indicated above, Hughes' testimony does not detail much of the conversation occurring during these negotiations. Cornhusker did not put on any evidence at trial. It is difficult to discern the manifest intentions of the parties with such an incomplete and conclusory record, but the record is sufficient to support the general findings of the court in favor

of Cornhusker.

An offeror is the master of the offer and may limit the means of acceptance to the actual performance of the bargained-for act, but unless such limitation is clear, the offeree may accept by promising to perform the act. See *In re Estate of Michels*, 223 Neb. 286, 389 N.W.2d 285 (1986). If Cornhusker's offer limited the means of acceptance to the execution of a written release, then the execution and delivery of the release were necessary to provide the acceptance and consideration for the contract. Under this theory, the trial court was free to find that the offer was never accepted and there was no contract formed. This would appear to be Frye's interpretation, as indicated by his belief that the offer was revocable any time before the execution of the release.

Alternatively, if Cornhusker's offer did not clearly limit acceptance to execution and delivery of the release, the trial court could have found that the conversation between Frye and Hughes did not show such a meeting of the minds of the parties as to convert the negotiations between the parties into an agreement. Such an agreement would have to be premised on Hughes' promise to execute a release, which would have provided consideration for the contract. Hughes' testimony did not explicitly indicate that he ever accepted Frye's counteroffer to pay up to 6 months' severance by promising to sign a release. The trial court was not required to infer that Hughes so promised.

As a third alternative, the trial court may have found that even though a contract was formed, Hughes' failure to timely tender performance by executing and delivering the release excused Cornhusker's duty to pay. The trial court could have found that the disagreement between Hughes and Frye over the terms of their agreement did not result in anticipatory breach by Cornhusker which excused Hughes' performance.

Hughes' petition did not state a claim for unpaid wages, vacation pay, or consulting fees. The evidence, viewed most favorably to Cornhusker, indicates that Hughes' offer to consult was a good will gesture offered gratuitously to encourage Frye to increase Cornhusker's offer of severance. Because we find that Hughes is not entitled to recover, we need

not discuss the assignments of error relating to the Nebraska Wage Payment and Collection Act. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. TERRY REYNOLDS, APPELLEE AND CROSS-APPELLANT.

457 N.W.2d 405

Filed June 29, 1990. No. 88-816.

1. **Trial: Rules of Evidence: Expert Witnesses.** Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 1989), does not render all expert testimony admissible.
2. _____: _____: _____. In determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers four preliminary and interrelated questions: (1) Does the witness qualify as an expert pursuant to Neb. Evid. R. 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403?
3. _____: _____: _____. Whether a witness is qualified to testify as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1989).
4. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** A trial court's factual finding pursuant to Neb. Evid. R. 104(1) concerning a determination whether a witness qualifies as an expert under Neb. Evid. R. 702 will be upheld on appeal unless the trial court's finding is clearly erroneous.
5. **Trial: Rules of Evidence: Expert Witnesses.** Under the test or standard enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), reliability for admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
6. _____: _____: _____. If an expert's testimony lacks probative value, the testimony is irrelevant and is inadmissible.
7. _____: _____: _____. If a witness is qualified as an expert pursuant to Neb. Evid. R. 702, a court considering admissibility of the expert's testimony, which may include an opinion, must decide whether the testimony is likely to assist the trier of fact to understand the evidence or determine a factual issue.
8. _____: _____: _____. Under Neb. Evid. R. 704, the test is not whether the expert's opinion or inference invades the province of the jury, but whether the opinion or inference is otherwise admissible and, in accordance with Neb. Evid. R. 702, will "assist the trier of fact" to understand the evidence or determine a

fact in issue.

9. _____: _____: _____. An expert's testimony, although relevant, may be excluded under Neb. Evid. R. 403 if the probative value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.
10. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** The determination whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb. Evid. R. 702 involves the discretion of a trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion.
11. **Trial: Rules of Evidence: Expert Witnesses.** Under the standard of helpfulness required by Neb. Evid. R. 702, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact.
12. _____: _____: _____. When an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.
13. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
14. **Criminal Law: Intoxication: Intent.** A defendant's condition of intoxication, otherwise called the defense of intoxication, may negative a subjective or mental element necessary for commission of the crime.
15. **Sentences: Appeal and Error.** When the State, pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1989), appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed.

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

Michael G. Heavican, Lancaster County Attorney, and Thomas S. Jaudzemis, and Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellee.

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

SHANAHAN, J.

A jury in the district court for Lancaster County found Terry

Reynolds guilty of murder in the first degree and using a firearm to commit a felony. Neb. Rev. Stat. § 28-303(1) (Reissue 1989) states that a person commits murder in the first degree if he or she kills another person "purposely and with deliberate and premeditated malice . . . ." Neb. Rev. Stat. § 28-1205(1) (Reissue 1989) provides that any person who uses a firearm to commit any felony which may be prosecuted in a Nebraska court commits the offense of using a firearm to commit a felony. A three-judge panel, authorized by Neb. Rev. Stat. § 29-2520 (Reissue 1989), sentenced Reynolds to life imprisonment for his murder conviction. The judge who presided at Reynolds' jury trial sentenced Reynolds to 20 years' imprisonment on the firearm conviction, which sentence is to be served consecutively to the life sentence.

The State has appealed and claims that the sentences imposed on Reynolds are excessively lenient. See Neb. Rev. Stat. § 29-2320 (Reissue 1989) (prosecutor's appeal of defendant's sentence). In his cross-appeal, Reynolds contends that reversible error occurred in the exclusion of certain evidence from two psychiatrists called to testify for Reynolds, in the refusal of Reynolds' tendered instruction on intoxication, and due to the insufficiency of evidence for the murder conviction.

BACKGROUND FOR THE FATALITY

"Quarters" and Quarrels.

After the evening of Friday the 13th, March 1987, had been spent in moving furnishings from the apartment of Grace and Robert Garner in Hickman, Nebraska, the movers, namely, Terry Reynolds and his wife, Hazel "Hassie" Reynolds, Tina Walker, and the Garners, adjourned around 11 p.m. to "drink a beer" in the Reynolds apartment, which was located in the same building as the Garner apartment. Sometime after midnight, the group of movers obtained a case of beer and decided to play "quarters," a game in which participants attempt to flip a coin into a glass of beer. The participant who is successful in that effort then selects another player to drink the beer from the glass containing the coin.

All participants in the quarters contest drank beer, but Terry

Reynolds and Tina Walker were also "taking shots" of whiskey. At the commencement of the quarters event, all players were "friendly and getting along real well." The atmosphere changed when Terry Reynolds and Tina Walker began "flirting" with each other. When Hassie Reynolds took Terry Reynolds aside and chided him about his flirting with Walker, he responded that "maybe I will get the orgy that I always wanted."

After 3 hours of quarters, the game halted. As Terry Reynolds went into the bathroom, Hassie Reynolds followed and again expressed her displeasure over Terry Reynolds' flirting with Tina Walker. When the Reynolds argument waned, Hassie Reynolds emerged from the bathroom and encountered Tina Walker. Terry Reynolds, emerging from the bathroom in pursuit of Hassie, seized his wife by the throat, dragged her into the children's adjoining bedroom, struck her "a number of times in the face," and pulled several clumps of hair from her head. Grace Garner entered the children's bedroom and attempted to stop Terry Reynolds from further injuring Hassie, but Terry Reynolds countered by shoving Grace to the floor. After Robert Garner intervened and the fracas had subsided, Hassie Reynolds assured the Garners that she was all right. Tina Walker, meanwhile, had left the apartment. Terry Reynolds apologized for his conduct, and the Garners left the Reynolds apartment.

After Garners' departure, Hassie and Terry Reynolds went to their bedroom, where Terry demanded that Hassie sexually satisfy him. On Hassie's refusal, Terry Reynolds repeatedly struck her and grabbed her hair "hard enough to pull [her] hair out." Terry Reynolds told Hassie that if she "didn't sexually satisfy him that he would leave and that [she would know] where he was going." Hassie replied that she did not care where Terry went so long as he left her alone. Terry Reynolds responded by inflicting additional physical abuse on Hassie, tearing the phone from the wall, and walking out of the apartment. Reynolds, who had acted as a drug informant for law enforcement, always kept a loaded ".38 revolver" in his apartment and, in his words, "I didn't go anywhere without my gun." As he was leaving the apartment, Terry Reynolds met Garners, again apologized to Grace Garner, said Hassie was

"fine," and gave Grace Garner permission to check on Hassie's condition. Terry Reynolds then meandered on foot through Hickman until "the next thing [he] knew [he] was on or almost right in front of Tina's house." As recounted by Terry Reynolds, "I was mad. I was hurt. I was mad at Hassie and I went up to Tina's house." Reynolds knocked on the door of the Walker house and was admitted by Tina's son, who had answered the door. On entry into the house, Reynolds found Tina asleep, removed his clothes, and shook Tina in an effort to awaken her for sexual intercourse. When she resisted, Reynolds struck Tina twice and choked her, but, for some reason, decided to terminate the episode and return to his apartment. As Reynolds was leaving the Walker house, he wiped the door handles on either side of the front door and told Tina to "go ahead and call the cops because it was [her] word against his and who were they going to believe."

While Terry Reynolds was on his trek to Tina's, Grace Garner went to the Reynolds apartment to check on Hassie, who, obviously, had been beaten. Subsequently, Heidi Cemer, the apartment manager, and her cousin, Shannon Warburton, arrived at the Reynolds apartment.

On Terry Reynolds' return to his apartment, he found Hassie Reynolds, Grace Garner, Heidi Cemer, and Shannon Warburton and told everybody "to get out of his home." When Heidi Cemer "told him to calm down," Terry Reynolds picked her up from a chair, threw her to the floor, grabbed her while she was lying on the floor, and raised a fist as if to hit her. At that point, Hassie Reynolds approached Terry Reynolds from behind and jumped on his back. During the ensuing struggle, Terry Reynolds flung Hassie to the floor and then chased Heidi Cemer, who was attempting to leave and obtain help. Terry Reynolds chased Cemer and caught her outside the apartment, where he trapped Cemer near a stairway, pointed the .38 revolver at Cemer's head, and told her that if she called anyone, he would kill Hassie and whomever might appear in response to any summons for help. As Reynolds was threatening Cemer, Shannon Warburton approached. Reynolds pointed the revolver at Warburton, but allowed her to pass by when Warburton indicated that she wanted only to go to Cemer's

apartment. During Reynolds' distraction, Cemer escaped.

Terry Reynolds returned to his apartment, where he found Hassie in the living room, pointed the .38 revolver at her nose, and stated, "[I]f anybody calls the law, I will kill you, I will kill Tabetha [Hassie's daughter who lived in the apartment] and I will kill the sheriff and myself." Immediately after these threats, Terry Reynolds and Hassie went to their bedroom, where Terry reminded Hassie what would happen "if the law was called." Shortly afterward, Terry Reynolds awakened his stepdaughter, Tabetha, and brought her into the bedroom with Hassie. While Hassie and Tabetha were in the bedroom, Terry, with the .38 revolver in hand, began pacing around the bedroom. Some 10 to 15 minutes later, Reynoldses heard a knock on the apartment door.

THE SHOOTING

Wearing his official uniform, Deputy Craig Dodge of the Lancaster County Sheriff's Department arrived at the door of the Reynolds apartment in response to 911 calls. When Terry Reynolds asked who was at the door, Deputy Dodge replied "sheriff's department." Because Hassie's face had been beaten, Terry asked her to put on makeup, but she refused. Terry Reynolds then put the muzzle of the .38 revolver in Hassie's back and escorted her to the apartment door, which Hassie opened approximately 6 or 7 inches. Through the partially opened doorway, Deputy Dodge was visible from within the apartment. A conversation involving Dodge and both Reynoldses ensued. Early in the conversation, Dodge placed his foot in the doorway to prevent closing the door. Throughout the conversation, Hassie was positioned between Dodge and Terry Reynolds, who had kept the revolver, which was hidden from the deputy's view, pointed in Hassie's back. Although Hassie attempted to persuade Dodge that everything was all right, Dodge did not leave. Approximately 3 to 5 minutes into the conversation, Dodge attempted to enter through the apartment doorway, and also moved his hand toward his service revolver. At this point, Terry Reynolds removed the revolver from Hassie's back, pointed the weapon toward the ceiling, lowered the muzzle, and then fired a single shot which struck Dodge just

below the chin. Dodge fell in the middle of the doorway and, shortly thereafter, died from the injury sustained by the gunshot from Terry Reynolds' revolver.

After shooting Dodge, Terry Reynolds went to his bedroom, where he grabbed a jacket and shotgun, and returned to the apartment's front door. As Terry Reynolds was about to leave the apartment, he bent down and took Dodge's service revolver, exclaiming: "I am going to die tonight because I am not going to jail." Reynolds, carrying his shotgun, revolver, and Dodge's service weapon, left the apartment, ran a little distance, and then threw all the firearms into a nearby creek. Within a short time, Reynolds, having decided to return home, was en route to his apartment when he was confronted by Deputy Wesley Loos of the Lancaster County Sheriff's Department, who arrested Reynolds and had him brought to the sheriff's headquarters.

REYNOLDS' TRIAL

The Information.

In its information, the State charged that Reynolds "did purposely and with deliberate and premeditated malice kill Craig Dodge" (count I) and that Reynolds "did use a firearm or other deadly weapon in commission of a felony," namely, the murder of Craig Dodge (count II).

Motions in Limine re Psychiatric Testimony.

Reynolds did not plead that he was "not responsible by reason of insanity at the time of the offense," that is, "not responsible by reason of insanity." Neb. Rev. Stat. § 29-2203 (Reissue 1989) (defense of "not responsible by reason of insanity").

In motions in limine, the State requested that Reynolds be barred from "eliciting opinion testimony at trial from psychiatrists or psychologists as to whether or not Terry Reynolds on March 14, 1987, did in fact purposely and with deliberate and premeditated malice kill Craig Dodge" (emphasis in original) and "from eliciting opinion testimony at trial from psychiatrists or psychologists as to whether or not the shooting of Craig Dodge by Terry Reynolds on March 14, 1987, was in fact an impulsive or spontaneous act" (emphasis in

original). Among bases for its motions in limine, the State asserted that the prospective psychiatric testimony on deliberateness and premeditation in Reynolds' shooting Dodge was not an "opinion or inference [which would] aid" the jury and was nothing more than "a factual determination which can be made by any juror who hears the evidence." When the court sustained the State's in limine motions, the court remarked:

> Well, I am not sure [the psychiatric] testimony would be that helpful to the jury. I think this is basically a jury question. It depends on how they are going to consider the evidence and what decision they will make as to whether [Reynolds] was — how scared he was when he was drunk . . . how much he had to drink, how much he worried about the assault on Tina and on and on and on. . . . I think this is for the jury to decide . . . . This doesn't mean that [the psychiatrists] won't, can't testify about certain areas, [Reynolds'] personality and so forth but it's the ultimate question here, I believe it's a jury question.

Offers of Proof.

During trial, outside the jury's presence, Reynolds made offers of proof through two psychiatrists, Drs. John Baldwin and Emmett M. Kenney.

According to Dr. Baldwin: "[T]houghtful or rational deliberation [is when] consequences are weighed, values are added, the need and the importance of the need is determined and choices are thought of or options are thought of and this would be a more reflective or what we call in our field premeditative act." Responding to defense counsel's inquiries whether Terry Reynolds deliberated or premeditated shooting Dodge, Dr. Baldwin testified:

> At the time the deputy was killed, I felt he was deliberate insofar as he deliberately lashed out at another human being. He wanted to stop, hurt, injure something of that nature, to this human being and the act was focused on that deputy sheriff. [However], the rational level of contemplation of an act did not occur. I do not feel he weighed other options of expressing whatever hostility he was expressing. I do not feel he weighed the consequences

> of the act. I do not feel he thought of the pros and con and what possible gain or good it could do for him. I do not feel he was the least bit aware of the emotional forces that were causing him to act in that direction.

Defense counsel then referred to the definition of "deliberate" contained in NJI 14.10: " 'Deliberate' is defined as not suddenly, not rashly; but requires that the defendant considered the probable consequences of his act before doing the act."

> Q. . . . Using that definition, do you have an opinion that you have reasonable professional confidence in as to whether in fact Terry Reynolds deliberated at the time the gun discharged and Deputy Craig Dodge was killed?
>
> A. Yes, I have an opinion.
>
> Q. And can you tell us, please, what the opinion is, did he deliberate using that definition?
>
> A. Using that definition, I do not feel he deliberated.

Dr. Baldwin further stated that his definition for "meditated" was "similar or equal to" his definition for "deliberate" and concluded that when Craig Dodge was killed, Terry Reynolds was acting impulsively, that is, "the act was impulsive."

As an additional offer of proof, Reynolds called Dr. Kenney, who expressed his opinion that Reynolds neither "premeditated" nor "deliberated the killing of Deputy Craig Dodge" and that Reynolds' responsive action regarding Dodge's presence "fits his [Reynolds'] usual pattern of behavior under stress. . . . It was an impulsive act."

Psychiatric Testimony for the Jury.

Both Drs. Baldwin and Kenney supplied evidence for the jury concerning Terry Reynolds' personality disorders.

According to Dr. Baldwin, at the time of the shooting Reynolds had elements of three different personality disorders: narcissistic, borderline, and antisocial. One with a narcissistic personality disorder "has a tendency to react with rage or intense despair if he faces — if he is forced to face inadequacies or forced to endure criticism." A borderline personality disorder, in part, prevents one from handling stress. A person

who has an antisocial personality disorder has "no ability to delay gratification of his urges." Dr. Baldwin further explained that impulsivity is a characteristic of all three of the aforementioned personality disorders and that Reynolds displayed impulsive behavior, which is distinguished from rational behavior in that impulsive behavior excludes an evaluation of actions and "the options . . . choices . . . the ways [one] can get this urge met . . . the consequences of meeting the urge . . . ." Dr. Baldwin concluded his testimony by expressing that Terry Reynolds was "an impulsive individual." Pursuant to the court's ruling on the State's motions in limine, defense counsel refrained from eliciting Dr. Baldwin's opinion that Reynolds had neither deliberated nor premeditated shooting Craig Dodge.

Dr. Kenney testified that Reynolds displayed a "history of poor impulse control . . . chaotic handling of anger with explosive rage." Also, Reynolds manifested "excessive autistic thinking," which, according to Dr. Kenney, means that "[p]eople have a fantasy life and their relationship with daydreaming and reality has a clear-cut boundary and in autistic thinking, a person gets into his daydreaming, if you will, and the use of fantasy and the line between reality and the fantasy gets a little blurred . . . ." Dr. Kenney also felt that Reynolds indicated "poor impulse control" and was "more impulsive than the average person." Explaining the relationship between autistic thinking and impulsivity, Dr. Kenney testified:

> [I]f you believe a plan has to go a certain way, and it doesn't go that way, then you have two choices. You can sit back and figure out another plan in a deliberate fashion, I guess I would say or calculated fashion, or you could just operate on impulse. . . . That is impulsive behavior . . . .

"[P]oor impulse control," according to Dr. Kenney, may result in "primitive maneuvers," such as threats and violence, that is, one with poor impulse control "goes into a primitive way of dealing with . . . stress by becoming violent." Since Reynolds displayed poor impulse control, when Reynolds was under stress, he would go "back to what worked before, temper. He has never really broken that pattern . . . . He is still under stress and tries to deal with it by temper and threatening behavior

. . . ." Regarding Reynolds' manner of solving any problem, Dr. Kenney related:

> As Terry described dealing with problems in his life, he describes, you know, deciding how things should go as he attempts to problem solve. He attempts whatever plans he lays out. Should it not work, he does what he thinks he wants to do. Should it not work, where he runs into complications, he traditionally does three things. He escalates the intensity of the demand, you know, or creates an uproar and if that doesn't work, then he attempts in his own way to explain it away, and if that doesn't work, then he acts impulsively.

Specifically, in reference to events surrounding the Dodge death, according to Dr. Kenney, when Reynolds was in the process of leaving the apartment,

> he leaves the house, he is going over and making love to that lady because in his fantasy life, in his autistic life, that is what he wants to do and he thinks it will work and it doesn't work, you know, and he is left without a contingency plan other than maybe violence, which in his case probably isn't thought about, he doesn't do problem solving. He doesn't, if you will, meditate on things the way other people do because of the autistic thing. He plans a scenario and it's going to work and that is as far as it goes. He doesn't go back again and say what happens is she says no. So when she says no, he impulsively becomes aggressive, repetition of his style of dealing with frustration and his lack of impulse control.

Dr. Kenney noted that Reynolds had a history of difficulties with alcohol consumption and that, consistent with Reynolds' method of solving problems, any person who consumes a great quantity of alcohol will act argumentatively and impulsively or show poor judgment and become physically aggressive. Dr. Kenney also felt that Reynolds was under "multiple stresses" and dealt with such stresses by becoming violent. Further, Dr. Kenney expressed an opinion that Reynolds' "poor impulse control" was reflected in the fact that Reynolds beat his wife and the very next moment asked her for sex, conduct which illustrates impulsive and self-defeating behavior with a poor

ability to plan. As an explanation for Reynolds' cessation of the attempted forcible sex with Tina Walker, Dr. Kenney testified: "Although Terry has impulse control problems, and he has poor frustration tolerance, he can bring his behavior under control." In view of the court's prior ruling on the State's motions in limine, defense counsel did not elicit whether Dr. Kenney had an opinion about deliberateness and premeditation by Reynolds regarding Dodge's death.

Intoxication Instruction and Verdicts.

Testimony from various witnesses indicated that Terry Reynolds consumed approximately a 12-pack of beer and a half pint of whiskey during the quarters competition. Participants in the quarters game supplied varied testimony about Reynolds' intoxication, ranging from Grace Garner's testimony, "I didn't figure he [Reynolds] was intoxicated," to Robert Garner's testimony that Reynolds was "drunk." Heidi Cemer and Shannon Warburton testified that Reynolds' eyes were "red" and "bloodshot" when they saw Reynolds shortly before the Dodge fatality. A deputy sheriff testified that Reynolds, when he was arrested, was "slurring" his words and was unsteady on his feet. However, another deputy stated that he did not notice slurring in Reynolds' speech or any difficulty in Reynolds' walking.

At the instruction conference, the court proposed to instruct the jury through "INSTRUCTION NO. 16," which reflects NJI 14.31:

> Ordinarily, voluntary intoxication is no justification or excuse for crime; but excessive intoxication by which a person is wholly deprived of reason may prevent deliberation, premeditation or having the intent charged.
>
> If you find that the defendant was intoxicated, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that the defendant was at the time in question capable of deliberation, premeditation, or having the intent charged.

Defense counsel objected to the court's proposed instruction concerning intoxication and offered the following instruction:

> Evidence of consumption of alcohol by the defendant has been received. That evidence may be considered by you, along with all the other evidence, to determine if you have a reasonable doubt as to whether the defendant killed Craig Dodge purposefully and with premeditated and deliberate malice.

After receipt of instructions which included instruction No. 16 set out above, the jury deliberated and returned a verdict of guilty on both charges against Reynolds.

SENTENCES IMPOSED

A three-judge panel sentenced Reynolds to life imprisonment for the Dodge homicide. Later, the judge who presided in Reynolds' jury trial sentenced Reynolds to imprisonment for 20 years on the firearm conviction, a sentence which was consecutive to the sentence of life imprisonment. The sentencing process and sentences imposed on Reynolds will be considered in relation to the State's claim that both sentences imposed on Reynolds are excessively lenient.

ASSIGNED ERRORS

Although the State has appealed and claims that the sentences imposed on Reynolds are excessively lenient, Reynolds has cross-appealed and asserts that certain prejudicial errors occurred in his trial which necessitate reversal of his murder conviction and warrant a new trial on the murder charge. If reversible errors occurred in Reynolds' trial, then reversing Reynolds' murder conviction and, correspondingly, setting aside the sentence imposed for the murder conviction obviates consideration of the State's appeal regarding the life sentence imposed on Reynolds. Hence, we proceed first to Reynolds' cross-appeal to decide whether Reynolds' murder conviction is legally sustained.

ERRORS ALLEGED BY REYNOLDS

Reynolds claims that reversible error occurred when the trial court excluded psychiatric opinions that Reynolds did not deliberate or premeditate shooting and killing Craig Dodge. Reynolds also contends that the court failed to instruct properly

on the issue of intoxication in relation to the murder charge against Reynolds. Finally, Reynolds claims that the evidence is insufficient to sustain his conviction for murder in the first degree.

Exclusion of the Opinions on "Deliberate" and "Premeditate."

Exclusion of psychiatric opinion testimony on the question whether Reynolds' shooting Dodge was a deliberate and premeditated act, Reynolds argues, constitutes a violation of a defendant's sixth amendment right to present relevant evidence in defense to a criminal charge. See *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

To evaluate Reynolds' argument, we first review the elements for the crime of first degree murder: "A person commits murder in the first degree if he kills another person . . . purposely and with deliberate and premeditated malice." § 28-303(1).

"Purposely," as an element of first degree murder, means "intentionally." *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). In *Batiste*, we also stated:

> "Deliberate malice" and "premeditated malice" are separate and distinct elements of the crime of murder in the first degree. *Pembrook v. State*, 117 Neb. 759, 222 N.W. 956 (1929).
>
> "Deliberate" means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. See NJI 14.10. Cf. *Pembrook v. State, supra* (for origin of language). A person kills with "deliberate malice" when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequence of doing the act.
>
> "Premeditated" means to have formed a design to commit an act before it is done. . . . A person kills with "premeditated malice" if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.

231 Neb. at 491, 437 N.W.2d at 132. See, also, Neb. Rev. Stat. § 28-302(3) (Reissue 1989): "Premeditation shall mean a design

to do something before it is done."

At trial and on appeal, Reynolds has admitted that he shot and killed Craig Dodge. However, Reynolds asserts that he did not kill Dodge with "deliberate and premeditated malice" and, thus, did not commit first degree murder. To support this assertion, Reynolds desired to have Drs. Baldwin and Kenney testify that he did not deliberate and premeditate shooting Dodge. A syllogism provides an insight into Reynolds' assigned error based on exclusion of the psychiatric testimony: One who is impulsive does not deliberate and premeditate an act by weighing the consequences of the act. Terry Reynolds is impulsive. Therefore, Terry Reynolds did not deliberate or premeditate the act of shooting Craig Dodge. Reynolds contends that Drs. Baldwin and Kenney, testifying before the jury, should have been allowed to express the conclusion in the foregoing syllogism, whereas the trial court excluded the psychiatrists' conclusory opinions concerning deliberation and premeditation in Reynolds' shooting Dodge.

Admissibility under Neb. Evid. R. 704.

According to Reynolds, Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 1989), requires admission of the psychiatric opinion evidence on deliberateness and premeditation in reference to Reynolds' shooting Dodge. Pursuant to Neb. Evid. R. 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Neb. Evid. R. 704 is identical to Fed. R. Evid. 704, as initially adopted, for which the advisory committee's note includes:

> The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.
>
> The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of

> useful information. . . . The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.
>
> . . . .
>
> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

We note that Fed. R. Evid. 704 was amended in 1984 by adding section or paragraph (b), which provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

As reflected in the report of the Senate Committee on the

Judiciary concerning the amendment by Fed. R. Evid. 704(b):

> The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to direct contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. . . . [E]xpert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been. . . .
>
> . . . .
>
> Moreover, the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven. The Committee has fashioned its Rule 704 provision to reach all such "ultimate" issues, *e.g.*, premeditation in a homicide case, or lack of predisposition in entrapment.

S. Rep. No. 225 *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3412-13.

Pursuant to Neb. Evid. R. 704, an expert's opinion, which is "otherwise admissible," is not objectionable and, therefore, inadmissible because the opinion embraces an ultimate issue to be decided by the trier of fact. Consequently, in the absence of a provision such as Fed. R. Evid. 704(b), the opinions of Drs. Baldwin and Kenney regarding deliberateness and premeditation in Reynolds' shooting Dodge were not rendered inadmissible simply because the opinions embraced an ultimate issue for the jury in Reynolds' case.

At the fringe of Neb. Evid. R. 704, and perhaps beyond, is *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977), an action against an automobile manufacturer to recover on the theory of strict liability for personal injuries. The station wagon in which the plaintiffs were riding struck a highway guardrail, skidded, and finally overturned. This court noted that the "ultimate fact at issue . . . was the cause of the station wagon turning into the guardrail." 198 Neb. at 475, 253 N.W.2d at 303. On that issue, this court held that the defendant's expert witness, a traffic engineer and consultant in

the field of traffic accidents, properly testified pursuant to Neb. Evid. R. 704 that in his opinion, the cause of the vehicle's striking the guardrail was "because the driver fell asleep." 198 Neb. at 475, 253 N.W.2d at 303.

Since an expert's opinion embracing an ultimate issue is not inadmissible if the opinion is "otherwise admissible," Neb. Evid. R. 704 must be read in conjunction with Neb. Evid. R. 702 (testimony by experts), 401 (relevant evidence defined), 402 (irrelevant evidence inadmissible), and 403 (exclusion of relevant evidence). See *Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988): "Rule 704 does not render all expert testimony admissible."

An Expert's Testimony; Admissibility in General.

Among the Nebraska Evidence Rules are Neb. Evid. R. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"; Neb. Evid. R. 401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"; Neb. Evid. R. 402, in part: "Evidence which is not relevant is not admissible"; and Neb. Evid. R. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers four preliminary and interrelated questions: (1) Does the witness qualify as an expert pursuant to Neb. Evid. R. 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in

light of Neb. Evid. R. 403?

Qualification of an Expert.

For admissibility of an expert's testimony pursuant to Neb. Evid. R. 702, the witness must be an expert whose testimony will assist the trier of fact to understand the evidence or determine a factual issue. Therefore, in considering admissibility of an opinion under Neb. Evid. R. 702, a trial court first determines whether a witness is an expert who meets the qualifications specified in Neb. Evid. R. 702. See *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979). Whether a witness is qualified to testify as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1989). See, *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Whether a witness is an expert under Neb. Evid. R. 702 depends on the factual basis or reality behind a witness' title or underlying a witness' claim to expertise. See *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962). Therefore, a trial court's factual finding pursuant to Neb. Evid. R. 104(1) concerning a determination whether a witness qualifies as an expert under Neb. Evid. R. 702 will be upheld on appeal unless the trial court's finding is clearly erroneous. See, *Alfonso v. Lund*, 783 F.2d 958 (10th Cir. 1986) (a trial court's finding under Fed. R. Evid. 104(a) that a physician was qualified as an expert in a particular area was not reversible unless such finding was clearly erroneous); *Compagnie Des Bauxites De Guinee v. Ins. Co. of N.A.*, 721 F.2d 109 (3d Cir. 1983) (under Fed. R. Evid. 104(a), a trial court's finding that a civil engineer qualified as an expert on the cause of loss of production is upheld unless the finding is clearly erroneous); *United States v. Thomas*, 676 F.2d 531 (11th Cir. 1982) (whether a witness is qualified as an expert involves a factual determination that will be sustained unless clearly erroneous); *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978) (a trial court's determination concerning the expert qualifications of a witness is sustained unless manifestly erroneous). We realize that some decisions of this court, before

and after adoption of the Nebraska Evidence Rules in 1975, have expressed that a determination of a witness' qualifications as an expert is within a trial court's discretion. See, *Mathine v. Kansas-Nebraska Nat. Gas Co., Inc.*, 189 Neb. 247, 202 N.W.2d 191 (1972); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). However, consistent with this court's other decisions involving a preliminary question of admissibility, for example, constitutional admissibility of evidence in a criminal case, see *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988), which have utilized the standard of "clearly erroneous," a trial court's determination of a witness' qualification as an expert shall be evaluated under the standard of "clearly erroneous."

The "Frye" Test or Standard.

In *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), the court, considering admissibility of a "lie detector" test, enunciated a standard for admissibility of scientific evidence: "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

While mentioning *Frye* in a string of citations with no discussion about the principle applied in the decisions cited, see *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949), or obliquely referring to *Frye* in excerpts from judicial opinions of other jurisdictions, see *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983), this court has, nevertheless, recognized and adopted the *Frye* test or standard for admissibility of scientific evidence. In *Boeche, supra*, this court, considering admissibility of a polygraph, or lie detector, test, concluded that

> the scientific principle involved in the use of such polygraph has not yet gone beyond the experimental and reached the demonstrable stage, and that it has not yet received general scientific acceptance. The experimenting psychologists themselves admit that a wholly accurate test is yet to be perfected.

151 Neb. at 377-78, 37 N.W.2d at 597.

Under the test or standard enunciated in *Frye*, reliability for

admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. See, *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (rejection of hypnosis to refresh a witness' recollection); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986) (horizontal nystagmus test rejected); M. Graham, Handbook of Federal Evidence § 703.2 (2d ed. 1986).

"Assist the Trier of Fact."

If an expert's testimony lacks probative value, see Neb. Evid. R. 401, the testimony is irrelevant and is inadmissible. See Neb. Evid. R. 402. It appears axiomatic that irrelevant evidence will not "assist the trier of fact." Thus, relevance of an opinion is among the initial questions for a trial court in determining admissibility of an expert's opinion under Neb. Evid. R. 702. See, *United States v. Shorter*, 809 F.2d 54 (D.C. Cir. 1987); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984).

If a witness is qualified as an expert pursuant to Neb. Evid. R. 702, a court considering admissibility of the expert's testimony, which may include an opinion, must decide whether the testimony is likely to assist the trier of fact to understand the evidence or determine a factual issue. See, *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989); *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *State v. Petrich*, 101 Wash. 2d 566, 683 P.2d 173 (1984).

Must a court exclude an expert's testimony or opinion about a subject which is within the comprehension of an average juror? An answer in the negative is suggested in 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02] at 702-15 to 702-16 (1988):

> Must a court exclude expert testimony if the subject is within the comprehension of the average juror? Such a test is incompatible with the standard of helpfulness expressed in Rule 702. First, it assumes wrongly that there

> is a bright line separating issues within the comprehension of jurors from those that are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.

Consistent with the preceding excerpt from Weinstein and Berger, this court has stated: "Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them." *Christensen v. City of Tekamah,* 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978); *Hegarty v. Campbell Soup Co.,* 214 Neb. 716, 335 N.W.2d 758 (1983). As observed by McCormick, an expert's contribution in litigation "is the power to draw inferences from the facts which a jury would not be competent to draw. . . . In fact, Rule 702 should permit expert opinion even if the matter is within the competence of the jurors if specialized knowledge will be helpful . . . ." McCormick on Evidence § 13 at 33 (E. Cleary 3d ed. 1984).

The helpfulness standard expressed in Neb. Evid. R. 702, that is, the expert's testimony or opinion will "assist the trier of fact," has been characterized by Weinstein and Berger:

> The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case.

3 J. Weinstein & M. Berger, *supra*, ¶ 702[02] at 702-18. See, also, *U.S. v. DeSoto*, 885 F.2d 354 (7th Cir. 1989).

Under Neb. Evid. R. 704, the test is not whether the expert's opinion or inference invades the province of the jury, but whether the opinion or inference is otherwise admissible and, in accordance with Neb. Evid. R. 702, will "assist the trier of fact" to understand the evidence or determine a fact in issue. See, *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980); *Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988) (the test for admissibility under Rule 704 is whether the jury will receive appreciable help from the expert's testimony or

opinion). According to Weinstein and Berger, "[m]ost exclusive rulings are explicable as findings by the court that the issue is inappropriate for expert resolution, either because the expert is not needed or because [the expert] is incapable of rendering assistance." 3 J. Weinstein & M. Berger, *supra*, ¶ 704[03] at 704-17. As one court has expressed, the "helpfulness test" or criterion requires that the expert's testimony must "add precision or depth to the jury's ability to reach conclusions about the subject" before the jury. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

An expert's testimony, although relevant, may be excluded if the probative value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. See Neb. Evid. R. 403. See, also, *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988); *State v. Hall*, 406 N.W.2d 503 (Minn. 1987); *United States v. McBride*, 786 F.2d 45 (2d Cir. 1986); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984).

The determination whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb. Evid. R. 702 involves the discretion of a trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion. See, *Little v. Gillette*, 225 Neb. 70, 402 N.W.2d 852 (1987); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860 (10th Cir. 1979). A reason for the aforementioned standard of review in relation to admission or exclusion of an expert's opinion was expressed in *U.S. v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987): "The trial judge has a hands-on familiarity with the nuances of the case—nuances which may not survive transplantation into a cold appellate record. Thus, the [trial] court's assessment of what will or will not assist the jury is entitled to considerable deference in the Rule 702 milieu." Cf. *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989) (relevance of offered evidence, otherwise admissible, involves the discretion of a trial court, whose ruling on relevance will be upheld on appeal unless the trial court abused its discretion).

Therefore, in Reynolds' case the question becomes: Did the trial court abuse its discretion in concluding that the psychiatric opinions would not assist the jury in Reynolds' trial and, therefore, in excluding the psychiatrists' testimony that Reynolds did not act with deliberateness and premeditation in shooting Craig Dodge?

This court has stated that "evidence of an accused's mental condition at the time the offense was committed is always admissible to prove absence of intent . . . ." *State v. Vosler*, 216 Neb. 461, 468, 345 N.W.2d 806, 811 (1984). In *Washington v. State,* 165 Neb. 275, 281, 85 N.W.2d 509, 513 (1957), which antedates the Nebraska Evidence Rules, this court stated: " '[E]vidence of the condition of the mind of the accused at the time of the crime . . . may be introduced . . . to show absence of any deliberate or premeditated design.' "

In *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), the trial court, in a first degree murder prosecution, would not allow a defense psychiatrist to testify that the "defendant's diminished mental capacity affected his ability to make and carry out plans. [The trial court] also did not allow [the expert] to testify whether he determined that defendant was under the influence of mental or emotional disturbance at the time of the offense." 322 N.C. at 246, 367 S.E.2d at 641. In finding that the trial court erred in excluding the psychiatrist's testimony, the Supreme Court of North Carolina stated that, pursuant to N.C. Evid. R. 702, which is substantially the same as Neb. Evid. R. 702, "[t]estimony that a defendant was incapable of planning his activities or carrying out plans, and that he was under mental or emotional disturbance, could assist the jury in determining whether a defendant in fact premeditated and deliberated." 322 N.C. at 248, 367 S.E.2d at 643. The *Shank* court also noted that although the opinion testimony tended to show that the defendant lacked the capacity to deliberate and premeditate, the testimony was admissible on an "ultimate issue" under N.C. Evid. R. 704 (which is substantially the same as Neb. Evid. R. 704).

The Supreme Court of North Carolina, on the same day it issued *State v. Shank, supra*, also issued *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). In *Weeks*, the defendant was

charged with the first degree murders of his father and stepmother. Defense psychiatrists testified about Weeks' mental condition at the time of the homicides; for example, chronic emotional disturbance characterized by an inability to deal with stress, an adjustment disorder with mixed disturbance of emotions and conduct, vulnerability to stress, living in a fantasy world, and a proclivity to rage when rebuffed. However, in *Weeks*, the trial court precluded defense experts from testifying that Weeks did not act with deliberation and premeditation when he committed the homicides in question. The *Weeks* court held that the opinion testimony about deliberation and premeditation was properly excluded and stated:

> [I]t is not error for a trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make. [Citations omitted.]
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> . . . .
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> Such testimony [about deliberation and premeditation] embraces precise legal terms, definitions of which are not readily apparent to medical experts. What defendant sought to accomplish with this testimony was to have the experts tell the jury that certain legal standards had not been met. [Citation omitted.] We are not convinced that either the psychologist or the psychiatrists were in any better position than the jury to make those determinations. Having the experts testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue.

322 N.C. at 164, 166-67, 367 S.E.2d at 903-04. See, also, *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). The difference between *Shank, supra*, and *Weeks, supra*, appears to be that in *Shank* the court was faced with an expert's opinion regarding the defendant's mental ability to effectuate subjective or mental elements of a crime, whereas in *Weeks*, the excluded psychiatric testimony related to the accomplished fact of deliberation and premeditation which, therefore, involved the opinion that the defendant was not guilty of murder in the first degree. In *Weeks*, the Supreme Court of North Carolina concluded that a

psychiatrist, obviously an expert in the field of psychiatry, was not an expert, for the purpose of N.C. Evid. R. 702, in determining whether the crime of first degree murder had been committed.

In *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984), which involved two convictions for first degree murder, the trial court excluded an expert's testimony that Gurganus' actions were from a " 'depraved mind' " rather than a " 'premeditated plan.' " 451 So. 2d at 821. However, holding that exclusion of the expert's testimony was proper, the Florida Supreme Court stated:

> We recognize that: "The trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed on appeal. . . . This discretion, however, is not boundless and expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts." *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). We find that the opinions the psychologists were asked to give in this case were not the proper subject of expert testimony. The defense was attempting to elicit a bottom-line opinion as to whether the actions of Gurganus were those of a "depraved mind" or a "premeditated plan." Both of these terms are legal terms with specific legal definitions. Essentially, the defense was attempting to elicit the psychologists' opinions as to whether Gurganus committed second-degree or first-degree murder. Such a conclusion was a legal conclusion no better suited to expert opinion than to lay opinion and, as such, was an issue to be determined solely within the province of the jury.

451 So. 2d at 821.

Consequently, we conclude that under the standard of helpfulness required by Neb. Evid. R. 702, a court may exclude an expert's opinion which is nothing more than an expression of

how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact. See, *Karns v. Emerson Elec. Co.*, 817 F.2d 1452 (10th Cir. 1987) (an expert's opinion telling the jury what result to reach is not helpful in deciding a case); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983) (an opinion which contains an expert's view of how the verdict should read and tells the jury what result to reach is properly excluded); *United States v. Ness*, 665 F.2d 248 (8th Cir. 1981) (proper exclusion of an opinion that the defendant did not intend to defraud a bank by misapplication of funds; the opinion was not helpful to the trier of fact); *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979) (forensic psychiatrist's opinion that a defendant's personality prevented the defendant from operating a motor vehicle in a reckless or wanton manner was properly excluded as the expert's substitution of his judgment as to defendant's state of mind); *Stoler v. Penn Central Transp. Co.*, 583 F.2d 896 (6th Cir. 1978) (opinion that a railroad crossing was extrahazardous was properly excluded).

Wigmore, explaining the "theory of the opinion rule," states:

> The true theory, then, of the opinion rule . . . is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression; but simply that his testimony, otherwise unobjectionable, is not needed, is *superfluous*.
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> . . . .
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> . . . We are dealing merely with a broad principle that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid on this point, his testimony is superfluous and is to be dispensed with.

(Emphasis in original.) 7 J. Wigmore, Evidence in Trials at Common Law § 1918 at 11-12 (J. Chadbourn rev. 1978).

Thus, when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is

superfluous and does not assist the trier in understanding the evidence or determining a factual issue. See, *U.S. v. Felak*, 831 F.2d 794 (8th Cir. 1987) (exclusion of an expert's opinion is proper when there is no basis for the conclusion that the subject was beyond the common understanding of the jurors or that the expert could offer information ordinarily unavailable to the jury); *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982) ("[i]f the jury is in as good a position to reach a decision as the expert, expert testimony would be of little assistance to the jury and should not be admitted"); *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505 (2d Cir. 1977) (an expert's testimony may be excluded when the tribunal does not need the witness' judgment, since the judge, or the jury properly instructed by the court, can determine equally well that which the witness would express in an opinion).

In Reynolds' case, we affirm the trial court's exclusion of the psychiatrists' opinions that Reynolds acted without deliberation and premeditation in shooting Craig Dodge. The reasons for upholding the exclusionary ruling are twofold. First, the psychiatric opinions did not relate to Reynolds' ability to effectuate subjective or mental elements for the crime of first degree murder, but, rather, related to factual existence of deliberation and premeditation as elements of first degree murder. In that posture, the psychiatric opinions were expressions that Reynolds was not guilty of the crime charged, murder in the first degree, and, therefore, were unlikely to assist the jury in determining whether Reynolds acted with deliberation and premeditation in shooting Craig Dodge. Second, the psychiatrists had thoroughly supplied the jury with information concerning Reynolds' personality disorders and the personality problems of one who is impulsive, especially the inability to deliberate and premeditate an act by weighing the consequences of the act. After the psychiatrists had evidentially provided the major and minor premises in the syllogism previously mentioned in "Exclusion of the Opinions on 'Deliberate' and 'Premeditate' " of this opinion, the jury was as qualified as the psychiatrists to draw the factual conclusion that Terry Reynolds, as an impulsive person, did not deliberate and premeditate the act of shooting Craig Dodge. Also,

equipped with extensive information supplied by the psychiatrists and other witnesses, the jury was obviously in a position better overall than that of the psychiatrists to determine whether Reynolds actually deliberated and premeditated the act of shooting Dodge. Under the circumstances, we are unable to conclude that the psychiatrists' opinions would have assisted the jury in determining whether Reynolds deliberated and premeditated the act of shooting Craig Dodge. Cf. *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989) (an expert's opinion that a construction bid of $698,000 substantially exceeded the construction project's budget of $350,000 was properly excluded, since the opinion would not assist the jury in determining whether an architect had breached his duty to remain within the project's budget). For the foregoing reasons, the psychiatric opinions about Reynolds' deliberation and premeditation were not information which would have assisted the jury in determining the factual issue of deliberation and premeditation in reference to the Dodge fatality. As we expressed in *State v. Juhl*, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989):

> [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.

Hence, we find no abuse of discretion in the trial court's exclusion of the psychiatric opinion evidence on deliberation and premeditation in the fatal shooting.

While *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), supports the general proposition that the sixth amendment prohibits a state from applying an evidential rule which prevents a defendant from presenting a defense based on relevant evidence, the sixth amendment does not make irrelevant evidence admissible and does not render admissible an expert's opinion which does not assist the trier of fact under Neb. Evid. R. 702. See, *Stano v. Dugger*, 883 F.2d 900 (11th Cir. 1989) (the sixth amendment right to present evidence does not

extend to irrelevant evidence); *United States v. Davis*, 772 F.2d 1339 (7th Cir. 1985) (the sixth amendment does not make irrelevant evidence admissible).

Consequently, we find no reversible error in the trial court's exclusion of the psychiatrists' testimony regarding deliberateness and premeditation in Reynolds' act of shooting Craig Dodge.

INTOXICATION INSTRUCTION

On the issue of Reynolds' intoxication, the trial court used NJI 14.31 for the instruction, whereas Reynolds contends that the trial court erred by refusing his tendered instruction on intoxication.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

A defendant's condition of intoxication, otherwise called the defense of intoxication, may negative a subjective or mental element necessary for commission of a crime. As LaFave and Scott observe:

> Intoxication is a defense to crime if it negatives a required element of the crime; and this is so whether the intoxication is voluntary or involuntary.
>
> . . . .
>
> . . . [I]t may be said that it is better, when considering the effect of the defendant's voluntary intoxication upon his criminal liability, to stay away from those misleading concepts of general intent and specific intent. Instead one should ask, first, what intent (or knowledge) if any does the crime in question require; and then, if the crime requires some intent (knowledge), did the defendant in fact entertain such an intent (or, did he in fact know what the crime requires him to know).

1 W. LaFave & A. Scott, Substantive Criminal Law § 4.10 at

551, 554 (West 1986).

Specifically, in reference to intoxication which negatives premeditation and deliberation, LaFave and Scott note:

> Just as intoxication may negative some required intention or knowledge, so too it may negative the premeditation and deliberation which a common type of first degree murder statute requires. Just as one may be so emotionally upset, or in such a panic, or so mentally abnormal (though not insane), as to be incapable of premeditation and deliberation, so intoxication may rob him of his capacity to premeditate and deliberate and thus reduce his crime from first degree to second degree murder. . . .
>
> Once again, for intoxication to negative premeditation and deliberation it must be so severe as to rob the defendant of his ability to premeditate and deliberate, although it need not in addition be so great as to render him unconscious or to deprive him of his normal ability to know right from wrong.

1 W. LaFave & A. Scott, *supra*, § 4.10 at 555.

We have acknowledged that "[i]t is clear that NJI 14.31 correctly states the law on the issue of intoxication as a defense." *State v. Donhauser*, 231 Neb. 114, 120, 435 N.W.2d 186, 190 (1989). Consequently, in *State v. Cain*, 223 Neb. 796, 800, 393 N.W.2d 727, 730 (1986), we stated:

> Voluntary intoxication is no justification or excuse for crime unless the intoxication is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent. *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978). Stated another way, voluntary intoxication is ordinarily not a justification or excuse for crime, but excessive intoxication as the result of which a person is wholly deprived of reason may prevent one from having the intent charged. *State v. Bevins*, 187 Neb. 785, 194 N.W.2d 181 (1972); *State v. LaPlante*, 183 Neb. 803, 164 N.W.2d 448 (1969).

See, also, *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989); *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Brown*, 174 Neb. 393, 118 N.W.2d 332 (1962); *Thompson v.*

State, 159 Neb. 685, 68 N.W.2d 267 (1955); *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951). Similarly, this court has held that evidence of intoxication may be admissible as a circumstance tending to negative the assertion that a defendant acted with deliberation or premeditation. *State v. Coleman*, 196 Neb. 721, 246 N.W.2d 61 (1976); *State v. Barnes*, 185 Neb. 384, 176 N.W.2d 18 (1970); *State v. Brown, supra*; *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957); *Tvrz v. State, supra.*

Reynolds asserts: "The jury was positively misled into believing that it could not consider the intoxication evidence for any other purpose than the intoxication defense by its misleading presence in the instruction packet." Brief for cross-appellant at 30. However, Reynolds neither explains nor elaborates on the foregoing conclusory expression. Insofar as deliberation and premeditation are elements in the murder charge against Reynolds, the second paragraph of the court's instruction No. 16 is virtually indistinguishable from Reynolds' tendered instruction, that is, Reynolds' intoxication from consumption of alcohol "should be considered" or "may be considered" by the jury in determining, beyond a reasonable doubt, whether Reynolds acted intentionally and with deliberation and premeditation in shooting Craig Dodge. Reynolds does not point to any particular expression or deficiency in instruction No. 16 which resulted in prejudice to Reynolds and deprived him of a fair trial. For the preceding reasons, Reynolds' assignment of error regarding the trial court's instruction on intoxication is without merit.

CLAIM OF INSUFFICIENT EVIDENCE

Reynolds states: "Even if this court does not consider the offers of proof of the two expert witnesses concerning Terry Reynolds' failure to deliberate, the evidence is wholly insufficient to warrant a rational factfinder in determinining [sic] that Terry Reynolds [sic] behavior was deliberate at the time he shot Craig Dodge." Brief for cross-appellant at 23.

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence

> presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987). See, also, *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986). See, also, *State v. Loveless, supra.*

In light of the evidence previously reflected in this opinion, it is unnecessary to make any comment about Reynolds' claim of insufficient evidence beyond our conclusion that the evidence supports Reynolds' conviction for the first degree murder of Craig Dodge.

CONCLUSION ON REYNOLDS' CROSS-APPEAL

We have considered each of Reynolds' errors assigned in his cross-appeal and conclude that there is no reversible error in Reynolds' convictions. Accordingly, Reynolds' convictions on count I, first degree murder, and count II, using a firearm to commit a felony, are affirmed.

SENTENCING

The trial court requested that a three-judge panel, including the judge who presided at Reynolds' trial, determine the sentence to be imposed on Reynolds' conviction for first degree murder. See § 29-2520 (determination of sentence for a first degree murder conviction). At the sentence hearing before the three-judge panel, evidence was presented relative to the aggravating and mitigating circumstances pertaining to imposition of the death penalty, that is, the circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1989). As an aggravating circumstance for imposition of the death penalty, § 29-2523(1)(g) provides: "The victim was a law enforcement

officer or a public servant having custody of the offender or another." In finding that § 29-2523(1)(g) did not exist as an aggravating circumstance, the sentencing panel stated:

> The prosecution contends that this aggravating circumstance exists apparently based simply on the fact that the victim was a law enforcement officer, since no evidence exists to show that defendant or another was in custody at the time the crime was committed.
>
> . . . .
>
> The prosecution evidently construes this subsection as providing for two separate aggravating circumstances: 1) the shooting of a law enforcement officer; and 2) the shooting of a public servant having custody of the offender or another.
>
> The panel does not agree with the above construction and finds that the subsection provides for only one aggravating circumstance which requires custody of the offender or another by the law enforcement officer or public servant to be present before this circumstance becomes operative. Since no custody existed in the present case, the panel concludes that (1) (g) does not exist.

The sentencing panel also considered existence of the aggravating circumstance set forth in § 29-2523(1)(h): "The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." In reference to § 29-2523(1)(h), the sentencing panel concluded:

> The evidence affirmatively shows that the victim was a law enforcement officer responding to a disturbance call in his official capacity. That during the course of the victim's investigation into the facts surrounding the disturbance call, the victim was attempting to gain entrance to the apartment of the defendant in order to conduct a meaningful investigation. The defendant resisted and was physically preventing the victim from entering the apartment by forcing the entrance door closed. During the struggle to keep the victim from entering, the defendant fired the shot that killed the officer, thereby hindering the enforcement of the laws.

However, the sentencing panel determined that three

mitigating circumstances existed in Reynolds' case, namely, § 29-2523(2)(b), which provides that "[t]he offender acted under unusual pressures or influences or under the domination of another person"; § 29-2523(2)(c), which states that "[t]he crime was committed while the offender was under the influence of extreme mental or emotional disturbance"; and § 29-2523(2)(g), which provides that "[a]t the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." The sentencing panel also determined that there were no "non statutory mitigating circumstances" in Reynolds' case. See *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986) (regarding imposition of the death penalty, a defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in § 29-2523(2)).

The three-judge panel, concluding that "[s]ufficient aggravating circumstances do not exist to justify the imposition of [the] sentence of death" and "[s]ufficient mitigating circumstances do exist that exceed the weight given any aggravating circumstances," sentenced Reynolds to life imprisonment on his conviction for the first degree murder of Craig Dodge. Later, the judge who had presided at Reynolds' jury trial sentenced Reynolds to 20 years' imprisonment on the firearm conviction, which sentence is to be served consecutively to the life sentence for Dodge's murder.

The State appeals concerning the sentences imposed on Reynolds for both convictions. See § 29-2320. In its brief, the State argues:

> The sentencing panel was wrong, as a matter of law, in concluding that the aggravating circumstance set forth in Neb.Rev.Stat. §29-2523(1)(g) R.R.S. 1943 (Reissue 1985) does not exist. The undisputed evidence was that at the time the defendant killed Craig Dodge, Dodge was on duty as a uniformed deputy sheriff for Lancaster County, Nebraska. The defendant was not in custody at the time of the murder. Because the sentencing panel failed to consider and weigh this key aggravating circumstance, the sentence of life imprisonment was incorrectly imposed,

and is excessively lenient.

Brief for appellant at 3.

When the State, pursuant to § 29-2320, appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed. *State v. Stastny*, 227 Neb. 748, 419 N.W.2d 873 (1988).

Ordinarily, "[n]o oral argument is allowed in any criminal case . . . [w]here the sole allegation of error is that the sentence imposed was excessive or excessively lenient." Neb. Ct. R. of Prac. 11F(5)b (rev. 1989). However, in view of the nature of the error alleged by the State and the implications regarding application of § 29-2523(1)(g) as an aggravating circumstance for imposition of the death penalty in Nebraska, we have allowed oral argument and now proceed to consider the questions raised by the State.

Sentence Imposed for First Degree Murder.

The sentencing panel concluded that an officer's custody of the defendant or another is necessary before § 29-2523(1)(g) becomes operative as an aggravating circumstance for the death penalty. The State suggests that the sentencing panel's

> reading of the statute is contrary to the clear and obvious meaning of the statute, and adds a requirement that was obviously not intended by the Legislature. Section 29-2523(1)(g) reads, "The victim was a law enforcement officer or a public servant having custody of the offender or another." This statute clearly meant to protect law enforcement officers and jailers. It is ridicules [sic] to think that this statute is only designed to protect law enforcement officers <u>if</u> they have someone in custody, and that is not what the statute says.

(Emphasis in original.) Brief for appellant at 4-5. The State concludes that, regarding the aggravating circumstance prescribed in § 29-2523(1)(g), " 'having custody of the offender or another,' refers solely to, 'public servant', and <u>not</u> to, 'law enforcement officer.' " (Emphasis in original.) Brief for appellant at 6.

While the State's preceding interpretation of the statutory

aggravating circumstance in question presents a rather restricted view, limited to the particular factual setting in the present appeal, we are denied the luxury of limitation in the necessary judicial examination of § 29-2523(1)(g) and must consider reasonably probable circumstances beyond the present appeal.

If the State's interpretation prevails, then killing at any time any person who happens to be a law enforcement officer justifies application of § 29-2523(1)(g) as an aggravating circumstance for imposition of the death penalty. In its present form, § 29-2523(1)(g) raises all-too-obvious questions: Must the officer, at the time of the officer's death, be in the performance of an official duty? Must the defendant have known, or should the defendant have reasonably known, that the victim was a law enforcement officer? Without answers to the preceding questions, and perhaps answers to other questions stemming from the absence of definitive statutory language, the State's broad and virtually unrestricted interpretation of § 29-2523(1)(g) may likely raise serious constitutional issues regarding vagueness in § 29-2523(1)(g) or equal protection inherent in the dichotomy of two homicide victims when one victim is a law enforcement officer who is not performing an official duty at the time of death, while the other victim is not a law enforcement officer. There is no legal distinction between the homicide victims reflected in the dichotomy. Yet, in the first part of the dichotomy, one is exposed to the death penalty on account of § 29-2523(1)(g), while, in the second part of the dichotomy, one is not exposed to the death penalty by virtue of § 29-2523(1)(g).

Of the 36 states in which the death penalty is authorized as a punishment for first degree murder, 27 states have chosen to fashion a statutory aggravating circumstance similar to § 29-2523(1)(g), but, unlike Nebraska, the 27 other states have provided a reasonably precise definition, characterization, or description of the law enforcement officer as a victim whose death may be the basis for imposition of the death penalty; for example, see, Ariz. Rev. Stat. Ann. § 13-703F (1989) ("[t]he murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the

defendant knew, or should have known, that the victim was a peace officer"); Colo. Rev. Stat. § 16-11-103(6)(c) (Supp. 1989) ("[t]he defendant knowingly killed [a law enforcement officer] while such person was engaged in the course of the performance of his official duties or in the enforcement of laws, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of his official duties or in the enforcement of laws, or the victim was knowingly killed in retaliation for the performance of his official duties or in the enforcement of laws"); Ill. Ann. Stat. ch. 38, para. 9-1(b)1 (Smith-Hurd Supp. 1990) ("the murdered individual was a peace officer . . . killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer"); Ohio Rev. Code Ann. § 2929.04(A)(6) (Anderson 1987) ("[t]he victim of the offense was a peace officer . . . whom the offender had reasonable cause to know or knew to be such, and . . . the victim, at the time of the commission of the offense, was engaged in his duties"). Included in additional states which have a statutory aggravating circumstance for the death penalty based on a defendant's killing a law enforcement officer who is performing an official duty ("duty") or a defendant's killing a law enforcement officer during the officer's performance of an official duty when the defendant knew, or should have known, that the victim was a law enforcement officer ("duty and knowledge") are Delaware—Del. Code Ann. tit. 11, § 4209(e)(1)c (1987) (duty); Florida—Fla. Stat. Ann. § 921.141(5)(j) (West Supp. 1990) (duty); Georgia—Ga. Code Ann. § 17-10-30(b)(8) (1982) (duty); Idaho—Idaho Code § 19-2515(g)(9) (1987) (duty); Indiana—Ind. Code Ann. § 35-50-2-9(b)(6) (Burns Supp. 1990) (duty); Kentucky—Ky. Rev. Stat. Ann. § 532.025(2)(a)7 (Michie Supp. 1988) (duty); Louisiana—La. Code Crim. Proc. Ann. art. 905.4A(2) (West Supp. 1990) (duty); Maryland—Md. Ann. Code art. 27, § 413(d)(1) (1988) (duty); Massachusetts—Mass. Gen. Laws. Ann. ch. 279, § 69(*a*)(1) (West Supp. 1990) (duty); Missouri—Mo. Ann. Stat. § 565.032 (Vernon Supp. 1990) (duty); Montana—Mont. Code Ann. § 46-18-303(6) (1989) (duty); Nevada—Nev. Rev. Stat. § 200.033(7) (1990) (duty and

knowledge); New Jersey—N.J. Stat. Ann. § 2C:11-3c(4)(h) (West Supp. 1990) (duty); New Mexico—N.M. Stat. Ann. § 31-20A-5 (1987) (duty); North Carolina—N.C. Gen. Stat. § 15A-2000(e)(8) (1988) (duty); Oklahoma—Okla. Stat. Ann. tit. 21, § 701.12(8) (West 1983) (duty); Oregon—Or. Rev. Stat. § 163.095(2)(a)(A) (1989) (duty); Pennsylvania—42 Pa. Cons. Stat. Ann. § 9711(d)(1) (Purdon Supp. 1990) (duty); South Carolina—S.C. Code Ann. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1989) (duty); South Dakota—S.D. Codified Laws Ann. § 23A-27A-1(7) (Supp. 1990) (duty); Tennessee—Tenn. Code Ann. § 39-13-203(i)(9) (Supp. 1989) (duty and knowledge); Utah—Utah Code Ann. §§ 76-3-207(2) and 76-5-202(1)(k) (1990) (duty and knowledge); and Washington—Wash. Rev. Code Ann. § 10.95.020(1) (Supp. 1990) (duty and knowledge).

We point out the statutes of other states only to show that killing a law enforcement officer while the officer is lawfully performing an official duty is a fairly common subject for an aggravating circumstance in conjunction with imposition of the death penalty. An aggravating circumstance of such nature has an obvious purpose: "There is a special interest in affording protection to [those] public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts v. Louisiana*, 431 U.S. 633, 636, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977). In other words, as a result of a law enforcement officer's service to the public, many states have determined that murder of a law enforcement officer during the officer's performance of an official duty is an aggravating circumstance in determining whether the death penalty should be imposed.

It appears that the State wishes us to forestall a possible constitutional quandary in § 29-2523(1)(g) by our supplying necessary but omitted qualifying language which accomplishes an acceptable definition or characterization for a law enforcement officer as a victim whose death may provide a basis for imposition of the death penalty in Nebraska. To that end, the State would have us apply the highly questionable rule of statutory construction expressed in *Board of Regents v. Gillette*, 149 Neb. 56, 66, 30 N.W.2d 296, 301 (1947): "The rule is that words may be supplied by the courts in construing a

statute where that is necessary to complete the sense thereof and give effect to the intention of the Legislature manifested therein." We reject the foregoing expression as a valid rule for statutory construction.

In Nebraska, as an apparent attempt at legislative economy, § 29-2523(1)(g) indicates categories of homicide victims, that is, a law enforcement officer and a public servant who has custody of a particular individual. However, without clarifying language to define or sufficiently characterize the officer-victim whose death may be the basis for the aggravating circumstance in question, § 29-2523(1)(g) presents very real and practical problems. Although "[b]revity is the soul of wit," economy of language to the point of verbal paucity in a statute is a dubious hallmark of, and may not be conducive to, constitutionally sound legislation, especially in reference to substantive or procedural due process required in the criminal justice system.

Consequently, we decline to rewrite § 29-2523(1)(g) to conform with the State's wishes and desired interpretation of the statute. The sentencing panel's interpretation of § 29-2523(1)(g) is correct under the circumstances and preserves the statute from constitutional suspicion. Therefore, we affirm the life sentence which the sentencing panel imposed on Reynolds for his conviction of first degree murder.

Sentence Imposed for Using a Firearm to Commit a Felony.

The State also claims that Reynolds' sentence of 20 years' imprisonment on the firearm conviction, to be served consecutively to his life sentence for first degree murder, is excessively lenient. Using a firearm to commit a felony is a Class III felony, see § 28-1205(2), and is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The State does not contend that the firearm sentence lies outside statutory limits and does not demonstrate in what manner the firearm sentence is excessively lenient as an abuse of discretion. Bearing in mind our standard of review, see *State v. Stastny*, 227 Neb. 748, 419 N.W.2d 873 (1988), we find no abuse of discretion by the trial court regarding the firearm sentence imposed on Reynolds.

CONCLUSION

We have considered all assignments of error raised in the State's appeal and Reynolds' cross-appeal. For the reasons previously stated in our consideration of the assignments of error, we affirm Reynolds' conviction and sentence for first degree murder and his conviction and sentence for using a firearm to commit a felony.

AFFIRMED.

DEAN EARL HAMMEL, APPELLANT, V. TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLEE.

457 N.W.2d 274

Filed July 6, 1990. No. 88-831.

Appeal from the District Court for Douglas County, DONALD J. HAMILTON, Judge, upon the recommendation of the Appellate Division of the District Court, WARREN, COADY, and RILEY, District Judges. Affirmed.

David F. Eaton and James E. Schaefer, of Gallup & Schaefer, for appellant.

Timothy M. Kenny and Sandra L. Maass, of Abrahams, Kaslow & Cassman, for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we determine that the record supports a finding that the negligence of the plaintiff-appellant was more than slight when compared to the negligence, if any, of the defendant-appellee, which was less than gross, and accordingly the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF L.C., J.C., AND E.C., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. L.T.C. AND K.K.C., APPELLANTS.

457 N.W.2d 274

Filed July 6, 1990. No. 89-829.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** The failure to appeal a juvenile court's dispositional order forecloses complaint concerning such order in a subsequent appeal of a judgment terminating parental rights.
2. **Parental Rights.** Neb. Rev. Stat. § 43-246 (Reissue 1988) does not require that the state Department of Social Services institute a plan for rehabilitation of a parent whose child has been found to be dependent and neglected.
3. **Juvenile Courts: Parental Rights.** A juvenile court may terminate parental rights under the various grounds specified in subsections (1) through (5) of Neb. Rev. Stat. § 43-292 (Reissue 1988) without providing the parent with a reasonable opportunity to rehabilitate himself or herself.
4. **Parental Rights: Proof.** It is only to terminate parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) that the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.

Appeal from the Separate Juvenile Court of Lancaster County: J. PATRICK MCARDLE, Judge. Affirmed.

Roberta S. Stick, of Legal Services of Southeast Nebraska, for appellants.

Richard E. Rothrock, Deputy Lancaster County Attorney, for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Defendant father, L.T.C., and defendant mother, K.K.C., appeal from the termination of their parental rights to L.C. and J.C., twin sons born to them on June 15, 1974, and to E.C., a son born to them on November 6, 1975. They contend that the court below erred (1) in failing to find that the state Department of Social Services had breached its responsibility to use reasonable efforts to reunify the family, (2) in finding that they had continuously or repeatedly neglected their children and

refused to give them the necessary parental care and protection, and (3) in terminating their parental rights. We affirm.

II. FACTS

The juvenile division of the Seward County Court acquired jurisdiction over the children on June 26, 1978, as the result of an adjudication that they fit within Neb. Rev. Stat. § 43-202(2)(b), (c), (d), and (e) (Reissue 1978), precursor to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), because of the unclean condition of the family's residence, the lack of food available at the residence for the children to eat, and the unsuitable and unclean mattress on which the children slept, and because the children were "quite dirty," wore unclean clothes, were "underfed," and "appeared . . . to have potential nutritional deficiencies" and "to suffer from arrested social and mental development."

Following a dispositional hearing on January 3, 1979, temporary custody of the children, who had been removed from the natural parents' home, was placed with the Seward County department of public welfare, which placed them in a foster home. The county court ordered that "continuing efforts be made to provide the natural parents with the necessary skills and training to enable them to re-unite the family." At a successive review hearing, the court, determining that the parents' cooperation with assisting social services agencies was poor, "with occasional progress . . . followed by retrogression," ordered "total cooperation by [the] parents with assisting agencies" and further ordered that visitation between the parents and children continue.

After a subsequent review hearing on March 31, 1980, the Seward County Court determined that "after a period of two years of intensive assistance" and "all reasonable efforts having been made to reunite [the] family," the parents remained unable to adequately care for their children, and accordingly placed permanent custody of the children with the state Department of Public Welfare, now the Department of Social Services (department), "for permanent foster placement" and ordered that "no further visitation or association [with the parents] be allowed." On appeal by the parents from this order, the district

court for Seward County, on January 16, 1981, concluded that the county court's order of March 31, 1980, had in effect terminated the parents' rights in and to their children without any pleading having been filed which sought such action. The district court therefore vacated the county court's order and remanded the matter for further proceedings.

On May 3, 1982, the county court, at the parents' request and under the authority of Neb. Rev. Stat. § 43-202.04 (Reissue 1978), now Neb. Rev. Stat. § 43-282 (Reissue 1988), transferred jurisdiction of the matter to the separate juvenile court of Lancaster County, the then residence of the natural parents and arguable domicile of the children. The separate juvenile court continued the existing custody arrangements for the children but did not order visitation or institute a plan with which the parents were required to comply. Such situation continued until October 10, 1983, when the separate juvenile court ordered that the parents be granted visitation with the children at least once per month but prohibited them from discussing with the children any attempt to regain custody.

On April 20, 1984, the separate juvenile court ordered continued visitations between the children and their parents, supervised by Parents and Children Together (PACT), a program designed to facilitate the reuniting of the family by teaching parenting skills to parents during their interaction with their children; extended or overnight visits in the parents' residence "conditioned upon an adequate physical environment"; a psychological evaluation of each parent; counseling for the parents, foster parents, and children; and that all interested parties consider long-term care that provides permanence for the children. On October 22, 1984, the separate juvenile court increased visitation to once every 2 weeks "because the [department] has only arranged limited visitation."

Subsequently, on May 24, 1985, the separate juvenile court determined that the visitations were emotionally disturbing to the children and that the children did not want visitations with their parents, and, based upon the opinion of a clinical psychologist that the visitation previously ordered by the court was not in the children's best interests, decreased visitation to

once every 2 months. Such situation continued until November 25, 1986, when the court ordered the maximum visitation consistent with the welfare and best interests of the children. This situation prevailed until January 17, 1989, when the court ordered the parents to cooperate with the social workers involved in their case and for the first time specifically directed them to "correct the conditions of neglect that led to their children being removed from their home."

A petition to terminate the parents' parental rights was filed on March 9, 1989. The separate juvenile court terminated the parents' rights on July 7, 1989, because they had substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection, the ground for termination contained in Neb. Rev. Stat. § 43-292(2) (Reissue 1988), and because termination was in the children's best interests. The court specifically found that the record did not support a finding that the parents had been provided sufficient direction as to the conditions they were required to correct in order that their children be returned to them and that, thus, no basis for termination of their parental rights existed under § 43-292(6). That subsection empowers a court to terminate parental rights when "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

The social worker who worked with the parents from 1981 through 1984 testified that prior to the overturning of the county court's March 31, 1980, order, his efforts had been directed toward facilitating adoption of the children. He made no effort to establish visitation between the parents and children until sometime in 1984, when such was ordered by the separate juvenile court. The social worker who next worked with the parents also admitted that the department's goal during his tenure from August 1984 until June 1985 was not reunification of the family but was adoption of the children by the foster family and, therefore, that he did not undertake overt steps to rehabilitate the parents. According to the family case manager, the department continued to promote adoption until September 1985, when it realized that adoption of children whose parents' parental rights were still intact was an

unrealistic goal and changed the goal to long-term foster care. The case manager testified that it was not until April 1988 that the department formally instituted rehabilitation of the family as its goal. A social worker who worked with the parents in 1988 viewed herself as working to rehabilitate them to the point that the children could make visits in the parents' residence. This worker related, however, that at the end of her tenure, the department was requesting termination of parental rights.

After the order removing the children from the parents' home in 1978, the county department of public welfare provided visitations at least every 2 weeks between the parents and the children. The visitations were generally supervised, lasted between 1 and 2 hours each, and took place in a public park or in a small conference room. In 1979, as a result of the family's involvement in PACT, the visitations were increased to several times per week, and several in-home visitations and at least one overnight visitation occurred.

Because of the county court's March 31, 1980, order terminating visitation between the natural parents and their children, the appeal of that order to the district court, and the subsequent transference of the case to the separate juvenile court, the children had no contact with their natural parents for a period of about 4 years from 1980 until sometime in 1984. During the remainder of 1984 through at least May 1985, visitation occurred about two or three times each month for 3 to 4 hours each, and there was at least one overnight visit. Thereafter, visitation between the parents and children has been periodic but infrequent, occurring five or six times in each of the years 1986, 1987, and 1988, with each visit lasting between 1 and 2 1/2 hours.

A PACT director who worked with the parents in 1979 and again in 1983 was called as a witness by the parents and stated that when she began working with the parents, they were "very cooperative," responded "very positively" to suggestions, and made an effort to keep their residence cleaner. When she again worked with the parents in 1983, their parenting skills were still "not highly developed." It is apparent from the record that by April 1988, the parents had become disenchanted with the system and were no longer willing to cooperate with the social

workers unless "it was in writing that it was a possibility the children would be returned to them." As the mother stated, "[S]omething should have been done a long time ago, but now it [is] too late."

Several of the social workers who worked with the parents throughout this case provided testimony that they instructed or attempted to instruct the parents on proper nutrition for the children, housekeeping skills, budgeting, personal hygiene, and basic parenting skills, and that they notified the parents of the conditions they needed to correct in order for the children to be returned to them, including that they obtain employment, remain in one location, and establish a home, and, in the case of the father, that he quit drinking alcohol. One social worker admitted, however, that although he identified for the parents various services that were available to them and encouraged the mother to become involved in parenting and nutrition classes, he did not undertake overt steps to provide these services to the parents but instead left it to the parents to pursue these services.

Although there was evidence that the parents participated in PACT training classes, they were never, according to several social workers, able to improve their budgeting and housekeeping skills. According to one social worker, there were "never consistent gains made that would have resulted in an appropriate environment for the children. Gains were very short term, but then there would be a regression." The parents' residences were found in an unclean condition on many occasions. On more than one occasion since the children were removed, the parents had an inadequate amount of food in their residence. Although the father had an occasional odd job, neither of the parents was ever employed for significant periods of time. Their only income was through Social Security benefits. The father was seen drunk on the street by several people at various times, arrived in a drunken condition at one of the visitations with the children, and missed another visitation because he was drunk. There was also testimony that the parents moved frequently.

Each of the social workers questioned on the subject opined that the parents were never in a position to have the children returned to them. The reasons given were the

inadequate living conditions of the parents' various residences, the limited intellectual functioning and physical capabilities of both parents, and the fact that the parents themselves were very dependent upon others to take care of them.

The children have lived with their current foster family since 1980. A clinical psychologist who interviewed the parents and children and observed them interact testified that the children have bonded to their foster parents, perceive the foster parents as their own, and look to them for parental guidance. This witness recommended that the children not be returned to the natural parents even if they were to become able to parent because such would cause the children psychological damage. He opined that termination of parental rights was in the children's best interests and expressed the further view that continued visitation with the natural parents would be psychologically and emotionally damaging to the children.

A counselor who had been working with the children for approximately 3 years also testified that the children have no emotional attachment to their natural parents and are instead emotionally attached to the foster family, that reuniting the children with their natural parents would be emotionally and psychologically damaging to the children, that being adopted by the foster parents would create for the children the sense of permanency and stability which they need, and that termination of parental rights is in the children's best interests.

Even the PACT director mentioned earlier, who was called as a witness by the parents, testified that termination of visitation with the natural parents and adoption by the foster family were in the children's best interests. She stated that as early as 1983 and 1984, the children had formed a "pretty solid" emotional attachment to the foster family and were no longer able to attach to their natural parents. This witness agreed that removal of the children from the foster home and placement with the natural parents would be very disruptive of the children's lives. She stated that although after the children had been removed from the parents' home she was of the opinion that the children "appeared to care" for the parents and that the parents could take care of them with the assistance of community support services, she subsequently recommended an open adoption and

at the termination hearing testified that even with intensive services, it was "too late" for the family to be reunited.

Each of the children testified that he had no feelings for his natural parents, referred to his foster parents as "mom and dad," and expressed a desire that visitations be discontinued and that he be adopted by the foster family. The foster mother testified that as dispositional review hearings approached, the children would become belligerent and withdrawn, isolating themselves from the rest of the family. According to both the counselor mentioned earlier and the PACT director, a "great deal of weight" should be given to the children's desires concerning visitation.

The foster family has expressed a willingness and desire to adopt the three children. The natural parents themselves have stated that they want the children to remain in foster care and do not feel they could care for the children, but that they want the visitations to continue.

III. ANALYSIS

1. Department's Duty

The parents' first contention is that under Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1988), parental rights may not be terminated until the department has expended reasonable efforts to reunify the family and that in this case the department breached its responsibility.

In so arguing, the parents refer us to several cases from other jurisdictions in which courts have, based upon the applicable agency's failure to make reasonable efforts to reunite the family, reversed lower court determinations to terminate parental rights. In each case the court determined that the agency had a statutory obligation to render such efforts prior to termination of parental rights under the theory of termination alleged. See, *Matter of Leon RR*, 48 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979) (New York statute, Social Services Law § 384-b, required that in order to terminate parental rights on the theory that child is permanently neglected, state must prove parents failed for period of more than 1 year after child placed within care of authorized agency to substantially and continuously or repeatedly maintain contact with or plan for

future of child although physically and financially able to do so, notwithstanding agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to best interests of child); *Matter of Jason S.*, 117 A.D.2d 605, 498 N.Y.S.2d 71 (1986); *Matter of Sheila G.*, 61 N.Y.2d 368, 462 N.E.2d 1139, 474 N.Y.S.2d 421 (1984); *In re Kristina L.*, 520 A.2d 574 (R.I. 1987) (Rhode Island statute, R.I. Gen. Laws § 15-7-7 (1984), required that in order to terminate parental rights on basis that child has been in the care of a child placement agency for 6 months, state must prove that it made reasonable efforts to reunite the family); *Matter of Jones*, 436 N.E.2d 849 (Ind. App. 1982) (at the time of the case, Indiana statute, Ind. Code § 31-6-5-4 (Supp. 1981), required that in order to terminate parental rights, the state must prove the child has been removed from the parents for 6 months under a dispositional decree, there is a reasonable probability that the conditions which resulted in removal will not be remedied, termination is in the child's best interests, the county department has a satisfactory plan for the care and treatment of the child, and reasonable services have been offered or provided to the parent to assist in fulfilling the parental obligation and parent has failed to accept them or they have been ineffective).

In an effort to relate the foregoing holdings to our law, the parents urge that not only does § 43-246 place upon the department the burden to make reasonable efforts to reunite the family prior to seeking termination of parental rights, but so does § 43-284.

Section 43-246 provides, in pertinent part, that the juvenile code shall be construed to effectuate the following:

> (1) To assure the rights of all juveniles to care and protection and a stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest;
>
> (2) To provide for the intervention of the juvenile court in the interest of any juvenile who is within the provisions of the Nebraska Juvenile Code, with due regard to parental rights and capacities and the availability of nonjudicial resources;

. . . .

(4) To achieve the foregoing purposes in the juvenile's own home whenever possible, separating the juvenile from his or her parent only when necessary for his or her welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual juvenile in all placements and to assure every reasonable effort possible to reunite the juvenile and his or her family.

We have enunciated that the policy statements recited above "are laudable" and establish a generalized program for the juvenile courts and the department to follow. *State v. Duran*, 204 Neb. 546, 554, 283 N.W.2d 382, 387 (1979). Nevertheless, § 43-246 has never been interpreted to require that the department institute a plan for rehabilitation of a parent whose child has been found to be dependent and neglected. See, *In re Interest of C.D.C., ante* p. 496, 455 N.W.2d 801 (1990); *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989). Indeed, we have held that the juvenile court may terminate parental rights under the various grounds specified in subsections (1) through (5) of § 43-292 without providing the parent with a reasonable opportunity to rehabilitate himself or herself. See, *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986); *In re Interest of M.W.M.*, 221 Neb. 829, 381 N.W.2d 134 (1986); *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984); *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981); *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *State v. Duran, supra*. It is only to terminate parental rights pursuant to subsection (6) of § 43-292 that the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so. See *State v. Duran, supra*.

Section 43-284 reads in relevant part:

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.

It is apparent, however, that the foregoing language has application only to the dispositional order which initially removes the juvenile from the parental home and does not have application to the ultimate determination of whether to terminate parental rights. If reasonable efforts were not made in this case to prevent the need for removal of the children from the home or the court made no such finding, the parents had an opportunity to appeal from the dispositional order removing the children from the home. See, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985). Having failed to appeal that determination, they may not now complain of it.

Thus, irrespective of what the law of other jurisdictions may be, the parents' first assignment of error is without merit under our law.

2. Grounds for Termination

The question presented by the parents' second assignment of error is whether, on this review de novo on the record, we find that the evidence clearly and convincingly establishes, *In re Interest of J.B. et al., ante* p. 530, 455 N.W.2d 817 (1990), the grounds for termination alleged by the State's petition and specifically by § 43-292(2), to wit, that the parents "have substantially and continuously or repeatedly neglected" their children and have "refused to give" them "necessary parental care and protection."

The answer is that the evidence does so establish. We have stated that parents may as surely neglect a child of whom they do not have possession by failing to put themselves in a position to acquire possession as by not properly caring for a child of whom they do have possession. *In re Interest of C.D.C., supra.* The parents have failed to provide an environment to which the children could return, and, as we have repeatedly stated, children should not be suspended in foster care, nor be made to await uncertain parental maturity. *Id.*

3. Best Interests of Children

The question inherent in the parents' third and final assignment of error is whether, on this de novo review, the evidence clearly and convincingly establishes that it is in the children's best interests that the parents' rights in and to their children be terminated.

Again, the answer is that it does. Because the children have lived with their foster family for nearly a decade, they have, as would be expected, bonded to their foster family and no longer have any emotional attachment to their natural parents. Visitations are harmful to the children, the children desire that the visitations be discontinued, and the children will acquire a much-needed sense of security if adopted by their foster parents.

IV. DECISION

It seems that much, although certainly not all, of the untoward delay in achieving a permanent legal resolution of this case rests with the social workers who decided to make no effort to reunify this family, but focused instead on making the children available for "open adoption." Under what authority did these employees of the state, who are neither elected nor appointed and are thus largely unaccountable to the citizenry, so decide? As noted earlier, one of the express purposes of the Nebraska Juvenile Code is "to assure every reasonable effort possible to reunite the juvenile and his or her family." § 43-246. Such has been the express policy of this state since July 12, 1974. See, 1974 Neb. Laws, L.B. 620; Neb. Rev. Stat. § 43-201.01(4) (Cum. Supp. 1974).

That the failure of a juvenile court to specify a plan of rehabilitation does not necessarily prevent the termination of parental rights does not mean that the state's social workers are free to formulate their own public policy. Public policy is fashioned by the Legislature and reviewed by the judiciary. This principle of governance seems to have eluded the social workers connected with this case, one of whom testified that "[w]e still have to keep the kids' best interest in mind even if the court makes mistakes."

In view of the manner in which this case was handled, it is

impossible to know whether these parents would ever have been able to acquire the skills required to enable them to provide their children with "necessary parental care and protection." However, the record does show that initially the parents were cooperative, responded positively to suggestions, and made an effort to do what they were told. It was after they, apparently through the passage of time, lost hope of ever being reunited with their children that they became unwilling to cooperate with the various social workers. The frustration generated in the parents by the approach used in this case is illustrated by the mother's response when she was asked in April 1988, about 10 years after she was first brought into the juvenile justice system, why she missed a visit from a social worker. She stated that "they had been through this before . . . it was a waste of time. . . . And so . . . didn't want to go through it again." The record can be viewed as establishing that the parents were set up to fail so that the various social workers involved could fulfill their self-assigned goal of placing the children for adoption.

If, on the other hand, it was obvious to everyone connected with this case that the parents could never become adequate to take care of their children no matter how much help and guidance they were given, why did it take the State more than a decade to pursue termination of their parental rights, and why did the courts below not require that the case progress to final resolution at a reasonable rate?

Although this is an egregious case, it is by no means the only one in which children have been kept in the juvenile justice system far longer than seems necessary. E.g., *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988) (6 years); *In re Interest of D.R. and S.B.*, 217 Neb. 883, 351 N.W.2d 424 (1984) (13 years). A juvenile justice system which permits children to languish in its grip for 12 years, as was done in this case, is seriously flawed; steps must be taken to assure that in the future children and families are treated as something more than raw material for the social services industry. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986) (proceedings in juvenile court involve impressionable children in their formative years, not impersonal flotsam and jetsam adrift on a sea of indecision or, much worse, societal insensitivity or

apathy).

Nonetheless, there being no merit under current law to the parents' assignments of error, we affirm the judgment below.

AFFIRMED.

IN RE GUARDIANSHIP OF T.C.W., A MINOR CHILD. K.T. AND J.T., APPELLEES, V. D.W., APPELLANT.

457 N.W.2d 282

Filed July 6, 1990. No. 89-1141.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by the district court and this court for error appearing on the record.
2. **Adoption: Abandonment: Proof: Time: Intent.** The critical period of time during which abandonment must be shown to eliminate the necessity of obtaining consent to adoption from a parent under the provisions of Neb. Rev. Stat. § 43-104 (Reissue 1988) is the 6 months *immediately preceding* the filing of the petition for adoption. However, evidence of a parent's conduct either before or after this statutory period may be considered as relevant to a determination of whether the purpose and intent of that parent was to abandon the child or children.
3. **Abandonment: Intent.** The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
4. **Adoption: Abandonment: Proof: Parental Rights.** To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.

Appeal from the District Court for Pawnee County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Pawnee County, THOMAS J. GIST, Judge. Judgment of District Court affirmed.

Michael K. High, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Victor Faesser, of Witte, Donahue & Faesser, P.C., for appellees.

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

WHITE, J.

On the petition of K.T. and J.T., the stepfather and natural mother of T.C.W., then age 5, the county court for Pawnee County entered an order which was filed January 26, 1989, appointing a guardian for T.C.W. and authorizing the guardian to sign a substitute consent for adoption pursuant to Neb. Rev. Stat. § 43-105 (Reissue 1988). The court found by clear and convincing evidence that D.W., the natural father, had acted

> in a manner evidencing a settled purpose to be rid of parental obligations and to forego parental rights, together with a repudiation of parenthood and an abandonment of parental rights and responsibilities for a period of more than 18 months immediately preceding the filing of the adoption petition and the petition for appointment of a guardian.

D.W., who had objected to the appointment of a guardian in the county court, appealed to the district court, which affirmed the county court. From that order and judgment the father appeals to this court, his sole assignment of error being that there was insufficient evidence to support a finding of abandonment.

These proceedings were initiated for the ultimate purpose of the adoption by K.T. of his stepdaughter. Appeals in adoption proceedings are reviewed by the district court and this court for error appearing on the record. *In re Adoption of C.L.R. and J.M.R.*, 218 Neb. 319, 352 N.W.2d 916 (1984); Neb. Rev. Stat. § 25-2733 (Reissue 1989).

The marriage of J.T. and D.W. was dissolved April 9, 1986, by a decree of the circuit court of Warren County, Missouri. The mother was awarded custody of the couple's minor child born May 29, 1983. K.T. and the mother were married in Missouri on May 18, 1986, and on May 20 the family moved to Pawnee County, Nebraska.

The evidence is uncontroverted that from June 1986 through December 1987, D.W. had no contact whatsoever with his child. He did not attempt to visit her, to call her on the

telephone, nor to send her any letters or gifts. He did not pay any child support during this time. He admitted that no one kept him from having contact with the child.

D.W., who was 27 years old at the time of the hearing, testified that when J.T. told him of the divorce, she also said that "maybe in a couple of years when you get your stuff together, get an apartment of your own, you'll be able to spend time with [T.C.W.] . . . ." Although the divorce decree had granted him visitation of one Sunday per month, D.W. said that he set a goal of 2 years to try to rebuild his life so that he could carry on a productive relationship with his child.

From the last time he saw T.C.W. until February 1988, D.W. testified that, apparently for employment opportunities, he moved from Missouri to Sacramento, California, and then on to several different locations in the Boston, Massachusetts, area. He was living in Boston at the time of the hearing.

D.W.'s father contacted him in January 1988, informing him of the adoption proceedings. D.W. called J.T. in February to discuss the matter, but did not inquire about his daughter after talking to J.T. and K.T. for approximately 1 hour. On March 19 and 20, 1988, D.W. visited his daughter, and he testified that during the visit he established a father-to-daughter bond with her. Since then he has called his daughter several times and has sent her letters and gifts.

The appellant's brief cites *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982), and *In re Guardianship of Sain*, 217 Neb. 96, 348 N.W.2d 435 (1984), for authority in adoption cases where abandonment was the issue.

In *Simonton*, we reversed the county court's finding of abandonment where the father showed sporadic contact with his two minor children. In the syllabi of the court we held:

> The critical period of time during which abandonment must be shown to eliminate the necessity of obtaining consent to adoption from a parent under the provisions of Neb. Rev. Stat. § 43-104 (Reissue 1978) is the 6 months *immediately preceding* the filing of the petition for adoption. However, evidence of a parent's conduct either before or after this statutory period may be considered as relevant to a determination of whether the purpose and

> intent of that parent was to abandon the child or children.
>
> . . . .
>
> . . . In an adoption proceeding, the ties of a natural parent are not to be treated lightly.
>
> . . . To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forego all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Mere inadequacy is not the test.

In *Sain*, we affirmed the lower court's finding that the father had not abandoned his minor child. We said that the record showed that the father's ex-wife, who had custody of the child and had remarried, played an active role in preventing the father from exercising his rights of visitation.

No one prevented D.W. from seeing his daughter in this case, and there was not even sporadic contact during the statutory period, nor for some 12 months prior to that. While the ties of a natural parent are not to be treated lightly in adoption proceedings, neither should noncustodial parents treat lightly their rights and responsibilities toward their minor children. Although a parent-child relationship was apparently rekindled by a visit after the adoption proceedings were initiated, this cannot justify a period of 18 months where not a flicker of interest was shown. We noted in *Simonton*:

> Where there has been a protracted period of totally unjustified failure to exercise parental functions, an isolated contact or expression of interest does not necessarily negate the inference that a person no longer wishes to act in the role of parent to a child. *Matter of Thomas F. L.*, 87 Misc. 2d 744, 386 N.Y.S.2d 726 (1976). . . . Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *Matter of Adoption of David C.*, 479 Pa. 1, 387 A.2d 804 (1978).

In re Adoption of Simonton, supra at 783-84, 320 N.W.2d at 454. The record shows not a mere inadequacy, but a total

parental absence toward a minor child of a young and tender age.

The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances. *In re Guardianship of Sain, supra*. The county court heard the facts and circumstances in the hearing for appointment of a guardian to give substitute consent for adoption. Under our review for error on the record, we cannot say that the court's finding of abandonment was clearly wrong, nor do we find any other error warranting reversal.

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

AFFIRMED.

LUIS MARTINEZ, APPELLANT, V. NEBRASKA DUPACO, APPELLEE.

457 N.W.2d 285

Filed July 6, 1990. No. 89-1228.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
4. _____. An injured worker's right to vocational rehabilitation services depends upon his inability to perform work for which the worker has previous training and experience.
5. _____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
6. **Workers' Compensation: Appeal and Error.** This court will not substitute its judgment for that of the compensation court where the record presents nothing more than conflicting medical testimony.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James H. Monahan for appellant.

Joseph E. Andres for appellee.

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

WHITE, J.

Plaintiff, Luis Martinez, appeals from an award on rehearing by a three-judge panel of the Workers' Compensation Court. The panel modified the original award by reducing the period that appellant was entitled to temporary total disability benefits from $22^{3}/_{7}$ weeks to $13^{2}/_{7}$ weeks and by finding that appellant was not entitled to an award for vocational rehabilitation services. Appellant's two assigned errors combine to assert that there was not sufficient evidence in the record to support the findings of fact and the making of the award.

The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Fenster v. Clark Bros. Sanitation, ante* p. 336, 455 N.W.2d 169 (1990); *Knowlton v. Airport Transportation Co., ante* p. 96, 454 N.W.2d 278 (1990). In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Fenster v. Clark Bros. Sanitation, supra; Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990).

The evidence most favorable to defendant-appellee, Nebraska Dupaco, reveals that Martinez, while employed as a boner by Nebraska Dupaco, was inadvertently stabbed in the top surface of the hand by a fellow employee on September 12, 1988. Martinez was initially treated by Dr. John Edney and was released to work on September 26. Martinez returned to work on September 29 and worked through the month of October. He was absent from work twice, and he left early three times during October. Martinez claims that his injury prevented him from performing his job because he did not have sufficient grip strength and his hand would become swollen when he tried to

work. Martinez was absent from work during the first 3 days of November and was at work on Friday, November 4. The next week he missed work on 4 consecutive days, and his employment was terminated on November 11. The personnel manager for the defendant testified at trial that Martinez was put on light duty after his injury and was never placed back on his full-duty job.

Martinez contends that he is entitled to further temporary total disability benefits and to rehabilitation services.

Martinez had been seen by two other physicians, Drs. James Canedy and Charles Pigneri. Both doctors provided deposition testimony for the rehearing.

Dr. Canedy testified that he first saw Martinez on October 21, 1988. He determined that Martinez had developed reflex sympathetic dystrophy, a pain dysfunctional syndrome which is a malfunction of the involuntary nervous system. Dr. Canedy started Martinez on occupational therapy because the longer he stayed away from actively using his hand, the worse the condition would get. After almost daily therapy sessions between December 2, 1988, and January 20, 1989, Martinez' hand improved, and Dr. Canedy released him to work on January 24. Dr. Canedy, whose opinions were based on a reasonable degree of medical certainty, testified that he did not believe Martinez would have any permanent partial disability.

Dr. Charles Pigneri saw Martinez on four different occasions, the first being September 23, 1988, and the last being June 13, 1989. Each visit lasted 10 to 15 minutes. Dr. Pigneri had Martinez perform functional tests, a "thumb-to-finger apposition test" and a "finger spreader test," and noted Martinez' subjective pain. No diagnostic tests were performed. Dr. Pigneri testified that Martinez' pain was possibly due to a neuroma as a result of a nerve laceration that did not heal at the ending. He did not know what caused the weakness in Martinez' hand and admitted that his prognosis that Martinez would continue to have problems unless his hand was repaired by a hand surgeon was based on speculation.

The compensation court found that Martinez was entitled to temporary total disability benefits for $13^{2}/_{7}$ weeks, less credit to the defendant for sums already paid to Martinez. The court

also found that no permanent disability had been established, and therefore Martinez was not entitled to an award for vocational rehabilitation services. The court further stated:

> This matter is in litigation primarily because of lack of agreement between two medical experts. It is axiomatic that in a workers' compensation case the claimant has the burden of proving all of the elements of his claim by a preponderance of the evidence. This burden includes the need to submit medical evidence that is sufficiently clear and definite to aid and enable the fact finder to make a rational judgment based on the evidence. If the claimant adduces medical evidence that is equivocal, vague, indefinite or otherwise lacking in probative value, the rehearing panel may not and will not supply missing links or fill in any blanks by means of speculation, conjecture, or surmise. We find that the plaintiff has failed to establish preponderantly that he sustained a disability as a result of said accident and injury that is or is likely to be permanent.

The compensation court's award on rehearing for temporary total disability benefits is supported by the evidence presented, if believed, by the defendant's personnel manager and the fact that Dr. Canedy released Martinez to work on January 24, 1989. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990).

As to the rehabilitation services, an injured worker's right to vocational rehabilitation services depends upon his inability to perform work for which the worker has previous training and experience. *Sherwood v. Gooch Milling & Elevator Co., ante* p. 26, 453 N.W.2d 461 (1990); *Hernandez v. Farmland Foods*, 227 Neb. 629, 418 N.W.2d 765 (1988). Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court. *Sherwood v. Gooch Milling & Elevator Co., supra*; *Hernandez v. Farmland Foods, supra*. The testimony of Dr. Canedy supports the court's finding regarding rehabilitation services.

As the compensation court noted, the basic dispute between

the parties was conflicting medical testimony. This court will not substitute its judgment for that of the compensation court where the record presents nothing more than conflicting medical testimony. *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986); *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985).

There being sufficient evidence to support the findings of fact and subsequent award, those findings are not clearly wrong, and the judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

IN RE INTEREST OF V.M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. D.M., APPELLANT.

457 N.W.2d 288

Filed July 6, 1990. No. 89-1265.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights.
3. **Parental Rights.** When a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.
4. _____. Where a parent is unable to discharge parental responsibilities because of mental illness, and where there are reasonable grounds to believe that such deficiency will continue for a prolonged and indeterminate period, parental rights may be terminated when such action is found to be in the best interests of the child.
5. _____. When a natural parent suffers from a mental illness and cannot be rehabilitated within a reasonable time, the best interests of the child require a final disposition be made without delay.
6. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Court for Hamilton County: CURTIS H. EVANS, Judge. Affirmed.

Michael H. Powell, of Powell & Powell, for appellant.

Michael J. Owens, Hamilton County Attorney, and Timothy J. Otto, guardian ad litem, of Whitney, Newman, Mersch & Otto, for appellee.

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

BOSLAUGH, J.

The appellant is the mother of a daughter that was born out of wedlock on May 9, 1986. She has appealed from the judgment of the county court on October 3, 1989, which terminated her parental rights to her daughter. The father relinquished his parental rights on October 30, 1989, and his rights are not involved in this appeal.

On October 20, 1987, a petition was filed alleging that the daughter was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), being under 18 years of age and homeless or destitute, or without proper support through no fault of her parent, or lacking proper parental care by reason of the fault or habits of her parent. At approximately 4:12 a.m. on that date, an Aurora, Nebraska, police officer found the appellant running in the street with only a sheet wrapped around her. Apparently, she was hallucinating from LSD, or acid, which she had taken. The appellant had left her daughter alone in her mobile home.

The appellant was admitted for treatment at Mary Lanning Hospital, and the child was placed in the temporary custody of the Department of Social Services (DSS) for foster care.

At the adjudication hearing on November 12, 1987, the appellant admitted that her daughter was a child as described in § 43-247(3)(a). The trial court ordered seven requirements for reunification of the appellant and her daughter. At a review hearing on June 21, 1988, the court added another four requirements. The eleven requirements for reunification were that (1) appellant continue participation as recommended in individual therapy with Dr. Dennison and follow any other

recommendations set forth by Dr. Sullivan at Mary Lanning Hospital; (2) appellant participate in regular visitations with her daughter as set forth by DSS; (3) appellant sign release of information forms for agencies she has been involved with in the past, in addition to agencies she may become involved with in the future; (4) appellant cooperate with and inform DSS of any significant changes in her situation, which is to include, but is not limited to, changes in her health, employment, housing, and legal or marital situation; (5) appellant consent to urine testing if drug use is suspected; (6) appellant seek employment or have a plan in mind for her future so that reunification plans for her and her child may proceed; (7) appellant work on obtaining living arrangements for her and her child; (8) appellant shall accept services as directed by DSS which may include working with a family support provider and/or a family therapist; (9) appellant shall abstain from alcohol and drug usage, and she shall continue to consent to urine testing if usage is suspected; (10) appellant shall enter into individual drug counseling after she has been released from her medication by Dr. Dennison; and (11) appellant is required not to maintain a relationship with a significant other who imbibes in alcohol or uses drugs not prescribed by a physician.

These requirements for reunification were continued in orders entered by the court following review hearings on October 11 and November 1, 1988, and June 6, 1989.

Between October 20, 1987, and July 2, 1989, the appellant was hospitalized four times for mental illness. She was diagnosed as suffering from chronic undifferentiated schizophrenia. The reason for the hospitalizations was the appellant's failure to take prescribed medications to control her condition and her use of alcohol and illegal drugs. Also during that time, the appellant on four separate occasions expressed to DSS workers her desire to relinquish her parental rights. Also, she twice attempted to commit suicide.

A petition to terminate her parental rights was filed July 28, 1989, alleging that the appellant was unable to discharge parental responsibilities because of mental illness, and there were reasonable grounds to believe her condition would continue for a prolonged indeterminate period, and that the

appellant had failed to correct the conditions which led to the court's determination that her daughter was a child as described in § 43-247(3)(a).

Following an evidential hearing on September 20, 1989, the court found that the State had proved by clear and convincing evidence both allegations of the petition and that it was in the daughter's best interests that the appellant's parental rights be terminated. On October 3, 1989, an order was entered terminating the appellant's parental rights.

The appellant has assigned as error the trial court's finding that the State had proved by clear and convincing evidence both allegations of the petition and its determination that it was in the daughter's best interests that the appellant's parental rights be terminated.

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

In re Interest of T.E., S.E., and R.E., ante p. 420, 421, 455 N.W.2d 562, 563 (1990), citing *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990).

A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights. *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989).

Where a parent is unable to discharge parental responsibilities because of mental illness, and where there are reasonable grounds to believe that such deficiency will continue for a prolonged and indeterminate period, parental rights may be terminated when such action is found to be in the best interests of the child. *In re Interest of T.E., S.E., and R.E.,*

supra.

As to the appellant's compliance or lack of compliance with the plan for rehabilitation, the evidence shows her attendance for therapy sessions with Dr. Dennison was irregular; visitations with her daughter were irregular and not productive in that she usually did not interact with the child and frequently slept during the visits; she signed release of information forms; she did not keep DSS advised of all significant changes in her situation; she did consent to urine testing, which revealed she had smoked marijuana; she did not follow up on job applications; she did not work on obtaining living arrangements for herself and the child; she refused to accept the services of DSS at various times; she continued to drink alcohol and use illegal drugs; she could not participate in drug and alcohol counseling because she was not released from her medication by Dr. Dennison; and she continued to maintain a relationship with Stacey Friesen, an illegal drug user. The appellant admitted at the evidential hearing that she had not complied with the plan and that although she wanted another chance to get her daughter returned to her custody, she would only cooperate with DSS because she had to.

Dr. Dennison testified that the appellant's condition could be controlled by medication, but that medication was not a cure. The appellant's history of staying on the medications prescribed by Dr. Dennison was sporadic. She would stay on the medications for 1 to 3 months and then disappear from treatment until she showed up in the hospital again. While the appellant was on the medication, she did well; however, she was unable to continue with her medication for more than a few months at a time, and she continued to use drugs and alcohol, which interfered with the effectiveness of the medication and which could also have caused an exacerbation of the illness. Dr. Dennison stated that if the appellant did not follow the recommended treatment, she would have repeated exacerbations of her illness during the rest of her life.

A person with the appellant's condition could make a good parent if he or she followed the treatment plan, Dr. Dennison testified, but if the treatment was not followed, a person with the appellant's condition could lose touch with reality,

hallucinate, misidentify her child, and be unable to provide for her child's needs. As to the appellant's ability to parent her child, Dr. Dennison testified that he was not sure that taking her medication and not abusing substances would alone qualify the appellant as a good parent; however, her chances of being a better parent would be enhanced. He further testified that he had no personal knowledge as to whether the appellant's illness affected her parental abilities adversely or whether the appellant would improve her parental abilities upon complying with his recommended treatment.

The appellant testified that since July 2, 1989, she had made a definite decision not to relinquish her parental rights, she had established her own residence, she had obtained employment, she was paying her own rent and utilities, she was taking her medication as prescribed and was not drinking alcohol or taking illegal drugs, she was involved in therapy to help her understand her mental illness, and she requested visitation with her daughter which was denied. The appellant believed that at that point she was doing what was required of her for reunification with her daughter, and she wanted another chance to regain custody of her daughter.

The appellant is not asking this court to return custody of her daughter to her at this time. She requests the case be continued in the county court so that she can continue to make progress in order to have her daughter returned at a later time.

As we stated in *In re Interest of D.*, 218 Neb. 23, 28, 352 N.W.2d 566, 570 (1984):

> As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child. In cases such as this the past is an indication of the future. Failure of a parent's good faith effort toward rehabilitation to correct

> a situation injurious to the life and normal development of a child may cause a court to conclude that a parent's past offers no future for the child.

The child has now been in foster care for over 2 1/2 years. Her current foster family is willing to adopt her.

When a natural parent suffers from a mental illness and cannot be rehabilitated within a reasonable time, the best interests of the child require a final disposition be made without delay. *In re Interest of T.E., S.E., and R.E., ante* p. 420, 455 N.W.2d 562 (1990). " 'A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " *Id.* at 423, 455 N.W.2d at 564, quoting *In re Interest of C.N.S. and A.I.S.,* 234 Neb. 406, 451 N.W.2d 275 (1990).

The evidence in this case is clear and convincing that the appellant failed to comply with the plan for rehabilitation, that she is unable to discharge her parental responsibilities because of her mental deficiency, that there are reasonable grounds to believe her mental condition will continue for a prolonged and indeterminate period, and that it is in the child's best interests that the appellant's parental rights be terminated. The judgment is, therefore, affirmed.

AFFIRMED.

IN RE INTEREST OF B.A.G., JR., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.A.G., SR., APPELLANT.

457 N.W.2d 292

Filed July 6, 1990. No. 89-1440.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court, but, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Parental Rights: Proof: Evidence: Words and Phrases.** An order terminating parental rights must be based on clear and convincing evidence. Clear and

convincing means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

3. **Parental Rights.** Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
4. **Parental Rights: Abandonment: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for displaying parental affection for the child.
5. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances.
6. **Parental Rights: Abandonment: Proof.** To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Mere inadequacy is not the test.
7. **Parental Rights: Abandonment.** The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child.
8. _____: _____. Abandonment is not an ambulatory thing, the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
9. **Parental Rights.** There must be a showing that termination of the parental rights will be in the child's best interests.
10. _____. It is axiomatic that a child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

H. Daniel Smith, of Sherrets & Smith, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

PER CURIAM.

The father, B.A.G., Sr., appeals from the order of the separate juvenile court of Douglas County terminating his parental rights to his son, B.A.G., Jr., and the order overruling his motion for a new trial.

Appellant assigns as error, generally, the court's findings that (1) he abandoned his son within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), (2) he neglected his son within the meaning of § 43-292(2), (3) it was in the best interests of the minor child that appellant's parental rights be terminated, (4) it was in the best interests of his son to remain in the custody of the Department of Social Services for adoption purposes, and (5) appellant's motion for visitation with his son should be denied.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court, but, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of T.E., S.E., and R.E., ante* p. 420, 455 N.W.2d 562 (1990).

The minor child was born on January 7, 1976. The child's natural mother, V.P., and his natural father, the appellant, were divorced sometime in 1975, according to appellant, but he also claims that the child was born before the divorce. Custody was awarded to the mother, and appellant was ordered to make monthly child support payments, none of which were ever made.

Appellant has been convicted of five felonies since 1975. There was apparently one conviction in 1976; there were two convictions for which he served time in prison from 1980 to 1983; and there were two more convictions, one for possession of over a pound of marijuana and another for use of a firearm in the commission of a felony. He is currently serving a sentence of 20 months to 5 years and a consecutive sentence of 5 to 10 years for those latter two convictions. Although eligible for parole in April 1990, appellant could be incarcerated until 1993.

Appellant claims to have last seen his son in 1983, although he says his parents lost contact with the boy's mother 8 or 9 years ago, which would have been in 1980 or 1981. He says that he does not know if he was granted visitation rights in the divorce decree, although he admits having received a copy of certain court papers which ordered him to pay child support.

He has never contacted the divorcing court to ascertain whether he was granted such visitation rights, nor has he made any attempt through the court to obtain custody. He claims to have made attempts through his family in Florida to locate his former wife and the child. He said that he made no attempts directly because he did not have the phone number and address, but admitted that his family had that information.

According to the appellant, he had no notification prior to July 1989 that proceedings were being held with reference to custody of his son and termination of his parental rights. The court file discloses service of summons on appellant by certified mail on August 24, 1989.

This case first came to the attention of juvenile authorities when, on December 17, 1987, the child was taken into protective custody by the Omaha police. The child had not seen his mother for over 2 days, and she had made no arrangements for his care. Various hearings were held, and the record leaves no doubt that the appellant had had no contact with his son for at least 6 years and had never supported him other than to name him as a Social Security beneficiary, for which the son received certain payments.

A Child Protective Services worker testified that appellant had made no contact with Child Protective Services from December 1987 through July 1989. This same witness testified that she had never been able to find the mother. It was not until after the child informed her that Social Security benefits had been paid in his behalf that she began to follow that lead. She was not sure whether the benefits were for disability or death of the appellant. Her attempts to gain this information from the Social Security office were unsuccessful. Finally, she was able to learn through Social Security records that there was a second address listed for appellant at the state penitentiary, so this witness sent a letter to appellant on July 11, 1989.

The minor child testified that he had little contact with his father when he was very young. He estimated that his father had been out of his life for 10 to 11 years. The child was told by his mother that the father was running from the police and, on another occasion, that she had heard he was dead. The minor said that he had never received a card, a letter, a present, or a

phone call from his father.

The child stated at one point in his testimony that he would like to have a relationship with his father. However, he also said that he was happy in the home where he was then living and felt comfortable there. He also said that he thought it would be okay to be adopted. He also expressed a good deal of ambivalence, stating that he would probably rather stay where he was in foster care without adoption and then, when asked if he would rather be in foster care until he was 19 or be adopted, stating that he probably would rather be adopted.

An order terminating parental rights must be based on clear and convincing evidence. Clear and convincing means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of J.B. and A.P., ante* p. 74, 453 N.W.2d 477 (1990).

Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. See, *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989); *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985).

In the case of *In re Interest of R.T. and R.T., supra*, this court said at 487-88, 446 N.W.2d at 16:

> In this case, while the fact of incarceration was involuntary as far as V.T. was concerned, her illegal activities leading to incarceration were voluntary on V.T.'s part. "[T]he fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated." [Citation omitted.] As stated in *In re Interest of Reed*, 212 Neb. 208, 211, 322 N.W.2d 411, 413 (1982), "Furthermore, we cannot disregard the appellant's conduct which resulted in his incarceration . . . ."

Section 43-292(1) provides that the court may terminate all

parental rights between a parent and child when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition. Abandonment, for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for displaying parental affection for the child. *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances. *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988).

To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Mere inadequacy is not the test. See *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).

The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child. *In re Interest of J.M.D.*, 233 Neb. 540, 446 N.W.2d 233 (1989).

Abandonment is not an ambulatory thing, the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *In re Interest of J.M.D., supra.*

During the past 14 years, appellant has voluntarily chosen to violate the law so as to have been convicted of five separate felonies. Although his incarceration on each occasion was nonvoluntary in a sense of the word, his actions that put him in prison were every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia. He just as effectively placed himself in a position where he could not possibly offer his "presence, care, love, protection, maintenance, and opportunity for displaying parental affection."

During the times that he was not incarcerated, appellant did not know whether he had been granted visitation rights by court

decree; he had a court order which required him to pay child support, which he has never done; and he knew what court handled his dissolution proceedings, yet made no inquiry to learn the whereabouts of his son or to obtain custody rights. He has been spurred to action only after receiving notice that his parental rights were to be terminated.

We have no problem finding that abandonment existed in a real and a legal sense and continued for more than a 6-month period before the filing of the petition for termination.

Having concluded that abandonment existed, it is not necessary to discuss in detail the issue of a substantial and continuous or repeated neglect of this child and the refusal by the appellant to furnish necessary care and protection, as required by § 43-292(2). That is abundantly clear from the facts recited above and the discussion relating to abandonment.

There still must be a showing that termination of the parental rights will be in the child's best interests. It is axiomatic that a child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990).

The record discloses that the child is doing well in the foster home and he wants to stay there. Although the statement is not necessarily determinative, and perhaps was hesitantly expressed, the child did say that he would like to stay where he was and to be adopted. We think that after 14 years of being adrift, he has a right to drop anchor.

Having disposed of the case in this manner, it is unnecessary for us to address assignments of error Nos. 4 and 5.

The judgment of the separate juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN A. GARVEY, RESPONDENT.

457 N.W.2d 297

Filed July 6, 1990. No. 90-511.

Original action. Judgment of suspension.

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

PER CURIAM.

Respondent, John A. Garvey, was notified by the Counsel for Discipline of the Nebraska State Bar Association on November 9, 1989, that he was the subject of complaints and was under investigation for the unauthorized practice of law. Respondent received notice from the Counsel for Discipline of the investigation of two complaints, one arising out of his representation of a defendant in the case of *State v. McMahon* in the Douglas County District Court, and the other arising out of his representation of a party in a civil case in the Douglas County Court. The basis of the complaints is that respondent's license to practice law in Nebraska was suspended in 1986 for failure to pay Nebraska State Bar Association dues. The respondent acknowledges that he has represented approximately a dozen other clients on various matters since his return to the active practice of law in early 1989.

Pursuant to Neb. Ct. R. of Discipline 13 (rev. 1989), the respondent filed a conditional admission on June 4, 1990, at which time an investigation was pending but no formal charge had been entered against him. The respondent admits that his conduct constitutes a violation of his oath of office as an attorney and constitutes the unauthorized practice of law conditioned upon this court's acceptance of the following terms: (1) that the court enter an order suspending him from the practice of law for a period of 6 months and allowing him to seek reinstatement thereafter; (2) that he volunteer to provide 50 hours of pro bono paralegal or research services to the Omaha Legal Aid Society, such offer subject to the acceptance and direction of the Omaha Legal Aid Society; (3) that he be permitted to function in a nonlawyer paralegal capacity for

purposes of research or other paralegal functions to be performed for the Omaha Legal Aid Society; and (4) that he shall counsel with the Committee on Alcoholism and Drug Abuse.

The relator's special prosecutor filed a declaration stating that, having reviewed the conditional admission and given all the facts and circumstances, the special prosecutor accepts the conditional admission as fair and just for all parties concerned.

The unauthorized practice of law by an attorney during a period of suspension is a serious matter that may warrant disbarment. See, *State ex rel. NSBA v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985); *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984). Given the facts and circumstances of this case, however, we agree that suspension is an appropriate sanction.

It is therefore the judgment of this court that respondent, John A. Garvey, be, and hereby is, suspended from the practice of law in Nebraska for a period of 6 months, effective August 1, 1990. All other terms of respondent's conditional admission are accepted and ordered.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

RALPH P. ROSNICK AND CENTRAL STATES TOOL AND DIE WORKS, INC., A NEBRASKA CORPORATION, APPELLANTS, V. RICHARD J. DINSMORE, APPELLEE.

457 N.W.2d 793

Filed July 13, 1990. No. 88-302.

1. **Summary Judgment.** A party defendant is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all

reasonable inferences deducible from the evidence.

3. **Breach of Contract: Forbearance: Estoppel.** A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
4. **Estoppel.** The doctrine of promissory estoppel does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.
5. **Estoppel: Courts.** The development of the law of promissory estoppel is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings.
6. **Bankruptcy: Debtors and Creditors.** Under the Bankruptcy Act, any claim not "dealt with" in the rearrangement plan remained dormant in the estate under the control of the bankruptcy court, rather than reverting to the debtor.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Clarence E. Mock, of Johnson and Mock, for appellants.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

GRANT, J.

This is an appeal from an order of the district court for Douglas County granting summary judgment to defendant-appellee, Richard J. Dinsmore, in a legal malpractice action instituted by plaintiffs-appellants, Ralph P. Rosnick and Central States Tool and Die Works, Inc. We reverse the order granting summary judgment against Rosnick and remand the cause for further proceedings in accordance with this opinion. We affirm the order of summary judgment against Central States.

This malpractice action is predicated upon circumstances which caused Ralph Rosnick and Central States, the corporation of which Rosnick was sole shareholder and president, to request attorney Ephraim L. Marks to bring suit against Carl Renstrom for Renstrom's failure to fulfill promises

to provide financing to Central States. Marks filed a petition against Renstrom in May 1978. In July 1980, Marks withdrew from the case, and different counsel appeared. In August 1980, the suit was dismissed for failure to comply with an order of the court. See *Rosnick v. Renstrom*, 210 Neb. 759, 316 N.W.2d 765 (1982). Rosnick and Central States alleged that on or before October 30, 1980, they retained the defendant-appellee, Dinsmore, to bring suit against Marks and his law firm for legal malpractice. The petition against Dinsmore alleges that Dinsmore was negligent in not properly pursuing the claim. On August 25, 1982, Rosnick and Central States, through a different attorney, brought an action against Marks for malpractice. The action against Marks was subsequently held to be barred by the statute of limitations. See *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). On November 1, 1982, Rosnick and Central States filed a petition initiating this action against Dinsmore. On April 29, 1987, an amended petition against Dinsmore was filed.

Dinsmore's answer to Rosnick and Central States' amended petition set out many defenses. Dinsmore denied that he agreed to sue Marks, denied any negligence on his part or the part of Marks, alleged that the negligence of still another attorney was an intervening cause of the damage, and alleged that the underlying action by Rosnick and Central States would have failed as a matter of law, regardless of any negligence by Marks. On October 13, 1987, Dinsmore filed a motion for summary judgment, alleging that the suit brought against Renstrom would have failed as matter of law for the following reasons:

> 1. The plaintiff Ralph P. Rosnick as a stockholder or officer of Central States Tool & Die Works, Inc., a Nebraska corporation, had no cause of action under any legal theory for the alleged failure of defendant Renstrom to furnish financial assistance and additional capital to the corporate plaintiff.
>
> 2. That an accord and satisfaction of claims between Rosnick and Renstrom concerning Central States Tool & Die Works, Inc., occurred when they entered the agreement dated November 5, 1976 . . . which agreement is in satisfaction of certain claims by Renstrom and the

release of Rosnick of certain claims. Nowhere in the agreement does Rosnick attempt to preserve his purported rights against Renstrom which were the subject matter of the lawsuit filed . . . on May 9, 1978.

3. Any purported oral agreement to provide unspecified financial support over an indefinite period is, as a matter of law, too vague and indefinite to be enforceable.

4. Any purported oral agreement to provide unspecified financial support over an indefinite period greater than one year is barred by the statute of frauds.

5. Central States filed Chapter XI bankruptcy on or about September 9, 1975 and the plan was confirmed on August 12, 1977. In none of the bankruptcy documents did Central States list its alleged rights against Renstrom as an asset and the Court's Order confirming the plan makes no mention of the alleged assets. That because of the conduct of Central States during the bankruptcy proceeding it is judicially estopped from asserting any cause of action against Renstrom in 1978 based upon any alleged agreement to furnish assets or credits to Central States.

6. The Order of the United States Bankruptcy Court confirming Central States' plan is in effect a judgment that Central States has no claim against Renstrom and is barred under the doctrines of res judicata and collateral estoppel.

As reflected in the judgment order, the parties stipulated at the hearing on the motion for summary judgment that "the sole issue presented on the motion for summary judgment is the validity of the plaintiffs' underlying claim of plaintiffs [sic] against Carl Renstrom . . . ." The trial court determined that the initial suit against Renstrom would have failed as a matter of law.

Rosnick and Central States timely appealed from this judgment and assign error to the district court's determinations that there remained no genuine issue as to a material fact relating to Rosnick and Central States' original action against Renstrom and that Renstrom would have been entitled to

judgment as a matter of law in that case.

The case, filed in 1982, presents to this court a single issue requiring a difficult analysis in 1990 of a case which allegedly was negligently handled by attorney Marks in 1978, to determine if that case could ever have been successfully presented. The myriad of other defenses set out in Dinsmore's answer are not before us. If this case is to be decided by determining the efficacy of each of those defenses one at a time, the length of the legendary case of Jarndyce and Jarndyce in Charles Dickens' "Bleak House" may be approached right here in Nebraska. Be that as it may, the single issue before us must be decided.

As we stated in *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 191-92, 450 N.W.2d 199, 201 (1990):

> A party defendant is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1985); *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989). Further, as we stated in *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 830, 448 N.W.2d 168, 170 (1989), "[i]n appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence."

The record, considered in the light most favorable to Rosnick and Central States, shows the following: In 1948, Rosnick started Central States as a tool-and-die shop serving other manufacturers. Rosnick incorporated Central States in 1969 and became its sole shareholder and president. By 1971, Central States manufactured its own line of recreational equipment for a number of major accounts, including Montgomery Ward & Co. of Chicago (Wards). During 1972, Rosnick sought capital to fund an expansion of Central States' production. Rosnick negotiated a financial arrangement with

More America, a Cedar Rapids, Iowa, investment group. Rosnick agreed with a representative of More America that More America would initially provide $300,000 in exchange for an "option to pick up" 30 percent of Central States' stock. More America would also be given the chance to obtain an option for up to 49 percent of Central States' stock, based upon a price of $100,000 for each additional 10 percent of the stock.

In the latter part of 1972, before the board of More America was able to approve the agreement, Rosnick had a conversation with his former employer, Carl Renstrom, who had "started [him] in the business." Renstrom called Rosnick because he heard Rosnick had "big things going." Renstrom met with Rosnick and offered to finance the expansion of Central States. Rosnick outlined the proposed plan of expansion, gave Renstrom "the figures," informed Renstrom that Central States was in the process of obtaining a Small Business Administration loan, and informed Renstrom that Rosnick had provided $135,000 of his own money as additional funds for Central States. Renstrom inquired as to how much additional capital Central States needed right away, and Rosnick responded that Central States needed an additional $300,000 right away. Rosnick testified in his deposition that Renstrom responded, "I've got it, I'll put it in with an option to acquire forty-nine percent of the stock five years from [now] on the basis that we . . . go public after five years."

Rosnick discussed his options with a representative from Wards. The Wards representative then contacted Renstrom and discussed the arrangement with Renstrom. Based upon the Wards representative's recommendation, Rosnick decided to obtain the funding from Renstrom instead of More America.

Renstrom provided Central States with $200,000 in November 1972 and another $100,000 in December 1972. Rosnick stated that he and Renstrom agreed that Renstrom "would have the opportunity to exercise an option on thirty percent of the stock at any time that he would desire and in no event later than five years when they would go public." Renstrom also would provide more capital to Central States as needed and apparently could obtain an option for up to 49 percent of the stock. There is no evidence in the record explicitly

stating the price to be paid for the stock under Renstrom's option. A permissible inference from the negotiations with More America and Renstrom is that the exercise of the option was a formality and that the price for at least 30 percent of the stock was to be considered already paid. In addition to the stock option, Rosnick agreed to provide Renstrom with voting proxies to all the shares of Central States stock. According to Rosnick, the capital furnished by Renstrom was supposed to be "equity capital."

Notwithstanding Rosnick's perception of the agreement, when Renstrom's attorney drew up the documents to evidence the agreement in 1973, the $300,000 was characterized as a loan. Renstrom's business manager requested Rosnick to sign a promissory note on behalf of Central States, to sign a personal guaranty of the note, to give as security his stock in another company which owned the building in which Central States operated, and to sign an irrevocable voting proxy for all of the Central States stock. After consulting with his then attorney, Rosnick acquiesced and entered into the modified agreement. Thereafter, Renstrom installed various business managers to oversee Central States' operation, and Rosnick's responsibilities were limited to the manufacturing aspect of the business.

Apparently, the oral understanding between Rosnick and Renstrom still included a promise by Renstrom to continue to provide financing to Central States as needed and a promise by Rosnick that Renstrom could thereby obtain an option on up to 49 percent of the Central States stock. This agreement is partially evidenced by a letter to the Small Business Administration signed by Renstrom and dated November 24, 1972. In the letter, Renstrom stated, "I have already invested, in the way of a loan, $200,000 and am prepared to go up to a half million, and further, if necessary, to bring this business [Central States] to an ultimate success." The agreement to finance is also evidenced by the pledge agreement, which contemplated further advances, and the irrevocable proxy, which was to continue in force so long as any debt from Central States to Renstrom remained.

By mid-1973 approximately 40 to 45 percent of Central

States' business was with Wards. Wards was interested in expanding its business with Central States. At a meeting in Chicago between Rosnick and Wards representatives, Wards proposed a plan of expansion for Central States which would result in increased sales to Wards at a rate of $1 1/2 to $2 million per year for a period of 7 years. The plan included the development of new products and an expansion of sales to a national market, including expanded sales to customers other than Wards.

Rosnick returned to Omaha and met with Renstrom and Renstrom's business manager. Renstrom agreed to furnish the $1 million that would be necessary within the first year of the expansion. Rosnick, along with Renstrom's business manager, returned to Chicago to discuss the details of the plan of expansion. On July 25, 1973, Rosnick, Renstrom, the business manager, and a representative from Wards met at Renstrom's home in Omaha to discuss the expansion plan and financing. Rosnick told Renstrom that Central States could operate on its own cash-flow during the next 6 months while the expansion was implemented, but that Central States would require Renstrom to supply $500,000 by the end of the year and that an additional $500,000 would be required another 6 months after that. If the cash-flow did not catch up by that time, another capital infusion would become necessary. Renstrom agreed to provide the funding according to the plan. Although it was seemingly inconsistent with Rosnick's earlier statements, Rosnick testified that at this point Renstrom already had the option to "pick up" 49 percent of the Central States stock and would realize huge profits when the expanded company went public.

In the following months Central States hired new employees, completed prototypes, and entered into agreements to sell millions of dollars worth of product to Wards and others. In early 1974, Central States was in need of additional capital, and Renstrom's business manager and the company controller made requests to Renstrom to put in the first $500,000. Renstrom stated that he would put in the first $500,000, but the money was not forthcoming. In response to further requests from the business managers, controllers, and Rosnick,

Renstrom continued to reassure them that the money was forthcoming. In the meantime all the company cash was used to pay operating expenses, and Rosnick contributed additional personal funds to maintain the company. In March 1974, apparently Central States was not able to meet its production obligations, and Wards threatened to cancel many of its orders. In a letter dated March 22, 1974, Renstrom wrote to Wards confirming that he had promised to financially support Central States and assuring Wards that he had recently made arrangements with his bankers to provide the financial support that Central States required to promptly fill Wards' orders.

The funds were still not forthcoming. Wards canceled its orders for the new products, and Central States was unable to overcome its cash-flow problems. As creditors began to exercise their remedies in June 1974, Renstrom put control of Central States back in Rosnick. In the latter part of 1974, Renstrom told Rosnick that Rosnick was going to have to make it on his own and that Renstrom was not going to put any more money into Central States. Rosnick contends that he contributed a total of $156,192 of his personal funds to Central States to support the company during the time Renstrom was reassuring him that he would come through with the promised funds.

From the record it appears that Central States filed for rearrangement under chapter 11 of the Bankruptcy Act on September 9, 1975. Central States did not list on its asset schedules any claim against Renstrom. Specifically, in response to the schedule's command to list "Contingent and unliquidated claims of every nature," Central States replied, "None." Renstrom filed an amended claim against Central States for $1.1 million, based upon promissory notes and interest thereon. The basis for the amount of this claim is not in the record. We note that the amount of Renstrom's bankruptcy claim against Central States indicates that Renstrom made significant additional advances or incurred other significant obligations on Central States' behalf beyond the $300,000 contribution described by Rosnick. There are vague references in the record that Renstrom guaranteed various lines of credit used by Central States. Rosnick testified that Renstrom's claim

was negotiated down to $330,000, but the claims register does not reflect such a reduction. According to the claims register, none of the $1.1-million amended claim was disallowed, and 20 percent of the amended claim was to be paid under the plan.

On November 5, 1976, Renstrom and Rosnick entered into an agreement to facilitate adoption of Central States' rearrangement plan. In exchange for Rosnick's stock in the company that owned the building in which Central States operated (which was all the outstanding stock of that company) and Rosnick's payment to Renstrom of $75,000 at a rate of $1,000 per month, Renstrom agreed to vote for approval of Central States' chapter 11 rearrangement plan, to deem satisfied Rosnick's personal guaranties of Central States' debts to Renstrom, and to cancel Rosnick's irrevocable proxy of Central States stock held by Renstrom. The agreement made no reference to a release of any claims Rosnick had against Renstrom. The rearrangement plan was confirmed on August 12, 1977. The record does not show any subsequent proceedings in the bankruptcy court, but Rosnick's testimony indicated that some debts remained under the rearrangement plan when Central States was "closed" in 1985.

On August 31, 1978, Rosnick and Renstrom agreed to modify certain obligations created by the November 5, 1976, agreement. The August 31, 1978, agreement included an undertaking by Rosnick and Renstrom not to use the November 5, 1976, agreement to "in any way, promote, impair or otherwise affect the course of The Litigation [the action by Rosnick and Central States against Renstrom as reflected in the May 1978 petition filed by Marks]."

Based upon the above facts, the issue is whether a jury could reasonably find that Renstrom's promises to provide funds to Central States created a legal liability to Rosnick or Central States which was enforceable in the action brought by attorney Marks in the state district court. As suggested by Dinsmore's motion for summary judgment, any claim by Rosnick must be separate from the claim of Central States and implicate damages separate from the damages accruing to Central States. We will consider Rosnick's action first.

In considering Rosnick's action against Renstrom based

upon a theory of promissory estoppel, we find that there remain genuine issues as to material facts and that Renstrom would not have been entitled to judgment as a matter of law. In *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985), this court applied the rule of law stated in the Restatement (Second) of Contracts § 90 at 242 (1981), which provides:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

We have applied the same theory in other cases. See, *Gilbert Central Corp. v. Overland Nat. Bank*, 232 Neb. 778, 442 N.W.2d 372 (1989); *Bigger v. Fremont Nat. Bank*, 215 Neb. 580, 340 N.W.2d 142 (1983); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976); *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957).

A jury could reasonably find that Renstrom should have expected Rosnick to rely on Renstrom's promise to provide $1 million to finance the expansion plan as agreed July 25, 1973, and that Renstrom should have foreseen that his reassurances might cause Rosnick to try to support the company in the short term. In view of Rosnick and Renstrom's prior course of dealing and other circumstances, a jury could also reasonably find that some part or all of Rosnick's personal contributions to Central States while awaiting Renstrom's performance were made in reasonable reliance upon Renstrom's reassurances. Finally, a jury could reasonably determine that justice requires that Renstrom pay Rosnick the amount that Rosnick was damaged by reasonably relying on Renstrom's promise and reassurances.

Dinsmore argues that application of promissory estoppel only provides a substitute for consideration and is not an independent cause of action. Dinsmore concludes that to recover under the Restatement, *supra*, all the elements to contract formation, apart from consideration, must be present, including an offer with reasonably definite terms. Dinsmore

asserts that none of Renstrom's promises were sufficiently definite to give rise to an enforceable contract.

First, the promise relied upon by Rosnick was not indefinite. Renstrom promised to contribute $1 million to Central States during 1974. By January 1974, $500,000 was to be paid, and the additional $500,000 was to be paid in June 1974. Second, there is no requirement of "definiteness" in an action based upon promissory estoppel. See, *Bixler v. First Nat. Bank of Oregon*, 49 Or. App. 195, 619 P.2d 895 (1980); *Southwest Water Services, Inc. v. Cope*, 531 S.W.2d 873 (Tex. App. 1975); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965); but see, *Gillum v. Republic Health Corp.*, 778 S.W.2d 558 (Tex. App. 1989); *Forstmann v. Culp*, 648 F. Supp. 1379 (M.D.N.C. 1986). Promissory estoppel only requires that reliance be reasonable and foreseeable. As stated in *Hoffman, supra*, the doctrine of promissory estoppel "does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee." *Id.* at 698, 133 N.W.2d at 275. The reason for the distinction between the contract requirement of reasonable definiteness and the promissory estoppel requirement of reasonable and foreseeable reliance is the nature of the remedy available. Promissory estoppel only provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. The usual measure of damages under a theory of promissory estoppel is the loss incurred by the promisee in reasonable reliance on the promise, or "reliance damages." Reliance damages are relatively easy to determine, whereas the determination of "expectation" or "benefit of the bargain" damages available in a contract action requires more detailed proof of the terms of the contract. The reasonableness of Rosnick's reliance on this promise and subsequent reassurances is an issue for a jury to determine.

In Dinsmore's argument that Rosnick cannot demonstrate a right to relief under a theory of promissory estoppel, Dinsmore relies in part on *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976). In determining that promissory

estoppel could not be used to circumvent the protection provided by the statute of frauds, we stated in *Farmland, supra* at 544-45, 244 N.W.2d at 90:

> Traditionally, the promissory estoppel claim has been used to supply the element of consideration where to refuse enforcement of a promise unsupported by a consideration would work an injustice to the party who relied to his detriment on the promise. . . .
>
> . . . [W]e determine section 90 of Restatement, Contracts 2d, Tent. Dr. No. 2 (1965), is limited in scope to informal contracts of a unilateral nature and its purpose in such instances is to dispense with the requirements of consideration to support the promise where it applies.

The transaction in *Farmland* was a grain sale for over $500, the enforcement of which was held to be barred by the statute of frauds. In that transaction a promise to sell was given as consideration for a promise to buy, and absent the statute of frauds a binding contract would have arisen. The rule in *Farmland* is designed to prevent circumvention of the statute of frauds through an action based upon promissory estoppel.

In *Farmland*, the court specifically stated that promissory estoppel "gives rise to a cause of action for damages." *Id.* at 544, 244 N.W.2d at 90. The *Farmland* requirement is met in this case, because Renstrom did not bargain for Rosnick's contributions to Central States. Under the facts seen most favorably to Rosnick, Renstrom bargained for Central States' expansion so that he could realize profits on his option to possess Central States stock. Renstrom's promise, as far as Rosnick was concerned, was unilateral in nature, in that it was not given in exchange for a promise from Rosnick. (At that time Renstrom controlled Central States.) Rosnick is not circumventing the statute of frauds because he never personally contracted with Renstrom in the first place. Moreover, the statute of frauds would not apply to the promises made to Central States in July 1973 which were performable within a year. See, *Maseberg v. Mercer*, 176 Neb. 668, 127 N.W.2d 208 (1964) (enforcement of contract is not barred by statute if performed by one side within a year); *Empson v. Deuel County State Bank*, 134 Neb. 597, 279 N.W. 293 (1938) (contract is not

within the statute of frauds merely because it might not be performed within a year).

As stated in *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 695, 133 N.W.2d 267, 273 (1965), "the development of the law of promissory estoppel 'is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings' " (quoting *Peoples National Bank of Little Rock v. Linebarger Construction Company*, 219 Ark. 11, 240 S.W.2d 12 (1951)). This is not a case where the plaintiff is attempting to use promissory estoppel to circumvent the statute of frauds or as a means of placing liability on a defendant after the breakdown of good-faith contract negotiations. This is a case where a jury could find that justice requires compensation for reliance damages reasonably and foreseeably induced by promises made and broken in a business setting.

We also disagree with Dinsmore's contention that Rosnick released Renstrom from any liability on this claim in the November 5, 1976, agreement. Renstrom agreed, in exchange for considerations from Rosnick, not to raise the November 5, 1976, "release" as a defense in the litigation of the claim against Renstrom, and at any rate, the release related to the guaranties and was a release of Renstrom's claims against Rosnick, not vice versa.

The reliance damages to Rosnick created by his contributions to support Central States while waiting for Renstrom's performance was personal to Rosnick and did not accrue to Central States. We therefore hold that the trial court erred in finding that there remained no genuine issues as to material facts in Rosnick's promissory estoppel action against Renstrom and that Rosnick's action would have failed as a matter of law.

Other considerations control the disposition of Central States' claim. Dinsmore contends that the terms of the contract are too indefinite to be enforceable as a matter of law, that the statute of frauds would have barred the action as a matter of law, and that failure to disclose the claim in Central States' bankruptcy bars the action under the doctrines of res judicata and judicial estoppel. We conclude that the initial action by

Central States against Renstrom would have failed as a matter of law, because Central States did not have standing to bring the claim.

Without determining whether Renstrom was legally liable to Central States as a result of his alleged breach of contract, we determine that Central States was not the appropriate party to bring suit against Renstrom in the state district court. The bankruptcy of Central States was governed by the Bankruptcy Act. The Bankruptcy Code did not become generally effective until October 1, 1979, and cases commenced prior to that date are governed by the Bankruptcy Act. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402 and 403, 92 Stat. 2549, 2682-83. See, also, *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982). The rearrangement plan, filed September 7, 1976, refers to specific provisions of the Bankruptcy Act. Under the Bankruptcy Act, any claim not "dealt with" in the plan remained dormant in the estate under the control of the bankruptcy court, rather than reverting to the debtor. See *Pako Corp. v. Citytrust*, 109 Bankr. 368 (D. Minn. 1989) (citing *Stein, supra*). In *Stein, supra*, Fred Stein was the assignee of an antitrust claim initially accruing to Century Cinema Circuit, Inc. Century filed for rearrangement under chapter 11 of the Bankruptcy Act and did not list the claim among its assets in the proceeding. In *Stein*, the court interpreted "[f]ormer section 70(i) of the Bankruptcy Act, 11 U.S.C. § 110(i) (1976)," 691 F.2d at 890, which stated that upon confirmation of the rearrangement, "the title to the property dealt with shall revest in the bankrupt or debtor . . . ." See *Pako, supra* (comparing 11 U.S.C. § 1141(b) (1988) of the Bankruptcy Code, which subsection provides that confirmation of the plan revests "*all* of the property of the estate in the debtor" (emphasis supplied), with the Bankruptcy Act provision above). The court in *Stein* determined that only property "dealt with" in the chapter 11 plan revested in the debtor and that any property not specifically "dealt with" in the plan remained dormant in the bankruptcy estate. Consequently, the court held that under chapter 11 of the Bankruptcy Act,

> [t]he proper procedure to enforce any newly discovered asset neither listed nor abandoned by the debtor in

> possession is to petition the bankruptcy court to reopen the proceedings under Rule 515 to permit the court to decide whether reopening is desirable and, if so, whether the claim is to be administered for the benefit of creditors or abandoned. If the claim is to be enforced for the estate, a trustee will be appointed for its enforcement.

691 F.2d at 893.

Stein declares that the issue of how undisclosed assets are pursued after the completion of chapter 11 rearrangements was one of first impression. However, the court based its determination on an analogy to the "well-established" line of cases dealing with the issue in chapter 10 bankruptcies. *Id.* at 890. Although *Stein* was decided after Central States hired Marks to pursue its claim against Renstrom, we determine that the law as interpreted by *Stein* applies to the status of Central States' claim against Renstrom. As far as the record shows, Central States' claim against Renstrom accrued prior to the confirmation of the chapter 11 rearrangement, was undisclosed, was not specifically abandoned, and was not dealt with in the rearrangement plan. The rearrangement plan specifically retained in the bankruptcy court jurisdiction over "[t]he collection of sums due Central States, which sums constitute assets of Central States' estate or money due the debtor-in-possession . . . ." The claim against Renstrom could only have been brought in the state court by a trustee appointed by the bankruptcy court. The record does not show that Central States was acting as appointed trustee of the bankruptcy court in the action against Renstrom. Central States did not have title to this claim against Renstrom and did not have the authority to bring an action against Renstrom on the claim in state court. Consequently, Central States' action against Renstrom in the state district court would have failed as a matter of law.

Central States' amended petition in this action against Dinsmore specifically alleges that Marks was hired to prosecute Central States' claim against Renstrom in the state district court and that Marks was negligent in several aspects of the prosecution of that claim. Central States could not have been damaged by this alleged negligence by Marks, because Central States did not have title to the claim. Central States' amended

petition against Dinsmore makes no further allegations of negligence by Marks. Therefore, no genuine issue of material fact remains, and Dinsmore is entitled to judgment against Central States as a matter of law.

The summary judgment against Rosnick is reversed, and the cause is remanded for further proceedings in accordance with this opinion. The summary judgment against Central States is affirmed.

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

ROBERT L. MCCUNE, APPELLANT AND CROSS-APPELLEE, V. ROSE NEITZEL, APPELLEE AND CROSS-APPELLANT.

457 N.W.2d 803

Filed July 13, 1990. No. 88-552.

1. **Evidence: Appeal and Error.** In an action at law, the Supreme Court on appeal views the evidence in the light most favorable to the prevailing party. All inferences which may be drawn from the evidence must be drawn in favor of the prevailing party.
2. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, failure of counsel to object to jury instructions after they have been submitted for review will preclude raising an objection to those instructions on appeal.
3. **Libel and Slander: Actions.** Whether a statement is actionable per se is a matter of law for the court.
4. **Libel and Slander: Juries.** In a slander per se case where the statement is clear and unambiguous, the issue the jury is to determine is not whether a statement is defamatory but whether the statement was made by the defendant.
5. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude relevant evidence which is otherwise admissible, and such rulings will be upheld on appeal absent an abuse of discretion.
6. **Witnesses: Impeachment: Prior Statements.** A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertions about those facts. A witness' prior inconsistent statement may be used to impeach the witness only on matters relevant to and otherwise admissible on some issue in the case tried.
7. **Pretrial Procedure: Pleadings: Evidence.** A motion in limine is a procedural step

to prevent prejudicial evidence from reaching the jury.

8. **Trial: Pleadings: Proof: Appeal and Error.** In order to preserve error before the Supreme Court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury.
9. **Directed Verdict.** In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
10. _____. In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
11. _____. On a motion for directed verdict or judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
12. **Libel and Slander: Words and Phrases.** Malice in the common-law sense of the term means hate, spite, or ill will toward the person about whom a statement has been published.
13. **Libel and Slander: Proof: Pleadings.** Proof of common-law malice is at issue only when truth or a conditional privilege has been asserted by the declarant.
14. _____: _____: _____. Truth of the matter charged as defamatory cannot be proved as a complete defense under a general denial.
15. **Libel and Slander: Proof: Damages.** In a suit for slander per se, no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages.
16. **Libel and Slander: Liability.** One who puts a libel or slander in circulation is liable for any subsequent publications that are the natural consequence of his or her act.
17. **Libel and Slander: Proof.** In proving a publication, a plaintiff is not required to show that the slander was made known to the public generally. It is enough that the plaintiff show that it was orally communicated to a single person other than the plaintiff.
18. **Libel and Slander: Liability.** One who repeats or otherwise republishes defamatory matter is subject to liability as if he or she originally published it.
19. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal.
20. **Verdicts: Appeal and Error.** A verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. 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.

21. **Libel and Slander: Damages.** In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation, (2) special damages, (3) damages for mental suffering, and (4) if none of these are proven, nominal damages.
22. **Damages: Evidence: Appeal and Error.** In reviewing the evidence on damages, an appellate court views the evidence in the light most favorable to the prevailing party, and all controverted facts are resolved in favor of that party.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Randall T. Smith for appellant.

Robert A. Wichser and Craig W. Feil, of Sodoro, Daly & Sodoro, for appellee.

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

FAHRNBRUCH, J.

Plaintiff, Robert L. McCune, appeals a Sarpy County district judge's order denying him the benefit of a $25,350 verdict rendered by a jury in his favor because he had been slandered.

The trial judge found that the damage award was the result of passion and prejudice and ordered a new trial on damages only. Plaintiff appeals that finding and order.

Rose Neitzel, the defendant, has cross-appealed, claiming the trial court erred (1) in failing to properly instruct the jury on slander per se, (2) in an evidentiary ruling, (3) in granting the plaintiff's motion in limine, and (4) in overruling her motions for a directed verdict.

We find that the verdict in favor of the plaintiff should be reinstated and that there is no merit in the defendant's cross-appeal.

In an action at law, this court on appeal views the evidence in the light most favorable to the prevailing party. *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989). All inferences which may be drawn from the evidence must be drawn in favor of the prevailing party. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

Taking the view most favorable to the plaintiff, the record

reflects the following operational facts.

McCune, a single, 27-year-old man, was raised in Springfield, Nebraska, which has a population of 800 inhabitants. Since the age of 15, the plaintiff at various times had been employed in the sprinkler business on a part-time and full-time basis. In March 1986, McCune began employment with a Gretna business owned by his brother. McCune's primary duties consisted of selling residential lawn sprinkler systems and managing the installation crews. The company operated within a 100-mile radius of Gretna.

During July 1987, the defendant's sister, Lois Keyes, was bedridden due to paralysis on her left side caused by a stroke. Patricia J. Dieleman was employed as a certified nurse's aide assigned by her employer to assist Keyes in her home. The plaintiff's mother, Betty Holz, with whom Dieleman shared a common employer, was a home health aide.

On the evening of July 8, 1987, Brenda Wills, Keyes' daughter, informed Keyes and Neitzel that she knew a friend of McCune's who was dying of AIDS. While Neitzel was visiting Keyes at her home the following afternoon, Keyes told Neitzel that she did not want Holz to take care of her because she was told that Holz' son had AIDS. Shortly thereafter, when Dieleman entered the room to attend to Keyes, Keyes, Dieleman, and Neitzel discussed Dieleman's coworkers with whom she was familiar. During the course of the conversation, Neitzel asked Dieleman if she knew the plaintiff's mother. After Dieleman indicated that she knew McCune's mother, Keyes became upset and stated that she did not want Holz in her home. When Dieleman asked why, Neitzel responded, "Didn't you know her son, Bobbie, has AIDS?" Dieleman thereupon asked, "Bobbie McCune has AIDS?" and Neitzel said, "Yes." Neitzel testified that she stated, "Lois said Bobbie McCune was in the hospital with AIDS." McCune was not afflicted with AIDS.

Dieleman testified that she was shocked when Neitzel made the statement to her. After Dieleman stated that she would have to warn somebody, Neitzel replied that she would warn her children if they were associating with a person that had AIDS. Later that same day, Dieleman reported Neitzel's remarks to a

friend of hers and to McCune's mother. Neitzel testified that she spoke of the July 9 events with Keyes' seven daughters, her own husband, her sister, her brother, and her four sons.

The plaintiff testified that after he became aware of Neitzel's statement, he believed that people would regard him differently. McCune avoided Springfield, where he had previously visited his mother and friends at least two times per week. Furthermore, McCune, due to embarrassment, avoided some family gatherings. He testified that one Springfield resident confronted him regarding AIDS.

There was evidence that McCune was a very good employee of his brother's until approximately the third week of July 1987, when his productivity declined dramatically. McCune testified that he was having problems with the workers he supervised because of the rumor that he was suffering from AIDS. McCune's brother informed him near the end of July that the installation crews which the plaintiff managed had lost respect for him due to rumors in the community and that he had to resign or be fired. At that time, McCune resigned his job. The plaintiff eventually left the Springfield area. He was able to find new employment in Ames, Iowa, commencing on April 1, 1988. The job in Ames entailed the same type of work in which the plaintiff was formerly engaged with his brother's company.

For about a month beginning the middle of July 1987, the plaintiff drank continuously. McCune had received alcohol abuse treatment in January 1987 and had remained sober until July 13 or 14. The plaintiff sought professional counseling and attended Alcoholics Anonymous meetings, after which he ceased drinking alcohol. McCune testified that it was a combination of factors in his life, including the AIDS rumors, which caused him to start drinking again. He also suffered from headaches and sleeplessness, was lethargic, and gained weight.

McCune filed a petition on September 24, 1987, alleging that Neitzel had falsely accused him of having AIDS. In her answer, Neitzel denied making any such statements. After trial, the jury returned a verdict in favor of McCune.

Because a resolution of Neitzel's cross-appeal favorable to her would dispose of McCune's appeal, we first address the defendant's cross-appeal.

Neitzel's first assignment of error claims the trial court erred in failing to properly instruct the jury on the law of slander per se. Defendant contends the trial court should have included her proposed instruction that read:

> Under Nebraska Law, language is actionable, i.e., slanderous per se, if by its nature and obvious meaning, it falsely imputes to another an existing venereal disease or other loathsome and communicable disease.
>
> In determining whether particular language is defamatory, words complained of cannot be isolated and must be considered in the context of the entire recital or verbal exchange.
>
> Language alleged to be defamatory, must be interpreted in its ordinary and popular sense, rather than in a technical manner.

Although the record reflects that defense counsel gave the judge proposed jury instructions before commencement of the trial, it appears that defense counsel abandoned his proposed instructions. The record reflects that at the instruction conference, defendant's counsel had no objection to any of the judge's proposed instructions. When asked if the defendant had any additional proposed instructions, defense counsel responded, "Not on behalf of the defendant; nothing additional." Absent plain error indicative of a probable miscarriage of justice, failure of counsel to object to jury instructions after they have been submitted for review will preclude raising an objection to those instructions on appeal. See, *Keller v. Noble*, 229 Neb. 542, 428 N.W.2d 170 (1988); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

Moreover, the trial judge stated that whether a statement amounted to slander per se was a question of law for the court to decide, and therefore, the words "slander per se" should not appear in the instructions. Based upon this trial court ruling and the court's instructions to the jury, it is clear that the trial court inferentially found that Neitzel's statement that McCune had AIDS was slanderous per se as a matter of law and that the statement's meaning was clear and unambiguous. See, generally, *Hennis v. O'Connor*, 223 Neb. 112, 388 N.W.2d 470

(1986). Neitzel does not contest this finding.

Without passing on the precision of the instructions given by the court, we hold that it would have been improper for the court to have included the defendant's slander per se instruction with those given to the jury. Whether a statement is actionable per se is a matter of law for the court. *Hennis v. O'Connor, supra*. In a slander per se action where the statement is clear and unambiguous, the issue the jury is to determine is not whether a statement is defamatory but whether the statement was made by the defendant. *Id*. Given the narrow issue Neitzel raises with regard to the trial court's instructions, the defendant's first assignment of error is meritless.

We next consider Neitzel's second complaint on appeal, that the trial court erred regarding an evidentiary ruling. During cross-examination, McCune denied that a friend of his died from AIDS. The plaintiff insisted his friend died of pneumonia. Neitzel's motion to introduce impeachment testimony on this point was denied. In Neitzel's question-and-answer offer of proof outside the jury's presence, McCune's treating physician testified that plaintiff's medical record stated that McCune told a member of the doctor's nursing staff or a physician that the plaintiff's best friend recently died from AIDS. The defendant contends that the ruling denied her the opportunity to attack McCune's credibility with a prior inconsistent statement. The error was prejudicial, Neitzel maintains, because of the importance of credibility in this case.

If the evidence is otherwise admissible, as a general rule, it is within the trial court's discretion to admit and exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion. See *State v. Nelson, ante* p. 15, 453 N.W.2d 454 (1990). A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertions about those facts. A witness' prior inconsistent statement may be used to impeach the witness *only* on matters relevant to and otherwise admissible on some issue in the case tried. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). See, also, *Jones v. Tranisi*, 212 Neb. 843, 326 N.W.2d 190 (1982) (stating that it is only as to matters relevant

to some issue involved in the case that a witness can be contradicted for purpose of impeachment).

Applying the foregoing rules to this case, McCune's alleged prior statement does not involve a matter which Neitzel could show independent of McCune's alleged self-contradiction. The fact that McCune may have informed medical personnel that a friend had died from AIDS is irrelevant as to whether McCune was slandered by Neitzel. Thus, the court did not abuse its discretion in excluding the evidence. The assignment of error is meritless.

We next turn to the defendant's contention that the trial court erred in sustaining McCune's motion in limine. In its ruling, the court prohibited Neitzel from inquiring about, or making reference to, the sexual orientation of plaintiff or any other witness. The court also prohibited Neitzel from inquiring about or making reference to McCune's medical records except in regard to the result of a test for AIDS.

The defendant argues that the operative words at issue suggest at least a possibility that an alternative lifestyle was material and relevant to the credibility of the plaintiff and certain witnesses. Because she was prevented from raising these issues on voir dire or during cross-examination, Neitzel contends that she was denied a fair trial.

A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. *State v. Nelson, supra.* It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. *Id.* Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court. *Id.* By the same token, in order to preserve error before the Supreme Court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context within which the questions were asked. See, *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987); Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1989).

Under the facts and circumstances of this case, any error in the trial court's ruling on Neitzel's motion in limine was not

preserved for consideration on appeal. Neitzel's assignment of error in this regard is without merit.

Neitzel's final assignment of error in her cross-appeal contends the trial court erred in failing to sustain her motions for directed verdict at the close of plaintiff's case and again at the close of defendant's case.

In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Bray v. Kate, Inc., ante* p. 315, 454 N.W.2d 698 (1990); *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990). In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Bray v. Kate, Inc., supra*; *Ginn v. Lamp, supra*.

On a motion for directed verdict or judgment notwithstanding the verdict,

> "the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom."

Hennis v. O'Connor, 223 Neb. 112, 116, 388 N.W.2d 470, 474 (1986) (quoting *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984)).

Neitzel attempts to advance numerous evidentiary grounds in support of her contention that the trial court should have granted her motions for directed verdict. Many of the defendant's arguments are not supported by the record. Neitzel's unsupported legal arguments defy fundamental concepts of slander per se.

Defendant first contends that plaintiff was required to prove that her statements were made with malicious intent or ill will. Neitzel is correct that malice in the common-law sense of the term means hate, spite, or ill will toward the person about

whom a statement has been published. See *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). However, proof of common-law malice is at issue only when truth or a conditional privilege has been asserted by the declarant. See, *id.*; R. Smolla, Law of Defamation § 1.03 (1990). In the defendant's answer, she did not allege truth or conditional privilege as a defense. Instead, she relied upon denials of McCune's allegations. In this defamation action, truth or conditional privilege must be pled as an affirmative defense. See, *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941 (8th Cir. 1969) (conditional privilege); *Murten v. Garbe*, 93 Neb. 589, 141 N.W. 146 (1913) (truth of the matter charged as defamatory cannot be proved as a complete defense under a general denial); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989) (truth). Since Neitzel did not so plead, malice was not at issue in this case.

Neitzel also argues that since McCune failed to present any evidence that other individuals thought any less of him or had a lower opinion of him because of the remarks she made, she was entitled to have her motions for directed verdict granted. In a suit for slander per se, no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages. Prosser and Keeton on the Law of Torts, *Defamation* § 112 at 788 (5th ed. 1984). See, also, *Sheibley v. Nelson*, 84 Neb. 393, 121 N.W. 458 (1909); *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886). "By definition, statements constituting slander per se are unambiguous in their defamatory meaning and do not require proof of extraneous facts." *Hennis v. O'Connor, supra* at 120, 388 N.W.2d at 476.

The defendant further contends that the trial court should have directed a verdict in her favor because the conversation she had with Keyes was private and she did not expect it to be repeated outside the family home. However, one who puts a libel or slander in circulation is liable for any subsequent publications that are the natural consequence of his or her act. *Schmuck v. Hill*, 2 Neb. (Unoff.) 79, 96 N.W. 158 (1901). Similarly, in proving a publication, a plaintiff is not required to show that the slander was made known to the public generally. It is enough that the plaintiff show that it was orally

communicated to a single person other than the plaintiff. *Fitzgerald v. Young*, 89 Neb. 693, 132 N.W. 127 (1911). Neitzel also argues that plaintiff presented no evidence showing the rumors originated with or were disseminated by her. The record reflects, however, that Neitzel admittedly told at least one other person that McCune had AIDS. In addition, one who repeats or otherwise republishes defamatory matter is subject to liability as if he or she originally published it. *Stone v. Banner Pub. Corp.*, 677 F. Supp. 242 (D. Vt. 1988); *Jones v. Taibbi*, 400 Mass. 786, 512 N.E.2d 260 (1987); Restatement (Second) of Torts § 578 (1977). See, also, 50 Am. Jur. 2d *Libel and Slander* § 170 (1970).

Viewing all evidence in favor of McCune as true and drawing all reasonable inferences therefrom, the trial court did not err in denying Neitzel's motions for a directed verdict. Neitzel's assignment of error is meritless.

As indicated, the trial court in part granted Neitzel's motion for a new trial. Finding that the $25,350 verdict in favor of McCune was awarded under the influence of passion and prejudice and in disregard of the evidence, the trial court granted a new trial on the issue of damages alone. McCune appeals from that order, claiming that there was sufficient competent evidence to support the jury verdict. In support of this, the plaintiff refers to his lost wages and benefits, physical and mental suffering, and impairment of reputation.

A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989). A court may vacate a verdict and grant a new trial when it appears that excessive damages have been awarded under the influence of passion or prejudice. See Neb. Rev. Stat. § 25-1142(4) (Reissue 1989).

> [A] verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. 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.

Crewdson v. Burlington Northern RR. Co., 234 Neb. 631, 643, 452 N.W.2d 270, 280 (1990). In recognition of the interests involved in a defamation action and the difficulty of proof in this area, this court has declared that in an action for libel or slander, the amount of damages is almost entirely in the jury's discretion. *Hall v. Vakiner*, 124 Neb. 741, 248 N.W. 70 (1933).

In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation, see, *Hall, supra*, and *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886); (2) special damages, see *Lawrence v. Jewell Companies, Inc.*, 53 Wis. 2d 656, 193 N.W.2d 695 (1972); cf. *Hruby v. Kalina*, 228 Neb. 713, 424 N.W.2d 130 (1988) (explaining that words which are not slanderous per se do not constitute a basis for recovery of damages in the absence of a specific allegation of special damages); (3) damages for mental suffering, see *Hall, supra*; and (4) if none of these are proven, nominal damages, see *Hutchens v. Kuker*, 168 Neb. 451, 96 N.W.2d 228 (1959). See, generally, Restatement (Second) of Torts §§ 620-623 (1977); R. Smolla, Law of Defamation §§ 9.01-.07 (1990).

In reviewing the evidence on damages, an appellate court views the evidence in the light most favorable to the prevailing party, and all controverted facts are resolved in favor of that party. *Hutchens, supra*. Even though in an action where the words are slanderous per se, no evidence need be given of actual damage to the reputation nor of the mental suffering of the plaintiff, *Boldt, supra*, and *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941 (8th Cir. 1969) (applying Nebraska case law on this issue), McCune did present evidence of injury to his reputation and of mental suffering.

McCune testified that after the slander was perpetrated by Neitzel, he noticed that people in Springfield were less friendly and that he "felt like people would look at [him] like [he] was an outcast . . . ." There was evidence that the installation crews which McCune managed lost respect for him due to the rumors circulating in Springfield concerning his affliction with AIDS. A resident of Springfield confronted McCune regarding the statement concerning AIDS. McCune testified that due to the AIDS rumor, he avoided Springfield, where he had previously made visits to his mother and friends on at least two occasions

per week. There was evidence that McCune did not attend some family gatherings because of the situation. The plaintiff testified that he was forced to leave the Springfield area in order to pursue his career.

As indicated, the record further reflects the plaintiff's mental suffering. After McCune became aware of Neitzel's statement, he dwelt on it for weeks, cognizant that Neitzel was very active in the community. Consequently, McCune isolated himself. He suffered from stress, sleeplessness, headaches, lethargy, and weight gain. McCune's therapist testified that the plaintiff felt ostracized by the community, was concerned about the rumors concerning him, and was having a difficult time in facing these problems. Significantly, the Omaha-Springfield area was an area McCune liked very much and was where he was raised, had always lived except when away at college, worked, and wished to remain.

In regard to special damages, there was evidence from which the jury could have concluded that the slander was the proximate cause of McCune's employment being terminated. McCune testified that after he left his brother's employment he actively sought permanent employment and was not able to secure such employment until April 1, 1988, with a firm in Ames, Iowa. While employed with his brother's company, McCune's salary was $20,000 per year plus a commission of 7 percent of his sales. McCune's gross sales in 1987 averaged $18,000 per month. The employment was on a year-round basis. In addition to his salary and commissions, McCune was provided with unlimited use of a business pickup truck valued at $350 per month; gas for the vehicle, which cost approximately $300 per month; motor vehicle insurance at the rate of $750 per year; licensing and taxes on the truck, which amounted to $350 per year; and health insurance. After McCune left his brother's company, his only other income in 1987 amounted to just over $300 for two temporary jobs. His employer at the time of trial was a new company, recently beginning a sprinkler business. The work was seasonal, and McCune received a salary of $1,500 per month for 10 months out of a year. He was not provided with health insurance benefits, nor was McCune paid commissions. At the time of

trial, McCune was still in the probationary period, after which there existed a possibility that he might receive commissions. A vehicle was not furnished to McCune. However, when the plaintiff used his personal van for business purposes, he was reimbursed for gas, taxes, licensing, and insurance.

The damages for lost earnings and commissions for the period that McCune was unemployed alone amount to over $23,000. In addition, McCune's former annual salary of $20,000 per year plus a commission of 7 percent of $216,000 ($18,000 per month times 12 months) was in excess of $35,000. This is far more than McCune's annual salary of $15,000, which he was receiving at the time of trial. See *Bloomfield v. Pinn*, 84 Neb. 472, 121 N.W. 716 (1909) (holding that in a defamation action probable future injury may be taken into consideration in fixing the amount of the damages). To this must be added McCune's lost fringe benefits plus his loss of reputation and mental suffering. In view of the fact that the foregoing evidence more than adequately supports the verdict, we need not consider whether other special harm suffered by the plaintiff was the proximate result of Neitzel's statements.

After reviewing the record, we conclude that the verdict of $25,350 does not shock the judicial conscience and that the verdict was not the result of passion, prejudice, mistake, or some other means not apparent in the record. Thus, the trial court abused its discretion in sustaining the defendant's motion for a new trial on the issue of damages.

The order of the district ordering a new trial on the issue of damages is reversed, and the cause is remanded to the trial court with instructions to reinstate the original verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

NEBRASKA PUBLIC EMPLOYEES, LOCAL NO. 251, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

457 N.W.2d 429

Filed July 13, 1990. No. 88-651.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing a Commission of Industrial Relations decision, the Supreme Court considers whether the decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether the commission's action was arbitrary, capricious, or unreasonable.
2. **Administrative Law: Commission of Industrial Relations: Jurisdiction.** The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
3. _____: _____: _____. The Commission of Industrial Relations has no authority to vindicate constitutional rights, to hear cases for breach of contract, or to declare rights, duties, and obligations of the parties.
4. **Commission of Industrial Relations: Words and Phrases.** An industrial dispute is any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment.
5. _____: _____. A mere request by a union for information regarding employee transfer lists and test results which is declined by the employer does not constitute an industrial dispute.

Appeal from the Nebraska Commission of Industrial Relations. Appeal dismissed, and cause remanded with directions.

Thomas F. Dowd, of Thomas F. Dowd & Associates, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery for appellee.

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

FAHRNBRUCH, J.

Nebraska Public Employees, Local No. 251, American Federation of State, County and Municipal Employees, AFL-CIO (the union), the collective bargaining representative

of some employees of the City of Omaha (Omaha), appeals an order of the Nebraska Commission of Industrial Relations (CIR) denying its request for test results of Omaha's employees in its bargaining unit.

Because the allegations in the union's petition do not set forth an "[i]ndustrial dispute" within the meaning of Neb. Rev. Stat. § 48-801(7) (Reissue 1988), the CIR lacked subject matter jurisdiction to rule on the union's petition. We dismiss, and remand this cause with directions to dismiss the petition.

"In reviewing a decision of the CIR, this court will consider whether the decision is supported by substantial evidence, *whether the CIR acted within the scope of its statutory authority*, and whether its action was arbitrary, capricious, or unreasonable." (Emphasis supplied.) *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 304, 427 N.W.2d 28, 33 (1988).

On February 4, 1988, the union, by letter, asked Omaha for all transfer lists and all testing results of employees in the bargaining unit the union represented. Omaha declined to furnish the transfer lists or testing results, basing its decision on Omaha's need to maintain confidentiality. Omaha did state, however, that if the union could provide reasons that would allow it to furnish the information without violating established policies and ordinances, it would do so.

The union did not attempt further communication with Omaha, but, rather, petitioned the CIR to enter an order requiring Omaha to furnish the requested information. The union contended Omaha was not bargaining in good faith and claimed it needed the information to fulfill its obligations as the employees' collective bargaining representative.

The CIR is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986), *overruled on other grounds*, *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). The CIR has no authority to vindicate constitutional rights, to hear cases for breach of contract, or to declare rights, duties,

and obligations of the parties. *Id.*

Neb. Rev. Stat. § 48-810 (Reissue 1988) provides that "*industrial disputes* involving governmental service . . . shall be settled by invoking the jurisdiction of the Commission of Industrial Relations." (Emphasis supplied.) Section 48-801(7) defines "[i]ndustrial dispute" as "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."

In this matter, the union merely made a general request for employee transfer lists and testing results, citing its need to fulfill its obligation as collective bargaining representative. The petition did not allege that this information related to a controversy involving terms and conditions of employment. A mere request by a union for information regarding employee transfer lists and test results which is declined by the employer does not constitute an industrial dispute. Thus, neither the CIR nor this court has subject matter jurisdiction over the matter contained in the union's petition. See *Wood v. Tesch, supra.*

Accordingly, the union's appeal to this court is dismissed, and the cause is remanded to the CIR with directions to dismiss the union's petition.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE VICTOR, APPELLANT.

457 N.W.2d 431

Filed July 13, 1990. No. 88-982.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient

evidence to support them.

2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
3. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
4. **Search and Seizure: Miranda Rights: Arrests.** One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on his or her freedom of movement of the degree associated with such an arrest.
5. **Constitutional Law: Search and Seizure.** Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
6. **Search and Seizure: Police Officers and Sheriffs: Duress: Proof.** The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances and is a matter that the State has the burden of proving.
7. **Search and Seizure: Miranda Rights: Arrests.** Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for the purpose of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.
8. **Police Officers and Sheriffs: Miranda Rights: Search and Seizure.** Police officers are not required to administer *Miranda* warnings to everyone whom they question. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody.
9. **Sentences: Death Penalty: Supreme Court: Appeal and Error.** Neb. Rev. Stat. § 29-2525 (Reissue 1989) requires the Supreme Court to review all cases in which the death penalty has been imposed.
10. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** What are aggravating and mitigating circumstances is, to a large extent, prescribed by statute, although the courts are required to consider any relevant evidence in mitigation.
11. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Evidence: Proof.** There is no burden of proof with regard to mitigating circumstances. The State may present evidence that is probative of the nonexistence of a mitigating circumstance, while the defendant may present evidence that is probative of the existence of a statutory or nonstatutory mitigating circumstance. However, because Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1989) do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.
12. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523 (Reissue 1989) exclusively lists the factors that may be relied upon in imposing the death penalty.

13. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstances must be proven beyond a reasonable doubt.
14. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Evidence.** A defendant may offer any relevant evidence on the issue of mitigation.
15. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** The "especially heinous, atrocious, [or] cruel" language of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.
16. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1989) sets forth three separate factual situations upon which a sentencing panel may conclude that aggravating circumstance (1)(a) exists.
17. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** In order for aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1989) to be present, the method of killing must entail something more than the ordinary circumstances that attend any death-dealing violence.
18. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
19. **Death Penalty: Supreme Court: Sentences: Appeal and Error.** The purpose of Neb. Rev. Stat. § 29-2521.03 (Reissue 1989) is to ensure that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances, and review includes only those cases in which the death penalty was imposed.

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

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

FAHRNBRUCH, J.

Clarence Victor appeals the imposition of the death penalty by a three-judge panel following his district court for Douglas County jury convictions for first degree murder and use of a weapon to commit a felony. We affirm.

On appeal, Victor does not challenge the overwhelming evidence that sustains his convictions but, rather, contends: (1) Statements made by the defendant to Omaha police officers should have been suppressed and ruled inadmissible at his trial; (2) Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) is unconstitutionally vague and allows for arbitrary application in a capital sentencing proceeding; (3) the sentencing panel improperly received into evidence his 1964 manslaughter confession in support of its finding that § 29-2523(1)(a) was proven beyond a reasonable doubt; (4) there was insufficient evidence to support a finding that § 29-2523(1)(d) was proven beyond a reasonable doubt; (5) the sentencing panel erroneously found that mitigating circumstance § 29-2523(2)(g) was not proven; and (6) the sentencing panel erred in finding the sentence of death was not disproportionate or excessive.

In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Wright, ante* p. 564, 456 N.W.2d 288 (1990); *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990).

Taking the view most favorable to the State, the facts reflect that at approximately 6 p.m. on December 26, 1987, Omaha police were dispatched to 2125 Ohio Street in Omaha, Nebraska. Upon arrival, the officers entered the residence and observed the deceased, 82-year-old Alice Singleton, lying on the floor in the kitchen area. Among other injuries, the deceased had a laceration to the neck area which was determined to be the cause of her death.

Investigation revealed that Clarence Victor, who had been convicted of two previous homicides, had performed gardening work for the deceased. A neighborhood canvass revealed that a neighbor had seen an older model cream-colored vehicle parked west of the deceased's home at 5 p.m. on the day of the murder. A male, described as between the ages of 30 and 40, wearing sunglasses and a hat, was seated in the car. The same neighbor later told police that Victor's vehicle was similar to the one she

had seen, but she could not positively identify it as the same vehicle.

The defendant's auto, which was near his home, was placed under surveillance. Once Victor was in his vehicle, officers were instructed to stop Victor's vehicle and make contact with the driver. After a period of time, a male entered the vehicle and proceeded north on 25th Avenue in Omaha. The vehicle turned into Church's Fried Chicken on 30th Street. A police cruiser pulled in directly behind the vehicle, and soon thereafter, an unmarked police vehicle also arrived. Upon request by an officer, the operator produced his driver's license. The driver, after being identified as Clarence Victor, was informed by police that an investigation was being conducted. The police asked Victor if he would voluntarily accompany them to the police station. Although Victor was not informed of the nature of the investigation, he nevertheless was cooperative and readily agreed to the request of the police officer. He was then transported to the police station in an unmarked police vehicle.

Once at the station, the defendant was questioned about his whereabouts on December 26, 1987. He was not advised of his rights as established in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), or told that he was under arrest. The defendant informed police that he had not been near the deceased's residence on the day of the murder.

Victor gave a written consent for law enforcement officers to search his residence and his automobile. He also agreed to provide hair samples and fingernail clippings and scrapings. While at Victor's residence, a police officer interviewed the defendant's brother-in-law concerning the defendant's whereabouts on December 26, 1987. The brother-in-law's statements were inconsistent with those previously given by the defendant. The police informed Victor that they had discovered some inconsistencies and asked the defendant if he would return to the police station for more questioning. Without requesting any additional information regarding the alleged inconsistencies, the defendant agreed to accompany the police and undergo further questioning.

After returning to the station, Victor was left alone while the officers consulted with a sergeant concerning the investigation.

Upon the officers' return, Victor was advised of his *Miranda* rights and acknowledged that he understood he was talking with police officers, waived his right to remain silent, acknowledged that anything he said could be used against him in court, and acknowledged his right to consult with a lawyer and have one present during questioning as well as his right to have a lawyer appointed to represent him if he could not afford one. Victor waived his *Miranda* rights and agreed to make a statement to the police.

Once again, the police proceeded to question the defendant with regard to his whereabouts on the day of the murder. Victor gave a different version of his whereabouts on the day of the murder, but this amended version was still inconsistent with the version given by the defendant's brother-in-law. After further questioning, Victor admitted to being at the victim's residence on the day of the murder. However, he denied involvement in Singleton's murder.

Victor's attention was directed to a previous homicide of which he had been convicted in 1964. Officer Pitmon Foxall of the Omaha Police Division testified:

> I specifically told Mr. Victor that when my father had investigated that homicide that he didn't lie to my father, and that he didn't have to lie to me. And that's when Mr. Victor told me at that point that he had been at the Singleton residence. He said that he had knocked on the door, she answered, there had been some argument by Mrs. Singleton, at which time he struck her.

The evidence from the suppression hearing reflects that after Victor made a verbal confession to the officers, the defendant jumped up and, without making a lurch or run toward a window, said, "I'm going to jump out of the window." The police officers calmed Victor.

Victor agreed to give a tape-recorded statement concerning his involvement in Singleton's death. This statement was received into evidence over the defendant's objection. In his taped statement, Victor acknowledged that he went to Singleton's home on December 26, 1987, and knocked on the door. After opening the door, Singleton began to scream and swing her hand and scratched him. A photograph of Victor's

face which was received at trial reflects scratches where the defendant said Singleton scratched him. Victor said he struck the victim with his hand and knocked her down and then struck her in the head three times with a pipe which he said he carried in his car for protection. He claimed that Singleton got tangled in some type of blue cord and that he used his pocketknife to cut the cord loose from her throat. Victor indicated that he then left Singleton's residence and, on his way home, threw away his pocketknife, the blue cord, and the pipe.

The evidence before the jury reflects that during his taped confession, Victor was relatively calm. After the taped confession, the defendant was told by the officers that he would be booked for murder in the first degree and for use of a weapon in the commission of a felony. Thereupon, Victor jumped toward the window in the interview room. It was necessary for the officers to quiet the defendant to prevent him from jumping through the window.

Dr. Blaine Roffman, a pathologist who performed an autopsy on Singleton, testified at Victor's trial that he saw contusions above the right eyebrow and on the right cheek area and some discoloration around Singleton's right orbital area. He also observed swelling around the left eye and a bruise to the left ear. The multitude of bruises on Singleton were caused by multiple blows, according to the pathologist. Dr. Roffman said that there were five lacerations to Singleton's neck and throat area, three of which penetrated deeply. They were caused by a sharp instrument. One penetrated to the depth of the victim's thyroid cartilage, or Adam's apple, about 3 inches. Dr. Roffman also noted that one of the lacerations was characterized by an irregular border. He stated that such an irregular border usually meant that there was not one quick stroke with a weapon, but some hesitation or "stopping and going" as the laceration was made.

Singleton also sustained fractures of the fourth through ninth ribs on the right side of her body and the second through ninth ribs on the left side of her body. There was hemorrhaging surrounding the fracture sites.

Dr. Roffman testified there was marked subscalp edema and hemorrhage throughout the entire front and lateral parts of

Singleton's scalp. The victim's brain showed subarachnoid hemorrhage above the left temporal lobe and left parietal area. There was subarachnoid hemorrhage of the right lateral occipital lobe and over the right parietal area of the brain. Dr. Roffman concluded that these injuries were caused by blunt trauma. He said that the trauma was caused by several blows to the head.

Singleton's death was attributed to a laceration of a branch of the left carotid artery with subsequent hemorrhaging. Dr. Roffman testified that it took 3 to 5 minutes for Singleton to bleed to death.

After the State rested its case, the defendant rested without adducing any evidence.

Following Victor's jury convictions, a three-judge panel was convened to determine the sentence to be imposed on the defendant for murder in the first degree. The sentencing panel received into evidence a certified copy of the judgment and sentence in *State v. Clarence Victor*, docket 95, No. 308, in the district court for Douglas County, Nebraska, showing the defendant's conviction in 1976 for murder in the second degree. Also received in evidence was a certified copy of the record in *State v. Clarence Victor*, docket 70, No. 304, in the district court for Douglas County, Nebraska, evidencing the defendant's 1964 manslaughter conviction and Victor's confession of that crime to police. In addition, police reports of the manslaughter were received in evidence, as were records of the state Department of Correctional Services relating to the defendant while he was incarcerated in the Nebraska Penal and Correctional Complex on previous occasions.

Victor objected to the reception into evidence of his manslaughter confession, contending it was not given in conformity with the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The defendant also filed a motion in limine asking the trial court to preclude the State from introducing evidence in support of § 29-2523(1)(d). Victor argued that aggravating circumstance (1)(d) was unconstitutionally vague and violated the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, as the application of the statute led to

arbitrary results. Contending the Nebraska death penalty statute constituted cruel and unusual punishment, defendant also moved the trial court to declare a portion of Neb. Rev. Stat. § 28-105 (Reissue 1985) null and void.

The panel overruled defendant's objections, rejected his challenges to the constitutionality of the Nebraska death penalty statutes, and sentenced him to death.

In support of its finding, the panel determined that the State had proven beyond a reasonable doubt that Victor "was previously convicted of another murder or a crime involving the use or the threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity," which constitutes an aggravating circumstance under § 29-2523(1)(a). To support the existence of aggravating circumstance (1)(a) the panel relied on Victor's convictions for second degree murder and manslaughter and the police reports in the 1964 manslaughter conviction.

The panel also found that § 29-2523(1)(d) was proven beyond a reasonable doubt. Section 29-2523(1)(d) reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." In making its finding that aggravating circumstance § 29-2523(1)(d) existed, the panel separated the section into two prongs. It specifically found that prong one, i.e., the murder "was especially heinous, atrocious, cruel," was proven beyond a reasonable doubt.

The panel stated:

> The panel finds from the evidence beyond a reasonable doubt that the murder of Alice Singleton was especially heinous, atrocious and cruel in that she was subjected to the imposition of extreme suffering by the defendant prior to her death, all as demonstrated by the nature of the injuries described above, the manner of their infliction, and her being alive and conscious during most if not all of the assault. Therefore, the panel finds that this prong of this aggravating circumstance exists beyond a reasonable doubt.

As to the second prong of § 29-2523(1)(d), "manifested exceptional depravity by ordinary standards of morality and

intelligence," the panel found there was insufficient evidence to prove its existence beyond a reasonable doubt.

The panel concluded that none of the statutory mitigating circumstances as set out in § 29-2523(2)(a) to (2)(g) were present, but found that the defendant's prison record compiled during his incarcerations for prior convictions was a mitigating circumstance. The panel found that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases.

I. MOTION TO SUPPRESS

Victor first contends the trial court committed reversible error in failing to suppress statements he made to Omaha police concerning his actions at the home of the victim. The defendant asserts those statements were the fruit of an unreasonable seizure of his person and were obtained in violation of his right against self-incrimination.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *Id.*

Prior to trial, Victor filed a motion to suppress requesting that the State be prohibited from using any statements he made to the police, contending those statements were obtained in violation of defendant's rights under the fourth and fifth amendments to the U.S. Constitution. Victor alleged that he was not properly advised of his constitutional rights as dictated in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); that he did not make a voluntary or intelligent waiver of his rights; that his interrogation was commenced prior to his being advised of his rights to remain silent and to assistance of counsel; and that the statements were the product of coercion, deception, and inducements of leniency. Victor claimed his statements were the fruit of an unlawful arrest.

Following a hearing, the trial court overruled defendant's suppression motion, finding:

> 1. That all statements made by the defendant prior to being advised of his Miranda rights were made at a time when defendant was neither in custody of or otherwise deprived of his freedom by members of the Omaha Police Division in any significant way.
>
> 2. That the defendant [later] made a voluntary and intelligent waiver of his constitutional rights as required by Miranda.
>
> 3. That all statements made by the defendant were made voluntarily, knowingly, understandingly and intelligently.
>
> 4. That all statements made by the defendant after being advised of his Miranda rights were made pursuant to a lawful arrest by members of the Omaha Police Division.

Miranda v. Arizona, supra, prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. The State concedes that such safeguards were not employed in the early stages of the police interviews. Thus, the pertinent question is whether the interviewing of Victor prior to his being advised of his *Miranda* rights constituted "custodial interrogation." If not, the ruling of the trial court is correct; but if the interviews did constitute custodial interrogation, the ruling of the trial court is erroneous, and the statements should have been suppressed.

Obviously, the interrogations were "custodial" only if Victor was in custody at the time of questioning. One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on his or her freedom of movement of the degree associated with such an arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986). "Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact." *State v. Bowersmith*, 224 Neb. 6, 9, 395 N.W.2d 527, 529 (1986). See, also, *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances and is a matter that the State has the burden of proving. *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for the purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983).

In *Beheler*, the defendant voluntarily went to the police station. While at the station, he talked about a murder but was not advised of his *Miranda* rights. The California Supreme Court found that this was a custodial interrogation and suppressed the statements. In reversing the California Supreme Court, the U.S. Supreme Court held that an inculpatory statement made by a suspect who was not given the *Miranda* warnings but who voluntarily went to the police station, was not placed under arrest, and was allowed to leave unhindered after an interview of less than 30 minutes was admissible, as the conditions of the suspect's voluntary participation did not render him "in custody." In *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983), this court held that a suspect who was interrogated in a police station but who was free to leave was not in custody.

Victor contends that "the police had formulated a plan designed to subtly overcome the Defendant's will by a show of strength, as illustrated by three police vehicles present at the point where the Defendant was initially contacted in his automobile." Brief for appellant at 13. Defendant further alleges that he "was not allowed to drive his own vehicle down to the police station, but rather was taken in a police car, thereby giving the police officers total control over the Defendant's movements and further over the venue of the

questioning of the Defendant." *Id.* Victor argues these actions by the police undermine any claim of the State with regard to the voluntariness of defendant's actions in accompanying the police for questioning.

In the initial contact with Victor, a police officer merely asked the defendant to voluntarily accompany him to Central Police Station for questioning. Victor asked if he could leave his car where it was parked. The defendant was very cooperative, readily agreed to accompany the police, and was transported in an unmarked police car. Victor was not handcuffed. When asked if he would consent to searches of his house and his vehicle, Victor readily agreed. He also was very agreeable and cooperative when asked if he would consent to the police's taking fingernail clippings and scrapings as well as hair samples from him. Defendant also agreed to accompany police to his home for a consensual search. Thereafter, Victor readily agreed to return to the police station for more questioning concerning various inconsistencies the police had uncovered. After returning to the police station, Victor was left alone in a room while the police officers consulted with a sergeant about the investigation. Upon returning from talking with the sergeant, the police obviously considered that Victor's freedom was restricted as of that time because, as previously indicated, the officers informed the defendant of his *Miranda* rights. Victor waived his *Miranda* rights and agreed to make a statement to the police.

The record clearly demonstrates that Victor voluntarily cooperated with the police. There is no evidence that the police prevented Victor from exercising any of his *Miranda* rights at any time or prevented him from terminating any searches he had authorized.

Given the totality of the circumstances, it cannot be said the trial court was clearly wrong in concluding that prior to being advised of his *Miranda* rights, Victor was not in custody or deprived of his freedom.

The defendant's assertion that a request to go to a police station for questioning carries an implication of obligation so awesome for a suspect that it renders his actions involuntary is not persuasive. As the U.S. Supreme Court noted in *Oregon v.*

Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977),

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

All of the trial court's findings we have discussed which have been questioned by the defendant are not clearly wrong and, indeed, are fully supported by the evidence.

II. CAPITAL PUNISHMENT

Victor's five remaining assignments of error address the sentence of death imposed on him by the sentencing panel. Defendant's first assignment of error in this regard challenges the constitutionality of § 29-2523(1)(d). Victor's next three assignments of error question the existence of aggravating circumstances and nonexistence of mitigating circumstances as found by the sentencing panel. The defendant's final assignment of error questions what he alleges to be the excessiveness of his sentence in relation to other death penalty cases.

When a defendant is found guilty of murder in the first degree by trial, the sentence may be imposed by the judge who presided at the trial or by a panel of three judges including the judge who presided at the trial. The two additional judges are designated by the Chief Justice of the Nebraska Supreme Court. See Neb. Rev. Stat. § 29-2520 (Reissue 1989). In Victor's case, the sentencing panel consisted of three judges, including the judge who presided at the defendant's trial.

Neb. Rev. Stat. § 29-2522 (Reissue 1989) requires a sentencing court, as prescribed in § 29-2520, to proceed in part

as follows:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Neb. Rev. Stat. § 29-2525 (Reissue 1989) requires the Supreme Court to review all cases in which the death penalty has been imposed. See, also, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

What are aggravating and mitigating circumstances is, to a large extent, prescribed by statute, although the courts are required to consider any relevant evidence in mitigation. See, *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer, supra*. There is no burden of proof with regard to mitigating circumstances. The State may present evidence that is probative of the nonexistence of a mitigating circumstance, while the defendant may present evidence that is probative of the existence of a statutory or nonstatutory mitigating circumstance. However, because Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1989) do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990).

Section 29-2523 exclusively lists the factors that may be relied upon in imposing the death penalty. *State v. Reeves, supra*. Aggravating circumstances must be proven beyond a reasonable doubt. *State v. Joubert, supra*. Section 29-2523(1) defines aggravating circumstances as follows:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to

the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

The mitigating circumstances defined by § 29-2523(2) are as follows:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or

intoxication.

In addition, a defendant may offer any relevant evidence on the issue of mitigation. See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court held that the death penalty may only be imposed under sentencing procedures that do not create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. "[A state] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). In *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the U.S. Supreme Court held that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Section 29-2523 provides guidelines that must be followed in order to avoid the indiscriminate application of the death penalty. "Absent such guidelines, the imposition of the death penalty in a particular case must be set aside as being in violation of the U.S. Constitution as declared by the U.S. Supreme Court." *State v. Joubert*, 224 Neb. 411, 425, 399 N.W.2d 237, 248 (1986).

A. Constitutionality of § 29-2523(1)(d)

Defendant first contends that aggravating circumstance (1)(d) of § 29-2523 is unconstitutionally vague and allows for arbitrary application in a capital sentencing proceeding.

Section 29-2523(1)(d) provides: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." Because the sentencing panel concluded that only the first prong of (1)(d), "especially heinous, atrocious, cruel," was proven beyond a reasonable doubt and because we are mindful of the U.S. Court of Appeals for the Eighth Circuit ruling in *Moore v.*

Clarke, No. 88-2584 (8th Cir. May 25, 1990), our discussion is limited to the constitutionality of the first prong of § 29-2523(1)(d).

The U.S. Supreme Court, in *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), affirmed the U.S. Court of Appeals for the Tenth Circuit holding that "heinous," "atrocious," and "cruel," as used in an Oklahoma murder sentencing statute were "unconstitutionally vague" under the eighth amendment to the U.S. Constitution. In that ruling, the Court noted that the Oklahoma courts had not adopted a limiting construction that cured the infirmity in the Oklahoma statute. But cf. *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir. 1989) (the "heinous, atrocious or cruel" aggravating factor in Alabama's death penalty statute had been narrowed to those homicides that were unnecessarily torturous to the victim for purposes of determining whether imposition of the death penalty was unconstitutionally "wanton" or "freakish").

Unlike the Oklahoma court in *Maynard v. Cartwright*, this court has adopted limiting language to guide Nebraska courts in applying the first prong of § 29-2523(1)(d) so as to remedy any constitutional infirmity of vagueness.

In *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977), we adopted the following statement made by the sentencing panel:

> "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed [in § 29-2523(1)(d)], but by the use of the [word] 'especially' . . . the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse . . . ."

In discussing the first prong of (1)(d) in *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982), we held:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially

> heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists.

In *State v. Ryan*, 233 Neb. 74, 142, 444 N.W.2d 610, 652 (1989), after restating our holdings in *Rust* and *Moore*, we concluded:

> Thus it can be seen that this court has adopted a limiting construction on aggravating circumstance (1)(d), as shown in cases extending from 1977 to 1986. We have held that "especially heinous, atrocious, or cruel" is limited to cases where "torture, sadism, or the imposition of extreme suffering exists," *State v. Moore, supra* at 470, 316 N.W.2d at 41, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time," *State v. Hunt*, [220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985)].

Victor correctly points out that the sentencing panel misquoted *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), in that portion of its findings relating to the constitutionality of the first prong of aggravating circumstance (1)(d). It is clear, however, that the sentencing panel correctly applied the constitutionally valid guidelines we have established for determining whether a murder was especially heinous, atrocious, or cruel in its determination that § 29-2523(1)(d) existed beyond a reasonable doubt. As the aggravating circumstance was not invalidly applied, the error committed by the panel in misquoting *Peery* is harmless beyond a reasonable doubt.

We conclude, as we did in *State v. Ryan, supra*, and *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), that this court has adopted such a narrow construction of § 29-2523(1)(d) as to render the first prong of the Nebraska statute sound and in full compliance with the U.S. Constitution. See, also, *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). Such a narrow construction does not lead to arbitrary results. Victor's assignment of error

that the first prong of § 29-2523(1)(d) is unconstitutional is meritless.

B. Findings of the Sentencing Panel

Assignments of error Nos. 3 through 5 address findings and rulings of the sentencing panel with regard to the existence or nonexistence of aggravating and mitigating circumstances.

The sentencing panel found that aggravating circumstances (1)(a) and (1)(d) exist beyond a reasonable doubt and that no mitigating circumstances as defined in § 29-2523(2) exist. The panel did find that defendant's prison record compiled during previous incarcerations was a mitigating circumstance.

1. Aggravating Circumstance (1)(a)

Victor first contends the sentencing panel improperly received into evidence his 1964 manslaughter confession in support of its finding that § 29-2523(1)(a) was proven beyond a reasonable doubt. Defendant objected to the admission of the confession, arguing that it did not conform to the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Aggravating circumstance (1)(a) sets forth three separate factual situations upon which a sentencing panel may conclude that (1)(a) exists. It states: "The offender was previously convicted of another murder *or* a crime involving the use or threat of violence to the person, *or* has a substantial history of serious assaultive or terrorizing criminal activity." (Emphasis supplied.)

The sentencing panel concluded that Victor had been previously convicted of second degree murder in 1976. The evidence supporting this conclusion is uncontroverted. We conclude, as a matter of law, that defendant's previous second degree murder conviction is, in itself, sufficient to support a finding that (1)(a) exists beyond a reasonable doubt. Thus, we need not decide whether the sentencing panel erred in receiving the confession into evidence, as any error committed in receiving the manslaughter confession would be harmless beyond a reasonable doubt.

2. Aggravating Circumstance (1)(d)

Victor next argues that even if § 29-2523(1)(d) is constitutional, there was insufficient evidence to support a finding that (1)(d) existed beyond a reasonable doubt. Section 29-2523(1)(d) reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." The panel correctly separated this section into two prongs. It concluded that the second prong, "manifested exceptional depravity by ordinary standards of morality and intelligence," was not proven beyond a reasonable doubt, but it specifically found that prong one, that is, "[t]he murder was especially heinous, atrocious, cruel," was proven beyond a reasonable doubt. After acknowledging that this court has established sufficient standards and guidance so as to make this prong of this aggravating circumstance constitutionally firm, the panel set forth the following:

> The evidence shows that in the late afternoon of December 26, 1987, the defendant went to the victim's home. The victim was an elderly woman, 82 years of age, four feet eleven inches in height, and weighing approximately 130 [sic] pounds. The defendant was a man 55 years of age, five feet eight inches tall and approximately 160 pounds. The defendant had previously done yard work for the victim.
>
> After the defendant entered the victim's home, a struggle ensued during which the defendant struck the victim about the face and head with his fists, then beat her with a pipe, and then cut her throat, the latter resulting in her bleeding to death.
>
> The autopsy revealed that as a result of defendant's assault, the victim sustained numerous injuries to the face and head including four areas of brain hemorrhage, six broken ribs on the right side of her body, and eight broken ribs on the left side, all with hemorrhage. The victim sustained a minor laceration in her pubic area and five lacerations to her throat, two of which were vertical and superficial, and three of which were lateral and penetrating. Two of the penetrating wounds were ragged

> and described by the pathologist as "stop and go" cuts rather than a quick even slash, one of these latter wounds penetrating to the area of the Adam's apple and cutting a branch of the carotid artery which resulted in the victim's bleeding to death. The medical evidence reveals that in addition to the cuts above described, the injuries to the head and body of the victim were the result of blunt trauma, evidencing a number of blows, and that throughout all of the assault and the injuries the victim was alive.
>
> The defendant, in describing the events of the murder, said he first struck the victim in the face with his fists, then beat her with a pipe, and then got out a knife which he said was to cut a cord from around her throat in which she had become entangled during the assault, but which we determine to be the time he inflicted the cuts on her throat and pubic area. *The defendant described the victim as struggling and screaming throughout the assault.*
>
> The evidence of the crime scene shows the assault and murder occurred in the kitchen of the victim's home in which there was evidence of the victim's blood in various areas of that room on furniture and appliances and in the area of the body, further evidencing the struggle that had occurred.
>
> The panel finds from the evidence beyond a reasonable doubt that the murder of Alice Singleton was especially heinous, atrocious and cruel in that *she was subjected to the imposition of extreme suffering by the defendant prior to her death, all as demonstrated by the nature of the injuries described above, the manner of their infliction, and her being alive and conscious during most if not all of the assault.* Therefore, the panel finds that this prong of this aggravating circumstance exists beyond a reasonable doubt.

(Emphasis supplied.)

In order for aggravating circumstance (1)(d) of § 29-2523 to be present, the method of killing must entail something more than the ordinary circumstances that attend any death-dealing violence. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

We agree with the sentencing panel's conclusion that the victim was forced to undergo extreme suffering before she died. This was a brutal, painful, and ruthless crime. The victim, a small 82-year-old woman, was repeatedly struck by the defendant with his fist and with an 8- to 10-inch pipe. She suffered substantial injuries to her head and face as well as 14 broken ribs. By the defendant's own admission, the victim was conscious and struggling during this painful ordeal. While not admitting to cutting the victim, Victor admitted that while he was using his knife, the victim was alive and screaming. Dr. Roffman concluded that all of the victim's injuries occurred before the victim died, although he could not conclude in what particular order. The victim's blood was found on a kitchen counter, a utility stand, a door, table legs, a light switch, a shoe, and an iron. There was a significant pool of blood on the floor some distance from the body. The victim was not only brutally beaten while she was conscious, but was also able to watch, struggle, and scream as Victor slashed her throat. The victim lay on her kitchen floor, where she eventually bled to death.

Beyond a reasonable doubt, the victim was subjected to the imposition of extreme suffering by the defendant prior to her death. In addition, the facts and circumstances of this case; the nature, extent, and severity of the victim's injuries; the vicious manner in which they were inflicted over a substantial period of time; and the obvious extent of the struggle that took place also support a finding beyond a reasonable doubt that Singleton was tortured while alive by the defendant. We agree with the sentencing panel's finding that aggravating circumstance (1)(d) did exist.

3. Mitigating Circumstance (2)(g)

Defendant also argues the sentencing panel erred in failing to find that mitigating circumstance (2)(g) of § 29-2523 existed. Mitigating circumstance (2)(g) reads: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." Victor contends that he was impaired by alcohol.

The sentencing panel addressed defendant's contention and

made the following findings:

As to intoxication, the murder appears to have occurred at some time between 4:00 o'clock p.m., when the victim's friend Mrs. Burton dropped the victim off at her home, and 5:52 p.m., when the 911 call was made reporting the murder and the police officer received the call to go to the victim's residence.

Adele Doyle testified that the defendant came to her home on the day of the murder at approximately four o'clock p.m., that he had several beers before arriving, that he refused her offer to drink anything further at her home, that she does not recall his drinking anything, that he smelled of alcohol but was not drunk, and that he left her home at approximately five o'clock p.m. and drove away in his car in a normal manner.

At approximately 7:30 p.m., the defendant's brother-in-law, Fred J. Walker, saw the defendant as he came into Walker's home where he roomed, and told Walker of the victim's death. Walker testified that he was close to the defendant, and, while defendant was visibly upset and agitated, he noted neither the odor of alcohol nor any indication that the defendant was intoxicated.

Defendant's initial statement to the police was that he had picked up a girl friend at about ten o'clock a.m., that they drove around, that he purchased a six-pack of beer while driving around and that he dropped his girl friend off around 3:30 to 4:00 o'clock p.m. and returned to his residence. In a second statement, the defendant said that at the time he picked his girlfriend up, he bought two beers from a bar, that about 10:45 a.m. he purchased some more beer which they drank and that he dropped his girl friend off at one o'clock and returned to his home.

Later, in his third and now incriminating statement the following questions and answers were given.

Q. Do you know why you did this, Victor?

A. I drank too much.

Q. Think you drank too much?

A. I drank too much.

Q. Do you think you have a problem?

A. Yeah, alcohol - I drank too much 3 - 4 - fifth of wine and three six-pack a day.

We agree with the sentencing panel in its conclusion that mitigating circumstance (2)(g) did not exist. The competent relevant evidence reflects that the defendant's capacity to appreciate the wrongfulness of his conduct or his failure to conform his conduct to the law was not impaired by intoxication. Victor's initial statements about what he consumed the day of the murder were inconsistent and do not deal specifically with the amount he consumed. His last statement that he drank too much is imprecise, conclusory, uncorroborated, and more consistent with his general admission that he had a problem with alcohol. His statements as to his actions in the victim's home are clear and concise and, although in some respects incredible, are not vague and do not suggest that his capacity was impaired by intoxication. This assignment of error is without merit.

We agree with the sentencing panel that no mitigating circumstances set out in § 29-2523(2)(a) to (2)(g) exist. Victor had a significant history of prior criminal activity. There is no evidence that defendant acted other than on his own accord without any outside pressure. We agree with the sentencing panel that defendant was not suffering from any extreme mental or emotional disturbance that influenced him to murder the victim or that the defendant's age had any effect on his conduct. The defendant was the sole actor in the murder, and there is no evidence to support a finding that the victim was a participant in Victor's conduct or consented to the act. Although the sentencing panel gave little weight to the defendant's conduct during previous incarcerations, the panel did consider that conduct as a nonstatutory mitigating circumstance. We also consider such record a mitigating circumstance.

The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). As we observed in *State v. Stewart*, 197

Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting *State v. Dixon*, 283 So. 2d 1 (Fla. 1973):

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."

Having weighed anew the aggravating circumstances and the mitigating circumstances, see *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), we conclude that, even excluding defendant's manslaughter conviction and giving full weight to Victor's conduct during previous incarcerations, the aggravating circumstances that were proven beyond a reasonable doubt to exist so far outweigh the mitigating circumstance that the imposition of the death penalty was appropriate and not arbitrary.

The assignments of error raised by Victor in regard to the sentence imposed by the sentencing panel have no merit.

C. Excessiveness of the Sentence

Victor lastly contends the sentencing panel erred in finding that a sentence of death was not disproportionate or excessive.

Neb. Rev. Stat. § 29-2521.03 (Reissue 1989) requires the Supreme Court to determine the propriety of the death sentence in a case in which it has been imposed by comparing the

sentence with previous cases involving the same or similar circumstances.

We have determined that the purpose of that statute is to ensure that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances and that the review should include only those cases in which the death penalty was imposed. *State v. Joubert, supra*; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

We have compared the facts and circumstances of this case with those of all the applicable cases in which the death penalty was imposed. We find that the sentence imposed in this case is no greater than, nor disproportionate to, the sentence imposed in any other case with the same or similar circumstances. Defendant's final assignment of error is also without merit.

III. CONCLUSION

As stated before, this court is charged with the automatic review of all cases in which the death penalty has been imposed. § 29-2525. This court has separately reviewed each of defendant's assignments of error and finds they are meritless.

For the reasons stated, Victor's convictions and his sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY PEREZ, APPELLANT.

457 N.W.2d 448

Filed July 13, 1990. No. 89-781.

1. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.
2. **Pleas: Appeal and Error.** The trial court is afforded discretion in deciding whether to accept guilty pleas, and the Supreme Court on appeal will reverse the trial court's determination only in case of an abuse of discretion.
3. _____: _____. In determining whether there was an abuse of discretion in the refusal of a trial court to accept or reject a plea, it is necessary to determine if the defendant suffered any prejudice.

4. **Motions for Continuance: Appeal and Error.** Generally, the denial of a motion for a continuance is a matter for the discretion of the trial court, whose ruling will be upheld absent an abuse of discretion.
5. **Motions for Continuance: Witnesses: Evidence: Appeal and Error.** Generally, in order to find an abuse of discretion in denying a motion for a continuance in order to locate witnesses, it is necessary that the defendant make a showing as to what evidence would be procured by calling such witnesses.
6. **Criminal Law: Motions for Continuance: Appeal and Error.** Where a criminal defendant's motion for continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion generally is not abuse of discretion.
7. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by the court in denying a request for a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.
8. **Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
9. **Juries: Discrimination: Equal Protection: Proof.** In order to prove discriminatory selection of a venire under the equal protection clause, a defendant must prove the existence of purposeful discrimination.
10. **Juries: Discrimination: Proof.** A defendant may seek to prove purposeful discrimination by proof of disproportionate impact.
11. _____: _____: _____. Disproportionate impact may be demonstrated either by showing that defendant's cognizable racial group has not been summoned for jury service over an extended period of time or that this group is substantially underrepresented in his or her venire and that the venire was chosen under a practice providing the opportunity for discrimination.
12. **Sentences: Appeal and Error.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
13. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only where there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
14. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
15. **Motions for New Trial: Evidence: Proof.** A defendant who has filed a motion for new trial on the ground of newly discovered evidence has the burden to show that the alleged newly discovered evidence is of such a substantial nature that if it had been received in the original trial, it would have changed the result.
16. **Evidence: Words and Phrases.** Generally, "newly discovered evidence" is

evidence material to the defense that could not with reasonable diligence have been discovered and produced at trial.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, and Robert L. Wolf for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

HASTINGS, C.J.

Defendant, Roy Perez, appeals from jury convictions of two counts of delivering or distributing a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988). He was sentenced to two terms of 3 to 6 years' imprisonment, to be served consecutively. Defendant alleges as error that the trial court erroneously refused to accept defendant's plea of guilty offered pursuant to a plea bargain, that the trial court erroneously refused to grant a continuance or postponement of his trial, that the trial court erred in allowing the trial to proceed when the jury did not appropriately reflect the inclusion of persons of Hispanic descent, that the trial court imposed an excessive sentence, that the trial court erred in refusing to sustain his motion for a directed verdict, and that the trial court erred in overruling defendant's motion for a new trial on the ground of newly discovered evidence because defendant was not permitted to allow the tape-recorded evidence of defendant's alleged admissions made during the drug sales to be examined by expert witnesses to determine whether such evidence had been altered or otherwise tampered with.

A two-count information was filed on December 1, 1988, charging defendant with violations of § 28-416, delivery or distribution of cocaine. On December 5, 1988, an arraignment was held, at which time defendant stood mute as to both of these charges, as well as to another charge of possession of cocaine. The court entered pleas of not guilty on behalf of the

defendant.

After a January 18, 1989, hearing, the trial court granted defendant's motion for a continuance and set a trial date of May 15, 1989.

The defendant was represented at all times by the public defender. A plea bargain was negotiated wherein the defendant would plead guilty to count I, in exchange for which the State would dismiss count II and the charge of possession of cocaine.

At a plea hearing on April 18, 1989, after the defendant tendered a plea of guilty, the court specifically and completely explained to the defendant all of his rights and the rights he would waive by pleading guilty.

When asked by the court whether he was satisfied with the manner in which his lawyer had negotiated the plea bargain, he answered, "No." The record shows that the defendant was dissatisfied because his counsel "was under a heavy load and he had no time to talk about the case or anything," and defendant also complained about the manner in which his attorney conducted a deposition of the principal witness against the defendant, i.e., he did not tell defendant he could have asked his lawyer to ask certain questions.

By his own admission the dissatisfaction with his lawyer constituted part of the reason for defendant's decision to plead guilty, and the evidence had nothing to do with that decision. On this basis the trial court refused to accept defendant's guilty plea, whereupon the State immediately withdrew the offered plea bargain.

On May 3, 1989, defendant filed a motion for continuance of the May 15 trial date for the reason that defendant had planned to plead guilty, but when the court refused to accept the plea it became too late for the defendant or his counsel to locate, contact, and subpoena witnesses. A hearing was held on that motion on May 8, 1989. The court inquired of the defendant and counsel as to the names and addresses of the witnesses they proposed to find and what would be the subject matter of their testimony. The defendant was extremely vague, stating that he did not know their last names, did not know the answers they would give to questions, and in some instances knew only their nicknames. As near as could be determined, the witnesses

would either testify as to defendant's good character or some of them allegedly would testify as to the character of the State's witness who made the buys from defendant, relating to his having worked for other state agencies setting up persons on "drug busts." The motion was denied on the theory that defendant had had almost 6 months to prepare for trial.

The principal witness against the defendant was one Charles Hieatt, a cooperating individual who made the two buys from the defendant, for which he was paid a fee by the police. The witness had been wired with a transmitter and microphone, which were used by the police to monitor the buys.

Three law enforcement officers testified as to their contacts with Hieatt, how he had been searched before being allowed to meet the defendant to make the buys, how he was kept under observation at all times, and how they immediately took the purchased drugs from him after the buys. They not only testified as to their observations of the defendant as he went to and from the place of the delivery, but also testified in part to the voices they heard from the transmitter on the witness. A chemist for the State Patrol testified that he identified the substances obtained during the buys as cocaine.

During the course of the trial it was brought out that Hieatt had been a drug user, had been arrested and convicted of felonies, and had worked for one or more other law enforcement agencies making buys. Defendant was also permitted to call several character witnesses in spite of the fact that he had neglected to list them as witnesses within the time provided by the trial court.

Defendant was convicted of both counts of distribution and was sentenced to consecutive terms of imprisonment of 3 to 6 years on each count.

On May 12, 1989, 3 days before trial, defendant filed a challenge to the jury array, alleging a systematic and unconstitutional exclusion of persons of Spanish or Mexican heritage from the panel. An evidentiary hearing was held on that motion the same day it was filed, and the motion was overruled.

We first discuss defendant's claimed error that the trial court refused to accept his guilty plea.

It is well established that a criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made. *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *overruled on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

The trial court is afforded discretion in deciding whether to accept guilty pleas, and the Supreme Court on appeal will reverse the trial court's determination only in case of an abuse of discretion. *State v. Leisy, supra.*

Defendant cites *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), and *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968), as imposing limits upon a trial court's discretion to reject a tendered plea of guilty.

Ammidown involved a situation where the trial court rejected a plea to a lesser offense for the reason that the public interest required the higher charge. That case related to a claimed trespass on judicial authority by the prosecutor's agreement. It did not involve a determination of the voluntary and intelligent nature of a tendered plea, and it is therefore readily distinguishable from the case at bar, which does involve such a question—a question reserved for the judiciary.

Griffin simply held that a guilty plea to a plea bargain arrangement should not be rejected without a good reason. Without our choosing to adopt this limitation, which appears to conflict with the "large measure of discretion" rule announced in *Leisy* and *Stewart*, it is sufficient to recognize that even if we were to adopt such a standard, we still could not find an abuse of discretion because the trial court had good reason to reject defendant's plea. Defendant's protestation of ineffective assistance of counsel, coupled with the admission that his dissatisfaction with his counsel played a part in his decision to accept the plea bargain arrangement, and his statement the evidence had nothing to do with his decision to plead guilty are more than sufficient to show there was good reason for rejecting defendant's plea.

Finally, in determining whether there was an abuse of

discretion, we must determine whether a defendant has suffered any prejudice as a result of the rejection of the plea. See, *Leisy, supra*; *People v Best*, 132 A.D.2d 773, 517 N.Y.S.2d 582 (1987).

Under the plea bargain arrangement, the defendant could have received a sentence of 16$^{2}/_{3}$ to 50 years' imprisonment. His sentences in this case were consecutive sentences of 3 to 6 years each. There is no merit to defendant's first assignment of error.

Regarding the denial of the motion for continuance, a continuance is a matter for the discretion of the trial court, whose ruling will be upheld absent an abuse of that discretion. See, Neb. Rev. Stat. § 25-1148 (Reissue 1989); *State v. Lewchuk*, 232 Neb. 229, 440 N.W.2d 229 (1989).

Defendant's motion for continuance was not supported by affidavit or any other evidence setting forth the facts upon which the continuance was requested, as required by § 25-1148.

In *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987), no written application was made and no supporting affidavits were on file in support of a motion for continuance, both of which are required by § 25-1148. This court stated:

> A failure to comply with § 25-1148 is relevant as to whether the trial court abused its discretion. In *Metschke v. Department of Motor Vehicles*, 186 Neb. 197, 200, 181 N.W.2d 843, 845 (1970), *overruled on other grounds Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), this court stated: "In the absence of a showing in conformance with section 25-1148, R.R.S. 1943, it is not error for the trial court to refuse to grant a continuance." In that case we found no abuse of discretion in denying the appellant's oral motion for a continuance (to secure additional witnesses) because there was no showing made as to what evidence would be procured by calling additional witnesses, no showing of materiality, and no showing of any other matters pertinent in support of the motion.

226 Neb. at 641-42, 413 N.W.2d at 905.

Even were we to consider defendant's claims further, in *State v. Eichelberger*, 227 Neb. 545, 556, 418 N.W.2d 580, 588 (1988), we held that "where the criminal defendant's motion for

continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion is no abuse of discretion." That is clearly the case here. The request for continuance notes defendant himself placed reliance upon the court's accepting his plea of guilty and chose not to prepare for trial.

" 'There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.' " *State v. Sluyter*, 224 Neb. 768, 771, 401 N.W.2d 480, 482 (1987); *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986). Defendant failed to make a sufficient showing that even if a continuance were granted for an indefinite period, he would be able to secure any material and noncumulative evidence. As a matter of fact, the content of the evidence he claimed these unnamed witnesses would furnish was that Hieatt had a criminal record and had been involved with other law enforcement agencies in "setting up people" on drug buys, which evidence was freely given by the State. Defendant has suffered no prejudice.

Defendant's challenge to the jury array grounded on the alleged systematic and unconstitutional exclusion of persons of Spanish descent was based on two affidavits submitted to the trial court.

One affidavit recited in relevant part as follows:

> Affiant states that there is in her possession as such Economic Development Coordinator of Panhandle Area Development Commission the official, printed report on the 1980 Census conducted in the United States of America; that such report is named 1980 Census of Population By The United States Department of Commerce, Bureau of the Census, and this official report shows that the then reported total population of Scotts Bluff County, Nebraska, was 38,344; and that in said county, included within such total population count were 4714 persons of Spanish descent.

This was the only evidence of the percentage of persons of Spanish descent in the population of the county as a whole.

The second affidavit is that of Santos Castro, the deputy of the acting clerk of the district court for Scotts Bluff County,

Nebraska, which acting clerk is also the acting jury commissioner for said county. Included in that affidavit is a description of the process in which the venire is composed. Lists of the registered voters and registered drivers in Scotts Bluff County are used. A computer merges the two lists, alphabetizes the names, and eliminates obvious duplicates. From this merged list, names are selected for the venire in a key number fashion. There were 125 names so selected. Added to this 125 were 23 names of persons transferred from an earlier venire selection. After taking into account disqualifications, inability to locate persons, excuses, and transfers of persons to serve on a later jury term, defendant's venire was formed. Copies of the original listing of 125 names, the 23 names of persons transferred to the venire for defendant's jury term, and the final or revised listing of the names of persons on defendant's venire were attached to the affidavit.

At the hearing on his challenge, defendant's attorney argued that based upon the affidavit relating to census figures, the total percentage of persons of Spanish descent in the population of Scotts Bluff County as a whole was 12.29 percent. He then argued that out of the original list of 125 names, only 2 of what he considers to be "reasonably obvious Spanish surnames" were ultimately included on the venire of 88 names, or 2.27 percent.

At a later point, he argued that the list of 23 names transferred to defendant's venire (those 23 are included in the 88 names just mentioned) from an earlier jury term contained what he deemed were only "names of Anglos." He then claimed this addition decreased the percentage of what he deemed to be Spanish surnames on defendant's venire, and further that the allowance of the transfer was "systematic" and "therefore bastardize[d] the process."

Defendant's counsel next drew the trial court's attention to the original list of 125 names. On that list there are 60 names that are crossed out and accompanied by a notation as to why they are eliminated, e.g., nonresident, no address, transferred, etc. Counsel contended nine of what he again believed to be reasonably obvious Spanish surnames were crossed out. He then stated: "[The] Jury Commissioner never makes any effort

to fill those vacancies out of names of people in this identifiable segment of the community. That is where the systematic exclusion comes into play. And really, Your Honor, that's what I'm arguing."

On appeal, defendant's argument changes its focus. He now presents in the nature of disproportionate impact theory the argument that he established a prima facie case of discrimination and points only to the statistical disparity between the alleged census results of the population as a whole and his calculations of the percentage of what he deems to be Spanish surnames on the venire.

Defendant provides no indication of whether his challenge of the composition of his venire is grounded upon the fair cross-section requirement of the 6th amendment or the equal protection clause of the 14th amendment, or both. We will address the protection afforded by each.

The U.S. Supreme Court, in *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), set forth what a defendant must prove in order to show a prima facie violation of his sixth amendment right to a jury pool representing a fair cross-section of the community.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364.

In a case involving a challenge under the equal protection clause to a venire containing no Mexican-Americans, *U.S. v. Garcia*, 836 F.2d 385, 388 (8th Cir. 1987), the court stated:

> In *Batson v. Kentucky*, 476 U.S. 79, 93-96, 106 S.Ct. 1712, 1721-22, 90 L.Ed.2d 69 (1986), the Supreme Court recently reviewed the criteria for establishing a prima facie case of denial of equal protection in venire selection. The court reiterated that the burden is on a defendant alleging

> discriminatory venire selection " 'to prove the existence of purposeful discrimination.' " *Id.* 106 S.Ct. at 1721 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967)). A defendant may seek to prove purposeful discrimination, as in this case by "proof of disproportionate impact." *Batson*, 476 U.S. at 93, 106 S.Ct. at 1721. Disproportionate impact may be demonstrated either by showing that the defendant's cognizable racial group has not been summoned for jury service over an extended period of time; or that his group is substantially underrepresented on his venire and that the venire was chosen under a practice providing the opportunity for discrimination. *Batson*, 476 U.S. at 95, 106 S.Ct. at 1722.

There was no evidence presented as to the makeup of prior venires, and thus we concern ourselves only with the latter requirement concerning both substantial underrepresentation and opportunity for discrimination.

There is no evidence in the record to suggest that defendant's data distort the degree of underrepresentation of persons of Spanish descent on the venire. The State presented no evidence at the hearing and made no objection to the receipt of defendant's affidavits into evidence. Rather, the State contended that defendant failed to demonstrate the requisite systematic exclusion or purposeful discrimination. We will limit our analysis accordingly.

Under the fair cross-section requirement, the third prong of the *Duren* prima facie case requirements must be met in addition to showing underrepresentation. That prong requires defendant to show that the underrepresentation of persons of Hispanic descent was systematic—that is, inherent in the particular jury selection process utilized. See *Duren, supra.*

In order to show the requisite purposeful discrimination under the equal protection clause, as required by *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), defendant must have shown in addition to substantial underrepresentation that the venire was chosen under a practice providing the opportunity to discriminate.

On appeal, defendant merely argues that an

underrepresentation exists. He completely fails to address the issues of systematic exclusion and purposeful discrimination. On this basis his argument on appeal must be rejected.

Although the argument is apparently abandoned for the purposes of this appeal, at the hearing defendant presented the argument that systematic exclusion "comes into play" because the jury commissioner fails to replace the names of Spanish-surnamed persons who are excused, disqualified, or transferred with the names of other Spanish-surnamed people. This argument is untenable, as it requires the substitution of a process mandating discrimination for the random and neutral procedure of jury selection currently used. There was no sufficient showing of systematic exclusion; consequently, defendant has failed to make out a prima facie case under the fair cross-section requirement.

Defendant has not even attempted to present evidence or argument as to whether the venire was chosen under a practice providing the opportunity to discriminate. Therefore, defendant has also failed to prove a prima facie case of discrimination under the equal protection clause.

The challenge to the jury array is without merit.

Defendant's sentences were not excessive. It is a fair conclusion from the evidence in this case that defendant has been heavily involved in the drug trade. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Eary, ante* p. 254, 454 N.W.2d 685 (1990); *State v. Zaritz, ante* p. 599, 456 N.W.2d 479 (1990).

Defendant's criminal record shows a longstanding disregard for the rule of law. Included among the many offenses he has committed are eight offenses involving substance abuse. The crimes of which he was convicted are of a serious nature.

Defendant's motion for a directed verdict should not have been sustained. In a criminal case a court can direct a verdict only where there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Eary, supra*; *State v. Brown, ante* p. 374, 455 N.W.2d 547 (1990).

The record fully supports the convictions, and this assignment of error is wholly frivolous.

In defendant's sixth assignment of error, defendant argues that his motion for new trial, based on newly discovered evidence, should have been granted.

A motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed. *State v. Costanzo, ante* p. 126, 454 N.W.2d 283 (1990).

A defendant who has filed a motion for new trial on the ground of newly discovered evidence has the burden to show that the alleged newly discovered evidence is of such a substantial nature that if it had been received in the original trial, it would have changed the result. *Id.*

Generally, "newly discovered evidence" is evidence material to the defense that could not with reasonable diligence have been discovered and produced at trial. *Id.*

The tape that defendant listened to after trial and that he claims spurred his sudden recall of the events relating to count I (which completely contradicts his testimony at trial) was in his possession far in advance of trial. Defendant failed to act with reasonable diligence by neglecting to review the tape and refresh his memory until after trial. The trial court held that defendant did not establish the discovery of new evidence and overruled the motion for new trial. It did not abuse its discretion in doing so.

As we have already determined that the tape-recorded testimony of the controlled buy does not constitute newly discovered evidence, it is unnecessary for us to now address whether that tape should have been listened to by an expert after trial upon defendant's factually unsupported and equivocal request to the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD J. BROUSSARD, APPELLANT.

457 N.W.2d 457

Filed July 13, 1990. No. 89-797.

1. **Trial: Evidence: Appeal and Error.** Generally, it is within the trial court's discretion to admit or exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
3. **Criminal Law: Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
4. **Criminal Law: Intent: Circumstantial Evidence: Proof.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

WHITE, J.

After a jury trial in the Douglas County District Court, Reginald J. Broussard was convicted of possession with intent to deliver a controlled substance. He appeals to this court. We affirm.

The evidence showed that on September 2, 1988, Omaha police executed a search warrant for a residence at 2952 Patrick

Avenue, Omaha, Nebraska. After breaking down the front door, police found defendant sitting on the couch and arrested him. Carlos Walker was arrested after he attempted to flee the residence. Glenda Smith, the renter of the house, was found sleeping next to her infant son in an upstairs bedroom.

A search of the residence uncovered a loaded revolver in the kitchen. A 22-gram rock of crack cocaine and a razor blade were found in a bag in the kitchen. A small quantity of crack cocaine was discovered in a child's snowsuit, which was in the bedroom where Glenda was sleeping. The police discovered $736 in cash on Walker, $169 was found in Smith's purse, and $100 was found in a diaper bag. The purse and the diaper bag were found in Smith's bedroom.

Broussard was subsequently charged with possession with intent to deliver a controlled substance, crack cocaine. At trial the State presented evidence to support its theory that Walker and Broussard were involved in a joint enterprise to sell crack cocaine. A witness for the State testified that there is a pattern in dealing crack cocaine whereby drug dealers from out of town will come to Omaha and establish a drug operation with the assistance of a local individual. The theory was that Walker came to Omaha from California and established a drug-dealing enterprise with Broussard. That witness testified that the street value of 22 grams of crack cocaine would be $2,500 to $4,000. The amount would be a 30- to 40-day supply for an individual user and would be consistent with resale. The smaller quantity of crack was valued at $20 to $100 and would be more consistent with a personal supply. Leonard Smith, Glenda's uncle, testified that he went to the residence on the day of the search and Walker gave him a piece of crack cocaine. The State stressed that no drug paraphernalia was found in the home.

It was Broussard's theory that he was only a user, not a supplier, of crack cocaine. A defense witness testified that some users go on "runs," where they use crack cocaine continually for several days. In some "sittings" a user can consume over 28 grams of crack cocaine. The witness estimated that 60 percent of the crack cocaine consuming population could use 22 grams of crack over a weekend. Glenda Smith testified that Broussard had been living with her for the last several months before

September 2, but she had thrown him out of the house that day because he had used crack cocaine. Smith explained that the money in her purse was the balance of her aid to dependent children check, which was cashed earlier in the day. She further testified that she never saw Broussard sell crack cocaine and never saw him with a gun. Officer Novotny testified for the State that after the arrest, Broussard admitted to him that on September 1 he and another man purchased from one Carlos Hayes 7 grams of crack cocaine for $600 and then returned to 2952 Patrick. Novotny testified that Broussard "said it was for his personal use and that he was going to share it with his friends at that house" and "[h]e said he wasn't going to sell it." Smith testified that after the arrests she found a soda bottle which had been altered so that it could be used to smoke crack cocaine.

The jury was instructed on principal and accomplice theories of criminal liability. Broussard was found guilty. On appeal to this court, Broussard raises several assignments of error, each of which will be discussed in turn.

Broussard first contends it was error for the trial court to sustain the State's motion in limine because the evidence sought to be admitted was crucial to his case. Before Officer Buske testified at trial, the State made a motion in limine to prevent Broussard from questioning Buske about a statement made to Buske by Walker. During a postarrest interrogation, Walker made a statement to Buske that Walker had sold crack cocaine to the "uncles and relatives of the resident at 2952 Patrick Avenue, Glenda SMITH." The State argued that this statement was inadmissible hearsay. Broussard argued that the statement fell within the hearsay exception found in Neb. Rev. Stat. § 27-804 (Reissue 1989). This section provides in pertinent 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:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not

> have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Broussard also argued to the trial court that the statements fell within the catchall residual clause found in § 27-804(2)(e). In this appeal, however, Broussard has apparently abandoned that contention.

Broussard argued to the trial court during an offer of proof that Walker's statement met each requirement of that section and should be admitted as an exception to the hearsay rule. To expedite the offer of proof, the trial court received Buske's written report, which was made a part of the record in this case. The trial court reasoned that the statement was not relevant because Walker did not identify Broussard by name, nor did Walker say that Broussard did not sell crack cocaine. Consequently, the trial court determined the statement was hearsay not within an exception, and sustained the motion in limine. Broussard was not able to question Buske about Walker's statement.

On appeal, Broussard contends it was error to sustain the motion in limine because it impeded his ability to present his theory of the case. Broussard states in his brief that

> [t]he theory of the defense in this case was that Broussard possessed crack sold to him by Carlos, but did not participate in the selling of crack. The offer of proof shows that Broussard attempted to introduce evidence that Walker sold to residents and relatives of 2952 Patrick Avenue, so as to add strength to his confession to the officer, that he purchased from a man named Carlos, and did not sell drugs.

Brief for appellant at 11.

Broussard, at trial, offered to prove that Carlos Hayes and Carlos Walker were the same person.

On appeal, the State has conceded that Walker was unavailable to testify. We also conclude that Walker's statement was against his penal interest and was corroborated so as to indicate the trustworthiness of the statement.

Additionally, the proffered evidence must be relevant. Walker's statement did not indicate that defendant did not sell crack cocaine, nor did it specifically name defendant as an individual to whom crack cocaine was sold. Walker stated that he sold crack cocaine to the "uncles and relatives" of Smith. Broussard was Smith's boyfriend, not an uncle or a relative. Although a different situation might be presented had Broussard been within the class of persons to whom Walker sold crack cocaine, the statement as it stands is only minimally relevant to corroborate Broussard's confession that he purchased crack cocaine from one Carlos Hayes, who might also be known as Carlos Walker. "Generally, it is within the trial court's discretion to admit or exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion." *State v. Nelson, ante* p. 15, 23-24, 453 N.W.2d 454, 460 (1990). We cannot conclude the trial court abused its discretion in finding this evidence was not relevant. The court did not err in sustaining the State's motion in limine.

Broussard next argues that the evidence was insufficient as a matter of law to sustain his conviction for possession with intent to deliver. This court has often stated that in reviewing a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990). "[A]fter a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt." *State v. Wilkening*, 222 Neb. 107, 110, 382 N.W.2d 340, 342 (1986).

In the present case, the jury was instructed with respect to principal and accomplice theories of liability. As we stated in *State v. Walker*, 187 Neb. 482, 484-85, 191 N.W.2d 817, 818 (1971):

> A common purpose among two or more persons to commit a crime need not be shown by positive evidence

> but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto. [Citation omitted.] Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.

The evidence showed that 22 grams of crack cocaine were found near Walker in a home where defendant was a resident and present at the time. A State's witness testified that 22 grams of cocaine were not consistent with personal use, but instead were consistent with resale. The evidence also showed that it is common for someone who is engaged in the sale of narcotics to have large amounts of cash and that Walker had $736 on him when he was arrested. A witness for the State testified that it is common for an individual from out of town to make contact with someone from the area and begin selling crack cocaine in a joint operation and that this type of operation was common in the area where the search occurred. Smith testified that Walker was not her friend, but was Broussard's friend, and that Walker had stayed at the residence as Broussard's guest for several days prior to the search. Testimony revealed that Walker was from California. As we stated in *State v. Matthews*, 205 Neb. 709, 712, 289 N.W.2d 542, 544 (1980): "Intent to deliver or distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses." Taking the view most favorable to the State, this evidence, although circumstantial, is sufficient to sustain Broussard's conviction for possession of a controlled substance with the intent to deliver. This assignment of error is without merit.

Broussard next contends that the jury instructions were erroneous for two reasons. First, he contends there was insufficient evidence to instruct the jury on the greater offense of possession with intent to deliver. This contention is without merit. The circumstantial evidence presented at trial was sufficient to permit an instruction that Broussard himself possessed a controlled substance with the intent to deliver. " 'When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be

proved by circumstantial evidence.' " *State v. Blue Bird*, 232 Neb. 336, 339, 440 N.W.2d 474, 476-77 (1989). As indicated above in the sufficiency of the evidence discussion, there were ample facts to permit an instruction on an aiding and abetting theory. The jury was properly instructed.

Second, Broussard argues that the instructions unduly emphasized the aiding and abetting theory of the case, citing *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985), and *State v. Medina*, 227 Neb. 736, 419 N.W.2d 864 (1988) (a jury instruction which directs the attention of the jury to and unduly emphasizes a part of the evidence is erroneous and should be refused). Broussard does not direct our attention to anything prejudicial or suggestive in the instructions. We have examined the instructions. They do nothing more than accurately and clearly instruct the jury. See *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987). There is no error.

Broussard lastly contends his sentence was excessive. Defendant was convicted of one count of unlawful possession of a controlled substance with the intent to deliver, a Class II felony. A Class II felony is punishable by a term of imprisonment from a minimum of 1 year to a maximum of 50 years. Neb. Rev. Stat. § 28-105 (Reissue 1985). Broussard was sentenced to the Nebraska Department of Correctional Services to not less than 4 nor more than 6 years' imprisonment, with credit for 99 days. This court has often stated that a sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed. *State v. Brown, ante* p. 10, 453 N.W.2d 576 (1990). Possession of a controlled substance with intent to distribute is a very serious offense. The sentence is well within the statutory limits. The sentencing court did not abuse its discretion.

Accordingly, defendant's conviction and sentence are affirmed.

AFFIRMED.

ROBERT G. GOTTSCH, DOING BUSINESS AS BOB GOTTSCH FEEDYARDS, APPELLANT AND CROSS-APPELLEE, V. BANK OF STAPLETON, A CORPORATION, APPELLEE, AND FIRST NATIONAL BANK OF OMAHA, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

458 N.W.2d 443

Filed July 20, 1990. No. 88-112.

1. **Trusts: Property.** A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property.
2. **Trusts: Fraud: Liability.** As a fraud-rectifying remedy, a constructive trust, even in the absence of the trustee's participation in fraud, is available on the basis of the principle that one who accepts a product of fraud, knowing the means by which the fraud-caused product was achieved, is liable to the defrauded party, although the recipient of the product did not personally participate in the fraud.
3. **Trusts: Proof.** A party seeking the remedy of a constructive trust has the burden to establish the factual foundation, by evidence which is clear and convincing, required for a constructive trust.
4. **Agency: Words and Phrases.** An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act.
5. **Agency.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
6. **Agency: Words and Phrases.** An agent is one authorized by another to act on the other's account and under the other's control.
7. **Uniform Commercial Code: Words and Phrases.** A "holder in due course" is a holder who takes an instrument for value, in good faith, and without notice that the instrument is overdue or has been dishonored or of any defense or claim against or claim to the instrument on the part of any person. Neb. U.C.C. § 3-302 (Reissue 1980). A holder takes an instrument for value when the holder takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due. Neb. U.C.C. § 3-303 (Reissue 1980).
8. **Summary Judgment.** A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1989).
9. **Summary Judgment: Judicial Notice.** A trial court may use appropriate judicial notice in resolving a motion for summary judgment.
10. **Judicial Notice: Records: Rules of Evidence.** As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), Neb. Rev. Stat. § 27-201(2)(b)

(Reissue 1989), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

11. **Judicial Notice: Records: Collateral Estoppel: Res Judicata.** A court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.
12. **Judgments: Collateral Estoppel.** Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.
13. **Due Process: Collateral Estoppel: Parties.** Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or in privity with a party to the prior litigation.
14. **Collateral Estoppel: Parties: Words and Phrases.** Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.
15. _____: _____: _____. In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.
16. _____: _____: _____. For the purpose of issue preclusion, the mere fact that litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants.

Appeal from the District Court for Logan County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

Michael E. Sullivan and J. Patrick Deveny for appellant.

Waldine H. Olson, of Schmid, Mooney & Frederick, P.C., for appellee First National Bank.

No appearance for appellee Bank of Stapleton.

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

SHANAHAN, J.

GOTTSCH V. CHURCHILL

In March 1979, Leslie Churchill, acting under a power of attorney from his wife, Phyllis Churchill, acquired 200 cows in South Dakota. On May 31, 1979, Robert G. Gottsch, doing business as Bob Gottsch Feedyards, filed an action against Churchills in the district court for Lincoln County, Nebraska,

and alleged that Churchills, by defrauding Gottsch, acquired funds for the 200 cattle purchased in March. In the Lincoln County fraud action, Gottsch did not claim any legal interest in the South Dakota cattle, but sought a money judgment on account of Churchills' fraud. Gottsch obtained a judgment for $190,350 on December 17, 1981, in *Gottsch v. Churchill.* Gottsch was unable to collect the Lincoln County judgment.

GOTTSCH'S SUITS AGAINST THE BANKS

Nature of Action.

When Gottsch was unable to satisfy his Lincoln County judgment against Churchills, he filed an action on January 19, 1984, against the Bank of Stapleton and First National Bank of Omaha (FNB) in the district court for Logan County, Nebraska, to impose a constructive trust on each of the banks.

Standard of Review.

An action to impose a constructive trust is an equity action. *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

> In an appeal of an equity action, the Supreme 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 Supreme 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.

Hughes v. Enterprise Irrigation Dist., 226 Neb. 230, 234, 410 N.W.2d 494, 497 (1987); *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989). See, also, Neb. Rev. Stat. § 25-1925 (Reissue 1989).

Pleadings.

In his second amended petition, Gottsch asserted in paragraphic form the fraud previously described in the Lincoln County action, namely, paragraph 4: Churchills defrauded Gottsch to acquire the 200 South Dakota cattle; paragraph 5: Churchills were joint venturers in the transaction with Gottsch;

and paragraph 6: The Churchill joint venture was conducted under the name "P. M. Churchill." Gottsch then alleged that the 200 head of South Dakota cattle, which were related to his fraud action in Lincoln County (*Gottsch v. Churchill*) and which had been acquired through Churchills' fraud on Gottsch, were later sold, with proceeds from the sales used by Phyllis Churchill to pay her indebtedness to the Bank of Stapleton and FNB. Gottsch further alleged that the Bank of Stapleton had notice that Gottsch "claimed an interest" in the fraudulently acquired cattle subsequently sold by Churchills. Also, Gottsch alleged that knowledge of the Bank of Stapleton was imputed to FNB. Therefore, Gottsch requested a constructive trust for the funds which came into the banks' possession on account of Phyllis Churchill's payments to the banks.

In its answer, FNB generally denied Gottsch's allegations and affirmatively raised the issue that FNB was a "bona fide purchaser for value and without notice" of fraud in reference to "payments received by [FNB] on the obligation owing from Phyllis Churchill. . . ."

Summary Judgment.

Gottsch requested a "summary judgment on paragraphs 4, 5, and 6 of his second amended petition" and asked the court to take judicial notice of "the bill of exceptions, pleadings, judgment and memorandum" in *Gottsch v. Churchill*, the Lincoln County fraud case in which Gottsch had obtained the $190,350 judgment against Churchills. The district court took "judicial notice of the complete court file" in *Gottsch v. Churchill* and stated that "[s]ince all of the allegations contained in paragraphs 4, 5, and 6 of the Plaintiff's Second Amended Petition in the instant case have been previously judicially determined in the Lincoln County District Court proceeding, the . . . Plaintiff's Motion for Summary Judgment is sustained."

Therefore, as a result of the summary judgment, Churchills' fraud on Gottsch was established in the proceedings against the banks.

Phyllis Churchill's Borrowing History.

To evaluate Gottsch's claim for a constructive trust, we must

examine Phyllis Churchill's history of borrowing money from the Bank of Stapleton and explore the "correspondent bank" relationship between the Bank of Stapleton and FNB.

Since 1967, Phyllis Churchill had borrowed money from the Bank of Stapleton in connection with her family's cattle-raising operations. In 1974, Phyllis and Leslie Churchill married and conducted their own cattle operations. In April 1977, Phyllis Churchill, already indebted to the Bank of Stapleton for $103,500, requested additional credit from the bank. Under the circumstances, the legal limit on a loan from the Stapleton bank was $105,000. However, Phyllis Churchill obtained a loan in excess of the $105,000 limit for the Bank of Stapleton when, on April 29, 1977, the Stapleton bank, as a correspondent bank of FNB, received funds through a "participation," or "overline," loan from FNB for Phyllis Churchill.

Correspondent Banks.

Donald Ostrand, manager of FNB's correspondent banking department between 1965 and 1985, explained the nature and role of a correspondent bank:

> The correspondent bank [here, Bank of Stapleton] is approached by a borrower [Phyllis Churchill] . . . and determines whether they are interested in having the borrower as a customer.
>
> If it involves funds in excess of what their legal limit is, they need a correspondent [FNB] to help them. Then they contact the correspondent and say, we have a customer A. This is what he is looking for or they are looking for. We can provide up to X amount of dollars. We are going to need your help for the overline portion, and are you interested. We say, Well, we are always interested, but send us the information in order that we may make a credit judgment, and so we make an independent credit judgment, and then we determine that we would be interested or would participate in that line.

Regarding the overline, or participation, loan to Phyllis Churchill, the Bank of Stapleton and FNB had various duties. As indicated by Ostrand, FNB made an independent credit judgment whether to participate in a line of credit to Phyllis

Churchill. FNB also set a $50,000 limit and the interest rate on the overline loan to Phyllis Churchill.

The Bank of Stapleton, in addition to informing FNB about possible participation in a loan, performed several services pertaining to the Phyllis Churchill overline loan. The Stapleton bank kept a separate ledger on the overline loan, had all the personal contact with Phyllis Churchill after FNB turned down Phyllis Churchill's request that she deal directly with FNB, prepared financial statements regarding Phyllis Churchill which were forwarded to FNB, supplied FNB with general information about Phyllis Churchill's business activity, and kept FNB informed relative to "important events" which might concern Churchill's overline account.

The Bank of Stapleton received .5 percent of the interest paid on Phyllis Churchill's overline loan, which, according to Clara Ewoldt, vice president of the Bank of Stapleton, was intended to cover the "paperwork and fees that the Bank of Stapleton would have in connection with the overline loan." The .5 percent was not "intended in any way to be a form of compensation, salary, bonus, or commission for [the Bank of Stapleton's] services." Although the Bank of Stapleton was not directly compensated for its work on overline loans, the correspondent bank relationship with FNB was, nonetheless, advantageous to the Bank of Stapleton because the relationship enabled the Stapleton bank to keep its customers when the legal loan limit for the Bank of Stapleton necessitated location of additional funds. Furthermore, while no Bank of Stapleton employee was ever simultaneously an employee of FNB, nevertheless, FNB suggested that, as a condition of FNB's becoming a participation lender, the Bank of Stapleton should hire "an experienced manager." FNB's suggestion resulted in the Bank of Stapleton's hiring Byron Keslar as its chief executive officer.

When FNB became a participation lender to Phyllis Churchill, FNB did not supply the Bank of Stapleton with a promissory note for the entire amount of Phyllis Churchill's indebtedness. Rather, a new note, payable to the Bank of Stapleton for the amount of the overline loan, was signed by Phyllis Churchill at the Stapleton bank. FNB sent the Bank of

Stapleton a participation certificate, which was filled out by an executive officer of the Stapleton bank and returned to FNB with a copy of the note for the overline loan. The participation certificate contained information regarding the amount of the overline loan, its due date, and collateral for the loan. Funds from the overline loan were not delivered directly to Phyllis Churchill, but were deposited in the Bank of Stapleton's account with FNB. Ewoldt described the Bank of Stapleton's account with FNB as the "[s]ame as [a] checking account. We have deposits and withdrawals." When funds were deposited in its FNB account, the Bank of Stapleton would then simultaneously deposit funds in Phyllis Churchill's account. To make payments on her overline account with FNB, Phyllis Churchill wrote checks payable to the Bank of Stapleton, which, in turn, paid FNB its proportionate share of a payment in accordance with the interbank participation agreement for the overline loan. Inferentially, the Bank of Stapleton's payments to FNB were made through checks deposited in the Stapleton bank's account at FNB.

From April 1977 until September 1982, Phyllis Churchill received overline loans in various amounts from FNB. If one of Phyllis Churchill's overline loans became due, the Bank of Stapleton renewed the loan without first contacting FNB so long as the amount of the overline loan was within the $50,000 limit set by FNB for 1979 and 1980. Keslar of the Bank of Stapleton characterized his autonomy in renewing Phyllis Churchill's overline loans: "[T]he boys down there [at FNB] told me to use my own judgment on those loans, and that's what I did."

Proceeds From Sales of the South Dakota Cattle.

In 1979, when Churchills bought 200 cows in South Dakota, Phyllis Churchill had an overline account with FNB. At various times in 1980, the Churchills sold some of the South Dakota cattle. Phyllis Churchill used the proceeds from those sales to pay her debts to the Bank of Stapleton and FNB. On March 3, 1980, the Bank of Stapleton received $80,686.80 from Phyllis Churchill, as payment of principal and interest on her underline account. Of the March 3 payment, $77,884.42 was traceable to

proceeds from sales of the South Dakota cattle purchased by Churchills.

Also, on March 3, 1980, Phyllis Churchill paid $5,297 on principal and interest in her overline loan from FNB, which funds were traceable to proceeds from sales of the South Dakota cattle. On October 27, 1980, Phyllis Churchill paid an additional $53,955.48 on principal and interest in her overline account. Of the $53,955.48 paid on October 27, $24,067.97 was traceable to sale proceeds from the South Dakota cattle. Therefore, as a result of the March and October 1980 payments by Phyllis Churchill, FNB received $29,364.97 in payment of principal and interest on Phyllis Churchill's overline account with FNB. The balance of Phyllis Churchill's overline account with FNB, after her payment on October 27, 1980, was "zero." However, Phyllis Churchill continued to borrow through her overline account and received additional funds, with an account balance of $44,500 as of March 20, 1981.

The Banks' Notice of Gottsch's Lawsuit Against Churchills.

As previously mentioned, on May 31, 1979, Gottsch filed his fraud action against Churchills in Lincoln County, so that *Gottsch v. Churchill* was filed approximately 1 year before the Bank of Stapleton and FNB received funds traceable to the eventual sales of Churchills' South Dakota cattle.

On October 18, 1979, counsel for Gottsch sent a letter to Keslar and notified him about the possibility that Keslar's deposition might be taken in *Gottsch v. Churchill.* Keslar had heard "bad things" about Leslie Churchill; for example, Keslar "heard that he [Leslie Churchill] had had trouble in [Phyllis'] banks." Keslar also suspected that Gottsch's suit concerned Leslie Churchill's involvement in the South Dakota cattle transaction. On the question whether Keslar ever told anyone at FNB about *Gottsch v. Churchill*, Keslar recalled that "I think I did," but was unable to specify when he talked with an FNB representative concerning any litigation involving Churchills. Keslar gave the letter regarding *Gottsch v. Churchill* to Eugene Hynes, a lawyer for the Bank of Stapleton, who discussed the letter with Keslar and specifically pointed out that the lawsuit involved both the Churchills, not just Leslie. Keslar related to

Hynes that the case probably involved the South Dakota cattle transaction. After discussing the matter with Keslar, Hynes visited with other officials for the Stapleton bank regarding *Gottsch v. Churchill*. Although Hynes believed that he also mentioned the Gottsch-Churchill litigation to FNB employees, Hynes was unable to establish the exact date of such communication.

According to Ostrand, head of FNB's correspondent banking department, *Gottsch v. Churchill* first came to his attention when he received Phyllis Churchill's financial statement, dated March 26, 1981, which contained a notation that Phyllis Churchill had a lawsuit pending against her. Ostrand testified that he may have discussed *Gottsch v. Churchill* with Ralph Peterson, an employee of FNB who often had contact with FNB's correspondent banks. Peterson, on the other hand, testified that he learned about *Gottsch v. Churchill* in 1980 or 1981 through a conversation with Mick Brosius, an owner of the Bank of Stapleton.

Notwithstanding information about *Gottsch v. Churchill*, neither the Bank of Stapleton nor FNB placed any restrictions on Phyllis Churchill's underline or overline accounts. According to Ostrand: "[I]t was a situation that apparently the Bank of Stapleton was not concerned about from the bank's standpoint and therefore, we were not concerned about it if that was the case."

District Court's Decision.

In the setting of Churchills' fraud, which had been established in the summary judgment proceedings through the district court's judicial notice of the Lincoln County action (*Gottsch v. Churchill*), the court determined Gottsch's claim against the banks.

The district court determined that the Bank of Stapleton had actual knowledge of the Churchills' fraud on Gottsch and based that determination on the letter from Gottsch's lawyer in October 1979 which informed Keslar about *Gottsch v. Churchill*; the availability, as a public record, of the court file for the *Gottsch v. Churchill* court; and Keslar's suspicion that *Gottsch v. Churchill* concerned the South Dakota cattle

transaction. Since the Bank of Stapleton had received $77,884.42 which was traceable to proceeds from sales of Churchills' South Dakota cattle and was subject to a constructive trust, the court entered judgment for $77,884.42 in favor of Gottsch against the Stapleton Bank.

However, as a matter of law, the court concluded that knowledge of the Bank of Stapleton concerning Churchills' fraud was not imputable to FNB. Also, the court found that, without notice of Churchills' fraud, FNB's receipt of the $29,364.97 paid by Phyllis Churchill, which satisfied her indebtedness at the time of payment, and FNB's subsequent extension of credit to Phyllis Churchill constituted FNB as a "bona fide lender" protected against liability and the constructive trust sought by Gottsch. For that reason, the district court dismissed Gottsch's action against FNB.

Gottsch appeals; FNB cross-appeals; but the Bank of Stapleton has not appealed.

GOTTSCH'S APPEAL

With fraud as an established fact through the summary judgment based on the district court's judicial notice of *Gottsch v. Churchill*, Gottsch contends that the Bank of Stapleton's knowledge of Churchills' fraud was imputed to FNB, and, therefore, Gottsch is entitled to judgment against FNB. Also, Gottsch contends that FNB's receipt of $29,364.97, which was paid by Phyllis Churchill and which satisfied Churchill's antecedent debt, does not constitute value for a bona fide transaction which precludes a constructive trust.

CONSTRUCTIVE TRUSTS: NATURE, GENERALLY

General Nature of a Constructive Trust.

> A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.

Ford v. Jordan, 220 Neb. 492, 494, 370 N.W.2d 714, 716 (1985); *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987).

"A constructive trust is a relationship, with respect to

property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment." *Knoell v. Huff*, 224 Neb. 90, 97-98, 395 N.W.2d 749, 755 (1986).

Also, this court observed in *In re Estate of Lienemann*, 222 Neb. 169, 177, 382 N.W.2d 595, 601 (1986):

> Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

As a fraud-rectifying remedy, a constructive trust, even in the absence of the trustee's participation in fraud, is available on the basis of the principle that one who accepts a product of fraud, knowing the means by which the fraud-caused product was achieved, is liable to the defrauded party, although the recipient of the product did not personally participate in the fraud. *Malakul v. Altech Arkansas, Inc.*, 298 Ark. 246, 766 S.W.2d 433 (1989); *Commercial Credit v. Beebe*, 123 Vt. 317, 187 A.2d 502 (1963); *Walters v. Maloney*, 758 S.W.2d 489 (Mo. App. 1988); *Beaton & Assoc. v. Joslyn Mfg. & Supply*, 159 Ill. App. 3d 834, 512 N.E.2d 1286 (1987); *Hruska v. First State Bank of Deanville*, 727 S.W.2d 732 (Tex. App. 1987).

Burden of Proof.

A party seeking the remedy of a constructive trust has the burden to establish the factual foundation, by evidence which is clear and convincing, required for a constructive trust. *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988); *Ford v. Jordan, supra.*

IMPUTATION TO FNB

Regarding Gottsch's contention that knowledge of the Bank of Stapleton was imputed to FNB, the question is: Did the

correspondent bank relationship, under the circumstances, supply a legal relationship through which the Stapleton bank's knowledge was imputed to FNB?

We begin by noting that "[a]n agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act." *Dunn v. Hemberger*, 230 Neb. 171, 180, 430 N.W.2d 516, 522 (1988); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989). Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship. See *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990). " ' "The distinguishing features of agency are its representative character and its derivative authority. . . ." ' " *Anderson v. Valley Feed Yards, Inc.*, 175 Neb. 719, 722-23, 123 N.W.2d 839, 842 (1963); *Valentine Oil Co. v. Powers*, 157 Neb. 87, 59 N.W.2d 160 (1953).

In *Valentine Oil Co. v. Powers, supra* at 91, 59 N.W.2d at 163, this court described an agent as " 'a person authorized by another to act on his account and under his control.' " An agent has also been defined as " 'one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. . . .' " *Watkins v. Waits*, 148 Neb. 543, 551, 28 N.W.2d 206, 210 (1947).

When FNB became a participation lender to Phyllis Churchill, FNB decided to extend credit to Phyllis Churchill on the basis of FNB's judgment and asserted its control over the overline loan to Churchill. Also, FNB set the $50,000 limit and the interest rate on the overline loan. However, after becoming a participation lender, FNB delegated to the Bank of Stapleton much of FNB's authority to act on Phyllis Churchill's overline account. The Bank of Stapleton carried out the day-to-day paperwork for the Churchill overline loan, including preparation of financial statements, and had nearly all the personal and direct contact with Phyllis Churchill. More

importantly, the Bank of Stapleton renewed Phyllis Churchill's overline loans without receiving FNB's prior permission for such renewals so long as a renewal loan was within the $50,000 limit set by FNB. Furthermore, FNB used the Bank of Stapleton as a source of information about FNB's overline customers, including Phyllis Churchill. For example, when asked whether FNB used a correspondent bank, such as the Bank of Stapleton, to obtain information regarding FNB's customers and overline accounts, including information about litigation involving a customer, Ostrand responded that "[u]nder the logistics, we have to. We couldn't keep up with all the filings. . . . I don't know of any correspondent or city regional bank that has a department that just follows filings. You have to rely upon your correspondent because they are your eyes and ears."

From the foregoing, it is clear that FNB actually delegated overline loan authority to the Bank of Stapleton and used the Stapleton bank in managing Phyllis Churchill's overline account. Thus, FNB expected the Bank of Stapleton to do more than simply handle paperwork on the overline loan. Strangely enough, FNB expressed that it would not become a participation lender with the Bank of Stapleton on the Phyllis Churchill loan "unless an experienced manager was hired for the day-to-day operations of running of the bank . . . because [FNB] wanted a chief executive officer that had banking experience." As the result of FNB's condition for its participation, the Bank of Stapleton hired Keslar as a bank officer meeting the qualifications expressed by FNB. Consequently, from our de novo review of the record, and contrary to the district court's finding, we conclude that an agency relationship actually existed between FNB and the Bank of Stapleton concerning the credit transactions with Phyllis Churchill.

VALUE TO PRECLUDE A CONSTRUCTIVE TRUST

Gottsch contends that FNB's receipt of $29,364.97, paid by Phyllis Churchill and applied to satisfy the indebtedness of her overline loan, does not constitute value in a bona fide transaction which precludes a constructive trust. To support

this contention, Gottsch relies on *Meier v. Geldis*, 148 Neb. 561, 28 N.W.2d 140 (1947), which involved an attempt by Augusta and Beulah Meier to have George Geldis declared trustee for Meiers' benefit concerning certain funds in Geldis' possession. One John Owens had induced Meiers to make various loans to third parties. However, Owens deposited Meiers' checks, which represented the loan proceeds, in his checking account. Owens then drew checks on his account, which contained the funds traceable to the Meier loans, and delivered the checks to Geldis, who applied the checks to Owens' antecedent debt to Geldis. In *Meier*, this court stated:

> Where property, as here, has been acquired by fraud, equity, at the suit of the injured parties, will impress a constructive trust upon such property in their favor and, in the event of a prior transfer by the wrongdoer, will trace the property, if possible, through whatever mutations and impress a trust thereon in the hands of a third person, unless he be a bona fide purchaser for value and without notice. . . .
>
> By his conduct in obtaining these funds Owens became a trustee thereof ex maleficio and the question arises whether the antecedent indebtedness of the defendant is such a consideration as to make him a bona fide purchaser for value. The record shows he had no notice either as to the source or nature of the funds with which he was paid.

Id. at 565, 28 N.W.2d at 142. This court determined that Geldis was not a bona fide purchaser for value because of "the principle that an antecedent debt is not such consideration as to have the consequence of cutting off the trust against the funds applied to the satisfaction of the debt, although the creditor acts in good faith and without notice but has not changed his position." *Id.* at 566, 28 N.W.2d at 143. Thus, Meiers obtained a constructive trust over the traceable funds in Geldis' possession. Gottsch urges this court to apply the *Meier* principle regarding antecedent debt and determine that FNB is not a bona fide purchaser for value.

However, *Meier v. Geldis, supra*, was decided before Nebraska adopted the Uniform Commercial Code, which became effective in 1965. In *Meier*, Geldis became a "holder"

of the checks. " 'Holder' means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." Neb. U.C.C. § 1-201(20) (Reissue 1980). Under the U.C.C., a holder may cut off a constructive trust if the holder is not a bona fide purchaser for value, but, rather, a "holder in due course." A "holder in due course" is a holder who takes an instrument for value, in good faith, and without notice that the instrument is overdue or has been dishonored or of any defense or claim against or claim to the instrument on the part of any person. Neb. U.C.C. § 3-302 (Reissue 1980). Furthermore, a "holder takes the instrument for value . . . when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due . . . ." Neb. U.C.C. § 3-303 (Reissue 1980). If *Meier v. Geldis* had been decided after Nebraska adoption of the U.C.C., Geldis clearly would have been a holder in due course, since he gave value, acted in good faith, and did not have notice of the Meiers' claim.

In Gottsch's case, the Bank of Stapleton became a holder when it received payment on the overline account from Phyllis Churchill on March 3 and October 27 of 1980. Accordingly, when the Bank of Stapleton negotiated an instrument to FNB for payment on the overline account, FNB became a holder entitled to protection from Gottsch's claim to proceeds from the sale of Churchills' South Dakota cattle provided that FNB qualifies as a holder in due course. FNB clearly received value, since Phyllis Churchill's checks of March 3 and October 27 were payments for an antecedent claim, namely, the balance due on her overline account with FNB. See § 3-303.

DISPOSITION OF GOTTSCH'S APPEAL

Although an agency relationship existed between the Bank of Stapleton and FNB, a relationship through which the Stapleton bank's knowledge was imputable to FNB, we cannot order that a judgment be entered for Gottsch against FNB. The reason for this conclusion is contained in our disposition of FNB's cross-appeal.

FNB'S CROSS-APPEAL

In its cross-appeal, FNB claims that the trial court erred in granting Gottsch summary judgment on the issue of Churchills' fraud.

FNB argues that collateral estoppel is inapplicable to prevent FNB's contesting Churchills' fraud determined in the Lincoln County proceedings. Although FNB's argument concentrates only on collateral estoppel, the method by which the trial court granted summary judgment implicitly raises two fundamental questions, namely, whether a trial court may use judicial notice to establish a material fact necessary for summary judgment and, if judicial notice is available for summary judgment, whether the court file in *Gottsch v. Churchill* is a proper subject for judicial notice.

Summary Judgment and Judicial Notice.

Regarding the information which a court may consider in reference to a summary judgment, Neb. Rev. Stat. § 25-1332 (Reissue 1989) provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See, also, *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

We note that Fed. R. Civ. P. 56(c), as a basis for a useful comparison with § 25-1332, provides that a summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Similar to § 25-1332, judicial notice is not specifically mentioned in Fed. R. Civ. P. 56(c); nevertheless, federal courts may utilize judicial notice in determining the merits of a motion for summary judgment. See, e.g., *Clay v. Equifax, Inc.*, 762 F.2d 952 (11th Cir. 1985) (a district court, on a motion for summary judgment, may consider matters which are the subject of judicial notice); *St. Louis Baptist Temple v.*

F.D.I.C., 605 F.2d 1169, 1171-72 (10th Cir. 1979) ("a district court may utilize the doctrines underlying judicial notice in hearing a motion for summary judgment"); *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 570 n.31 (E.D. Pa. 1982) ("[j]udicial notice may be used in resolving a motion for summary judgment"); *Fed. Election Com'n v. Hall-Tyner Election Campaign Comm.*, 524 F. Supp. 955, 959 n.7 (S.D.N.Y. 1981) ("facts subject to judicial notice may be properly considered in a motion for summary judgment").

Furthermore, Neb. Evid. R. 201(6) states: "Judicial notice may be taken at any stage of the proceeding." In reference to Fed. R. Evid. 201(f), which is identical to Neb. Evid. R. 201(6), Weinstein and Berger state:

> The provision in subdivision (f) for taking judicial notice at any stage of the proceedings . . . means not only that a judge may dispense with formal proof of adjudicative facts at any time during the course of a litigation, but also that [the judge] must abide by the requirements of Rule 201 when doing so. Examples [include] the use of judicial notice in ruling on motions, commenting on the evidence, instructing the jury, making findings of fact and deciding appeals.

1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[6] at 201-47 (1989). The foregoing meaning of "proceeding" is consistent with the view in federal courts that judicial notice may be utilized for disposition of a motion for summary judgment.

Therefore, "proceeding," within Neb. Evid. R. 201(6), includes judicial activity which occurs after commencement of an action and includes judicial action in an appeal. See 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5110 at 522 (1977) ("[t]he trial court may take judicial notice during the pretrial stages under [Fed. R. Evid.] 201(f)"). See, also, *In re Estate of Casselman*, 219 Neb. 653, 655, 365 N.W.2d 805, 806 (1985) ("[w]e . . . take judicial notice of the record in *Casselman I* [previous appeal of the case]"). Cf. *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 407-08, 275 N.W.2d 822, 825 (1979) ("it can hardly be argued

that this appellate court cannot now take judicial notice of its own records in . . . two prior related cases").

From the foregoing, we conclude that a trial court may use appropriate judicial notice in resolving a motion for summary judgment. Thus, we now address the issue whether the district court's use of judicial notice was proper in the present case.

> Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue [1989]), pertains to judicial notice of adjudicative facts and states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."
>
> A fact is adjudicative if the fact affects the determination of a controverted issue in litigation . . . .
>
> . . . .
>
> When neither of the alternative tests prescribed in Neb. Evid. R. 201(2) is satisfied, judicial notice of an adjudicative fact is improper. See *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68 (3d. Cir. 1983). See, also, 1 J. Weinstein & M. Berger, *supra*.
>
> A judge or court may take judicial notice, whether requested or not. Neb. Evid. R. 201(3).

State v. Vejvoda, 231 Neb. 668, 675-76, 438 N.W.2d 461, 467-68 (1989). In *Vejvoda*, we also stated that

> [j]udicial notice of an adjudicated fact is a species of evidence, which, if relevant as an ultimate fact or a fact from which an ultimate fact may be inferred, is received without adherence to the Nebraska Evidence Rules otherwise applicable to admissibility of evidence and establishes a fact without formal evidentiary proof.

Id. at 676, 438 N.W.2d at 468.

Judicial Notice and Collateral Estoppel.

Regarding judicial notice of court records, this court has stated:

> With respect to collateral estoppel we held in Johnson v. Marsh, 146 Neb. 257, 19 N.W.2d 366 [1945], that where

> cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Peterson v. The Nebraska Nat. Gas Co., 204 Neb. 136, 138, 281 N.W.2d 525, 527 (1979); *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985); *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983); *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981).

From *Peterson, supra*, it is evident that this court has considered a court's judicial notice of its own records in relation to collateral estoppel.

According to M. Graham, Handbook of Federal Evidence § 201.3 at 72-73 (2d ed. 1986):

> A court will take judicial notice of its own acts and records in the same case, of facts established in prior proceedings in the same case, of the authenticity of its own records of another case between the same parties, of the files of related cases in the same court, and of public records on file in the same court. In addition judicial notice will be taken of the record, pleadings or judgment of a case in another court between the same parties or involving one of the same parties, as well as the record of another case between different parties in the same court.

As expressed in McCormick on Evidence § 330 at 927 (E. Cleary 3d ed. 1984):

> It would seem obvious that the judge of a court would take notice of all of the records of the institution over which he presides, but the courts have been slow to give the principle of judicial notice its full reach of logic and expediency. It is settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings. The principle seemingly is equally applicable to matters of record in the proceedings in other cases in the same court, and some decisions have recognized this, but many courts

> still adhere to the needless requirement of formal proof, rather than informal presentation, of recorded proceedings in other suits in the same court. Matters of record in other courts are usually denied notice even though it would appear manifest that these public documents are logically subject to judicial notice as readily verifiable facts.

See 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5106 (Supp. 1990).

Hence, as a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

However, as one court has expressed:

> A distinction must be carefully drawn between taking judicial notice of the *existence* of documents in the Court file as opposed to the truth of the facts asserted in those documents. . . .
>
> . . . [W]hile a Court may take judicial notice of each document in the Court's file it may only take judicial notice of the *truth* of facts asserted in documents such as orders, judgments, and findings of fact and conclusions of law because of the principles of collateral estoppel, res judicata, and the law of the case.

(Emphasis in original.) *In re Snider Farms, Inc.*, 83 Bankr. 977, 986 (N.D. Ind. 1988). See, also, *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987) (judicial notice of an adjudicative fact as a basis for collateral estoppel is subject to the fundamental requirement of due process and a litigant's opportunity to be heard); *Colonial Leasing etc. v. Logistics Control G.I.*, 762 F.2d 454, 459 (5th Cir. 1985) ("[c]are should be taken by the court to identify the fact it is noticing, and its justification for doing so. This is particularly necessary when a document, such as a court judgment, from which any number of distinct facts might be drawn, is the object of the notice"); *M/V American Queen v. San Diego Marine Const.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("[a]s a general rule, a court may not take judicial notice of proceedings or records in another cause so as to

supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it"); *United States v. Am. Tel. & Tel. Co.*, 83 F.R.D. 323 (D.D.C. 1979) (judicial notice of court records should be limited to the fact of their existence rather than the truth of the matters contained in the court records); *Texas Real Estate Com'n v. Nagle*, 767 S.W.2d 691, 694 (Tex. 1989) ("[a] court may take judicial notice of its own records and judgments, but the use to which such records may be put is circumscribed by the doctrines of res judicata and collateral estoppel").

It is clear that the

> doctrine [of collateral estoppel] imposes limits upon when a party can be bound by a determination of fact made in another case, limitations that would be meaningless if a party could not contest any fact that had ever been decided by any court in any litigation because of the rules of judicial notice.

21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5106 at 257 n.31.13 (Supp. 1990).

In *Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 297 (D.C. 1987), the court stated:

> While it is true that "[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records," 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5106 (Supp. 1987), that does not necessarily imply that a court must therefore notice the truth of all facts that are ascertained in those records.

See, also, *Matter of Pima County Mental Health, etc.*, 149 Ariz. 7, 9, 716 P.2d 68, 70 (1986) ("[t]he rules of evidence allow the court to take judicial notice of the contents and disposition of a file, that the case exists and that allegations were made, but the court may not take notice of the truth or falsity of specific allegations except as established by final judgment").

Thus, a court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.

In the present appeal, although the trial court was the district court for Logan County, the court could judicially notice the

existence of the court file for *Gottsch v. Churchill* in the district court for Lincoln County. Furthermore, the trial court could judicially notice the fact of the judgment obtained in *Gottsch v. Churchill*. However, the trial court could not judicially notice existence of Churchills' fraud unless, by virtue of collateral estoppel, Churchills' fraud was a previously adjudicated fact binding on FNB.

Collateral estoppel " 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *State v. Gerdes*, 233 Neb. 528, 530, 446 N.W.2d 224, 227 (1989) (quoting *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)).

> "Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation."

State v. Gerdes, supra at 530, 446 N.W.2d at 227 (quoting *State ex rel. Douglas v. Morrow,* 216 Neb. 317, 343 N.W.2d 903 (1984)).

The doctrine of collateral estoppel "recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly." *Vincent v. Peter Pan Bakers, Inc.*, 182 Neb. 206, 207, 153 N.W.2d 849 (1967); *Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 196 Neb. 158, 241 N.W.2d 674 (1976). Furthermore,

> [d]ue process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial.

Hickman v. Southwest Dairy Suppliers, Inc., 194 Neb. 17, 28-29, 230 N.W.2d 99, 106 (1975); *Borland v. Gillespie*, 206 Neb. 191, 292 N.W.2d 26 (1980).

FNB asserts that collateral estoppel is inapplicable because FNB was not a party or in privity with a party in *Gottsch v. Churchill*. Gottsch argues that FNB "was in privity with a

party, Phyllis M. Churchill, in that [FNB] subsequently acquired an interest in the 200 cows which were the subject of the earlier case, specifically, the bank acquired $ 29,364.97 of the proceeds from the sale of those cows." Reply brief for appellant at 17.

> "Privity depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. . . .
>
> "Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to *the right adjudicated in the first action*."

(Emphasis supplied.) *Schurman v. Pegau*, 136 Neb. 628, 637, 286 N.W. 921, 925 (1939); *Midwest Franchise Corp. v. Wakin*, 201 Neb. 450, 268 N.W.2d 737 (1978); *Hickman v. Southwest Dairy Suppliers, Inc., supra*. See, also, *Consumers Public Power District v. Eldred*, 146 Neb. 926, 22 N.W.2d 188 (1946). Privity has also been defined as

> [m]utual or successive relationship to the same rights of property. In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. . . . Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest.

Black's Law Dictionary 1079 (5th ed. 1979). See, also, Restatement (Second) of Judgments § 43, comment *a*. at 2-3 (1982):

> If the [prior] action is characterized as having involved only the "personal" rights of the litigants, it does not affect the property itself. The consequence of such a characterization is that a person who subsequently acquires property owned by one who was a party to litigation is not bound by the judgment (although he may, for example, take it subject to the lien of a money judgment against his predecessor in title). On the other hand, if the action is regarded as having concerned "property," the determinations in the action delimit the

property interest of the parties and therefore establish what passes to their successors to the interest.

In essence, Gottsch argues that FNB has privity with the Churchills as a successor in interest to the property involved in *Gottsch v. Churchill*. However, the court in *Gottsch v. Churchill* did not determine ownership of or any property interest in the 200 head of South Dakota cattle acquired by Churchills. Rather, the "right adjudicated" in *Gottsch v. Churchill* was Gottsch's personal right to a money judgment for damages on account of Churchills' fraud.

Certainly, FNB desired, similar to the Churchills' desire in *Gottsch v. Churchill*, to disprove fraud in the acquisition of the South Dakota cattle. However, for the purpose of issue preclusion, the mere fact that litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants. *Am. Polled Hereford v. City of Kansas City*, 626 S.W.2d 237 (Mo. 1982). See, also, *Charvis v. Charvis*, 529 S.W.2d 814, 815 (Tex. Civ. App. 1975) ("[p]rivity is not established by the mere common interest of persons in the same question"); *Boring v. Miller*, 215 Tenn. 394, 386 S.W.2d 521 (1965) (an interest in proving the same set of facts involved in prior litigation is insufficient to establish privity); *Ruffinengo v. Miller*, 579 P.2d 342 (Utah 1978).

Gottsch's previous action against Churchills (*Gottsch v. Churchill*) was based on Gottsch's personal right to damages caused by Churchills' fraud and did not determine or involve the title to, or any property interest in, the South Dakota cattle, whereas Gottsch's action against FNB relates to property, namely, the South Dakota cattle in their converted form of traceable proceeds from the sales of the cattle. In view of the foregoing principles concerning collateral estoppel, we conclude that FNB was not in privity with Phyllis Churchill in *Gottsch v. Churchill*. Thus, the trial court erred in taking judicial notice of the court record in *Gottsch v. Churchill* to establish Churchills' fraud, a material fact which was established through summary judgment on the issue of Churchills' fraud and which was the basis for issue preclusion or collateral estoppel on the question of fraud.

CONCLUSION

Although an agency relationship existed between the Bank of Stapleton and FNB, a relationship through which the Bank of Stapleton's notice of fraud was imputable to FNB, existence of the Churchill fraud was established by the district court's judicial notice as a basis for collateral estoppel. Since the district court's improper use of judicial notice in relation to collateral estoppel denied FNB an opportunity to contest the issue of Churchills' fraud, we reverse the district court's judgment in the action between Gottsch and FNB so that FNB may have its day in court on the question of Churchills' fraud.

Regarding a retrial, the existence of the agency relationship between the Bank of Stapleton and FNB has been determined in this appeal and will not be an issue for determination on retrial. Establishment of the agency relationship concomitantly establishes imputability as a consequence of the agency. However, since FNB, as a result of this appeal, is entitled to a new trial on the question of Churchills' fraud, FNB is entitled to litigate the entire issue and all aspects of the Churchill fraud, which necessarily includes the question of the Bank of Stapleton's notice about the fraud, although the district court has previously found that the Bank of Stapleton had notice of Churchills' fraud. There may be other aspects of notice to the Bank of Stapleton which were not explored or which were bypassed on account of the district court's judicial notice which conclusively established existence of Churchills' fraud. We will not speculate what facts might have a bearing on the question of the Bank of Stapleton's notice about Churchills' fraud, if such fraud actually existed. Rather, to correct the trial court's erroneous uses of judicial notice and the doctrine of collateral estoppel, a new trial on the issue of Churchills' fraud will include consideration of the notice to the Bank of Stapleton notwithstanding Gottsch's judgment against the Bank of Stapleton. We are mindful of the fact that a retrial under the directions specified may result in an incongruous situation: liability of the Bank of Stapleton, as FNB's agent, which has not appealed the judgment, and the possibility that FNB, as the principal which has appealed and won a new trial, may not be

liable on retrial if the evidence fails to establish that Churchills perpetrated a fraud on Gottsch or that the Bank of Stapleton had notice about Churchills' fraud, if established. That possible incongruity only emphasizes the sweeping effect of judicial notice and ramifications from improper use of judicial notice in a rather complex case. Nevertheless, we reverse the district court's judgment and remand this matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., concurs.

JOY M. QUALLEY, APPELLEE, V. RONALD K. QUALLEY, APPELLANT.

457 N.W.2d 812

Filed July 20, 1990. No. 88-617.

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

Warren R. Arganbright for appellant.

James H. Quigley for appellee.

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

PER CURIAM.

This is an appeal from an order entered in the Cherry County District Court dissolving petitioner and respondent's marriage. Respondent appeals, contending that the trial court erred in the property division and in failing to award respondent alimony.

In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). "The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the discretion of the trial judge." *Ritz v. Ritz*, 229 Neb. 859, 862, 429 N.W.2d 707, 709 (1988).

We have reviewed the record de novo. There is no abuse of discretion. The district court's decree is affirmed.

AFFIRMED.

CHARLENE JEANNETTE YONKER, APPELLEE, V. DONALD ELBERT YONKER, APPELLANT.

457 N.W.2d 813

Filed July 20, 1990. No. 88-640.

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

James H. Truell for appellant.

James D. Livingston and Patrick A. Brock, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellee.

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

PER CURIAM.

We have reviewed the district court's decree in this dissolution of marriage action de novo on the record; finding no abuse of discretion therein, we affirm the same and award the petitioner-appellee the sum of $1,000 to apply toward the services of her attorney in this court.

AFFIRMED.

TAMARA BREWINGTON, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELIZABETH JEAN BREWINGTON, DECEASED, APPELLANT, V. DWIGHT RICKARD, APPELLEE.

457 N.W.2d 814

Filed July 20, 1990. No. 88-668.

1. **Malpractice: Insurance: Waiver: Notice: Jurisdiction.** The provision in Neb. Rev. Stat. § 44-2840(4) (Reissue 1988) that requires, upon waiver of the medical panel review, service of a copy of the petition upon the director of the Department of Insurance at the time the action is filed in court is merely a notice requirement and neither confers nor denies jurisdiction of the court.
2. **Malpractice: Insurance: Actions: Waiver.** The filing of an action in court is affirmative conduct constituting a waiver of a medical panel review under Neb. Rev. Stat. § 44-2840(4) (Reissue 1988).

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Thomas J. Shomaker, of Sodoro, Daly & Sodoro, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the district court for Platte County that the court did not have jurisdiction over the matter, and thus it dismissed plaintiff's petition. In her petition, plaintiff alleged that the defendant-appellee, Dwight Rickard, a physician, was negligent in furnishing medical services which resulted in the death of a child 9 days after labor and delivery.

At issue is the timeliness of notice sent to the director of the Department of Insurance of the State of Nebraska after the filing of a petition in the district court.

Neb. Rev. Stat. § 44-2840(4) (Reissue 1988) provides:

> The claimant may affirmatively waive his or her right to a panel review, and in such case the claimant may proceed to file his or her action directly in court. If the claimant waives the panel review, the claimant shall serve a copy of

> the petition or complaint upon the director personally or by registered or certified mail at the time the action is filed in court.

The defendant complains that the plaintiff failed to execute a waiver of the medical panel. Noting that the above statute does not provide for a specific method of waiver, we find that the filing of the plaintiff's action in the district court is in itself a sufficient waiver of the panel review.

The suit was filed on November 2, 1987, and a copy of the petition was served on the director on January 14, 1988. Subsequent to the filing of the appeal in this case and the filing of briefs by the parties, this court released its opinion in *Ourada v. Cochran*, 234 Neb. 63, 449 N.W.2d 211 (1989).

In *Ourada*, we held that "the provision which requires that a copy of the petition be sent to the Department of Insurance neither confers nor denies jurisdiction of the court." 234 Neb. at 65, 449 N.W.2d at 213. Specifically, in that case this court held that the department's receipt of the petition within 5 days after it was filed with the court sufficiently effectuated the purpose of giving the department notice of a claim which might affect the Excess Liability Fund.

The purpose of the Excess Liability Fund is to provide coverage when the basic coverage of the health care providers has been exhausted. See Neb. Rev. Stat. § 44-2833 (Reissue 1988). A showing of prejudice to the fund would evidence a failure to give timely notice under § 44-2840(4). It would properly be the duty of the caretaker of the fund, i.e., the director of the Department of Insurance or the risk manager, if one has been appointed, to assert that prejudice, and thus to limit recovery of a judgment creditor to the limits of the primary coverage.

No prejudice has been alleged or shown, and the district court's dismissal of the plaintiff's timely filed petition was not proper. Therefore, we must reverse and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LLOYD R. TRACKWELL, JR., APPELLANT.

458 N.W.2d 181

Filed July 20, 1990. No. 89-866.

1. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as a trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
2. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, LYLE WINKLE, Judge. Judgment of District Court reversed, and cause dismissed.

Mark M. Sipple, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

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

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

WHITE, J.

Defendant was convicted of third degree assault after a trial in the county court for Platte County. The district court affirmed the conviction and sentence. Defendant has appealed to this court. We reverse and dismiss.

On November 21, 1988, a complaint was filed against the defendant, Lloyd R. Trackwell, Jr., alleging that he did "intentionally, knowingly, or recklessly cause bodily injury to Lois A. Murcek . . . ." The case was tried to the court. The evidence presented at trial showed the following relevant facts: Defendant owns ACP Collection Agency in Lincoln, Nebraska. Larry Holmes is his employee. On the night of October 14, 1988, defendant and Holmes went to a farm north of Monroe, Nebraska, to repossess a 1988 Ford Ranger pickup owned by Lois Murcek. Murcek lives on the farm with Frank Able. There apparently was some repair work done on the

pickup at a Lincoln garage, and Murcek had defaulted on payments. Defendant testified that an artisan's lien had been filed. Murcek had received notice that she was in default.

After unsuccessfully attempting to obtain assistance from the Platte County sheriff's office, defendant and Holmes drove to the farm together in defendant's vehicle. Defendant drove onto the farmplace and dropped Holmes off near the pickup, which was parked either partially in or near a barn. The pickup box was loaded with personal property belonging to Able and Murcek. Holmes began to drive the pickup down the 50- to 60-foot driveway while defendant waited in his car near the end of the driveway. From this point the facts are in dispute.

Able and Murcek testified to one version of the evening's events. Murcek testified that she was awakened around 11 p.m. by Able shouting to her that the pickup was being stolen. She ran outside and observed that the pickup was beginning to proceed down the driveway toward a county road. In an attempt to stop the pickup, she attached herself to the front of the pickup by grabbing "the grill or the bottom of the bug screen or something." Although the pickup "bumped" her with a series of jerking motions, she remained attached to the pickup, with her feet sliding along the gravel driveway. She testified that a car was parked near the end of the driveway. She further testified that she could hear a voice coming from behind her as she faced the pickup, yelling, " ''Cmon, [sic] Lar! Keeping [sic] coming Lar! . . .' " As the pickup approached the end of the driveway, someone grabbed her from behind, pulling her off the pickup and throwing her to the ground. At trial she identified this man as the defendant. She testified that after throwing her to the ground the defendant returned to his vehicle and drove away. She suffered a deep laceration on two fingers, and various bruises and scratches. It was the State's theory that these injuries were caused by defendant's throwing Murcek from the truck.

Able testified that after he ran outside he attached himself to the driver's side of the pickup by grabbing the rearview mirror. His testimony basically corroborated Murcek's version of the facts. Able also testified that he saw a man near the end of the driveway who was yelling, " 'Cmon, Lar! Take it easy! 'Cmon,

Lar."

Defendant and Holmes recounted a different version of the events. Holmes testified that he never saw anyone leave the house. He testified that he saw Able pounding at the driver's side of the pickup but that he never saw Murcek at all that night. He also testified that defendant did not leave his vehicle and that he did not hear defendant yell words of encouragement.

Defendant testified that he saw Murcek and Able come out of the house. He stated that Able attached himself to the driver's side of the pickup. However, he testified that Murcek attached herself to the rear of the pickup and that "[s]he was draggin' down in back of the — back — she — like a Bugs Bunny cartoon. She was trying to stop the truck and draggin' on the back of it, holding these bunge [sic] straps." He testified that both Able and Murcek dropped off the pickup near the end of the driveway and that he never left his car and never grabbed Murcek. Defendant was not questioned as to whether he yelled encouragement to Holmes. It was defendant's theory that the bungee cords and subsequent fall caused Murcek's injuries.

The trial judge issued a memorandum opinion and relied on a "criminal enterprise" theory to find defendant guilty of third degree assault. The conviction was affirmed by the district court. Defendant appeals to this court, contending, in sum, that his conviction for third degree assault is contrary to fact and law.

This court has stated that the factual findings of a judge who serves as a trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988). In the present case there were several different theories upon which the trial court, as fact finder, could have imposed criminal liability. The trial court issued a detailed but sometimes confusing memorandum opinion. The trial court found facts to support one theory of criminal responsibility, to the exclusion of other theories. In this appeal we feel compelled to be bound by the facts as affirmatively determined by the trial court. For this court to determine facts on appeal and apply those facts to some other theory of criminal responsibility would be, in effect, to retry this case on appeal, with the Supreme Court sitting as the fact finder.

In the memorandum opinion the trial judge rejected Able and Murcek's version of the cause of Murcek's injuries and accepted the defendant's version:

> The version of the defendant's, that the victim was hanging onto the back of the pickup, losing control after she had been dragged down the driveway and being thrown to the ground, cutting her hand on the bungy [sic] strap or the rear of the pickup, appears more consistent with the photographs showing her injuries.

It appears in the present case that the State attempted to prove that defendant himself committed a third degree assault on Murcek by grabbing her and throwing her to the ground. The memorandum opinion indicates that the State's theory was squarely rejected by the trial court.

An alternative basis of criminal liability would have been that defendant aided and abetted Holmes in committing the assault upon Murcek. Neb. Rev. Stat. § 28-206 (Reissue 1989) states that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." See, also, *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988); *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987). Murcek's and Able's testimony that defendant shouted words of encouragement might have been sufficient, if believed, to convict defendant of aiding and abetting the ostensible assault upon Murcek by Holmes. However, the trial court did not find that defendant aided and abetted Holmes by shouting words of encouragement.

Instead, the memorandum opinion is reasonably clear that the trial court based criminal liability solely on a "criminal enterprise" theory. The trial court reasoned that "[t]here was no attempt to unload the personal property and when the election was made to take the pickup with the personal property loaded thereon, [defendant and Holmes] were engaging in the criminal enterprise of theft of personal property." The trial court reasoned that defendant and Holmes knew before they began to move the pickup that the pickup contained personal property. He further reasoned that defendant encouraged or assisted Holmes in taking the pickup, making defendant an aider and

abettor under § 28-206, and therefore both men became equally culpable in the criminal enterprise of theft. It does not appear from the record whether defendant or Holmes was charged with or convicted of theft. The trial court then determined Holmes recklessly injured Murcek and imposed criminal liability upon defendant for Holmes' assault.

In the memorandum opinion the trial court did not find that defendant assisted or encouraged Holmes to assault Murcek either before or after Holmes began to drive the pickup. Without such a finding defendant would only be present at the scene. As we stated in *State v. Sutton*, 231 Neb. 30, 45, 434 N.W.2d 689, 699 (1989): " ' "Mere presence, acquiescence, or silence . . . is not enough . . . to constitute one an accomplice. . . ." ' "

The trial court based accomplice liability solely on the theory that defendant and Holmes were engaged in a "criminal enterprise," and therefore defendant would automatically be liable for any subsequent criminal act committed by Holmes. We do not agree. As the court stated in *Hollingsworth v. State*, 366 So. 2d 326 (Ala. Crim. App. 1978):

> The language of some of the cases emphasizing the requirements necessary or sufficient to make one accountable as a principal, who aids or abets another in the commission of a felony, has apparently been taken by some to mean that if one meets all of the requirements of an aider or abettor in the commission of a crime contemplated by the two or more conspirators, he becomes the aider or abettor of the other conspirator or conspirators in the commission of *every* crime committed by him or them in the course of overt action pursuant to the conspiracy. Such misconception should no longer prevail in view of the illuminating treatment of the subject by Judge Bookout in *Howell v. State*, Ala. Cr. App., 339 So.2d 138, 139 (1976), wherein the principle is accurately stated as follows:
>
> " 'Every person engaging in a joint enterprise is not automatically and equally guilty of a crime committed independently by another participant in the venture. A conspiracy necessary to fix guilt on all participants must

> be one in which all have a meeting of the minds (though only for an instant) to commit the crime charged. *A different crime independently committed and not a foreseeable consequence of the conspiracy can hardly be charged to one who neither participated in its commission, nor aided therein, although all originally started out on some other illegal venture.*' "

(Latter emphasis supplied.) 366 So. 2d at 332.

The court added that an accomplice is criminally responsible for the proximate, natural, and logical consequences of the common criminal undertaking, and these consequences should be determined from the particular facts of the case. See, also, *State v. Ivy*, 119 Wis. 2d 591, 350 N.W.2d 622 (1984) (one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act).

In the present case, Holmes' conduct toward Murcek was independent of the ostensible theft. It was not a foreseeable consequence, nor was it a natural and probable consequence, that Murcek, whose presence was unknown to Holmes, would attach herself to the rear of the pickup and allow herself to be dragged the length of the driveway, where she would eventually lose her grip and fall to the ground. On the facts of this case as determined by the trial court, defendant is not criminally responsible as an accomplice for Holmes' acts. We do not decide whether Holmes' acts constitute an assault. The theory upon which the trial court relied to impose criminal liability on defendant is erroneous as a matter of law.

We note here the trial court found that under the self-help repossession provision of the Uniform Commercial Code, Neb. U.C.C. § 9-503 (Reissue 1980), "[a]ny privilege or right to enter upon the private property of another to peaceably retake the property would terminate upon commencement of the criminal enterprise." A mere trespass onto the open land of another, without more, will not usually constitute a breach of the peace under this section. See, *Jefferds v. Ellis*, 127 Misc. 2d 477, 486 N.Y.S.2d 649, 652 (1985), *rev'd on other grounds* 122 A.D.2d

595, 505 N.Y.S.2d 15 (1986) (providing as it does that the only restriction on repossession is that it be without a "breach of the peace," § 9-503 authorizes the commission of a common-law trespass, action which was not permitted at common law to regain possession of personal property); *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750 (Fla. App. 1977) (when a security agreement provides the secured party has on default the rights and remedies provided by the Uniform Commercial Code, the right of repossession stated by Fla. Stat. § 679.503 (1975) implies, just as it did at common law, a limited privilege to enter upon the debtor's land); *Butler v. Ford Motor Credit Co.*, 829 F.2d 568 (5th Cir. 1987) (rejecting the contention that entering a private driveway to repossess a vehicle without the use of force is a breach of the peace because it constitutes a trespass); 2 J. White & R. Summers, Uniform Commercial Code § 27-6 at 577 (3d ed. 1988) ("We have found no case which holds that the repossession of an automobile from a driveway or a public street (absent other circumstances, such as the debtor's objection) itself constitutes a breach of the peace, and many cases uphold such a repossession").

The repossession in the present case, however, was clearly a breach of the peace. Defendant and Holmes went to the farm at 11 p.m.; took the pickup, which was loaded with personal property; and fled despite Able's protest, which was known to Holmes. There was also controverted testimony that the front part of the pickup may have been parked in an outbuilding. For representative cases concerning the facts which may constitute a breach of the peace, see, e.g., *Dixon v. Ford Motor Credit Corp.*, 72 Ill. App. 3d 983, 391 N.E.2d 493 (1979) (when a creditor repossesses in disregard of the debtor's unequivocal oral protest, the repossession may be found to be a breach of the peace); *Nicholson v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1975) (assault and battery constitutes a breach of the peace); *Kimble v. Universal TV Rental*, 65 Ohio Misc. 17, 417 N.E.2d 597 (1980) (breach of the peace is a violation of public order, a disturbance of the public tranquility, by an act or conduct tending to provoke or excite others to breach the peace, and includes any violation of any law enacted to preserve the peace and good order); *Morris v. First Natl. Bank & Trust Co.*

of Ravenna, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) (breach of the peace results when creditor legally enters debtor's premises but is physically confronted by one in charge of such premises, told to desist his efforts at repossession, and instructed to depart from the premises, and creditor refuses to heed such commands). The trial court correctly concluded that defendant would be deprived of any defense afforded by § 9-503.

Keeping in mind that though the defendant may have known that personal property not subject to an artisan's lien was in the truck, defendant is charged with assault only. He was not found to himself have committed the assault, to have ordered or encouraged the assault, or to have reasonably contemplated that Holmes would assault the victim.

Under the facts as determined by the trial court, defendant, as a matter of law, is not criminally responsible as an accomplice for Murcek's injuries. Defendant's conviction is reversed, and the cause is dismissed.

REVERSED AND DISMISSED.

BOSLAUGH, J., dissenting.

It seems to me that an injury to a debtor who resists a repossession accomplished by force is a foreseeable consequence of the repossession.

The defendant and his employee Holmes went to the farm for the express purpose of taking possession of the pickup truck and driving it away. Not content to take only the pickup truck, they took the cargo also. When the owners, Murcek and Able, tried to resist the repossession, Holmes continued to drive away, resulting in the injury to Murcek. The defendant was present at the scene and, instead of telling Holmes to stop, shouted encouragement to Holmes to continue. This appears to be a classic case of aiding and abetting, which is what the trial court found.

I would affirm the judgment.

STATE OF NEBRASKA, APPELLEE, V. LARRY W. SCHNECKLOTH, APPELLANT.

458 N.W.2d 185

Filed July 20, 1990. No. 89-1171.

1. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Appeal and Error.** If a defendant has the constitutional right to an attorney in the prosecution of an appeal, the defendant has the right to effective assistance of counsel in the appeal.
2. **Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel is analogous to a claim of ineffective counsel at trial and is evaluated by the same standard used to assess the assistance of counsel at trial.
3. **Criminal Law: Effectiveness of Counsel: Conflict of Interest.** In criminal proceedings a defendant's right to effective counsel includes a lawyer's representation free from conflicting interests.
4. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest.** A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel.
5. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest: Proof.** In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.
6. _____: _____: _____: _____. A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.
7. **Constitutional Law: Criminal Law: Effectiveness of Counsel: Conflict of Interest: Proof.** The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Larry W. Schneckloth, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

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

PER CURIAM.

Larry W. Schneckloth appeals from the district court's denial of postconviction relief under Nebraska's Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). Schneckloth,

contending that he was denied effective assistance of counsel in his direct appeal, *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981), claims that the district court should have held an evidentiary hearing on Schneckloth's motion for postconviction relief.

STANDARD OF REVIEW

> A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987); *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *State v. Davis*, 228 Neb. 622, 423 N.W.2d 487 (1988).

As reflected in the direct appeal, *State v. Schneckloth, Koger, and Heathman, supra*, the State charged John Koger, Noel Heathman, and Schneckloth with kidnapping, see Neb. Rev. Stat. § 28-313(1) (Reissue 1989); first degree sexual assault, see Neb. Rev. Stat. § 28-319(1) (Reissue 1989); and using a firearm to commit a felony, see Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), all of which were alleged to have occurred on February 27, 1980. Schneckloth was represented by the Douglas County public defender's office; Koger and Heathman were represented by privately retained counsel. Although the record does not contain information regarding the consolidation of the trials for Koger, Heathman, and Schneckloth, none disputes that, over Schneckloth's objection, the district court sustained the State's consolidation motion.

During trial, Koger and Heathman testified; Schneckloth declined to take the stand. The State subsequently presented a rebuttal witness to impeach testimony from Koger and Heathman. The rebuttal testimony incriminated Schneckloth and his codefendants. See *State v. Schneckloth, Koger, and Heathman, supra*. However, the court gave a limiting

instruction, admonishing the jury that the rebuttal witness' testimony should not be considered as evidence against Schneckloth. The jury found each defendant guilty as charged.

After trial, Schneckloth's lawyer filed a motion for new trial, alleging that the court erred in consolidating Schneckloth's case for trial with the cases of Heathman and Koger and erred in overruling Schneckloth's motion to sever his trial from the trials of Koger and Heathman. Schneckloth's lawyer also contended, among other things, that the trial court erred in the admission of testimony from the State's rebuttal witness. The trial court overruled Schneckloth's motion for new trial and sentenced Koger, Heathman, and Schneckloth each to life imprisonment for the kidnapping conviction, with a concurrent sentence of 8 to 10 years' imprisonment for the first degree sexual assault conviction, and also sentenced each defendant to a term of 3 to 5 years' imprisonment for the firearm conviction, a sentence which was consecutive to all other sentences imposed. See *State v. Schneckloth, Koger, and Heathman, supra.*

Koger, Heathman, and Schneckloth appealed their convictions and sentences, which appeals, with approval of counsel, were consolidated. In their direct appeal, Schneckloth, Heathman, and Koger were jointly represented by the Douglas County public defender's office. The sole assignment of error pertained to the sentences imposed for the kidnapping convictions. None of the errors alleged in Schneckloth's motion for new trial were assigned as errors in the direct appeal. This court affirmed the convictions and sentences of Koger, Heathman, and Schneckloth. See *State v. Schneckloth, Koger, and Heathman, supra.*

On August 8, 1989, pursuant to the Nebraska Postconviction Act, §§ 29-3001 et seq., Schneckloth filed a "Verified Motion to Vacate or Set Aside the Sentence," contending that he was denied his rights under both the U.S. and Nebraska Constitutions because he was not afforded conflict-free assistance of counsel in the direct appeal. Specifically, Schneckloth alleged that his lawyer in the direct appeal failed to provide Schneckloth with conflict-free assistance of counsel because appellate counsel (1) stipulated that the appeals of Koger, Heathman, and Schneckloth were consolidated for

purposes of appeal, resulting in a conflict of interest for Schneckloth's lawyer; (2) failed to provide Schneckloth with individual representation in the appeal; (3) failed to assign as error the questions set out in Schneckloth's motion for new trial; and (4) failed to request a transcript of the hearing on the motion to consolidate the trials of Koger, Heathman, and Schneckloth, when the transcript would have shown that Schneckloth had a defense which was antagonistic to the defense of Koger and Heathman. Schneckloth alleged that his appellate counsel's conduct resulted in denial of his constitutional rights of effective assistance of counsel and due process guaranteed under the 5th, 6th, and 14th amendments to the U.S. Constitution.

After reviewing the file and record in Schneckloth's case, the district court, without an evidentiary hearing, concluded that Schneckloth had failed to show that prejudice resulted from the appellate absence of an assignment of error regarding consolidation of Schneckloth's trial with his codefendants' and from consolidation of the three defendants' appeals. The district court remarked:

> Defendant fails to allege how he was prejudiced by consolidation of his trial with that of his codefendants other than to indicate that he was damaged by rebuttal evidence adduced at trial regarding the two codefendants. The file reflects that the jury was properly admonished that the rebuttal testimony was admissable [sic] against the two codefendants only and not against this defendant. Under these circumstances it is obvious that defendant's appellate counsel did not feel that this was a viable issue on appeal. Failure to pursue on appeal an invalid issue can hardly be evidence of incompetent counsel.
>
> Similarly defendant fails to show how he was prejudiced by consolidation of the appeals before the Supreme Court other than to state that there was a conflict of interest because the defense advanced by this defendant was different than that of his codefendants. Defendant's appellate counsel obviously determined that the issues of all three defendants on appeal were identical.

The district court denied Schneckloth's motion for

postconviction relief.

In his postconviction appeal, Schneckloth claims that (1) the two-part standard expressed by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is inapplicable to Schneckloth's claim that he was denied conflict-free assistance of counsel on appeal and that the standard set forth in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), is the correct standard regarding a conflict of interest; (2) the district court should have held an evidentiary hearing; and (3) Schneckloth is entitled to the postconviction relief of a new direct appeal and court-appointed counsel. The gist of Schneckloth's argument is that, although he was represented by counsel independent from his codefendants at trial, appellate representation of all three codefendants by the public defender constituted a conflict of interest which denied Schneckloth effective assistance of counsel. Schneckloth argues that the public defender's joint representation of the three codefendants on appeal prevented assertion of the error that the trial court improperly allowed the rebuttal witness' testimony and that error occurred by the consolidation of the defendants' trials.

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

If a defendant has the constitutional right to an attorney in the prosecution of an appeal, the defendant has the right to effective assistance of counsel in the appeal. *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Our research has not disclosed any U.S. Supreme Court decisions expressing a standard for assessing a claim of ineffective assistance of appellate counsel, although the Supreme Court has stated that appellate counsel must support a defendant's appeal to the best of counsel's ability. See, *Evitts v. Lucey, supra*; *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). However, some courts have

held that a claim of ineffective assistance of appellate counsel is analogous to a claim of ineffective counsel at trial and is evaluated by the same standard used to assess the assistance of counsel at trial. *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986); *United States v. Birtle*, 792 F.2d 846 (9th Cir. 1986); *Downs v. Wainwright*, 476 So. 2d 654 (Fla. 1985); *Mato v. State*, 478 N.E.2d 57 (Ind. 1985).

Relying on *Strickland v. Washington, supra*, this court has stated:

> [T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. As used in the *Strickland* test, a reasonable probability is "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 494.

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988). See, also, *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *State v. Uwanaka*, 230 Neb. 808, 433 N.W.2d 540 (1989).

On the other hand, a standard different from the *Strickland* standard is employed when determining whether a convicted defendant has been denied the sixth amendment right to assistance of counsel as a result of a conflict of interest from representation of codefendants. "For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests." *State v. Williams*, 224 Neb. 114, 119, 396 N.W.2d 114, 118 (1986); *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). In *State v. Turner, supra*, we examined the characteristics of a conflict of interest:

> A conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. . . . The phrase "conflict of interest" denotes a situation in

which regard for one duty tends to lead to disregard of another . . . where a lawyer's representation of one client is rendered less effective by reason of his representation of another client . . . or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose . . . . A conflict of interest exists "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." . . .

In criminal proceedings a defendant's right to effective counsel includes a lawyer's representation free from conflicting interests. . . .

However, a sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel. . . . "An 'attorney representing two defendants . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' " . . .

". . . .

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. . . .

". . . Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. . . .

". . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 346-50, 100 S. Ct. 1708, 64 L. Ed.

2d 333 (1980).

Further, as the U.S. Supreme Court expressed in *Strickland v. Washington*, 466 U.S. [668, 692], 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984): "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.' " Citing *Cuyler v. Sullivan, supra.*

A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.

(Citations omitted.) *State v. Turner, supra* at 131-33, 354 N.W.2d at 621-23.

In *State v. Williams, supra*, quoting language from *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), we stated:

"The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]

"Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland v. Washington, post*, at 693-696 [citations omitted]." . . .

. . . .

As indicated in *Strickland v. Washington, supra*, a conflict of interest, per se, does not annihilate or frustrate a defendant's constitutional right to effective assistance of counsel, necessitating reversal of a judgment in a criminal case. However, there is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of

> interest must be shown to have resulted in counsel's conduct detrimental to the defense.

State v. Williams, 224 Neb. 114, 120, 122, 396 N.W.2d 114, 118-19 (1986).

Thus, a defendant alleging a denial of effective assistance of counsel as a result of a conflict of interest is not required to show prejudice because prejudice will be presumed by the demonstration that (1) defendant's lawyer actively represented conflicting interests and (2) the actual conflict of interest adversely affected the performance of defendant's lawyer. See *State v. Williams, supra*. However, a defendant alleging ineffective assistance of counsel without the conflict of interest element must show (1) a deficient performance by the defendant's lawyer and (2) prejudice to the defense by virtue of such deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Schneckloth argues that rather than applying the standard expressed in *Strickland v. Washington, supra*, which includes a prejudice requirement, the proper standard is expressed in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), which does not contain a prejudice requirement. Schneckloth contends that the record submitted to the district court shows that the public defender had a conflict of interest by representation of all codefendants jointly, and, therefore, Schneckloth was presumptively denied effective assistance of counsel. Schneckloth further maintains that if he had had individual representation in his direct appeal, counsel would have assigned different errors, such as the admission of rebuttal testimony and consolidation of the trials and appeals.

What Schneckloth is actually contending is that he was denied the opportunity to present a defense antagonistic to his codefendants, Koger and Heathman, when the trial court refused to grant Schneckloth a separate trial. That contention is clearly without merit. The record establishes that Schneckloth was represented by individual counsel at trial, thus providing him an opportunity to present an antagonistic defense if that was his desire. However, this was not the strategy employed by Schneckloth's counsel at trial, and, as stated before, a defendant in a postconviction action cannot raise questions

which could have been raised on direct appeal. *State v. Dillon*, 224 Neb. 503, 398 N.W.2d 718 (1987). The issue of an antagonistic defense at trial is, therefore, determined by a claim of ineffective counsel at trial, whereas in the present appeal, Schneckloth argues only that his appellate counsel was ineffective.

Accordingly, we turn to the real issue before us: whether Schneckloth was denied conflict-free assistance of counsel in his direct appeal to this court by virtue of the public defender's joint representation of Koger, Heathman, and Schneckloth in their consolidated appeals. Under the standard for determining whether a defendant has been denied effective counsel on appeal, that is, the standard expressed in *Cuyler v. Sullivan, supra*, Schneckloth must demonstrate that (1) his appellate counsel actively represented conflicting interests and (2) this actual conflict of interest adversely affected appellate counsel's performance.

Schneckloth suggests that the public defender failed to assign as error the trial court's admission of the rebuttal testimony because such an argument would have prejudiced and conflicted with the interests of Schneckloth's codefendants, Koger and Heathman. However, the public defender's omission of an argument concerning the rebuttal testimony would not have conflicted with the interests or appellate positions of Koger and Heathman, would not have been antagonistic to any argument the public defender would have made on behalf of Koger and Heathman, and would not have affected the outcome of the appeals for Koger and Heathman. See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Similarly, any argument which the public defender could have made regarding severance of the trials for Koger, Heathman, and Schneckloth would not have worked to the detriment of any of the three defendants. In fact, such an argument concerning the rebuttal testimony would have benefited any, if not all, of the three codefendants. Consequently, Schneckloth has failed to show that the public defender actively represented any conflicting interests in the joint representation of Koger, Heathman, and Schneckloth. The clash of interest and antagonism necessary for a conflict of interest does not exist in Schneckloth's case.

Schneckloth has failed to establish an actual conflict of interest which adversely affected his lawyer's performance. There is no merit to Schneckloth's claim that he was deprived of effective assistance of counsel due to a conflict of interest on the part of his attorney.

Schneckloth contends that the district court erred in not holding an evidentiary hearing under the Nebraska Postconviction Act.

> A court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact. *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983); *State v. Turner, supra*.
>
> An evidentiary hearing is not required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading 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. *State v. Propst*, 228 Neb. 722, 424 N.W.2d 136 (1988); *State v. Petitte*, 228 Neb. 144, 421 N.W.2d 460 (1988); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Lytle, supra*; *State v. Turner, supra*.

State v. Start, 229 Neb. 575, 578, 427 N.W.2d 800, 802-03 (1988). "[T]he defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant." *State v. Uwanaka*, 230 Neb. 808, 809, 433 N.W.2d 540, 541 (1989).

Schneckloth has failed to demonstrate an actual conflict of interest, which is the basis of his postconviction motion, and the files and records in Schneckloth's case do not show a violation of his rights under the U.S. or Nebraska Constitutions. Under the circumstances, Schneckloth's motion neither factually nor legally alleges grounds for relief under the Nebraska Postconviction Act. The district court properly refused to grant

Schneckloth an evidentiary hearing and properly denied Schneckloth's request for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF D.D.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.P. AND V.P., APPELLEES, AND REGINA T. MAKAITIS, GUARDIAN AD LITEM, ON BEHALF OF D.D.P., APPELLANT.

458 N.W.2d 193

Filed July 20, 1990. No. 89-1221.

1. **Juvenile Courts: Parental Rights: Guardians Ad Litem.** Neb. Rev. Stat. § 43-277 (Reissue 1988), which sets out the procedures for an adjudication of a petition under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), requires the appointment of a guardian ad litem for the child in such proceedings.
2. **Juvenile Courts: Parental Rights.** An adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) involves allegations of conduct concerning the activities of parents, not juveniles.
3. **Juvenile Courts: Parental Rights: Pleas.** A child is not required to enter a plea in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) because allegations filed pursuant to § 43-247(3)(a) are not directed at the child or the child's conduct.
4. **Juvenile Courts: Parental Rights.** It is within the trial court's discretion whether or not to permit a child to be present at an adjudication hearing in a Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) proceeding.
5. **Juvenile Courts: Parental Rights: Guardians Ad Litem.** A guardian ad litem appointed under Neb. Rev. Stat. § 43-277 (Reissue 1988) to represent a juvenile affected in a Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) proceeding must be given the right to participate meaningfully in the § 43-247(3)(a) adjudication.
6. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an adjudication in a juvenile court under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Reversed.

Regina T. Makaitis, guardian ad litem, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

GRANT, J.

This is an appeal from an August 29, 1989, adjudication order of the separate juvenile court of Douglas County finding D.D.P., born March 12, 1978, to be a juvenile within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). The child's parents did not contest jurisdiction of the juvenile court on the basis stated, but the guardian ad litem for the minor child timely appealed the order, on behalf of the child. We reverse the adjudication order of the juvenile court.

A petition was filed on June 15, 1989, alleging that the child

> comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-247(3a), being under the age of eighteen years, homeless or destitute, or without proper support through no fault of [the] parents of said child, in that:
>
> A. Said child displays severe behavior problems, including threats and acts of violence.
>
> B. [The parents of said child] are unable to adequately provide for his needs due to these behaviors.

When the adjudication hearing was held, the child was in the care of the Department of Social Services, pursuant to a detention order of the juvenile court. Although the transcript of the detention hearing is not in the record, the record before us indicates that neither the parents nor the child's guardian ad litem resisted detention when that matter came on for hearing on June 26, 1989.

On August 29, 1989, the guardian ad litem, counsel for the State, and the child's parents with their counsel were present at the adjudication hearing to determine whether the child was a juvenile under § 43-247(3)(a). Before the hearing began, the guardian ad litem moved that the matter be continued to a later date, so the child could be present to enter a plea. The motion was denied. The guardian ad litem, on the child's behalf, then attempted to offer a plea denying the petition's allegations that concerned the child's behavior. The court refused to accept the guardian's plea on behalf of the child, stating that the petition

was directed against the parents, not the child, and that the court knew of no reason why the child would respond to a petition in which no charges were alleged against him.

The record indicates that the parents had been apprised of their rights at the time of the detention hearing. At the adjudication hearing, the parents admitted the jurisdictional allegations contained in the petition. As a factual basis for the pleas, the father recited two instances in which he and his wife were unable to cope with the child's behavioral problems. The father reported one occasion where the child allegedly poured alcohol in an infant's bottle, from which the infant then drank. On another occasion, when the child was receiving counseling at a psychiatric hospital, he allegedly became verbally and physically violent, flipped over a table, hit a counselor in the stomach, and insulted his father.

The court received two exhibits as additional support for the parents' pleas. One exhibit, a hospital discharge summary, showed that the child was admitted on April 12, 1989, to Lutheran Medical Center to be treated for depression, and was discharged on May 26, 1989. This summary showed the child had a history of "suicidal ideation and recently jumped into twelve feet [sic] water in an attempt to drownd [sic] himself." The summary referred to other actions of the child which were dangerous to himself or others, and further set out that at the time of his admission, the child "was mildly agitated and looked very sad." A report of a psychological evaluation conducted when the child was admitted to the hospital was also received by the court. The evaluation supported the conclusions of the discharge summary.

Based on the parents' admissions, the factual basis of the father's testimony, and the two exhibits, the court accepted the pleas, found that the child was within the meaning of § 43-247(3)(a), and set the matter for disposition. The guardian ad litem appeals, alleging that the juvenile court erred (1) in refusing to accept a plea of denial on the child's behalf, (2) in holding an adjudication hearing without the child's being present, (3) in failing to accord the child an evidentiary hearing, and (4) in determining that a preponderance of the evidence established that the child was within the meaning of

§ 43-247(3)(a).

The first three assignments of error can be summarized as contending that the adjudication under § 43-247(3)(a), without permitting the child to attend or at least to enter a plea, denied the child his right of procedural due process. As stated previously, the court rejected a plea of denial offered by the guardian ad litem on behalf of the child. The procedures for an adjudication of a petition filed under § 43-247(3)(a) are set out in Neb. Rev. Stat. § 43-277 (Reissue 1988). Although that section does not provide a child with a procedure whereby he can respond to allegations brought against his parents under § 43-247(3)(a), § 43-277 does require the appointment of a guardian ad litem for the child in such proceedings.

The role the guardian ad litem plays in § 43-247(3)(a) cases is not specifically set out by statute, nor has it been specifically determined by this court. However, with respect to a proceeding involving the termination of parental rights, we have stated: " 'Generally speaking, a guardian ad litem appears to be an individual who steps into the position of the minor and, after considering the alternatives, asserts the right of the minor as the guardian ad litem sees fit. . . .' " *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 389, 431 N.W.2d 611, 612 (1988). We see no reason why the guardian ad litem's basic role would be any different in cases involving jurisdictional proceedings filed under § 43-247(3)(a).

Appellant contends that the child should have been provided an opportunity to enter a plea. Appellant correctly points out that had a petition been brought under § 43-247(3)(b) by reason of the child's being "wayward or habitually disobedient [and] uncontrolled by his or her parent," the child would have been afforded an opportunity to respond to the allegations concerning his conduct in satisfaction of the requirements of due process. See Neb. Rev. Stat. § 43-279 (Reissue 1988). An adjudication under § 43-247(3)(b) involves allegations of juvenile misconduct akin to a criminal proceeding. As such, the proceedings clearly require the procedural safeguards set out in § 43-279, allowing the child an opportunity to respond to the allegations directed at him or her.

An adjudication under § 43-247(3)(a), on the other hand, as

in this case, involves allegations that the juvenile was homeless or destitute, or without proper support through no fault of the juvenile's parents. The allegations of conduct concern the activities of the parents, not the juvenile. In that situation, the parents must respond to the charges. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). Therefore, in proceedings under § 43-277, the child is not required to enter a plea. Unlike under § 43-247(3)(b), allegations filed pursuant to § 43-247(3)(a) are not directed at the child, but instead are directed at the parents. In this case, the trial court did not err in denying the juvenile the right to enter a plea.

Further, we cannot say that the court erred in not permitting the child to be present at the adjudication hearing. Such a determination is within the discretion of the juvenile court. Where the child is an infant or incompetent, there would not be the necessity that the child be present. In this case, the presence of the child might have exacerbated the bad feelings between the child and his parents. The court did not err in this regard.

This is not to say that children are without legal rights which must be protected in proceedings under § 43-247(3)(a). The child is vitally concerned in any such proceedings, and, while it is generally presumed that parents act in the best interests of their children, it is conceivable that the best interests of the child are not always what the parents contend. See *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

In participating in § 43-247(3)(a) proceedings and asserting the rights of the minor, the guardian ad litem is entitled to investigate the allegations and prepare a report to the court. The guardian ad litem is also entitled to participate fully in the proceedings before the court in both adjudication and disposition hearings.

The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

> The State's jurisdiction "arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants . . . .

> "....
>
> "The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms."

In re Interest of R.A. and V.A., 225 Neb. 157, 168, 403 N.W.2d 357, 365 (1987). A guardian ad litem appointed under § 43-277 to represent a juvenile affected in a § 43-247(3)(a) proceeding must be given the right to participate meaningfully in the § 43-247(3)(a) adjudication.

In this proceeding, the guardian ad litem did participate and ultimately appealed the case. The trial court did permit the guardian ad litem to participate and did not err in that regard.

The fourth assignment of error has merit and requires reversal. The section of the juvenile code on which the court relied in its adjudication, § 43-247(3)(a), provides, in part, that the juvenile court shall have jurisdiction of "[a]ny juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent...."

The question presented is whether a preponderance of the evidence establishes that the child is a juvenile who is homeless or destitute or without proper support of his parents, within the meaning of § 43-247(3)(a), because the child needs help which the parents cannot supply.

> In an appeal from an adjudication in a juvenile court under § 43-247(3)(a), the Supreme 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 Supreme 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.

In re Interest of D.S., 232 Neb. 345, 346, 440 N.W.2d 477, 478 (1989). We note that the *D.S.* case was concerned with a different portion of § 43-247(3)(a), concerning a child alleged

to be one lacking proper parental care "by reason of the fault or habits of his or her parent . . . ."

The record shows that the child was physically abused by his biological mother and sexually abused by a relative prior to being adopted, at the age of 5, by his parents appearing in this case. Evidence shows that the child has severe emotional problems. A psychological evaluation indicated that the child reported experiences of visual and auditory hallucinations and that he has a conduct disorder. During his 6 weeks of hospitalization, the child was diagnosed as having an identity disorder, dysthymia, enuresis, and oppositional defiant disorder, and he was placed on the medication imipramine. According to the hospital discharge summary, the child exhibited numerous problems with aggression throughout the period of his hospitalization.

The State contends that the parents lack insight into the child's emotional problems and this lack of insight frustrates their efforts to either grasp or cope with their child's behavior. Their inability to understand the nature of the child's behavior causes the parents to react in an authoritarian manner. It appears that the child had complex problems and that his parents were unaware of those problems and were incapable of responding to his particular needs.

The dispositive fact in this appeal is that the record does not set out any factual basis for the acceptance of the parents' admissions at the adjudication hearing in the juvenile court. As set out above, the father's testimony as to the factors showing the parents could not cope with the child's behavior was (1) that the child had put alcohol in an infant's bottle, from which the infant then drank, and (2) that D.D.P. had become physically and verbally violent at the psychiatric hospital, toward both his father and hospital personnel.

These factors might well support a determination that the parents, through no fault of their own, cannot properly handle their child, and, therefore, the child was lacking "proper support through no fault of his parents," within the meaning of § 43-247(3)(a). Both of these incidents, however, occurred either before or during the child's treatment at the hospital and are referred to in the discharge summary and psychological

report.

Specifically knowing those factors, and after specifically recognizing the parents' inabilities, the physician concluded in the discharge summary:

> At the time of discharge, he [the child] will be taking Imipramine 75mg po qhs. We will send him back to the adoptive parent home to re-attend school, take his Imipramine and be followed in the office in individual therapy. We have recommended the family be involved in family therapy....

Included in the psychological report given to the physician who prepared the discharge summary is the sentence "Family therapy is indicated for this boy to see what dynamics exist within the family." There can be no doubt that after 6 weeks of treatment, the physician believed the child should be returned to his family. There is nothing in the record, based on facts occurring after the child's discharge, to the contrary.

The child was discharged on May 26, 1989. A petition was filed in juvenile court on June 15, 1989. There is no testimony of any occurrences between those two dates. Nevertheless, the juvenile court's order of August 29, 1989, provided, in part, that "said child should remain in the temporary custody of Nebraska Department of Social Services for appropriate care, education and maintenance...."

Such order is not supported in any way in the medical testimony before the juvenile court. After 6 weeks of treatment, the physician determined the child should be sent back to his parents, not placed in the custody of the department. Yet, according to the petition, the child was in the custody of the Department of Social Services when the petition was filed on June 15. There could have been incidents in the time between May 26 and June 15 that would establish a factual basis for the admissions and would justify the court order, or perhaps a psychological evaluation would indicate the parents are incapable of responding to the child's needs, but such evidence is not in the record before us.

In light of the undisputed reports before the court, the two incidents arising before the child was discharged from the hospital do not provide a sufficient factual basis for the court's

order.

Since there was no evidence to support the juvenile's adjudication, that order of adjudication is reversed.

REVERSED.

CAROLYN HENSMAN, INDIVIDUALLY AND FOR HER MINOR CHILDREN, KASSONDRA LEA HENSMAN AND ALICIA MARIE HENSMAN, APPELLANT, V. PAUL PARSONS AND TAMERA PARSONS, APPELLEES.

458 N.W.2d 199

Filed July 20, 1990. No. 89-1244.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by the Supreme Court de novo on the record, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Appeal and Error.** An issue not properly presented to and passed upon by the trial court may not be raised on appeal.
3. **Parental Rights: Adoption: Proof.** The burden is on the natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
4. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
5. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
6. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
7. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts: Intent: Appeal and Error.** When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances. Such findings will be upheld on appeal unless they are clearly erroneous.
9. **Child Custody.** Under Nebraska law, the best interests of the child must always be considered in determining matters of child custody.

10. **Parental Rights: Adoption: Proof.** A natural parent seeking to revoke a valid relinquishment has the burden of showing that the best interests of the child require revocation.

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

Audrey S. Ellison for appellant.

Dennis E. Martin for appellees.

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

FAHRNBRUCH, J.

Carolyn Hensman appeals an order of the district court for Douglas County discharging a writ of habeas corpus under which she sought to have the two children she had relinquished for adoption returned to her. The district court concluded that Hensman had permanently relinquished her parental rights to the children. We affirm.

A decision in a habeas corpus case involving the custody of a child is reviewed by the Supreme Court de novo on the record, *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 419 N.W.2d 531 (1988); *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987). In a de novo review of a record, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. See *In re Estate of Widger, ante* p. 179, 454 N.W.2d 493 (1990).

On Saturday, June 3, 1989, appellant contacted the appellees, Paul and Tamera Parsons, inquiring whether they were interested in adopting her 6- and 17-month-old daughters. Hensman stated that she needed an answer by the next day, but she agreed to let the Parsonses have the children overnight to help them reach their decision. On Sunday, June 4, 1989, the appellees told Hensman that they wished to adopt the children but wanted to contact an attorney to assure that the adoption would be permanent. Appellant agreed to the Parsonses' condition.

On June 5, 1989, at the office of appellees' attorney,

Hensman executed two separate consents and relinquishments for the adoption of her daughters by the Parsonses. Thereafter, having sold some of her belongings, Hensman left the State of Nebraska, spending some time in Minneapolis, Minnesota, as well as in Des Moines, Iowa. In early July 1989, appellant called the Parsonses and requested the return of the children. The Parsonses refused.

Hensman petitioned the trial court for a writ of habeas corpus, contending that (1) she did not fully understand the significance of the relinquishments, (2) she could revoke the relinquishments because a decree of adoption had not yet been entered, and (3) at the time of the execution of the relinquishments, she was under the effect of antidepressant medication and undergoing great mental anguish due to personal difficulties.

At the hearing on appellant's petition, Parsonses' attorney, who was also their counsel at trial, testified that appellant reviewed the relinquishments and, prior to execution, the attorney questioned Hensman as to whether she understood the contents of the relinquishments and whether she understood that execution of the documents was a permanent relinquishment of her children. The attorney testified that Hensman said she had read the relinquishments, that she understood them and that it was her desire to execute them, and that she understood the serious nature of her actions.

Appellant admitted that she understood she was giving custody of her children to the Parsonses. Hensman contended, however, that no one explained the relinquishments to her. She claimed she only gave temporary custody to the Parsonses and could change her mind. Hensman also asserted that the relinquishments were not entered into voluntarily and knowingly because, at the time of the relinquishments, she was depressed, under a lot of stress, and was taking medication. Hensman conceded that the word "temporary" did not appear in the relinquishments.

After the hearing, the trial court found that the relinquishments were ambiguous because on the one hand, they gave the impression that they were permanent, but on the other hand, they stated that the relinquishments were irrevocable

upon the entry of a decree of adoption. Despite the ambiguity, the trial court concluded from the facts of the case that appellant knew that the relinquishments were taking place and that they were for the purpose of adoption by the Parsonses, that Hensman understood the relinquishments to be absolute and permanent, and that having this knowledge, she knowingly and voluntarily executed the relinquishments. The trial court found that the relinquishments complied with Nebraska statutes. The trial court also found that appellant's ability to understand the events surrounding the execution of the relinquishments was not impaired by medication and that, despite evidence of emotional stress, appellant executed the relinquishments knowingly and voluntarily. The trial court further determined that it was in the best interests of the children to adhere to the terms of the relinquishments.

On appeal, Hensman contends the trial court erred (1) in finding that the relinquishments complied with Neb. Rev. Stat. § 43-106.02 (Reissue 1988); (2) in failing to find that appellant had revoked the relinquishments pursuant to Nebraska law; (3) in finding that appellant knew the relinquishments were absolute and permanent; (4) in finding that appellant knowingly and voluntarily executed the relinquishments; (5) in finding that the relinquishments were valid while also finding that they were ambiguous; (6) in receiving the testimony of appellees' attorney, in violation of DR 5-102 of the Code of Professional Responsibility; (7) in utilizing the best interests standard for terminating appellant's parental rights; and (8) in finding that adherence to the relinquishments was in the best interests of the minor children.

Hensman first claims the trial court erred in concluding that the relinquishments complied with all the statutory requirements for a valid relinquishment. Specifically, appellant contends that the requirements of § 43-106.02 were not met because she was never presented with nonconsent forms. A review of the record reveals that the issue of presentation or nonpresentation of nonconsent forms was not presented to the trial court. An issue not properly presented to and passed upon by the trial court may not be raised on appeal. *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989).

Appellant's first assignment of error is not properly before this court.

Hensman's second through fourth assignments of error are inextricably related and will be considered together. In sum, appellant argues that the trial court erred in finding that she executed the relinquishments voluntarily and knowingly and that she knew they were absolute and permanent. Hensman also contends that the trial court erred in failing to find that she had revoked the relinquishments.

The burden is on the natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given. *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987). In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid. *Id.*

Hensman claims that a number of forces impacted upon her decision to sign the relinquishments so as render her acts involuntary and the relinquishments invalid. Appellant argues (1) that she was in an unsettled state of mind and suffering from depression, (2) that she was being treated by a physician for premenstrual syndrome, and (3) that the Parsonses caused the relinquishments to be executed in haste.

Although appellant may have been in a somewhat unsettled state of mind and suffering from depression at the time of the relinquishments, her assertion that her condition rendered the relinquishments invalid is without merit. This court has made it clear that stress alone, whether financial or personal, does not rise to the level of duress that would negate a valid relinquishment. See, *Gaughan v. Gilliam, supra*; *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985); *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971).

In her petition, Hensman alleged that her reasoning was affected by antidepressant medication. Dr. Ziad Zawaideh, a family practice physician who was treating Hensman, testified that he had prescribed a diuretic for her which simply relieved symptoms connected with premenstrual syndrome. Dr. Zawaideh stated that the purpose of the diuretic was to alleviate the physical discomforts of bloating and water retention. No

other medications had been prescribed for appellant. The doctor, in fact, stated that the diuretic would not affect appellant's thinking processes.

The evidence clearly demonstrates that Hensman comprehended the effects of executing the relinquishments. Witnesses who had been privy to the execution of the relinquishments, including appellant's witness Tammy Haden, testified that prior to the execution of the relinquishments, appellant was asked whether she read the documents, whether she understood the contents thereof, and whether her execution was her voluntary act. Hensman was further advised that execution of the documents was a permanent surrender of her children. Hensman acknowledged that she had read the documents and understood their contents and their permanency, and she stated that she wanted to relinquish her daughters. Hensman also actively participated in the relinquishment process, completing the necessary adoption medical history forms and an authorization for the release of the children's medical information.

Appellant's actions before and after the relinquishments were signed also evidence that she acted voluntarily and knowingly. Hensman initiated the contact with the Parsonses, requesting that they take custody of her children. Appellant had previously considered relinquishing her youngest child to the appellees but reconsidered. She ultimately requested the Parsonses to take two of her children.

Hensman clearly understood the consequences of her actions. She was properly informed and voluntarily and knowingly relinquished her children for adoption.

With regard to the permanency of the relinquishments, Hensman claims that she was only granting temporary custody of her children to the Parsonses and that the Parsonses caused the relinquishments to be executed in haste. Neither of these claims is supported by the evidence. Both the appellant and the Parsonses testified that there were no conversations between them evidencing that the custody was temporary. Hensman placed her children with appellees on June 3, stating that she had to have an answer from the Parsonses by the next day. Appellees advised Hensman that they would only agree to take

custody of the children if it was on a permanent basis. On June 5, appellant executed the relinquishments to assure that the relinquishments were permanent. She sold her furniture and left the state. There was no evidence that Hensman retained any responsibility for the children once she placed them with the Parsonses, and Tamera Parsons testified that no provisions were made by Hensman to care for the children, financially or otherwise.

From a de novo review of the record, we conclude that the relinquishments and consents were voluntarily and knowingly executed by Hensman and that appellant failed to meet her burden of proof to establish the contrary. The evidence also demonstrates that appellant knew the relinquishments were absolute and permanent. That Hensman may have changed her mind at some time after she had relinquished her children is insufficient to invalidate the earlier consent. Having determined that the relinquishments were voluntary, we conclude it is not necessary for this court to consider the question of their attempted revocation. See *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987).

Appellant next asserts that the trial court's finding that the relinquishments were valid is inconsistent with its finding that they are ambiguous, is contrary to law, and is not sustained by the evidence.

The two relinquishments signed by Hensman were identical except for the names and birth dates of the children. The second paragraph of each document states:

> I therefore acknowledge that should *I hereby relinquish said* [*children*] *for adoption that such relinquishment is irrevocable* and that knowing such, I nevertheless hereby consent to the adoption of said minor [children] by [Paul and Tamera Parsons] and I hereby freely and voluntarily, with full knowledge and understanding, relinquish all right to the possession, custody and control from this day forward forever . . . that said [children] shall be adopted to be hereafter forever the [children] of [Paul and Tamera Parsons].

(Emphasis supplied.) The third paragraph of each relinquishment provides:

> I further acknowledge that I fully understand the significance of this consent and relinquishment and the fact that it is *irrevocable upon the entry of a decree of adoption* by the County Court of Douglas County, Nebraska....

(Emphasis supplied.) The final paragraph of each relinquishment states:

> I therefore hereby execute this relinquishment and consent to adoption of my minor [children] and I do hereby *voluntarily relinquish . . . all right to and custody of and power over and control over my minor* [*children*] *that said* [*Paul and Tamera Parsons*] *may become the legal parents of said* [*children*] and I hereby waive the service of any and all notice in any proceedings for adoption.

(Emphasis supplied.)

In *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989), we stated:

> Whether a document is ambiguous is a question of law initially determined by a trial court. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). "Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).
>
> Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). See, also, *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties).

We conclude, as did the trial court, that the relinquishments are ambiguous in that the documents contain language which reasonably leaves the impression that relinquishment is

permanent and not revocable and also gives the impression that the relinquishment is revocable until a decree of adoption is entered.

However, it is not inconsistent or contrary to law for the trial court to have concluded that the relinquishments were ambiguous and to have also concluded that they were valid. When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances. Such findings will be upheld on appeal unless they are clearly erroneous. See, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). The evidence clearly demonstrates that Hensman understood the relinquishments to be absolute and permanent. The trial court's findings in this regard are not erroneous. This assignment of error is without merit.

Relying on DR 5-102 of the Code of Professional Responsibility, appellant next asserts that the trial court erred in receiving the testimony of the Parsonses' attorney, who was also appellees' counsel at trial. The record clearly reflects, however, that Hensman entered into an agreement to allow the Parsonses' attorney to testify at trial and raised no objection at any time thereafter. Appellant's failure to object to the Parsonses' attorney's testifying at trial precludes appellate review of this issue. See, generally, *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989).

Hensman finally asserts that the trial court's utilization of the best interests standard for terminating her parental rights is contrary to law and not sustained by the evidence. Appellant also contends that the trial court erred in finding that adherence to the relinquishments was in the best interests of the minor children.

Appellant cites numerous cases in support of her proposition that the trial court must find that she was an unfit parent before it can terminate her parental rights. First, none of the cases appellant cites involve the relinquishment of a child by a parent for adoption. Thus, these authorities are inapplicable to this matter. Second, this is not a juvenile court proceeding terminating Hensman's parental rights under Neb. Rev. Stat.

§§ 43-291 et seq. (Reissue 1988), but, rather, it is a consent and relinquishment for adoption pursuant to Neb. Rev. Stat. §§ 43-101 et seq. (Reissue 1988).

Under Nebraska law, the best interests of the child must always be considered in determining matters of child custody. See *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981) (relinquishment). See, also, *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987) (relinquishment); *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985) (relinquishment).

> The rule in Nebraska is that a natural parent "can, by agreement, surrender the custody of his infant children to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of the children, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it." *State v. Nebraska Children's Home Society*, 94 Neb. 255, 263, 143 N.W. 203, 206 (1913).

Lum v. Mattley, supra at 791, 305 N.W.2d at 880.

Thus, a natural parent seeking to revoke a valid relinquishment has the burden of showing that the best interests of the child require revocation. *Lum v. Mattley, supra*.

> The rule's focus on the child's best interests recognizes that it is the child who will bear the brunt of the impact of revoking a valid relinquishment, by being uprooted and shifted from home to home. To focus instead upon any "right" of a relinquishing parent to change her mind would ignore the fact that parental rights are no longer an issue after a valid relinquishment and would further abrogate our responsibility to the best interests of the child.

Id. at 792, 305 N.W.2d at 880-81.

A careful review of the record fails to demonstrate that it is in the children's best interests that the relinquishments be revoked and the children be returned to appellant. Appellant did not meet her burden of proof in that regard.

The trial court's judgment is affirmed.

AFFIRMED.

CAPORALE, J., concurring.

I write separately, not because I disagree with the result reached by the majority but because it seems to me that the majority has commingled two distinct aspects of the required analysis. This is perhaps best illustrated by the majority's statement that "the record fails to demonstrate that it is in the children's best interests that the relinquishments be revoked and the children be returned to" the mother. I respectfully submit that whether the mother has the right to revoke her relinquishments is a different question from whether, should she have that right, custody of the children must be returned to her. See, *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981); *State v. Nebraska Children's Home Society*, 94 Neb. 255, 143 N.W. 203 (1913).

As to the relinquishments, the majority correctly observes that whether a document is ambiguous is a question of law. Thus, the trial court's conclusion that the documents are ambiguous is meaningless because as to such a question we, as an appellate court, have an obligation to reach an independent conclusion. *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989). In determining that the relinquishments are ambiguous, the majority overlooks that the documents must be read as a whole and, if possible, effect must be given to every part thereof. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). It is clear to me that so read, the relinquishments provide that they become irrevocable only upon the entry of a decree of adoption.

It further seems to me that even if the relinquishments were ambiguous, the majority will have read them incorrectly, for it has ignored the rule that ambiguities are to be construed against the drafter. See *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

Thus, I would conclude that the mother could, and did, revoke her relinquishments. As indicated earlier, however, such resolution of that issue does not end the analysis because, as the majority correctly notes, in a habeas corpus action involving the custody of a minor, the child's best interests is a factor to be considered. *Lum v. Mattley, supra*. Moreover, the mother, as

the party seeking to change custody, had the burden of affirmatively demonstrating that the best interests of the children require that she regain custody. *Lum v. Mattley, supra.* Little of the record is devoted to that issue, and that little does not sustain the mother's burden in that regard. Thus, I, too, would affirm the judgment of the district court.

DELANE LUEHRING, APPELLEE, V. TIBBS CONSTRUCTION COMPANY AND BITUMINOUS INSURANCE COMPANIES, APPELLANTS.

457 N.W.2d 815

Filed July 20, 1990. No. 89-1262.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it; however, findings made by the Workers' Compensation Court which are not supported by credible evidence and are clearly wrong will be set aside.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
4. **Workers' Compensation: Words and Phrases.** Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jon S. Reid, of Kennedy, Holland, DeLacy & Svoboda, for appellants.

Robert E. Zielinski, of Byrne, Rothery, Lewis, Tubach, Zielinski & Peterson, for appellee.

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

CAPORALE, J.

Plaintiff-appellee, DeLane Luehring, brought this action when defendants-appellants, Tibbs Construction Company and Bituminous Insurance Companies, reduced his workers' compensation benefits. Defendants appeal from the judgment granting Luehring total disability benefits. Their three assignments of error combine to assert that the compensation court erred in finding (1) that Luehring continues to be totally disabled as a result of his work-related accident and (2) that efforts at vocationally rehabilitating Luehring would have been futile as of the date of the award. We affirm.

The injury which precipitated this action occurred on March 17, 1985, when, in the course of his employment with Tibbs Construction, Luehring, who is 49 years old and has but a high school education, fell approximately 20 feet from a ladder, fracturing his left hip and rupturing a disk in his back. Luehring suffered from low back pain after the fall, and a myelogram later revealed "a large defect at the L4-5 with possibly an additional defect at L3-4." On March 24, 1986, Luehring underwent a "laminectomy and disc excision L4/L5 on the right," but his symptoms were not alleviated by this procedure. Luehring then underwent a "posterolateral L4-5 spine fusion" on April 29, 1987. While this procedure did not eliminate his symptoms, Luehring did become involved in rehabilitative activities after the latter operation.

The record indicates that Luehring has been hospitalized with low back pain on at least two occasions since his April 29, 1987, operation, including once in May 1988 after he experienced a "sharp pain in the right low back" while changing a tire on his wife's car, and at least once in March 1989 when he was unable to "ambulate" after the "sudden onset of severe low back pain" occurring when he lifted a "small package" above his shoulders.

A May 11, 1988, letter to rehabilitation consultant Gail Leonhardt from Luehring's treating physician, Dr. H.R. Woodward, recites that Luehring had by that time reached maximum medical improvement, had a 30-percent permanent

partial disability of the body as a whole, and should be able to proceed with vocational rehabilitation for a job which would not require the lifting of more than 35 pounds.

Woodward later asked that Luehring complete a "functional capacities assessment." An October 12, 1988, "Work Capacity Evaluation" prepared by Don Anderson, who is apparently a physical therapist at Immanuel Medical Center in Omaha, states, in part:

> Based on observations of the patient's behavior and comparison of the actual data, I would conclude that the patient probably did not put forth his maximum effort within his pain tolerance throughout this evaluation. For example, the patient states he is unable to assume the testing position for the static strength leg test. He was, however, able to assume the exact same position and bend even further with his knees for the dynamic floor to knuckle lift. This indicates inconsistency in the patient's behavior and one has the tendancy [sic] to assume that the patient could have performed better than the actual numbers indicate. The patient is consistent in scoring in the lower 5-10 percentile of healthy males, however, I am unsure he gave maximum effort on each test.

After the work capacity evaluation resulting in the foregoing report, Woodward again wrote to Leonhardt, on January 16, 1989, observing that it was difficult to determine Luehring's disability and that the foregoing work capacity evaluation had not been very helpful. He then went on to state:

> Given [Luehring's] overall condition and my observation of him and knowledge of his treatment, as well as the results of the testing procedures, I would estimate [Luehring] should be able to be involved in light to moderate work activities which should allow him to lift an occasional 30 to 35 pounds and more frequently 10 to 15 pounds. I would ask him to avoid vigorous or uncontrolled twisting, turning and bending. Prolonged standing and walking would probably cause him to be symptomatic as well.

However, in another letter, written to Luehring's counsel on March 27, 1989, Woodward stated, in part:

> In regard to your specific questions, [Luehring's] hospitalization of 3/5/89 does not change my opinion of his permanent partial impairment of 30% of the whole man. This is, in fact, relatively generous considering the objective findings. I have not changed my opinion regarding his ability to perform light to moderate work activity based on objective findings. *I think it is unlikely that [Luehring] could cause "further injury to himself" by proceeding with the activities outlined above. He may not be able to tolerate this due to discomfort, but from an objective standpoint there is no evidence that he would cause any further damage to his low back.*

(Emphasis supplied.)

Leonhardt prepared, apparently on January 23, 1989, an "Appraisal of Work Readiness" regarding Luehring, which reads, in part:

> Throughout the whole rehabilitation process and especially since . . . Woodward's indication of Luehring's having reached Maximum Medical Improvement, attempts were made to counsel with Luehring regarding future work alternatives. This included options of on-the-job training, training and development of his own business, etc. In all of these conversations, Luehring stated that there was absolutely nothing he would be able to do. He stated that occasionally he has good days; however, the least bit of work activity can have him down on his back for two days at a time. He was totally unresponsive to rehabilitation efforts, stating repeatedly that there was nothing he would be able to do.
>
> Based upon . . . Woodward's observations . . . Luehring should be able to perform work activity ranging in weight from 10-35 pounds. It is indicated that 10-15 pounds could be done frequently. . . . Based upon this information, there are jobs which Luehring is capable of performing.

At trial, Luehring testified that his daily activities include light household chores, going for walks, "tinker[ing]" with a car, and "small things like that." Luehring testified that he begins to experience back pain after 5 to 30 minutes of activity and that he must then lie down. According to Luehring, the

length of time that he must lie down in order to relieve his back pain is variable, ranging from "an hour or two" to "a day or two." Luehring's testimony also indicates that he experiences back pain when he remains in a seated position for extended periods of 30 minutes or longer.

Leonhardt testified he had found jobs which Luehring could perform. However, cross-examination elicited the following exchange:

> Q How many of those employers are going to hire . . . Luehring, if he has to go in the hospital for a day or two at a time, he has to rest every couple of hours, with any type of activity, any prolonged sitting, any standing, walking, if — He may have to be off the job for two or three days at a time. How many of those employers that you've looked at would be willing to hire . . . Luehring?
>
> A I would suppose none of them.

In addition to the foregoing, a "Loss of Earning Capacity" report prepared by rehabilitation consultant Lynne Easterday concluded that based on the estimated restrictions outlined by Woodward, Luehring is no longer able to compete for approximately 50 to 60 percent of the jobs for which he had the opportunity prior to his injury, but that based on Luehring's own assessment of his physical capacities, he is no longer able to compete for approximately 80 to 100 percent of the jobs.

In its judgment the compensation court stated:

> [Luehring] exhibits certain objective symptoms but also has subjective complaints which, if believed, renders [sic] [him] unable to engage in any substantially remunerative employment. The Court believes that [Luehring] is truthful with respect to these subjective complaints.
>
> . . . .
>
> The Court does not believe that [Luehring] has failed to cooperate in efforts at rehabilitation. [His] physical and intellectual limitations lead the Court to conclude that vocational rehabilitation at this time would be futile. Accordingly, the Court makes no award of vocational rehabilitation presently, but will allow the parties to bring that issue before the Court at a later time if [Luehring's] physical condition changes so as to allow him to

> participate in some form of vocational rehabilitation training.

Defendants' first summarized assignment of error alleges that the compensation court incorrectly found that Luehring continues to be totally disabled. In making this assertion defendants state: "The plaintiff has the burden of proving the nature *and extent* of his claimed disability, and where the injury is not of an objective nature the disability must be established by expert medical testimony." (Emphasis supplied.) Brief for appellants at 9.

Defendants cite the following language from *Osborne v. Buck's Moving & Storage*, 232 Neb. 752, 754, 441 N.W.2d 906, 907 (1989):

> " 'Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.' "

Defendants then state: "In this case . . . Luehring suffered a lower back injury which was not plainly apparent. His current complaints are primarily of pain, as such, his condition is subjective requiring expert testimony or medical evidence to establish the nature and extent of his claimed disability." Brief for appellants at 9.

Regardless of whether Luehring's injury is "plainly apparent" in this case, the medical evidence contained in the record clearly shows that his condition was caused by the injury which arose out of and in the course of his employment. The thrust of defendants' argument, however, is that the opinion of a medical expert is required to show not only the cause of a claimed disability, but also the *extent* of the disability. Contrary to such an assertion, once the cause of a disability has been established, this court has allowed the compensation court to consider the testimony of the claimant in determining the extent of the claimant's disability. See, *Sherwood v. Gooch Milling & Elevator Co., ante* p. 26, 453 N.W.2d 461 (1990); *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988).

In the present case, Woodward provided evidence that

Luehring would not further injure himself by engaging in limited activity, but qualified that conclusion by stating: "He may not be able to tolerate this due to discomfort, but from an objective standpoint there is no evidence that he would cause any further damage to his low back." Luehring testified that he begins to experience back pain after 5 to 30 minutes of activity and that he must then lie down in order to relieve the pain.

Citing such evidence, defendants place considerable reliance upon *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 236, 430 N.W.2d 550, 552 (1988), in which this court stated: "In the state of the present record, considering the absence of evidence as to plaintiff's capability to perform other jobs for which he is, or could be made to be, qualified, it would appear that additional evidence addressing this situation is necessary." The *Kleiva* court then remanded the cause for further proceedings.

The present case is easily distinguishable from *Kleiva*. Here, the record contains the reports of two rehabilitation consultants. One report, relying upon Woodward's observations, concludes that "there are jobs which Luehring is capable of performing." The other report concludes: "At worst, based on . . . Luehring's self-reports of his physical capacities, he would . . . be totally disabled for all practical purposes." Thus, the compensation court was faced with conflicting evidence concerning the extent of Luehring's disability and resolved the issue in Luehring's favor.

Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it. *Sherwood v. Gooch Milling & Elevator Co., supra*; *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990). However, findings made by the Workers' Compensation Court which are not supported by credible evidence and are clearly wrong will be set aside. *Kleiva v. Paradise Landscapes, supra*. In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Sherwood v. Gooch Milling & Elevator Co., supra; Carter v. Weyerhaeuser*

Co., supra. Moreover, as the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Carter v. Weyerhaeuser Co., supra*.

Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Sherwood v. Gooch Milling & Elevator Co., supra*; *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984).

The record in this case presents sufficient evidence to support the compensation court's finding that Luehring is presently totally disabled.

Defendants' second summarized assignment of error alleges that the compensation court erred in finding that efforts at vocationally rehabilitating Luehring would have been futile as of the date of the award. In discussing this assignment of error, defendants contend that Luehring's benefits should be suspended or reduced because Luehring has been "unresponsive" to vocational rehabilitation. In presenting this argument defendants rely upon Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988), which states:

> *Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated* to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education, if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the compensation court or judge thereof to be suitable for him or her or refuses to be evaluated under

> the provisions of subsection (3) of this section, the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

(Emphasis supplied.)

Although the record suggests that Luehring displayed a pessimistic attitude toward prospects for rehabilitation, it nonetheless supports a conclusion that Luehring did not refuse to cooperate in such efforts. For example, Leonhardt testified that Luehring "cooperated in terms of meeting me for appointments, but as far as — I guess he was really kind of unresponsive to the vocational things, claiming that he couldn't do them." Given the previously discussed evidence of Luehring's physical condition as of the date of the hearing resulting in the judgment from which this appeal is taken, it cannot be said the compensation court was clearly wrong in determining that vocational rehabilitation efforts would have been futile at this time.

Accordingly, the judgment of the compensation court must be, and hereby is, affirmed. Luehring is awarded the sum of $1,500 to apply toward the services of his attorney in this court. See Neb. Rev. Stat. § 48-125 (Reissue 1988).

AFFIRMED.

BOSLAUGH, J., dissenting.

The issue in this case is the extent of the plaintiff's disability resulting from his back injury. The award of total disability appears to be based upon testimony of the injured worker rather than upon expert medical evidence.

The burden was upon the plaintiff to establish the extent of his disability, and it has long been the rule of this court that such an injury requires expert medical evidence to establish not only the causal relationship, but the extent of the disability resulting from the injury. Unless that rule is to be abandoned, the record in this case does not support an award of total disability.

HASTINGS, C.J., joins in this dissent.

ANTHONY R. CAPALDI, APPELLEE, V. MYRNA A. CAPALDI, APPELLANT.

457 N.W.2d 821

Filed July 20, 1990. No. 89-1276.

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

Myrna A. Capaldi, pro se.

Van A. Schroeder, of Bertolini, Schroeder & Blount, on brief, for appellant.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellee.

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

PER CURIAM.

Myrna A. Capaldi appeals an order of the district court for Sarpy County modifying a dissolution of marriage decree by changing the custody of her daughter and her son from their mother to their father. We affirm.

Among her assignments of error, the appellant complains that the trial judge should have recused himself from the trial of the petition for modification of the dissolution decree because he had answered letters from the parties. In each instance, the judge sent copies of his letters to both parties and to the children's guardian ad litem. He also received copies of the letters written by the parties to each other. The judge's letters indicate that he was attempting to smooth the transfer of the children from one parent to the other during times of visitation. Although nothing in the judge's letters reveals any favoritism or bias toward either the mother or the father, this court does not condone efforts by a judge, no matter how well intentioned, to settle differences between litigants, other than after a hearing on pleadings and evidence's being adduced in the court over which the judge presides. Because of a lack of showing of bias or favoritism toward either party in this case, at most, the refusal of the trial judge to recuse himself was harmless error.

The appellant also complains that her minor children were questioned in the judge's chambers without being sworn as witnesses. Questioning of the children was by the attorney for each party, by the guardian ad litem, and by the judge. The record reflects no objection by the appellant to that procedure at the trial. In fact, her attorney participated in the questioning. Generally, where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal. *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984). See, also, *State v. Shepherd, ante* p. 426, 455 N.W.2d 566 (1990); *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990). This assignment of error is without merit.

The ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Emme v. Emme, ante* p. 505, 455 N.W.2d 808 (1990); *Helms v. Helms,* 234 Neb. 630, 452 N.W.2d 269 (1990).

We have reviewed the record de novo, as we are required to do, and have determined that the trial court did not abuse its discretion. *Emme v. Emme, supra*; *Helms v. Helms, supra*.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF C.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.T., APPELLANT.

457 N.W.2d 822

Filed July 20, 1990. No. 89-1404.

1. **Parental Rights: Abandonment: Words and Phrases.** "Abandonment," for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

2. **Parental Rights: Abandonment: Intent: Proof.** Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988) is a question of fact and depends on parental intent, which may be determined by circumstantial evidence.
3. **Juvenile Courts: Parental Rights.** Parental visitation rights, as a subject within the Nebraska Juvenile Code, are matters for judicial determination.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Elizabeth C. Schrock for appellant.

Karen L. Vervaecke, guardian ad litem.

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

SHANAHAN, J.

Pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Reissue 1988), the separate juvenile court of Douglas County, on November 19, 1986, conducted an adjudication hearing attended by C.A.'s biological parents, lawyers for the parents, C.A.'s guardian ad litem, the State's attorney, and a representative of the Nebraska Department of Social Services (DSS). The court determined that C.A. was a juvenile within § 43-247(3)(a) (a child who is in a situation dangerous to life or limb or injurious to the health or morals of the child). On November 6, 1989, the juvenile court terminated parental rights concerning C.A., on account of parental abandonment of C.A. for more than 6 months immediately prior to the State's filing its petition for termination of parental rights. See § 43-292(1). C.A.'s mother, B.T., has appealed, but C.A.'s father has not appealed.

STANDARD OF REVIEW

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. [Citations omitted.] In the

> absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. [Citations omitted.] A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.

In re Interest of T.C., 226 Neb. 116, 117-18, 409 N.W.2d 607, 609 (1987); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

BACKGROUND

Adjudication and Disposition Proceedings re C.A.'s Father.

C.A. was born on January 13, 1982, to R.A. and B.T., who had been married since October 1979. The marriage of R.A. and B.T. was dissolved in September 1985, and R.A. was granted custody of his daughter, C.A.

In January 1986, after the Omaha Police Division received a complaint that R.A. was sexually abusing C.A., the child was placed in the temporary custody of DSS. On February 13, 1986, the State filed a petition and alleged that C.A. was a child within § 43-247(3)(a) on account of R.A.'s sexual misconduct with C.A. Pending adjudication, C.A. remained in the temporary custody of DSS. Also, during pendency of the adjudication proceedings, the child's mother, B.T., married J.T. on March 28, 1986, and requested temporary custody of C.A. in the proceedings pending before the juvenile court, a request which the court denied.

At the adjudication hearing on November 19, 1986, the court found the allegations of the State's petition to be true, determined that C.A. was a juvenile within § 43-247(3)(a), and, at a dispositional hearing on July 9, 1987, continued DSS' temporary custody of C.A. for placement with B.T. and J.T., the child's stepfather. The court further ordered that B.T. and J.T. participate in counseling and maintain a suitable residence and income, and also ordered that the child's father, R.A., submit to a psychological evaluation and maintain visitation

with C.A. under DSS supervision.

Subsequent Review Proceedings.

B.T. and J.T., without court approval, took C.A. to Joplin, Missouri, in December 1987. The court record does not disclose the reason for that change of residence. Around February 17, 1988, B.T. "decided that she no longer wanted to care for [C.A.]" and voluntarily gave C.A. to the Missouri Department of Social Services in Joplin, which, in turn, returned C.A. to DSS in Nebraska.

The court held a review hearing on February 23, 1988. B.T. did not attend the hearing, but remained in Joplin. The court ordered that C.A. remain in DSS' temporary custody for "appropriate foster care placement." On March 16, the court ordered that C.A. should receive therapy arranged by DSS. In April, B.T. filed, but later withdrew, a motion to transfer the proceedings to Missouri. Although notified, B.T. failed to attend additional review hearings held on June 21 and September 23, but was represented by her lawyer at those hearings, in which the court continued DSS' temporary custody of C.A. During the September hearing, the court was informed that C.A. was "experiencing a lot of depression from being abandoned by her mother."

Without having had any contact with C.A. for nearly a year, B.T. arrived in Omaha on February 10, 1989, with the expressed intention of regaining custody of her daughter. Kara Murphy, a juvenile court probation officer, told B.T. that she should meet with caseworkers for C.A. At a meeting on March 1, which included B.T.; Betty Burton, who was a Child Protective Services worker; C.A.'s therapist; and Murphy, B.T. was told that she would have to participate in counseling as a condition for visiting C.A. At a review hearing held on April 17, Murphy testified:

> I arranged counseling with Sue Willig from Lutheran Family Services for [B.T.]. I informed [B.T.] of the arrangement and I called the next day to see if she had made contact with this therapist at which time I was informed she had returned to Missouri. She later returned and notified her attorney that she decided prior to any

> counseling or any attempt to work on this issue that the problems of [C.A.] were too severe and she had changed her mind. She has decided she no longer wanted to be her — part of her life. It was decided at the meeting that even if [B.T.] decided not to try for reunification with [C.A.], she make a commitment to meet in therapy with [C.A.] to close out some old issues with her because she has severe feelings of abandonment and [B.T.] agreed to do that. She failed to do this.

B.T. did not attend the April 17 hearing, but was represented by counsel who, in reference to Murphy's testimony, conceded that "[e]verything that has been said appears to be correct." B.T.'s counsel did state, however, that B.T. was attempting to exchange letters with C.A. Also, at the April 17 hearing, the court, without objection, received Burton's DSS case report regarding the meeting between B.T. and the caseworkers for C.A.:

> A meeting was arranged for March 1, 1989, with [C.A.'s] primary therapist, Lisa Richardson, so that [C.A.'s] emotional state resulting from the relationship between her and [B.T.], could be explained. The therapist did explain [C.A.'s] complex needs and recommended that [B.T.] become involved in a plan. The plan included [B.T.'s] need to make a firm commitment to work hard and accept [C.A.] as she is because to give up again would be devastating and destroy [C.A.]. We explained that [C.A.] needed structure, consistency and nurturing and she needed to equip herself with these essential parenting qualities. She claims she really wanted reunification with this child. We explained that since she felt that she could not handle [C.A.] in the past, nothing had presently changed with [C.A.] that would make it any easier. She would need to make a commitment and stick by the commitment so that she could help [C.A.]. It is felt that by [B.T.'s] response, that she did not really want to accept any responsibility. Shortly after that meeting, she left town without any explanation. If she had made a commitment to work, an actual visit would have been arranged between her and [C.A.].

The child's father, R.A., did not attend the hearing. R.A. had never visited C.A. after the hearing in November 1988 and, since November 1988, had not participated in counseling ordered by the court.

At the conclusion of the April 17 hearing, the court ordered that C.A. continue receiving therapy and remain in DSS' temporary custody.

Termination Proceedings.

On May 2, 1989, the State filed a motion or petition to terminate the parental rights of B.T. and R.A. Regarding the child's mother, the State alleged that B.T. had abandoned C.A. "for a period in excess of six months immediately preceding the filing of said motion herein, to wit: [B.T.] has had no contact with said child, nor provided any financial or emotional support for said child for over one year." In her answer, B.T. denied that she had abandoned C.A., "in that on February 10, 1989, the natural mother returned to Omaha and immediately requested a visit with her daughter. This request was denied."

A hearing for termination of parental rights was held on November 6, 1989. Although C.A.'s parents had approximately 6 months' notice of the State's motion to terminate their parental rights, neither B.T., who was still residing in Joplin, nor R.A. appeared at the hearing, although B.T.'s lawyer appeared on her behalf.

At the termination hearing, Burton and Murphy recounted the circumstances regarding B.T.'s visit to Omaha in February 1989 and subsequent return to Missouri shortly after the March 1 meeting with C.A.'s caseworkers. Burton explained why it was necessary that B.T. participate in therapy before resuming contact with C.A.: "[B.T.] had taken [C.A.] to the Missouri Department of Social Services and indicated to them at that time that she didn't want to care for her and that [would be] devastating to [C.A.] for that to happen again." Murphy testified that B.T. stayed at the Vincent House, a shelter for the homeless, when she appeared in Omaha in February 1989. Murphy also testified that at the March 1 conference with C.A.'s caseworkers, B.T. was initially willing to stay a "few short months" so that she might be reunited with C.A.

However, B.T. departed for Missouri after arrangements for her counseling had been made.

Although B.T. did not present any witness at the termination hearing, it was noted that B.T. had sent C.A. four letters and a birthday card during the period when, according to the State, B.T. had abandoned C.A.

At the conclusion of the hearing, the court, having found that C.A. was a child within the meaning of § 43-247(3)(a), determined that the evidence clearly and convincingly established that C.A.'s parents, B.T. and R.A., had abandoned C.A. for the 6 months immediately preceding commencement of the termination proceedings, that is, the 6 months before the State filed its petition. See § 43-292(1). The court concluded that the best interests of C.A. required termination of parental rights and, therefore, terminated the parental rights of B.T. and R.A. concerning C.A.

ASSIGNED ERRORS

B.T. contends that the court erred in the conclusion that there was clear and convincing evidence of parental abandonment as a basis to terminate her parental rights concerning C.A. B.T. also argues that the court erred in finding that the termination of B.T.'s parental rights was in C.A.'s best interests.

TERMINATION OF B.T.'S PARENTAL RIGHTS

Concerning the termination of parental rights on account of abandonment, this court has recognized that

> [t]he Nebraska Juvenile Code provides that parental rights may be terminated when the best interests of a child require the termination of parental rights. See § 43-292. "A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987). "In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence." *In re Interest of T.C.*, 226 Neb. 116,

> 117, 409 N.W.2d 607, 609 (1987).
>
> Among the bases for termination of parental rights, § 43-292 includes: "(1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition . . . ."
>
> "Abandonment," for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. See *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988).

In re Interest of J.L.M. et al., 234 Neb. 381, 398, 451 N.W.2d 377, 388 (1990). Whether a parent has abandoned a child within the meaning of § 43-292(1) is a question of fact and depends on parental intent, which may be determined by circumstantial evidence. See *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988).

B.T. argues that she attempted to maintain physical contact with C.A. in February 1989, which would have been within the 6 months before the State filed its petition to terminate parental rights, but was denied contact by DSS and C.A.'s therapist. According to B.T., DSS "felt that it was more important for [B.T.] to jump through a series of 'commitment hoops' before she would be allowed to see her daughter." Brief for appellant at 11.

Regarding B.T.'s claim that she was improperly prevented from visiting C.A., we note that § 43-284 of the juvenile code provides:

> When any juvenile is adjudged to be under subdivision (3) of section 43-247, the court . . . may make an order committing the juvenile to the . . . (5) care and custody of the Department of Social Services. . . . The Department of Social Services shall have the authority to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

Section 43-284 does not authorize DSS to determine or place restrictions on parental visitation rights. Parental visitation rights, as a subject within the Nebraska Juvenile Code, are

matters for judicial determination. Illustrative of the need for judicial determination regarding a matter pertinent to children within a court's jurisdiction is *Ensrud v. Ensrud*, 230 Neb. 720, 729, 433 N.W.2d 192, 199 (1988), where the trial court, pursuant to a dissolution decree, ordered that physical custody of Ensruds' child was "exercisable as directed by the child custody officer." In disapproving of the trial court's delegatory action, we stated:

> In *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), this court considered and reversed a "trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation." *Id.* at 200, 297 N.W.2d at 762. In disapproving the judicially conferred authority for the psychologist's determination of visitation rights, this court stated: "Such delegation could result in the denial of proper visitation rights of the noncustodial parent. . . . The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties. [Citation omitted.]" *Id.* at 200-01, 297 N.W.2d at 762.
>
> . . . .
>
> A decision concerning physical custody . . . which necessarily involves ascertaining the best interests of the child, is a matter for constitutionally authorized judicial determination. Such judicial authority cannot and shall not be delegated to administrative personnel, who assist a court charged with the responsibility of determining the best interests of a child involved in a dissolution proceeding.

Ensrud, supra at 730-31, 433 N.W.2d at 199.

Notwithstanding DSS' lack of authority to determine parental visitation rights, the present appeal is distinguishable from *Ensrud* and *Deacon*, since the juvenile court did not grant or delegate to DSS any authority to determine visitation rights concerning C.A. B.T., who was represented by a lawyer, could have requested that the court examine DSS' directive that B.T.

obtain counseling as a condition for visiting C.A. However, B.T. chose to return to Missouri without any further contact with DSS or the court.

Furthermore, we also point out that B.T.'s actions during the 6 months preceding the State's motion to terminate cannot be viewed in total isolation from B.T.'s previous conduct and absence from C.A., especially since DSS' reluctance to allow B.T. to see C.A. was the result of B.T.'s past indifference to C.A.'s well-being. B.T.'s indifference was clearly exhibited in her voluntarily delivering C.A. to the Missouri Department of Social Services; in failing to have any contact with C.A., or to make any effort to contact the child, from February 1988 to February 1989; and, without excuse or justification, in failing to appear at court hearings in 1988 and 1989 concerning C.A. We note that child custody by DSS gives the department some authority similar to a guardian's authority. See § 43-285: "In any case when the court shall award a juvenile to the care of [DSS], the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department . . . ." In view of § 43-285, DSS, although lacking authority to determine parental visitation rights, was, subject to judicial review, authorized to set conditions beneficial for reestablishment of contact between C.A. and B.T. Overall, B.T. still had the ability to secure visitation rights through the juvenile court.

Thus, we conclude that B.T.'s 1989 appearance for a visit with C.A. in Omaha and DSS' response do not excuse or justify B.T.'s extended absence from C.A.'s life. B.T. also contends, however, that " 'physical presence' " is not a "pivotal requirement in a determination of abandonment," and, thus, contact was maintained with C.A. "throughout the six months immediately prior to the filing of the Petition" because "the record clearly shows that [B.T.] wrote letters and a card . . . ." Brief for appellant at 15.

" 'Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.' " *In re Interest of J.M.D.*, 233 Neb. 540, 543, 446 N.W.2d 233, 235 (1989). While we do not ignore B.T.'s letters and card to C.A., nevertheless, under the

circumstances, such actions by B.T., in the context of B.T.'s past behavior, are small tokens of parental affection for a child and an inadequate substitute for parental presence in a child's life.

From our de novo review of the record, we conclude that the evidence is clear and convincing that B.T. abandoned C.A. for a period of 6 months before the State filed its petition for termination of B.T.'s parental rights. It is also clear that the State has established that termination of B.T.'s parental rights is in the best interests of C.A.

Thus, we conclude that the juvenile court was correct in terminating the parental rights of B.T., and, accordingly, the juvenile court's judgment is affirmed.

AFFIRMED.

JOHN C. BINDRUM, APPELLANT, V. FOOTE & DAVIES AND LIBERTY MUTUAL INSURANCE CO., APPELLEES.

457 N.W.2d 828

Filed July 20, 1990. No. 89-1450.

1. **Workers' Compensation.** When an employee has reached maximum recovery, his or her remaining disability is permanent, and such employee is no longer entitled to compensation for temporary disability.
2. _____. The question of whether an injured employee has reached maximum medical improvement is a question for the Workers' Compensation Court as trier of fact.
3. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it; however, findings of the Workers' Compensation Court which are not supported by credible evidence and are clearly wrong will be set aside.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
5. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
6. _____. An employee, unless he or she is otherwise qualified to receive

temporary total disability benefits, is entitled to such benefits only while undergoing rehabilitation which has been ordered by the compensation court.

7. _____. Under the provisions of Neb. Rev. Stat. § 48-162.01(3) and (6) (Reissue 1988), an employee is entitled to vocational rehabilitation benefits when, as the result of a compensable injury, he or she is unable to perform work for which he or she has previous training or experience or when there is a reasonable probability that such rehabilitation will reduce the amount of earning power loss the employee would otherwise suffer.
8. _____. Whether an injured employee is entitled to vocational rehabilitation is a question of fact to be determined by the Workers' Compensation Court.
9. _____. When prescribed as the only form of appropriate vocational rehabilitation for an injured employee, direct job placement is vocational rehabilitation within the meaning of Neb. Rev. Stat. § 48-121(5) (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Jay L. Welch and Alan M. Thelen, of Rickerson, Welch & Kruger, for appellees.

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

CAPORALE, J.

Plaintiff, John C. Bindrum, appeals from an award of the Workers' Compensation Court on his petition for compensation benefits as the result of an accident arising out of and in the course of his employment with defendant-appellee Foote & Davies, a commercial printing firm. Bindrum assigns as error, in summary, (1) the compensation court's finding that he reached maximum medical recovery as of December 12, 1988, and (2) its failure to award him temporary total disability benefits from December 13, 1988, until such time as he successfully completes vocational rehabilitation and has been returned to the work force. We direct that the judgment of the compensation court be affirmed as modified by this opinion.

Bindrum, a high school graduate who was 35 years old at the time of the trial from which this appeal was taken, sustained injury on October 28, 1987, when a defective wrench he was using to tighten a roll of paper in connection with his duties as a

"second perfecting operator" slipped and, in his words, "wrenched [his] upper back between [his] shoulder blades, up around [his] left shoulder," as the result of which he felt "kind of a pulled muscle type tearing sensation." He nonetheless continued performing the same duties at work until early November 1987, when he was moved to a job involving lighter duty and consequently less pay. Effective January 4, 1988, Bindrum was demoted because of his poor performance. Sometime in September or October 1988, he was dismissed because of his inability to perform the necessary work. According to a stipulation of the parties, Bindrum was temporarily totally disabled from the time he was discharged until at least December 12, 1988.

Bindrum participated in physical therapy from January 14 until February 2, 1988. At the end of that time, his physical therapist stated: "Objectively, I have difficulty finding a problem with [Bindrum's] back, either at the musculotendinous or spinal joint areas. I am also not sure how much effect the present physical therapy is having on his problem." Accordingly, physical therapy was discontinued.

On February 10, 1988, Bindrum was examined by Dr. Paul G. Dworak, an orthopedic surgeon, who determined that Bindrum suffered "diffuse interscapular pain" and that his "symptoms seem to be more of a ligamentous nature and this is sometimes very difficult to totally alleviate." As of March 1, 1988, Dworak recommended that Bindrum remain "on light duty at work for the next month to allow this ligamentous/muscular disorder to heal itself since it has been going on for a significant amount of time." Subsequently, in an October 7, 1988, letter to the claim representative for defendant-appellee Liberty Mutual Insurance Co., the workers' compensation insurance carrier for Foote & Davies, Dworak stated:

> When I examined Mr. Bindrum the vast majority of his clinical symptoms seemed to be secondary to mild fascial etiology of his interscapular pain. . . . Prior to being seen by myself he had undergone a work hardening program in physical therapy . . . which did not prove to be very beneficial.

> Finally we underwent an MRI scan of his thoracic spine . . . . There is absolutely no evidence of any disc herniation.
>
> . . . [W]e are reaching maximum medical benefit since he still has persistent symptoms almost a year to the date. He has exhausted all medical treatment to the present time.

Dworak suggested that Bindrum consider vocational rehabilitation if unable to return to previous employment.

Dr. John C. Yeakley, also an orthopedic surgeon, examined Bindrum on December 12, 1988, and stated in a letter to Bindrum's attorney that he was unable to detect any neurological impairment of Bindrum's spine and diagnosed Bindrum as suffering "from a posttraumatic myofascial pain syndrome involving the paravertebral and periscapular musculature of the mid and upper thoracic region." According to Yeakley, Bindrum's condition "is due directly to the injury in question . . . ." Yeakley recommended "oral anti-inflammatory medications, physical therapy on an intermittent basis as necessary, work activities within his tolerance limits, and avoidance of any heavy lifting and carrying, twisting of the trunk, stooping, and working at shoulder level or above." Yeakley stated, "I see no indication for further diagnostic studies nor do I feel that his problem is amenable to surgical intervention."

Subsequently, in a February 3, 1989, letter to Foote & Davies' attorney, Yeakley stated that because he had not examined Bindrum since December 12, he was unaware of Bindrum's current condition and therefore was unable to determine whether Bindrum "has reached maximum medical benefit." Yeakley reported: "As of the time I last saw him, I would consider him to have a 3 percent permanent physical impairment in the body as a whole due to his strain injury."

Dworak also evaluated Bindrum's permanent physical impairment and determined, according to a February 14, 1989, letter to Foote & Davies' attorney: "[Bindrum] would be rated at 3.5 percent permanent physical impairment and loss of physical function to the <u>whole</u> body. This rating is based upon pain associated with chronic muscle spasm. . . . He had

essentially reached maximum medical improvement after his last office visit and completion of the MRI scan findings." According to Dworak's office notes and a letter written on October 7, 1988, Bindrum's last office visit occurred on September 21, 1988, the MRI scan was conducted on October 5, and the results of the MRI scan were received at least by October 7.

On February 27, 1989, Yeakley prescribed physical therapy for Bindrum. Bindrum participated in physical therapy from March 7 until May 1, 1989. As of May 10, 1989, Yeakley recommended that Bindrum return to work with certain restrictions such as that Bindrum avoid lifting or carrying over 25 pounds; stooping, bending, or twisting his trunk; activities "using the upper extremities which require persistent heavy gripping or rapid alternating movements of the hands and forearms"; working at shoulder level or above; and assuming unusual positions, and that Bindrum limit squatting, kneeling, and crawling.

In a report dated May 18, 1989, Dr. Thomas R. Estes, Jr., a neurosurgeon who examined Bindrum on May 16, 1989, stated: "Mr. Bindrum's disability rest[s] solely on his subjective reporting of his limitation. There is nothing on his physical examination, nor his carriage, nor his demeanor, while being interviewed that indicate[s] the degree nor the source of his discomfort." Estes testified that as of May 25, 1989, Bindrum had "achieved maximum medical healing" and that there was no medical reason Bindrum could not return to work. Estes recommended, however, that Bindrum not return to work until "he feels he is able to complete the activities related to his work without the further exacerbation of pain . . . ." Estes also recommended that when Bindrum returned to work, he should operate "within his tolerance limits," avoid heavy lifting or twisting, avoid work at shoulder level or above, and participate in work which allows a frequent change in position. Estes noted that the activities Bindrum stated he was able to perform at home were in direct contradiction to the work restrictions placed on Bindrum by his physicians and to the work activities Bindrum stated he could perform. When questioned by Bindrum's attorney, Estes agreed that Bindrum was restricted

from performing "heavy labor" because of his back pain and that Bindrum required retraining so that he could perform a job involving lighter work.

Bindrum contacted the Nebraska Division of Rehabilitation Services in May 1989 and completed a vocational evaluation from July 24 through July 26, 1989. In a September 13, 1989, letter to Bindrum's attorney, a counselor with the Division of Rehabilitation Services stated that although she had met weekly with Bindrum to assist him in obtaining suitable employment, he had not yet had an interview for a potential position. The counselor stated that if Bindrum were unable to obtain an appropriate employment situation, it would be in his "best interests to look into school programs at Southeast Community College," but that because Bindrum was unable, after vocational evaluation and counseling, to decide on a specific program of education, "the most appropriate plan would be to arrange for an on-the-job training in a technical field which is consistent with [Bindrum's] assets, limitations and preferences."

At the request of Foote & Davies' insurance carrier, Bindrum sought vocational rehabilitation services from Career Design, Inc., a vocational rehabilitation specialist. Bindrum participated in interviews at Career Design on May 3 and June 5, 6, and 7, 1989. The vocational rehabilitation specialist concluded that with vocational rehabilitation Bindrum would be capable of earning as much as he did at the time of his injury. Career Design prepared a vocational evaluation report dated July 17, 1989, which formulates two possible rehabilitation plans for Bindrum. One such plan involves placement in an area directly related to Bindrum's work history. The other plan contemplates placement in an area indirectly related to Bindrum's work history for which Bindrum may require on-the-job training for a 6-month period and would receive temporary total disability benefits during the training period. According to the report, under either plan Bindrum's loss of earning capacity is no greater than 5 percent. The report states that "Mr. Bindrum did not appear to be particularly interested in determining a vocational goal."

According to Bindrum, all of the jobs he has held, including

his employment at Foote & Davies, have involved heavy, strenuous work. Bindrum testified that until the injury in 1987, he had no serious back problems. Since the time of the injury, Bindrum stated he has continued to experience pain similar to that he initially experienced. He testified that on some days he has less pain than on others and that on bad days he is unable to do anything. Bindrum further stated that he is able to sit for an hour, but with some discomfort. According to Bindrum, he is able to participate in certain activities at home, such as mowing the lawn, changing the oil in his motor vehicle, fixing up the house, and housekeeping chores, if he "rest[s] in between."

The compensation court awarded Bindrum benefits for temporary partial loss of earning power during the periods he continued to work, but during which he received demotions, and for temporary total disability after he was discharged from work until December 12, 1988, and determined that after December 12, 1988, Bindrum was entitled to benefits for a 5-percent loss of earning power. The compensation court also awarded Bindrum vocational rehabilitation involving assistance from Career Design in obtaining job placement, with the provision that if such placement were not successful within a reasonable period of time, Career Design was to assist Bindrum in arranging for on-the-job training. The compensation court further awarded temporary total disability benefits for the 7 days in 1989 during which, prior to the court's award of rehabilitation, Bindrum underwent testing to develop an appropriate voluntary plan of vocational rehabilitation.

Bindrum's initial contention is that the compensation court erred in terminating his temporary total disability benefits as of December 12, 1988, and in determining his permanent loss of earning power. Implicit in the compensation court's judgment is the finding that as of December 12, 1988, Bindrum had attained maximum medical recovery. When an employee has reached maximum recovery, his or her remaining disability is permanent, and such employee is no longer entitled to compensation for temporary disability. *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989).

The question of whether an injured employee has reached

maximum medical improvement is a question for the Workers' Compensation Court as trier of fact. *Carter v. Weyerhaeuser Co., supra*. Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it; however, findings of the Workers' Compensation Court which are not supported by credible evidence and are clearly wrong will be set aside. *Sherwood v. Gooch Milling & Elevator Co., ante* p. 26, 453 N.W.2d 461 (1990); *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Martinez v. Nebraska Dupaco, ante* p. 720, 457 N.W.2d 285 (1990); *Fenster v. Clark Bros. Sanitation, ante* p. 336, 455 N.W.2d 169 (1990); *Sherwood v. Gooch Milling & Elevator Co., supra*. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Martinez v. Nebraska Dupaco, supra*; *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990); *Carter v. Weyerhaeuser Co., supra*.

It is true, as Bindrum points out, that Yeakley's letter dated December 12, 1988, does not support a finding that Bindrum had obtained maximum medical healing as of that date. Although Yeakley states that further diagnostic studies and surgical intervention would be unavailing, he also prescribes physical therapy, medication, and limitations on work activities. Nowhere in his letter does Yeakley state that Bindrum has attained maximum medical recovery. In fact, in his later February 3, 1989, letter, Yeakley states that he was unaware of Bindrum's current condition and therefore was unable to determine "whether or not [Bindrum] has reached maximum medical benefit." The record, however, does support a finding, based upon Dworak's opinion, that Bindrum had reached maximum medical improvement by an earlier date, October 7, 1988. However, the parties stipulated that Bindrum was entitled to benefits for temporary total disability until December 12, 1988. Therefore, from the compensation court's order

terminating temporary total disability after December 12, 1988, it can be inferred that the court determined that Bindrum had attained maximum medical recovery as of October 7, 1988, but, pursuant to the parties' stipulation, was entitled to temporary total disability until December 12, 1988. There is nothing clearly wrong in that determination.

Bindrum next contends that he should have received temporary total disability benefits during the time he voluntarily accepted the rehabilitative services his employer voluntarily offered prior to the compensation court's award of such services. We disagree.

It is true that the Workers' Compensation Act contemplates that an employer may voluntarily offer and the employee voluntarily accept rehabilitative services. See Neb. Rev. Stat. § 48-162.01(3) (Reissue 1988). It is also true that Neb. Rev. Stat. § 48-121(5) (Reissue 1988) provides: "The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation" and that § 48-162.01(3) provides, in part:

> When as a result of [an injury covered by the Nebraska Workers' Compensation Act] an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. If such services are not voluntarily offered and accepted, the Nebraska Workers' Compensation Court or any judge thereof on its or his or her own motion, or upon application of the employee or employer, and after affording the parties an opportunity to be heard by the compensation court or judge thereof, may refer the employee to a qualified physician or facility for evaluation and report of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation . . . .

However, we do not read these subsections to contemplate that an employee is entitled to temporary disability benefits while undergoing rehabilitation voluntarily offered by the employer.

Such an interpretation would defeat one of the act's primary purposes, which is "restoration of the injured employee to gainful employment." § 48-162.01(1). An employer would be discouraged from voluntarily offering rehabilitative services if by so offering it would become obligated to provide temporary disability benefits. As stated in *Carter v. Weyerhaeuser Co., supra* at 564, 452 N.W.2d at 37: "[I]t has long been the policy of this court to construe the Nebraska Workers' Compensation Act liberally so that its beneficent purposes may not be thwarted by technical refinements of interpretation." Therefore, we read §§ 48-121(5) and 48-162.01(3) to mean that an employee, unless he or she is otherwise qualified to receive temporary total disability benefits, is entitled to such benefits only while undergoing rehabilitation which has been ordered by the compensation court.

Under this rule, Bindrum is not entitled to the temporary total disability benefits the compensation court awarded him for the 7 days in 1989, prior to the award of rehabilitation, on which days Bindrum was undergoing testing for purposes of determining an appropriate vocational rehabilitation plan. Nevertheless, because the defendants do not contest that award, we do not modify the compensation court's judgment in that regard.

Bindrum further contends that he is entitled to temporary total disability benefits during the time that he undergoes vocational rehabilitation pursuant to the compensation court's award, notwithstanding the fact that the extent of his loss of earning power has been determined, and that the court erred in failing to award him such benefits.

In order to resolve this claim, we must first determine whether the compensation court's award of rehabilitation is appropriate. Such a determination requires us to answer two questions: Is Bindrum entitled to vocational rehabilitation? Do direct job placement and on-the-job training constitute vocational rehabilitation?

We have held, based upon § 48-162.01(3) and (6), that an employee is entitled to vocational rehabilitation benefits when, as the result of a compensable injury, he or she is unable to perform work for which he or she has previous training or

experience or when there is a reasonable probability that such rehabilitation will reduce the amount of earning power loss the employee would otherwise suffer. *Sherwood v. Gooch Milling & Elevator Co., ante* p. 26, 453 N.W.2d 461 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). See, also, *Martinez v. Nebraska Dupaco, ante* p. 720, 457 N.W.2d 285 (1990). We have also held that whether an injured employee is entitled to vocational rehabilitation is a question of fact to be determined by the Workers' Compensation Court. *Sherwood v. Gooch Milling & Elevator Co., supra*. Since the compensation court did not find Bindrum to be totally disabled, a condition which exists when an employee is unable to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could perform, *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988), it must be inferred that the court concluded there is a reasonable probability that rehabilitation will reduce the amount of loss of earning power Bindrum has suffered. While one can certainly question how much one who has suffered such a minimal reduction in earning power can be helped, Bindrum's declarations of pain, the restrictions Yeakley and Estes placed upon Bindrum's work activities, Estes' acknowledgment that Bindrum was restricted from performing "heavy labor" because of his back pain and that Bindrum required retraining so that he could perform a job involving lighter work, and the vocational rehabilitation specialist's statement that with vocational rehabilitation Bindrum could obtain a job paying as much as he was earning at the time of his injury, marginally support the compensation court's finding in that regard.

As to the second question, Do direct job placement and on-the-job training constitute vocational rehabilitation? we have recently concluded that a plan of direct job placement, at least when prescribed as the only form of appropriate vocational rehabilitation for an injured employee, is vocational rehabilitation within the meaning of § 48-121(5) and therefore entitles such an employee to temporary disability benefits.

Carter v. Weyerhaeuser Co., 234 Neb. 558, 452 N.W.2d 32 (1990). Both the Division of Rehabilitation Services and Career Design recommended direct job placement and on-the-job training as the most appropriate plan of rehabilitation for Bindrum. Therefore, the compensation court's award of services to Bindrum in the form of assistance in obtaining job placement or in arranging on-the-job training is an appropriate award of rehabilitation and is supported by the evidence.

Because the award of rehabilitation was appropriate, Bindrum is, as he contends, entitled to temporary total disability payments during the period he is involved in rehabilitation.

Although the defendants ostensibly argue that § 48-121(5) is to be read as meaning that an employee is entitled to compensation only for the actual time spent in receiving rehabilitative services, such is not the case. We have defined "temporary disability," as used in § 48-121(3), which provides that compensation for temporary disability shall cease when the extent of permanent disability is ascertained, as the period during which an injured employee is submitting to treatment, convalescing, suffering from injury, and unable to work because of the accident. *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964). Thus, under § 48-121(5), an injured employee is entitled to compensation for such reasonable period of time as is spent undergoing rehabilitation and he or she is therefore unable to work. See *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 470, 436 N.W.2d 542, 546 (1989): "There is no question but that Neb. Rev. Stat. §§ 48-121(5) and 48-162.01 (Reissue 1988) provide that an employee is entitled to temporary total disability benefits and, where appropriate, travel and living expenses *while undergoing rehabilitation*." (Emphasis in original.)

Carter v. Weyerhaeuser Co., supra, establishes that even when the rehabilitation is in the form of direct job placement, the employee is entitled to temporary total disability benefits.

Because we determine that Bindrum is entitled to temporary total disability benefits while undergoing the vocational rehabilitation ordered by the compensation court, it is necessary to suspend the payment of benefits for the 5-percent

loss of earning capacity the compensation court determined Bindrum has presently suffered. At the conclusion of the rehabilitative effort, it will be necessary for the compensation court to determine whether the effort was successful and in fact reduced the loss of earning power Bindrum presently suffers. See *Thom v. Lutheran Medical Center, supra.*

Accordingly, we direct that the award of the compensation court be modified in accordance with this opinion and, as so modified, affirmed.

AFFIRMED AS MODIFIED.

J.T. MILLMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER T. DUNCAN, DECEASED, APPELLANT, V. COUNTY OF BUTLER, NEBRASKA, APPELLEE.

458 N.W.2d 207

Filed July 27, 1990. No. 88-314.

1. **Political Subdivisions Tort Claims Act: Negligence.** As a result of the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), the defense of governmental immunity is abrogated concerning a cause of action based on a political subdivision's negligence under circumstances in which a private person would be liable for injury and damages.
2. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
3. **Political Subdivisions Tort Claims Act: Jurisdiction.** Compliance with the filing or presentment of claim provision in Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Nebraska Political Subdivisions Tort Claims Act is not a jurisdictional prerequisite for adjudication of a tort claim against a political subdivision.
4. **Political Subdivisions Tort Claims Act: Notice.** As a condition precedent to commencement of a suit brought under the Political Subdivisions Tort Claims Act, one must timely file a proper claim with the appropriate political subdivision.
5. **Actions: Words and Phrases.** A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.
6. **Pleadings: Actions: Words and Phrases.** In reference to a petition, a cause of action means a statement of the subject matter on which a plaintiff claims a right to a remedy.
7. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought

under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual.

8. **Political Subdivisions Tort Claims Act: Negligence: Notice.** Filing or presentment of a claim under the Political Subdivisions Tort Claims Act is neither a condition precedent to a political subdivision's tort liability nor a substantive element for a claimant's recovery in a negligence action against a political subdivision, but is a condition precedent to commencement of a negligence action against a political subdivision.
9. _____: _____: _____. Under the Political Subdivisions Tort Claims Act, a plaintiff does not have immediate and unrestricted access to a court for redress on account of a political subdivision's negligence, but has a qualified right to commence a negligence action, a limitation on the right to commence a tort action against a political subdivision in the form of a precedent filed claim.
10. **Political Subdivisions Tort Claims Act: Limitations of Actions.** A plaintiff's right to sue under the Political Subdivisions Tort Claims Act is, in turn, limited by the political subdivision's right to ascertain the merits and value of the plaintiff's claim.
11. **Political Subdivisions Tort Claims Act: Negligence: Notice: Limitations of Actions.** As a limitation on a plaintiff's right to commence a negligence action against a political subdivision, compliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Nebraska Political Subdivisions Tort Claims Act is a procedural precedent to commencement of the negligence action; hence, noncompliance with the notice is a defense to the plaintiff's action.
12. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** A general denial in the political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Political Subdivisions Tort Claims Act.
13. **Political Subdivisions Tort Claims Act: Pleadings: Notice: Proof.** If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of the plaintiff's noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Political Subdivisions Tort Claims Act, the plaintiff has the burden to show compliance with the notice requirement.
14. **Limitations of Actions: Waiver.** A statute of limitations does not create or extinguish a right, but only places a limitation on a remedy which may be tolled or waived.
15. **Limitations of Actions: Proof.** A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
16. **Limitations of Actions.** If there is no evidence on the issue of a statute of limitations, the statute of limitations is not a submissible issue for the fact finder.
17. **Political Subdivisions Tort Claims Act: Limitations of Actions.** The filing or presentment provision in Neb. Rev. Stat. § 13-919(1) (Reissue 1987) of the Political Subdivisions Tort Claims Act bars a plaintiff's action and precludes a remedy or relief only if the claim is not filed or presented within the statutorily specified time.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed and remanded with direction.

Rollin R. Bailey, of Bailey, Polsky, Cada, Todd & Cope, for appellant.

Peter C. Bataillon and Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee.

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

SHANAHAN, J.

On December 30, 1985, J.T. Millman, personal representative of the estate of Christopher T. Duncan, deceased, filed a wrongful death action in the district court for Butler County against the County of Butler, Nebraska. Millman filed the action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983 & Cum. Supp. 1986). The district court concluded that it lacked subject matter jurisdiction and dismissed Millman's action; hence, this appeal.

In 1987, the Political Subdivisions Tort Claims Act was legislatively transferred, without change in any statutory language, from chapter 23, article 24, of the Revised Statutes of Nebraska (Reissue 1983, Cum. Supp. 1986 & Supp. 1987), to chapter 13, article 9, of the Revised Statutes of Nebraska (Reissue 1987), namely, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1987). Consequently, references to statutory sections of the Political Subdivisions Tort Claims Act are based on the current act, §§ 13-901 et seq. (Reissue 1987).

On March 10, 1986, Millman filed an amended petition which, with some subsequent amendment, expressed a cause of action against Butler County for the county's negligent maintenance of a county road and a bridge. See § 13-912 (political subdivision's liability for a defective bridge or highway). Millman alleged that the county's negligence caused a vehicle in which Duncan was a passenger on April 21, 1984, "to run off the bridge and land upside down in the water below the bridge," where Duncan drowned. Also, Millman alleged that Butler County

> was given timely notice of the claims in this suit as required by the Nebraska Political Subdivisions Tort Claims Act, and after [Butler County] failed to make a final disposition of the claim within six months of it being filed, said claim was withdrawn and this lawsuit was instituted. [Millman] has fully complied with all of the provisions of the Nebraska Political Subdivisions Tort Claims Act.

In its answer, Butler County admitted its existence as a political subdivision of the State of Nebraska and generally denied Millman's allegations. Additionally, in its answer, after alleging what is apparently a defense of assumption of risk, that is, Duncan had actual knowledge of the "alleged defect of the bridge" and "there were other safe routes which were available and known" to Duncan, Butler County asserted that "plaintiff's cause of action is barred by the statute of limitations."

As early as April 1986, the parties engaged in discovery, commencing with interrogatories to the plaintiff. The answers to those interrogatories supplied the county with information regarding the names and addresses of witnesses and the existence of documentary evidence, such as photographs and diagrams pertaining to the accident site. This information was received by the county's lawyer on April 28, 1986. On April 7, 1987, the parties mutually stipulated for, and later received, a continuance for trial. Thereafter, on July 30, 1987, the county took the deposition of Dr. Edward Post, a civil engineer with expertise in "roadside safety," apparently expertise in the field of safety engineering or construction of highways. On direct examination by the county's lawyer, Dr. Post meticulously testified about the fatal accident and supplemented his testimony with documents which he had prepared or used in his consideration of the fatal accident. On September 3, 1987, in Hollywood, Florida, Butler County obtained the deposition of Joseph R. Meyer, the driver of the pickup in which Duncan was riding when the accident occurred.

A 3-day trial commenced on October 28, 1987. During that trial, neither party offered any evidence that a tort claim was filed with Butler County. Rather, evidence related to the merits of the negligence action regarding Duncan's death. Millman

called several witnesses who collectively testified about the road-bridge condition at the accident site. Butler County presented witnesses who also testified about the accident site and its relation to Duncan's death. At the conclusion of evidence, the court took the case under advisement. Later, the court entered its order, reflecting its findings and disposition of the action: "The plaintiff has failed to offer any evidence of subject-matter jurisdiction as required by [§ 13-905; filing claim]. Accordingly, this Court lacks subject-matter jurisdiction, and this matter must be and is hereby dismissed . . . ." Millman timely filed a motion for new trial regarding the dismissal. Also, Millman requested leave to withdraw his rest in the case and offer evidence that a claim had been filed with Butler County in compliance with § 13-905. After the district court overruled Millman's motion for a new trial and denied Millman's request to reopen the case for evidence regarding the filing of the Duncan claim with Butler County, Millman appealed and contends that (1) the district court erred regarding the effect of the filing or presentment provision prescribed in § 13-905 of the Political Subdivisions Tort Claims Act and (2) the trial court should have allowed him to reopen the case for evidence regarding compliance with § 13-905. Butler County asserts that "the trial court properly dismissed the cause of action for failure to prove subject matter jurisdiction." Brief for appellee at 11. Also, Butler County argues that there was no abuse of discretion in the district court's refusing to allow Millman to reopen his case and offer evidence that the Duncan claim was filed with Butler County.

JURISDICTIONAL QUESTION

Before we consider the district court's decision that it lacked subject matter jurisdiction, a reexamination of pertinent parts of the Nebraska Political Subdivisions Tort Claims Act is in order. Subject to specific exclusions and exemptions, see § 13-910, the Political Subdivisions Tort Claims Act provides for a Nebraska political subdivision's liability for its torts the same as a private party may be liable for torts. See § 13-903(4):

> Tort claim shall mean any claim against a political subdivision for [injury and damages] caused by the

> negligent or wrongful act or omission of any employee of the political subdivision . . . under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such [injury and damages].

See, also, § 13-908: "Except as otherwise provided in this act, in all suits brought under this act, the political subdivision shall be liable in the same manner, and to the same extent as a private individual under like circumstances . . . ." Cf. *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988) (subject to specified exemptions, the State Tort Claims Act provides for the state's liability for its torts the same as a private party may be liable for torts). Thus, as a result of the Nebraska Political Subdivisions Tort Claims Act, the defense of governmental immunity is abrogated concerning a cause of action based on a political subdivision's negligence under circumstances in which a private person would be liable for injury and damages. See, *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988) (the Nebraska Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977); *Hall v. Abel Inv. Co.*, 192 Neb. 256, 219 N.W.2d 760 (1974).

In its pertinent part, § 13-905 of the Political Subdivisions Tort Claims Act states: "All tort claims under [the Political Subdivisions Tort Claims Act] shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision . . . ."

Section 13-907 provides in part: "Jurisdiction, venue, procedure, and rights of appeal in all suits brought under [the Political Subdivisions Tort Claims Act] shall be determined in the same manner as if the suits involved private individuals . . . ." The district court concluded that filing or presentment of a claim, prescribed in § 13-905, is a jurisdictional prerequisite to litigate a negligence action brought under the Political Subdivisions Tort Claims Act.

"Jurisdiction is the inherent power or authority to decide a case." *Chicago Lumber Co. v. School Dist. No. 71, supra* at 365, 417 N.W.2d at 763; *Blitzkie v. State, supra*; *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987); *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431

(1983).

Article V, § 9, of the Nebraska Constitution states: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law."

In *Chicago Lumber Co. v. School Dist. No. 71, supra* at 365, 417 N.W.2d at 763-64, we stated: "Whether a claimant may maintain an action brought under the Political Subdivisions Tort Claims Act or, ultimately, whether a claimant may prevail in such action is a matter for adjudication by a court exercising jurisdiction in accordance with the Political Subdivisions Tort Claims Act."

Courts in several jurisdictions have considered the filing or presentment provision, frequently called a notice requirement, in a governmental tort claims act in relation to jurisdiction for adjudication of a tort action and have concluded that the filing or presentment provision is not a jurisdictional prerequisite for judicial determination of a tort action against a governmental entity or body. Regarding failure to comply with the notice requirement of Rhode Island's governmental tort claims act, the Supreme Court of Rhode Island, in *Mesolella v. City of Providence*, 508 A.2d 661 (R.I. 1986), addressed a city's argument that noncompliance precluded subject matter jurisdiction for the action in the trial court. In *Mesolella*, the court observed:

> We are of the opinion that the city in the case at hand . . . confused the lack of jurisdiction over a particular action for failure to comply with the conditions precedent with a lack of jurisdiction over the class of cases to which that action belongs—blurring the distinction, as has often been done before, between the " 'appropriate exercise of power' " and the " 'absence of power.' " [Citations omitted.] The term "subject matter jurisdiction," when properly used, refers only to the court's power to hear and decide a case and not to whether a court having the power to adjudicate should exercise that power. [Citation omitted.]

508 A.2d at 665-66.

In *Vasys v. Metropolitan District Commission*, 387 Mass. 51, 438 N.E.2d 836 (1982), the trial court concluded that noncompliance with the filing or presentment provision in the Massachusetts Tort Claims Act was a jurisdictional defect under the act and dismissed a negligence action against the governmental entity. Reversing the trial court's jurisdictional ruling, the Supreme Judicial Court of Massachusetts stated:

> We hold that a complaint brought under [the Massachusetts Tort Claims Act] cannot properly be dismissed for lack of subject matter jurisdiction solely because the plaintiff failed to comply with the presentment requirement of [the tort claims act]. Our conclusion is based on modern views on the doctrine of sovereign immunity [and] the broad purpose of the statute to provide an effective remedy for persons injured as a result of the negligence of governmental entities in the Commonwealth....

387 Mass. at 55, 438 N.E.2d at 839.

Similar to the court in *Vasys, supra*, the Supreme Court of Wisconsin, in *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), reversed a decision by a lower court, which had held that noncompliance with the filing or presentment requirements of the Wisconsin tort claims act defeated subject matter jurisdiction of the trial court, and concluded:

> [S]tatutory conditions or conditions precedent have nothing to do with subject matter jurisdiction of [the trial court]. [Citations omitted.] They deal only with the appropriate conditions set by the legislature as a prerequisite for commencing or maintaining an action. Subject matter jurisdiction is conferred on the [trial court] by the constitution. [Citation omitted.] Whether or not a proper claim has been filed, the [trial court] has jurisdiction of the subject matter.

121 Wis. 2d at 51-52 n.6, 357 N.W.2d at 552 n.6. See, also, *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990) (filing a claim is not a jurisdictional prerequisite for an action against government under tort claims act); *Moran v. Town of Mashpee*, 17 Mass. App. 679, 461 N.E.2d 1231 (1984)

(improper compliance with a governmental tort claims act is not a jurisdictional defect); *Bryant v. Duval County Hosp. Authority*, 502 So. 2d 459 (Fla. App. 1986) (noncompliance with notice requirements of the Florida tort claims act is not a jurisdictional defect).

Consequently, we conclude that compliance with the filing or presentment of claim provision in § 13-905 of the Nebraska Political Subdivisions Tort Claims Act is not a jurisdictional prerequisite for adjudication of a tort claim against a political subdivision. "Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989) (jurisdictional issue). For that reason, as a matter of law, the district court incorrectly determined that it lacked subject matter jurisdiction regarding the suit brought by Millman.

Although the district court assigned lack of subject matter jurisdiction as the reason for dismissal of Millman's action, notwithstanding that the district court actually had jurisdiction to decide Millman's case, the fact remains that the district court dismissed Millman's action. "Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." *Sommerfeld v. City of Seward*, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985). "A correct result will not be reversed merely because a trial court reached that correct result for an incorrect reason." *Travelers Indemnity Co. v. Heim*, 223 Neb. 75, 80, 388 N.W.2d 106, 110 (1986). We must, therefore, decide whether the district court properly dismissed Millman's action.

A TORT CLAIM: NATURE AND FUNCTION

A Condition Precedent to Filing Action.

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 366, 417 N.W.2d 757, 764 (1988), we stated:

> The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political

> subdivision. . . . As a condition precedent to commencement of a suit brought under the Political Subdivisions Tort Claims Act, one must timely file a proper claim with the appropriate political subdivision.

Recognition and acknowledgment that filing or presentment of a claim pursuant to Nebraska's Political Subdivisions Tort Claims Act is a condition precedent to commencement of a tort action against a political subdivision has also been expressed in *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 788, 420 N.W.2d 291, 294 (1988) ("[T]he filing of a notice of claim under the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision"); in *Utsumi v. City of Grand Island*, 221 Neb. 783, 785-86, 381 N.W.2d 102, 104 (1986) (" 'The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision . . .' "); and in *Campbell v. City of Lincoln*, 195 Neb. 703, 712-13, 240 N.W.2d 339, 344 (1976) ("The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision"). See, also, *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 748, 438 N.W.2d 124, 127 (1989) ("the filing of a notice of claim under the Political Subdivisions Tort Claims Act is a condition precedent to the institution of a suit").

More recently, referring to the Political Subdivisions Tort Claims Act, we stated in *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 582, 447 N.W.2d 20, 21 (1989):

> [T]he Tort Claims Act . . . is procedural in nature. The Tort Claims Act is not part of Schmid's cause of action in negligence, but sets out the procedural means through which the district waives its sovereign immunity. Without compliance with the procedural requirements of the Tort Claims Act, the political subdivision's sovereign immunity applies, and not the Tort Claims Act. A plaintiff who sues a political subdivision for negligence and has not complied with the procedures in the Tort Claims Act could not be said to have properly brought an action pursuant to the Act, because it would not apply.

Function of a Filed Tort Claim.

The purpose or function of a written tort claim against a political subdivision was explained in *Chicago Lumber, supra* at 368-69, 417 N.W.2d at 766:

> [T]he written claim required by [the Political Subdivisions Tort Claims Act] notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

See, also, *West Omaha Inv. v. S.I.D. No. 48, supra*; *Campbell v. City of Lincoln, supra*. Thus, the Nebraska Political Subdivisions Tort Claims Act affords a governmental subdivision a pre-action opportunity, or a period before commencement of a lawsuit, to examine the merits of a tort claim and possibly avoid the expense, time, and varied but frequent rigors of litigation to dispose of a claim. See *Chicago Lumber, supra*. Cf. *Hill v. Middletown Bd. of Ed.*, 183 N.J. Super. 36, 443 A.2d 225 (1982) (the purpose of notice under the New Jersey governmental tort claims act is to expedite investigation with the hope of reaching a nonjudicial settlement and to protect accessibility to information about the incident on which the claim is based).

Notice Requirement and a Cause of Action.

There exists, however, a problem on account of *Utsumi v. City of Grand Island, supra*, wherein Utsumi's petition failed to allege compliance with the notice requirement of the Political Subdivisions Tort Claims Act. The city filed a demurrer to Utsumi's petition, claiming that the petition did not state sufficient facts to constitute a cause of action against the city. When the demurrer was sustained and Utsumi failed to plead further, the trial court dismissed Utsumi's negligence action against the city. In affirming the dismissal, this court relied on a statement in *Sole v. City of Geneva*, 106 Neb. 879, 881, 184 N.W. 900 (1921):

> When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions.

The foregoing excerpt from *Sole* is found in *Utsumi, supra*. The predicament engendered by *Utsumi* is twofold. First, *Sole* did not involve a tort claim against a city, but did involve a statutory cause of action for detachment of land from a city pursuant to a special cause of action created by Rev. Stat. § 5090 (1913). *Delozier v. Village of Magnet*, 104 Neb. 765, 178 N.W. 619 (1920), cited in *Utsumi* as support for the excerpt from *Sole* set forth above, also involved the special detachment statute, § 5090, mentioned in *Sole*. The *Sole* court quite correctly concluded that since the cause of action existed by statute, one seeking detachment of land by virtue of the statute must fulfill the statutory prescription for detachment. This leads to the second troublesome aspect of *Utsumi* and its reliance on *Sole*. As noted, *Sole* involved a statutorily created cause of action, whereas *Utsumi* involved a cause of action based on common-law negligence and, therefore, a cause of action which exists independent of any statute.

"A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty." *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 193, 376 N.W.2d 539, 548 (1985); *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988); *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986); *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980). In reference to a petition, a cause of action means a statement of the subject matter on which a plaintiff claims a right to a remedy. *Muenchau v. Swarts*, 170 Neb. 209, 102 N.W.2d 129 (1960); *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950); *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943); *Zelen v. Domestic Industries*, 131 Neb. 123, 267 N.W. 352 (1936); *Myers v. Moore*, 78 Neb. 448, 110 N.W. 989 (1907).

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 370, 417 N.W.2d 757, 767 (1988), we acknowledged that "to recover under the Political Subdivisions Tort Claims Act a claimant must prove the four basic elements of negligence," namely, the substantive elements of negligence, which are duty, breach of duty, proximate causation, and damages. See, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987) (elements of actionable negligence); *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986) (negligence action under Political Subdivisions Tort Claims Act; contributory negligence).

Courts in several other jurisdictions have recognized that filing or presentment of a claim under a governmental tort claims act is a procedural precedent for commencement of a negligence action against a governmental subdivision and that filing or presentment of a claim is not an element in a negligence cause of action against a governmental entity or body. For example, in *Aaron v. City of Tipton*, 218 Ind. 227, 32 N.E.2d 88 (1941), the Supreme Court of Indiana explained the purpose of the written notice provision in Indiana's governmental tort claims act. The court's explanation in *Aaron* coincides with our explanation for the purpose of the notice provision as set forth in *Chicago Lumber, supra.* The *Aaron* court concluded that the notice provision "did not constitute a condition precedent to the liability of the city or to the accrual of the claimant's right against the city," 218 Ind. at 232, 32 N.E.2d at 90, and then more fully explained the rationale underlying the procedural aspect of a notice provision as a condition precedent to commencement of an action:

> Our notice statutes do not purport to set up a condition precedent to the liability of the city, but merely establish a procedural step which was necessary to the remedy of bringing an action to enforce the liability. The city may pay such liability without any notice having been given. If two persons were injured in the same accident caused by the same negligence on the part of the city, one claim might be settled by the city and the other contested. The liability of the city might be identical on the two claims. The only necessity of notice on the contested claim is to enable that

> claimant to institute and maintain his action. The notice does not affect the legal or moral obligation of the city to pay for the damages caused by its negligence. Its only purpose is to enable the city to make a prompt investigation as to its liability. The notice does not affect the right, it affects only a remedy of the injured—the remedy of instituting and maintaining an action for the collection of the damages.
>
> . . . Even more clearly is the serving of the notice merely a procedural step in the remedy where the liability is a common-law liability for negligence rather than a statutory liability.

218 Ind. at 235-37, 32 N.E.2d at 91-92.

The procedural principle expressed in *Aaron, supra*, was reexamined and affirmed some 34 years later in *Thompson v. City of Aurora*, 263 Ind. 187, 325 N.E.2d 839 (1975), when the Indiana Supreme Court considered, and reversed, a directed verdict against Thompsons because they alleged, but failed to prove, that written notice of their claim was given to the city, as required by the Indiana governmental tort claims act. The *Thompson* court expressed the following: "As stated in *Aaron*, the notice requirement is not an element of a plaintiff's claim of negligence, but rather a procedural precedent which must be performed prior to commencement of the suit." 263 Ind. at 193-94, 325 N.E.2d at 843.

The Kansas Supreme Court, in *Fuller v. State Highway Comm.*, 140 Kan. 558, 559, 561, 38 P.2d 99, 99-100 (1934), held that the provision for written notice pursuant to the Kansas governmental tort claims act did "not have any relationship to the liability. It is simply something that must be done preliminary to filing suit. . . . The giving of the notice in our statute is not the establishment of particular conditions. It is merely a preliminary step in the bringing of the action."

From the foregoing, it is clear that a negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual and "to recover under the Political Subdivisions Tort Claims Act a claimant must prove the four basic elements of negligence." *Chicago Lumber Co. v. School Dist. No. 71*, 227

Neb. 355, 370, 417 N.W.2d 757, 767 (1988). See, also, §§ 13-904 and 13-908. See, further, *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986). For that reason, filing or presentment of a claim under the Political Subdivisions Tort Claims Act is neither a condition precedent to a political subdivision's tort liability nor a substantive element for a claimant's recovery in a negligence action against a political subdivision, but, as has been frequently stated by this court, is a condition precedent to commencement of a negligence action against a political subdivision. In retrospect, through *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986), we elevated the procedural requirement of notice under the Political Subdivisions Tort Claims Act to the level of a substantive element in a negligence action against a political subdivision. Hence, any language in *Utsumi* which indicates, explicitly or implicitly, that compliance with the Nebraska Political Subdivisions Tort Claims Act is a substantive element in a negligence cause of action against a political subdivision is expressly disapproved.

NONCOMPLIANCE WITH NOTICE REQUIREMENT: A DEFENSE

Thus far, we have determined that compliance with the notice requirement of the Political Subdivisions Tort Claims Act is not a jurisdictional prerequisite for a negligence action brought under the act and have also reaffirmed the principle that filing or presenting a claim against a political subdivision is a condition precedent for a claimant's right to commence a tort action against a political subdivision. As we noted in *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 477 N.W.2d 20 (1989), filing or presenting a tort claim against a political subdivision is a procedural matter under the Political Subdivisions Tort Claims Act.

As a matter of procedure, how may a political subdivision raise the issue that a claimant has failed to comply with the filing requirements of the Political Subdivisions Tort Claims Act? As a preface for our discussion about the procedural aspects of filing a claim under the Political Subdivisions Tort Claims Act, we note that filing a claim is the subject of two

parts of Nebraska's Political Subdivisions Tort Claims Act. First, there is the requirement that a claim be filed with the political subdivision. See § 13-905. Second, there is the requirement that a claim be timely filed within the time limit specified in § 13-919(1). Thus, § 13-905 pertains to the actual filing of a claim against a political subdivision, that is, whether in fact a claim was filed in accordance with § 13-905, while § 13-919(1) specifies the time limit for filing a claim and other time limits restrictively defining the period in which a suit may be commenced against a political subdivision.

Condition Precedent as a Limitation of a Right to Sue.

How, then, as a matter of procedure, is the issue raised that a claimant-plaintiff has failed to comply with the notice requirement contained in § 13-905 as a condition precedent to the right to sue under the Political Subdivisions Tort Claims Act?

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 365, 417 N.W.2d 757, 764 (1988), we stated that a district court has the power to determine whether a plaintiff in a tort action against a political subdivision "was entitled to maintain its action brought under the Political Subdivisions Tort Claims Act." Within the word "entitled," found in the excerpt from *Chicago Lumber, supra*, is a judicial determination whether a claimant in a tort action against a political subdivision has the right to come into court for disposition of the claim.

Concerning a negligence action between private parties, a plaintiff may immediately invoke judicial process to resolve a claim against the defendant and, if successful on the claim, obtain a compensatory remedy. However, as we have repeatedly stated in reference to the Political Subdivisions Tort Claims Act, before a plaintiff may commence a negligence action against a political subdivision, a filed claim against the political subdivision is a condition precedent to commencement of the action. Thus, under the Political Subdivisions Tort Claims Act, a plaintiff does not have immediate and unrestricted access to a court for redress on account of a political subdivision's negligence, but, rather, has a qualified right to commence a negligence action, or, more simply, has a limitation on the right

to commence a tort action against a political subdivision in the form of a precedent filed claim prescribed by § 13-905. From the notice requirement of § 13-905, as a condition for a plaintiff's right to commence a negligence action against a political subdivision, there emerges a correlative right for the political subdivision: the right to an opportunity for investigation of the negligence claim and possible achievement of a settlement to avoid litigation. Thus, a plaintiff's right to sue under the Political Subdivisions Tort Claims Act is, in turn, limited by the political subdivision's right to ascertain the merits and value of the plaintiff's claim.

Several courts which have considered noncompliance with a notice requirement under a governmental tort claims act have concluded that the notice requirement is a limitation on a plaintiff's right to sue under the tort act; for example, see, *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990); *Hill v. Middletown Bd. of Ed.*, 183 N.J. Super. 36, 443 A.2d 225 (1982); *Ferguson v. New Mexico State Highway Com'n*, 99 N.M. 194, 656 P.2d 244 (1982); *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983) (construing the Texas Tort Claims Act). As a limitation on a plaintiff's right to commence a negligence action against a political subdivision, compliance with the notice requirement of § 13-905 of the Nebraska Political Subdivisions Tort Claims Act is a procedural precedent to commencement of the negligence action; hence, noncompliance with the notice is a defense to the plaintiff's action. See, *Pritchard v. State, supra*; *Mesolella v. City of Providence*, 508 A.2d 661 (R.I. 1986); *Vasys v. Metropolitan District Commission*, 387 Mass. 51, 438 N.E.2d 836 (1982); *Hill v. Middletown Bd. of Ed., supra*; *City of Wilmington v. Spencer*, 391 A.2d 199 (Del. 1978); *Thompson v. City of Aurora*, 263 Ind. 197, 325 N.E.2d 839 (1975); *Yurechko v. Allegheny Co.*, 430 Pa. 325, 243 A.2d 372 (1968); *Kamani v. Port of Houston Authority, supra*; *Bryant v. Duval County Hosp. Authority*, 502 So. 2d 459 (Fla. App. 1986); *Ferguson v. New Mexico State Highway Com'n, supra*.

Although noncompliance with the notice requirement affords a political subdivision a defense to a negligence action under the Nebraska Political Subdivisions Tort Claims Act, a

general denial in the political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act. See, *Pritchard v. State, supra* (affirmative defense); *Mesolella v. City of Providence, supra* (general denial is insufficient to raise defense of noncompliance; affirmative defense must be specifically expressed); *Vasys v. Metropolitan District Commission, supra* (general denial is insufficient to raise defense of noncompliance; affirmative defense must be specifically expressed); *Hill v. Middletown Bd. of Ed., supra* (affirmative defense); *City of Wilmington v. Spencer, supra* (affirmative defense); *Thompson v. City of Aurora, supra* (general denial is insufficient to raise defense of noncompliance; affirmative defense must be specifically expressed); *Yurechko v. Allegheny Co., supra* (affirmative defense); *Bryant v. Duval County Hosp. Authority, supra* (general denial is insufficient to raise defense of noncompliance; affirmative defense must be specifically expressed). Unless a political subdivision pleads the affirmative defense of noncompliance with the notice requirement of § 13-905, the political subdivision waives the defense of noncompliance with the notice requirement. See, *Mesolella v. City of Providence, supra*; *Hill v. Middletown Bd. of Ed., supra*; *City of Wilmington v. Spencer, supra*.

Some courts have viewed the "right to come into court" as an aspect of a plaintiff's capacity to sue. See, *Keehn v. Joseph C. Mackey and Co.*, 420 So. 2d 398 (Fla. App. 1982); *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); *Flour Mills of America, Inc. v. Pace*, 75 F.R.D. 676 (E.D. Okla. 1977). If the "right to come into court" is procedurally equated with a plaintiff's capacity to commence a suit, Nebraska has a procedure to raise the issue of a plaintiff's capacity to sue. Neb. Rev. Stat. § 25-806(2) (Reissue 1989) provides that a defendant may demur to a petition when the petition facially reflects that "the plaintiff has not legal capacity to sue." Neb. Rev. Stat. § 25-808 (Reissue 1989) provides that if a plaintiff's lack of capacity is not apparent from the petition,

> the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.

In *Hinze v. School Dist. No. 34*, 179 Neb. 69, 71, 136 N.W.2d 434, 436 (1965), this court stated that "want of legal capacity to sue is waived unless raised by demurrer or answer." See, also, *Ebberson v. School Dist. No. 64*, 180 Neb. 119, 141 N.W.2d 452 (1966). See, further, *Kuncl v. Kuncl*, 99 Neb. 390, 156 N.W. 772 (1916), wherein the defendant failed to plead that the plaintiff-executrix lacked capacity to maintain an action and, on appeal, contended that the executrix could not maintain the action in which the executrix obtained a judgment from which the appeal was taken. However, this court stated in *Kuncl* at 391, 156 N.W. at 773:

> The judgment is assailed on the ground that the executrix, as such, has no right to maintain the suit . . . . The defense that an executrix cannot maintain an action to enforce, in favor of the estate of testator, a resulting trust against a defendant to whom the legal title to realty in controversy had been conveyed is waived unless interposed by demurrer or answer. [Citations omitted.]

If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of the plaintiff's noncompliance with the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act, the plaintiff has the burden to show compliance with the notice requirement. See *Thompson v. City of Aurora*, 263 Ind. 197, 325 N.E.2d 839 (1975).

The procedures set forth above lend themselves to an expeditious disposition of litigation under the Political Subdivisions Tort Claims Act. For example, if a plaintiff in a tort action against a political subdivision fails to plead compliance with the filing requirement of § 13-905, availability of a demurrer, asserting that a claim has not been filed with the political subdivision and thereby raising the notice issue, affords the court and a political subdivision an opportunity to

speedily resolve the question whether a notice was actually filed, a matter collateral to the merits of the plaintiff's claim, and avoid a lengthy and perhaps costly trial on the merits of the negligence claim. Such economy in time will be welcomed by courts for the reduction of docket congestion. Political subdivisions will undoubtedly appreciate the decreased cost of defending tort litigation, including elimination of extensive and expensive discovery for a trial which need not occur. On the other hand, if a plaintiff pleads that a claim has been filed in compliance with § 13-905, the political subdivision may still preserve the notice issue, that is, whether the plaintiff did in fact file a claim, by asserting the plaintiff's noncompliance with § 13-905 as an affirmative defense specifically alleged in the political subdivision's answer. In this manner, the question whether a plaintiff has in fact filed a complaint in compliance with § 13-905 may be properly raised and preserved for disposition in a summary judgment. See *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990) (summary judgment is a proper procedure to determine the question whether a plaintiff has complied with the claim-filing requirement of a tort claims act). If there were no compliance with the notice requirement, notwithstanding the allegation in Millman's pleading, the present appeal and the extensive use of discovery displayed in this case supply unimpeachable evidence proving the validity of the procedure which we have outlined above. Moreover, the information which might be provided in the Duncan claim's cursory content contained within the four corners of some document filed with the county pales in the reality of comparison with the information actually obtained by the county through the proceedings. When Butler County failed to assert its defensive statutory right to the pre-action opportunity available to a political subdivision, the county rendered the notice requirement immaterial as an issue and eliminated the necessity of proof that Millman had complied with the notice requirement as a condition for commencement of the lawsuit based on the county's alleged negligence in Duncan's death.

Statute of Limitations.

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb.

355, 364-65, 417 N.W.2d 757, 763 (1988), we stated: "[T]he statute of limitations on filing a claim or suit for a political subdivision's tortious conduct is exclusively prescribed by § 23-2416 of the Political Subdivisions Tort Claims Act." Section 23-2416 (Reissue 1983), mentioned in *Chicago Lumber* as the statute of limitations pertaining to the Nebraska Political Subdivisions Tort Claims Act and as amended in 1984, has been replaced, without statutory alteration, by § 13-919, which provides:

> (1) Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body. . . .
>
> . . . .
>
> (5) This section and section 25-213 shall be the only statutes of limitations applicable to tort claims as defined in this act.

See, also, *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981) (§ 23-2416(1), now § 13-919(1), is a statute of limitations).

A statute of limitations does not create or extinguish a right, but only places a limitation on a remedy which may be tolled or waived. *Dept. of Revenue v. Mumma Bros. Drilling*, 173 Ind. App. 487, 364 N.E.2d 167 (1977). See, also, *Stock v. Meissner*, 217 Neb. 56, 348 N.W.2d 426 (1984) (statutes of limitations merely affect procedure by which existing rights may be enforced); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981); *Dishon v. Oliver*, 402 A.2d 1292 (Me. 1979) (statutes of limitations are laws of procedure and operate only on a remedy, not on a substantive right). "A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense." *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988); *Van Burg v. Van Engen*, 76 Neb. 816, 107 N.W. 1006 (1906). If there is no evidence on the issue of a statute of limitations, the statute of limitations is not a submissible issue for the fact finder. See *Rucker v. Ward*, 131 Neb. 25, 267 N.W. 191 (1936).

Thus, the filing or presentment provision in § 13-919(1) bars

a plaintiff's action and precludes a remedy or relief only if the claim is not filed or presented within the statutorily specified time, and operates in a manner identical to the remainder of § 13-919(1) concerning the time limits for commencement of a tort action against a governmental subdivision.

TRIAL OF THE WRONGFUL DEATH CLAIM

Millman's petition on which the case was tried contained the allegation that a claim had been filed with Butler County in compliance with the Political Subdivisions Tort Claims Act. However, in its pleadings, Butler County failed to affirmatively raise the issue of noncompliance with the notice requirement prescribed in § 13-905 of the Political Subdivisions Tort Claims Act. Therefore, Butler County waived any question concerning the notice requirement of the Political Subdivisions Tort Claims Act in relation to Millman's action against the county. Additionally, as we have discussed above, § 13-919(1), which bars a suit against a political subdivision in the absence of a claim filed within 1 year after accrual of the negligence cause of action, is a statute of limitations. In its answer the county affirmatively alleged Millman's "cause of action is barred by the statute of limitations." By pleading the statute of limitations as an affirmative defense, Butler County took upon itself the burden to prove that the Duncan claim was not filed within 1 year after Duncan's death. Yet, there is no evidence that the Duncan claim was not timely filed with the county. In that posture, the statute of limitations contained in § 13-919(1) was not an issue submissible to the court as the fact finder in the negligence action against Butler County. Consequently, the district court could not have properly concluded that absence of a timely filed claim barred prosecution of the action against Butler County for the wrongful death of Christopher T. Duncan.

CONCLUSION

Therefore, since the district court had jurisdiction to adjudicate the negligence claim for Duncan's death and since Butler County did not, as a procedural matter, affirmatively raise the issue of noncompliance with the notice requirement of the Political Subdivisions Tort Claims Act or establish a defense

under the statute of limitations, the district court should have proceeded to dispose of the Duncan claim on its merits. Also, since Millman, under the circumstances, was not required to prove compliance with the notice requirement of the Political Subdivisions Tort Claims Act, the district court's refusal to allow Millman to withdraw his rest and present evidence concerning compliance with the notice requirement is not a question which we need to address, inasmuch as that aspect of the proceedings is not an actual issue.

The district court erred by dismissing Millman's action against Butler County. For that reason, we reverse the judgment of the district court and remand this matter to the district court with direction to proceed to an adjudication of the merits of the Duncan wrongful death claim prosecuted by Millman against Butler County.

REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., dissenting.

Contrary to the majority's opinion, there can be no question but that a claim under the Nebraska Political Subdivisions Tort Claims Act is a statutory cause of action. Under common law, the king (sovereign) could do no wrong, and therefore there was no cause of action for common-law negligence against the sovereign. See *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968). A county, being a political subdivision of the state, having subordinate powers of sovereignty, was not liable at common law for negligence in maintaining a public road or bridge. *Stitzel v. Hitchcock County*, 139 Neb. 700, 298 N.W. 555 (1941). "[C]ounties are not liable to individuals for damages on account of the negligent or tortious acts of their officers or servants *unless made so by statute*." (Emphasis supplied.) *Id.* at 703, 298 N.W. at 557.

In 1969, the Legislature enacted the Political Subdivisions Tort Claims Act in controversion of the common law. In doing so, the Legislature, in what is now known as Neb. Rev. Stat. § 13-902 (Reissue 1987), declared:

> [N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and . . . *no suit shall be maintained against such political subdivision on any tort claim except to the extent, and*

> *only to the extent, provided by this act.* The Legislature further declares that it is its intent and purpose through this enactment to provide uniform procedures for the bringing of tort claims against all political subdivisions . . . and that the procedures provided by this act shall be used to the exclusion of all others.

(Emphasis supplied.)

Neb. Rev. Stat. § 13-905 (Reissue 1987) provides that all tort claims must be filed and acted upon by the political subdivision against which the claim is made. Neb. Rev. Stat. § 13-906 (Reissue 1987) provides:

> No suit shall be permitted under this act unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under this act.

In *Utsumi v. City of Grand Island*, 221 Neb. 783, 785-86, 381 N.W.2d 102, 104 (1986), this court held that " '[t]he notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision . . . .' " We also declared:

> "When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, *he must allege and prove* all the facts essential to a strict compliance with the prescribed conditions."

(Emphasis supplied.) *Id.* at 786, 381 N.W.2d at 104 (quoting *Sole v. City of Geneva*, 106 Neb. 879, 184 N.W. 900 (1921)).

Utsumi, supra, placed the burden upon a plaintiff to allege and prove compliance with the provisions of the Political Subdivisions Tort Claims Act, and that is where the burden should be. In today's opinion, the majority has shifted the burden of raising the issue of compliance with the Political Subdivisions Tort Claims Act to the defendant political subdivision.

I see no reason to differentiate between tort claims and

contract claims when pursued against a county. Yet, today's decision does just that. A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1987) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time. *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986).

The majority has improvidently departed from the rule adhered to in *Utsumi, supra*, and *Jackson, supra*.

WHITE and CAPORALE, JJ., join in this dissent.

IN RE ESTATE OF ANNA ROSE NOVAK, DECEASED. GLADWYN A. YOUNGS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNA ROSE NOVAK, DECEASED, APPELLANT, V. ROSE HITZ AND STATE OF NEBRASKA, APPELLEES.

458 N.W.2d 221

Filed July 27, 1990. No. 88-431.

1. **Wills: Undue Influence: Words and Phrases.** Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator.
2. **Wills: Undue Influence: Proof.** The elements which must be proved to establish undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
3. _____: _____: _____. The burden of proof on the issue of undue influence is on the party contesting the will.
4. **Wills: Undue Influence: Parties: Presumptions: Proof.** When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party.
5. **Wills: Undue Influence: Presumptions: Evidence: Proof.** Where the evidence establishes there was no undue influence, the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced.
6. **Wills: Undue Influence: Presumptions.** While the existence of a confidential or fiduciary relationship will not alone create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances, may justify an inference of undue influence.

7. **Wills: Undue Influence: Trial: Evidence.** In a will contest, a motion by the proponent to withdraw the issue of undue influence from consideration by the jury, when made at the close of the evidence of the contestant, admits the truth of all material and relevant evidence submitted by the contestant, and the contestant is to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion.

Appeal from the District Court for Lancaster County, ROBERT R. CAMP, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court reversed, and cause remanded with directions.

Charles M. Pallesen and Richard P. Garden, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Tad D. Eickman and Alan L. Steinacher, of Steinacher, Vosoba & Hanson, for appellees.

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

BOSLAUGH, J.

This is an appeal in a will contest. The testatrix, Anna Rose Novak, died on December 11, 1985.

On February 13, 1986, Gladwyn A. Youngs, the sole beneficiary named in the will and the person nominated as personal representative in the will, filed an application for informal probate. On this same date a statement and order of informal probate was issued, and Youngs was appointed personal representative.

On April 2, 1986, Rose Hitz, a friend of the decedent's, filed an application for formal probate. The application alleged that Hitz was a claimant against the estate; that prior to the death of the decedent, Youngs had borrowed approximately $30,000 from the decedent; that Hitz sought to prevent informal probate of the will because Youngs had been directed by the decedent to draft a will naming Hitz and her children as beneficiaries, but that in drafting the purported will Youngs substituted himself as beneficiary; and that at the time the purported will was executed, the decedent was seriously ill and a

patient in Lincoln General Hospital. The application further alleged that Youngs should be removed as personal representative and that a determination of heirship should be made.

On July 14, 1986, Youngs filed an answer praying that the will be admitted to probate.

The trial commenced May 1, 1986. Although the record does not show that any pleadings had been filed by the State of Nebraska, an Assistant Attorney General was present and participated in the trial. Although undue influence or lack of testamentary capacity had not been specifically alleged in the application filed by Hitz, counsel for proponent Youngs stated that the proponent had no objection to proceeding with the trial as to "whatever objections are either plead [sic] or made today."

The will was offered and received in evidence. Since the will was "self proving," the contestant then had the burden of going forward. At the close of the contestant's evidence, the proponent moved that the application be dismissed. The county court found that the evidence of the contestant was insufficient to establish undue influence or lack of testamentary capacity and dismissed the application.

Upon appeal to the district court, that court found that the will was the result of undue influence, reversed the judgment of the county court, and struck the will from probate.

The proponent has appealed to this court. His principal assignments of error are that the district court erred in finding that the will was the product of undue influence and in applying a presumption of undue influence in arriving at its decision.

Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986).

The elements which must be proved to establish undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence. *Id.*

The burden of proof on the issue of undue influence is on the party contesting the will. *McGowan v. McGowan*, 197 Neb.

596, 250 N.W.2d 234 (1977).

When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. *Loomis v. Estate of Davenport*, 192 Neb. 461, 222 N.W.2d 369 (1974).

Where the evidence establishes there was no undue influence, the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced. *Id.*

The record shows that the testatrix, Novak, was 87 years of age when she died, leaving a will which named the proponent, Youngs, as the sole beneficiary of her estate. The total value of her estate, including nonprobate items, was $258,508.92. Youngs received all of this property except a lady's diamond ring, valued at $1,475; a 20-year-old color television set; and a certificate of deposit payable on death to "Mrs. Rose Hitz."

Youngs had known the decedent since May or June 1978. He was introduced to her by his law partner, Stanley D. Cohen, whom Novak had engaged to probate her brother Frank's estate. Following this meeting, Youngs handled the probate of Novak's brother's estate.

Youngs and Novak became close friends while working on her brother's estate. This friendship continued after the estate was closed in March or April 1980.

Youngs occasionally shared his poetry and photography interests with Novak. He wrote some poems and took pictures for her. He also remembered her on holidays and her birthday with cards and small gifts.

Youngs and Cohen shared the fee earned from probating Novak's brother's estate. Novak was not happy about this arrangement and believed Cohen had stolen $10,000 from the estate. Although Youngs did not believe Cohen could have done such a thing and tried to convince Novak of his belief, she was not persuaded and insisted on giving Youngs an extra $15,000 to make up the difference she believed Cohen had unfairly received from her brother's estate. Youngs testified he did not want to accept the money; however, after consulting with

another attorney, he agreed to accept the money on the condition that it be structured as a loan. Youngs executed a promissory note to Novak and made several payments in the amount of $300. Later, Novak destroyed the note because she intended the money to be a gift.

The evidence shows that Novak, generally, had a good knowledge of her finances and investments. Youngs assisted Novak with her financial affairs from time to time; however, Novak selected her own investments. During Novak's final years following her illness in July 1983, she signed three or four checks each month for her recurring bills, and Youngs would complete and deliver the checks. Youngs always reviewed the canceled checks and bank statements with Novak and at no time did he sign a check for her.

Hitz testified that she had known the Novak family all her life. Both families had lived in Milligan, Nebraska. Her father had been a close friend of Novak's brother Frank. Hitz and Frank also became good friends, and at Frank's funeral, Hitz talked with Novak. After Frank's death, Hitz and Novak became friends, and they did many things together. Hitz gave Novak baked goods and vegetables from Hitz' garden, got groceries for her, and took Novak about in Hitz' automobile. When Novak became ill on July 29, 1983, Hitz took Novak to the emergency room at the hospital.

On July 29, Hitz found Novak in very poor health at her apartment. Hitz called Youngs and informed him of Novak's condition, and Hitz met Youngs for the first time that day.

Hitz stayed with Novak for most of the day, and on the evening of July 29, at the direction of Novak, Hitz prepared in her handwriting a document signed by Novak which provided: "I, Ann R. Novak want Rose Hitz to handle my personal business. Rose Hitz is to inherit all of my money & everything I own. She is to share it with her children—Randy, Rus, Rochelle." This document, which appears to contain the signature of Ann R. Novak, was not witnessed.

On July 30, 1983, after Novak was admitted to Lincoln General Hospital, she told Hitz that she wanted to make a will. Hitz contacted Youngs and told him that Novak wanted to make a will.

Acting on Hitz' request, Youngs testified that he visited Novak at the hospital and confirmed that she wanted to make a will. Novak had indicated to Youngs at least as early as 1979 that she wanted to remember him and perhaps a friend when the time came to arrange her estate. During the course of the conversation at the hospital, Youngs told Novak that if she still intended to remember him in her will, it would be necessary to obtain another attorney to prepare the will. Novak did not want another attorney to prepare her will. Youngs told her it was not necessary to include him in her will; however, if she desired to do so, she would be required to retain another attorney to prepare her will.

Apparently, Novak agreed to retain independent counsel to prepare her will and wanted an attorney of Czech heritage. According to Youngs, she selected Ronald Svoboda from a list of Czech names Youngs had prepared from the Nebraska State Bar Association's directory. Youngs had met Svoboda once or twice before at Masonic meetings.

Youngs contacted Svoboda and met him at his office in Weeping Water, Nebraska. Youngs told Svoboda that Novak was an elderly friend who had previously indicated she wanted to remember Youngs in her will. Youngs told Svoboda that he understood that Novak had no heirs and that she most likely would wish to remember Hitz, the Catholic church, and himself in her will.

Youngs requested that Svoboda not disclose the contents of the will to Youngs. He also told Novak that he did not want to know the contents of her will. Svoboda honored Youngs' request, and he did not send Youngs a copy of the will until after Novak's death.

Svoboda agreed to prepare Novak's will after discussing the ethical aspects with his law partners. On August 22, 1983, Svoboda visited Novak at the hospital and interviewed her for approximately 45 minutes. He learned that Novak had no relatives, that she knew where her money was invested and the value of her investments, and that she was aware of the size of her estate. He then reviewed with Novak the ultimate disposition of her estate.

Novak instructed Svoboda that a substantial payable-

on-death certificate of deposit would be arranged for Hitz and that she wanted Hitz to receive the diamond ring and the color television set; however, Novak did not want to include provisions for the certificate of deposit, ring, and television set in her will. Novak instructed Svoboda that the balance of her estate was to go to Youngs. Svoboda questioned Novak several times about the division of her estate to confirm that he understood her wishes.

After the initial interview, Svoboda prepared the will by hand, printing the dispositive provisions in the will, which had been partially typewritten prior to his meeting with Novak. He then gave the will to Novak and asked her to review it. He asked her if she had any questions, and she did not. The will was then executed by Novak and was witnessed by two nurses.

Novak's primary care physician testified as to Novak's mental condition on the date the will was executed. He testified that from the time of Novak's admission to the hospital until several days after the execution of the will, Novak was alert, attentive, and oriented. He stated that she had been able to give an accurate family history and concluded that although Novak had significant medical problems, she had sufficient mental capacity to execute a will on August 22, 1983.

Svoboda testified that he had wanted to prepare a fully typewritten will for Novak because he did not like the fact that her will was partially typewritten and partially filled in by hand. Although he had a fully typewritten will prepared later, it was never given to Novak to execute, and the will executed on August 22, 1983, was the will admitted to probate after her death.

Youngs paid Svoboda's fees with his personal funds.

Youngs argues that the facts were insufficient to raise a presumption of undue influence and that by applying the presumption, the district court improperly shifted the burden of proof from the contestant to Youngs.

While the existence of a confidential or fiduciary relationship will not alone, " 'according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances,' " may justify an inference of undue influence.

In re Lobb's Will, 173 Or. 414, 431-32, 145 P.2d 808, 814 (1944). See, also, *In re Estate of Ankeny*, 238 Iowa 754, 28 N.W.2d 414 (1947); *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977); *Loomis v. Estate of Davenport*, 192 Neb. 461, 222 N.W.2d 369 (1974); *In re Estate of Kajewski*, 134 Neb. 485, 279 N.W. 185 (1938); *Matter of Estate of Gonzales*, 108 N.M. 583, 775 P.2d 1300 (1988). Such suspicious circumstances, combined with a confidential or fiduciary relationship so as to raise a presumption of undue influence, include a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, lack of advice to the testator from an independent attorney, an elderly testator in weakened physical or mental condition, lack of consideration for the bequest, a disposition that is unnatural or unjust, the beneficiary's participation in procuring the will, and domination of the testator by the beneficiary. *In re Estate of Ankeny, supra*; *Matter of Estate of Gonzales, supra*.

Neb. Rev. Stat. § 30-2431 (Reissue 1989), which is adapted from the Uniform Probate Code, provides that the burden of proof of undue influence is on the contestants of the will. This section did not change the rules concerning the effect of a presumption of undue influence established by case law which were existing prior to the adoption of the code. *Matter of Estate of Gonzales, supra*. See, also, *McGowan v. McGowan, supra*.

The evidence of the contestant in this case established that a confidential and fiduciary relationship existed between the testatrix and the proponent. In addition thereto, her evidence established many suspicious circumstances. Although the evidence is in conflict, the testimony of Hitz was to the effect that the will in question was contrary to the expressed intentions of the testatrix.

In a will contest, a motion by the proponent to withdraw the issue of undue influence from consideration by the jury, when made at the close of the evidence of the contestant, admits the truth of all material and relevant evidence submitted by the contestant, and the contestant is to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion. *In re Estate of Bainbridge*, 151 Neb. 142, 36 N.W.2d

625 (1949). When the evidence of the contestant is considered in accordance with this rule, it is clear that the motion of the proponent should have been overruled.

Facts which raise a presumption of undue influence are sufficient to withstand a motion for a directed verdict. *McGowan v. McGowan, supra*. In this case, the evidence of the contestant was sufficient to raise a presumption of undue influence. Accordingly, Youngs, as proponent of the will, then had the burden to go forward with evidence to rebut the presumption; however, because the county court erroneously dismissed the contestant's petition, Youngs has not had an opportunity to present evidence to rebut the presumption.

After the party alleging undue influence establishes facts which raise a presumption of undue influence, the burden of going forward with the evidence shifts to the proponent to rebut the presumption of undue influence. *Loomis v. Estate of Davenport, supra*. The burden of proof as to undue influence remains with the contestant throughout the trial, and after evidence has been introduced, the presumption disappears. *McGowan v. McGowan, supra*; *Loomis v. Estate of Davenport, supra*. The presumption of undue influence may be rebutted by proof that the testator had competent independent advice and that the will was his or her own voluntary act, or by other evidence of the circumstances surrounding the execution of the will. See, *Loomis v. Estate of Davenport*, 192 Neb. 461, 222 N.W.2d 369 (1974); *In re Estate of Kajewski*, 134 Neb. 485, 279 N.W. 185 (1938).

Both the district court and the county court decided the issue of undue influence as a matter of law. Although there is substantial evidence of undue influence in this case, we believe the evidence on the issue of undue influence presents a question of fact. Accordingly, the judgment of the district court is reversed, and the cause is remanded with directions to remand the cause to the county court for further proceedings in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, C.J., not participating.

JUDITH BRENNAN, APPELLANT, V. SCHOOL DISTRICT NO. 21 OF HOLT COUNTY, NEBRASKA, ALSO KNOWN AS ATKINSON ELEMENTARY SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

458 N.W.2d 227

Filed July 27, 1990. No. 88-656.

1. **Schools and School Districts: Teacher Contracts.** Teacher terminations under Neb. Rev. Stat. §§ 79-12,107 to 79-12,121 (Reissue 1987) are properly characterized as "proceedings" subject to the provisions of Neb. Rev. Stat. § 7-107 (Reissue 1987).
2. **Attorneys at Law.** An attorney normally has the power to make agreements regarding procedural issues.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Reversed and remanded for further proceedings.

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

Domina, Gerrard, Copple & Stratton, P.C., and Daniel D. Jewell, of Jewell, Gatz, Collins, Dreier, Fitzgerald & Balsiger, for appellee.

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

WHITE, J.

This is an appeal from an order of the district court for Holt County denying a request for a declaratory judgment that appellant was not discharged lawfully from her teacher's position in School District No. 21 of Holt County and was thus still an employee of the district. The parties and the court treated the case as a law action, and we shall do so also.

An extended recitation of the facts is necessary for an understanding of the issues involved in this appeal.

Judith Brennan, the appellant, was initially employed to teach on a full-time basis for the 1986-87 school year by School District No. 21 of Holt County. The school board of the district and its superintendent determined not to retain Brennan's services, and on March 3, 1987, Brennan received a notice

advising her of possible termination of her employment at the close of the contract year. The reason given was a reduction in force, pursuant to Neb. Rev. Stat. §§ 79-1254.05 et seq. (Reissue 1987). On March 5, Brennan responded in writing, requesting a hearing. No hearing was held.

Negotiations between Brennan's representative and school board attorney John Higgins were started March 12, which negotiations appear to have contributed to the failure to hold the reduction in force hearing. The negotiations were not successful.

On April 7, another letter was sent to Brennan notifying her of the district's intent to consider whether her status as a probationary teacher should be terminated and advising her that if she wished a hearing, she must submit a written request within 7 days of the receipt of the notice. No written request for hearing was submitted to the school district. The school board held a meeting on May 4, and Brennan's contract was terminated.

On April 8, the district's attorney and Brennan's representative spoke by phone concerning possible settlements of the dispute. On April 14, Brennan's representative again spoke with Higgins and inquired whether it would be necessary for Brennan to submit a second demand for a hearing. Higgins informed him that it would not be necessary to submit a second demand for hearing and that if the parties could not reach an agreement, Brennan would be provided a probationary hearing by the district prior to official action being taken on the contract.

In a May 4 conversation with Dr. William Gall, the superintendent of School District No. 21, Higgins told Gall that if the school board did not agree to a negotiated settlement, the board would have to give Brennan a hearing.

The trial court found that Higgins did advise Brennan's representative, Lowell Zetterman, that a second demand for a hearing was unnecessary, and also found that neither Gall nor the school board was informed of Higgins' promise until after May 5.

The trial court further found that Higgins did not have the actual or apparent authority to waive the demand requirement

and that the purported waiver was not within the proper scope of his duties as an attorney for the board.

At issue is the authority of a school district attorney, engaged in negotiations with a teacher's representative, to waive the formal demand for hearing provided for in Neb. Rev. Stat. § 79-12,114 (Reissue 1987).

Both appellant and appellee cite to and argue the provisions of Neb. Rev. Stat. § 7-107 (Reissue 1987), which provide as follows:

> An attorney or counselor has power: (1) To execute, in the name of his client, a bond for an appeal, certiorari, writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced; (2) *to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers*; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court; (3) to receive money claimed by his client, in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

(Emphasis supplied.)

The waiver was clearly established by Higgins' testimony. We then reach the critical issue as to whether the waiver was within Higgins' authority and, if so, was it within the scope of his proper duties and powers.

Assuming that the Legislature, in any event, has the authority to define the practice of law and to prescribe the limits to which an attorney may bind a client, we proceed to an analysis of the issue.

The requirements of a termination proceeding of a probationary employee of a school district are set out in § 79-12,114 to Neb. Rev. Stat. § 79-12,117 (Reissue 1987) and authorize a more informal proceeding, though they still require notice of hearing, opportunity to appear in person or by a representative, opportunity to offer evidence, and an open

session in the event of a termination. The sections referred to are a part of a larger section dealing with the whole area of tenure and retention of school district employees.

We have referred to the procedures contemplated by Neb. Rev. Stat. §§ 79-12,107 et seq. (Reissue 1987) as "teacher termination proceedings." See, e.g., *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985); *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983). See, also, *Bickford v. Board of Ed. of Sch. Dist. #82*, 214 Neb. 642, 336 N.W.2d 73 (1983); *Moser v. Board of Education*, 204 Neb. 561, 283 N.W.2d 391 (1979).

Appellee argues that administrative hearings are not proceedings to which § 7-107 applies. On the contrary, to so hold would ignore the myriad of administrative bodies, state and local, in which participation is part and parcel of the active practice of the law. The term "proceeding" is used advisedly, as the Legislature appears to have recognized that a much broader area of the practice of law obtains than merely the litigation of disputes in a court of law.

Higgins was, at times, retained by the school district to advise, consult with, and negotiate on behalf of the district in various areas of school law, including employment questions. The record clearly shows that he was acting on behalf of the school district as its attorney in the matter of the termination of Brennan's employment, including his negotiations with Brennan's representative. As such, Higgins had the real and the apparent authority to waive the formal notice requirement, and his client is bound thereby.

The appellee finally suggests that as the notice and the demand must be in writing, no hearing could lawfully be held absent the written demand. We have held that parties may waive procedural provisions by agreement. *Simmons v. Murray*, 189 Neb. 695, 204 N.W.2d 800 (1973), *modified, Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982). See, also, *Yanzick v. Board of Trustees*, 177 Mont. 459, 582 P.2d 338 (1978).

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

W & K FARMS, INC., APPELLANT, V. AARON R. WALTER, APPELLEE.

458 N.W.2d 230

Filed July 27, 1990. No. 88-911.

1. **Corporations: Debtors and Creditors: Words and Phrases.** "Liquidation," as applied to a corporation, means the winding up of the affairs of the corporation by collecting all its assets, settling with creditors and debtors, and apportioning the amount of profit and loss.
2. **Corporations: Debtors and Creditors: Claims.** Under the provisions of Neb. Rev. Stat. § 21-2046 (Reissue 1987), liquidation requires that corporate debts be taken care of. Any distribution of assets to shareholders without taking care of corporate debts would be illegal, and corporate creditors can assert claims against shareholders in possession of corporate assets.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Richard L. Spittler for appellee.

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

HASTINGS, C.J.

This is a continuance of *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987).

Upon remand of the cause to the district court following the first opinion, appellant W & K Farms, Inc., filed a third amended petition, alleging generally that Hi-Line Farms, Inc., made and delivered to plaintiff W & K Farms its promissory note in the sum of $38,595.92; that with a minor exception, no payment had been made on the note; that defendant Aaron R. Walter asserted that Hi-Line Farms was dissolved for nonpayment of occupation taxes on August 4, 1981, pursuant to Neb. Rev. Stat. § 21-313 (Reissue 1977), and the survival statute, Neb. Rev. Stat. § 21-20,104 (Reissue 1987), had expired, thus barring plaintiff's suit against the corporation; and that since dissolution of the corporation, defendant Walter, as the sole remaining officer and only stockholder, appropriated the corporate property as his own without regard

to plaintiff's debt and had failed and refused to pay the debt.

The amended petition goes on to allege that defendant Walter holds the property of the corporation in trust for the creditors and prays for judgment against Walter in the amount of the unpaid balance of the note.

Defendant Walter demurred to this amended petition. Plaintiff W & K Farms asked leave of the court to amend its third amended petition by alleging that Walter was a director of the dissolved corporation. Leave was denied, the demurrer was sustained, and the third amended petition was dismissed on the basis that the survival period of § 21-20,104 had expired.

Section 21-20,104 provides in part that "[t]he dissolution of a corporation . . . shall not take away or impair any remedy . . . for any right or claim existing, or any liability incurred, *prior to such dissolution* if action or other proceeding thereon is commenced within two years after the date of such dissolution." (Emphasis supplied.)

It is the appellee's theory, and the holding of the trial court, that this was a suit for recovery on the note which was in fact brought more than 2 years after the dissolution of the corporation. Appellant's theory of the case is that it is not suing on a liability incurred prior to dissolution.

Having been dissolved by the Secretary of State, the corporation, Hi-Line Farms, needed to be liquidated. "Liquidation," as applied to a corporation, means the winding up of the affairs of the corporation by collecting all its assets, settling with creditors and debtors, and apportioning the amount of profit and loss. 16A W. Fletcher, Cyclopedia of the Law of Private Corporations § 7968 (rev. perm. ed. 1988). Since liquidation requires that corporate debts be taken care of, any distribution of assets to shareholders without taking care of corporate debts would be illegal, and corporate creditors can assert claims against shareholders in possession of corporate assets.

Furthermore, Neb. Rev. Stat. § 21-2046 (Reissue 1983) provided in part as follows:

> *In addition to any other liabilities*, a director shall be liable in the following circumstances unless he or she complies with the standard provided in sections 21-2001 to

21-20,134, for the performance of the duties of directors:

> . . . .
>
> (3) A director who votes or assents to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known debts, obligations, and liabilities of the corporation shall be liable, jointly and severally with all other directors so voting or assenting, to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations, and liabilities of the corporation are not thereafter paid and discharged . . . .

(Emphasis supplied.) Appellant sought to allege liability on the part of the appellee as a director who voted or assented to a distribution of assets of the corporation to the detriment of existing creditors.

Liquidation of Hi-Line Farms occurred *after* the corporation was dissolved. Appellant alleges that Walter, as shareholder, took control of the corporate assets after the dissolution and sought to allege that Walter, as director, assented to such distribution of the corporate assets. Appellant's claim against Walter as sole shareholder and director of Hi-Line Farms arose after dissolution and is not barred by § 21-20,104.

The trial court should have allowed W & K Farms to amend its third amended petition to allow the allegation that Walter was a director, and the court erred in sustaining the demurrer and in dismissing the petition.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. TINA L. MOORE, APPELLANT.

458 N.W.2d 232

Filed July 27, 1990. No. 89-858.

1. **Convictions: Appeal and Error.** The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
3. **Courts: Records: Appeal and Error.** Appellate courts in Nebraska are limited to considering errors which appear on the record from the trial court and may not consider errors not found in the record.
4. **Testimony: Trial: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its rulings will be upheld on appeal absent an abuse of discretion.
5. **Sentences: Appeal and Error.** Sentences imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Douglas County, JOHN E. CLARK, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of District Court affirmed.

J. Mark Barnett for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

BOSLAUGH, J.

The defendant, Tina L. Moore, was convicted in county court of theft by shoplifting, in violation of Neb. Rev. Stat. § 28-511.01(1)(a) (Reissue 1989), and fined $150. Upon appeal to the district court, the judgment was affirmed. She has now appealed to this court, contending that the evidence was insufficient to sustain her conviction and that the district court erred in failing to consider her constitutional objection to § 28-511.01, in limiting the scope of her cross-examination, and in imposing an excessive sentence.

The Supreme Court will sustain a criminal conviction if,

taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thayer, ante* p. 70, 453 N.W.2d 474 (1990); *State v. Carter*, 234 Neb. 378, 451 N.W.2d 271 (1990).

Section 28-511.01 provides, in part:

> (1) A person commits the crime of theft by shoplifting when he or she, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession of such property or its retail value, in whole or in part, does any of the following:
>
> (a) Conceals or takes possession of the goods or merchandise of any store or retail establishment.

The record shows that the offense took place at a 1/2 Price Store in Omaha, Nebraska. The loss control manager for the store testified that he saw the defendant enter the earring department and select a pair of earrings. She took the earrings off their display card, looked around in several directions, and put the earrings on her ears. The defendant then threw the empty earring display card into the bottom of her shopping cart, selected four more pairs of earrings, and put them in the cart with the empty card.

While the defendant was in the women's department, she dropped the empty earring display card on the floor. She was still wearing the earrings when she went to the checkout counter. The defendant purchased several other items, did not pay for the earrings, and left the store. The price of the earrings was $4.99. She was apprehended by the loss control manager, who called the police. While the manager was on the telephone, the defendant admitted that she had purposely taken the earrings.

The State's evidence, which has been summarized, was sufficient, if believed, to support the defendant's conviction for shoplifting.

In her second assignment of error, the defendant claims the district court erred in failing to consider her constitutional objection to § 28-511.01, which was not raised in the trial court.

The rule is that " '[e]xcept in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it

will be considered to have been waived.' " *State v. Moore*, 226 Neb. 347, 349-50, 411 N.W.2d 345, 348 (1987) (quoting *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985)). See, also, *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988). The defendant claims that this rule is arbitrary and capricious and in violation of the due process clauses of U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

Similar contentions were addressed in *State v. Moore, supra*. In that case, the defendant was convicted of disturbing the peace and quiet of others and resisting arrest, both in violation of the Lincoln Municipal Code. Moore failed to question the constitutionality of the ordinances during his trial, but claimed that the constitutionality issue was raised during his appeal to the district court and, therefore, should be addressed by this court. In *State v. Moore, supra* at 350, 411 N.W.2d at 348, we said:

> A similar contention was rejected in *State v. Kaiser*, [218 Neb. 556, 356 N.W.2d 890 (1984)], where we stated at 558, 356 N.W.2d at 892:
>
> "The fallacy with this argument, however, is that appeals in criminal matters from the municipal court to the district court are not reviewed de novo upon the record; rather, they are reviewed 'for error appearing on the record made in the county or municipal court.' Neb. Rev. Stat. § 24-541.06(1) [Reissue 1985] . . . . The district court in the instant case was functioning as an appellate court and not as a trial court; thus, it was restricted in its review to the record made in the lower court."

Neb. Rev. Stat. § 24-541.06 (Reissue 1985) has been revised and transferred to Neb. Rev. Stat. § 25-2733 (Reissue 1989) and now provides that "[i]n all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court or on the record made, if prior to July 1, 1985, in the municipal court."

Although the defendant claims that the foregoing rule is inconsistent with our rules governing plain error on the record and defects in informations, her arguments are without merit. In *State v. Thomas*, 229 Neb. 635, 640, 428 N.W.2d 221, 225

(1988), we said:

> Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, *but plainly evident from the record*, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.

(Emphasis supplied.)

In *Nelson v. State*, 167 Neb. 575, 582-83, 94 N.W.2d 1, 6 (1959) (citing *Hunt v. State*, 143 Neb. 871, 11 N.W.2d 533 (1943)), we said that "an objection to an information may be raised for the first time on appeal where so defective that by no construction can it be said to charge the offense for which accused was convicted." An information, however, is part of the record of the trial court.

Pursuant to § 25-2733, appellate courts in Nebraska are limited to considering errors which appear on the record from the trial court and may not consider errors not found in the record. By failing to raise her constitutional objection in the trial court, the defendant waived her right to do so in the district court and in this court. Her assignment of error is without merit.

The defendant next contends that the trial court erred in limiting the scope of her cross-examination. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its rulings will be upheld on appeal absent an abuse of discretion. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

Specifically, the defendant complains that the court should have allowed trial counsel more latitude in cross-examining the loss control manager about his conversation with the defendant after the defendant's apprehension. The witness was first asked whether the defendant had told him of her concerns regarding this offense. The trial court properly sustained the State's objection on the ground of relevancy. The witness was later asked whether he made any personal comments to the defendant. When defendant's trial counsel was asked to defend the relevance of her line of questioning, her response was, "I'd just like to know, Judge." In a second line of questioning,

defendant's trial counsel attempted to cross-examine the loss control manager as to whether he had advised the defendant of her *Miranda* rights. The trial judge properly sustained the State's objection to these questions.

The trial court did not abuse its discretion in limiting cross-examination to relevant issues. The defendant's assignment is without merit.

Finally, the defendant complains that the trial court erred in sentencing her by formulating the sentence based upon consideration of the fact that she maintained her innocence throughout the trial of this matter. The record shows that after finding the defendant guilty as charged, the trial judge asked the defendant whether she had anything to say before sentence was pronounced. The defendant replied, "I didn't do it. That was not my intentions." The court's subsequent remarks were not a criticism of the defendant's maintaining her innocence throughout the trial, but an observation that the defendant failed to express any remorse for her actions even after having been found guilty beyond a reasonable doubt.

The crime for which the defendant was convicted is a Class II misdemeanor. See Neb. Rev. Stat. § 28-518 (Reissue 1989). The maximum penalty for a Class II misdemeanor is 6 months' imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1989). The defendant was ordered to pay a $150 fine. Sentences imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Shepherd, ante* p. 426, 455 N.W.2d 566 (1990). The trial court did not abuse its discretion in sentencing the defendant.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN M. WILLIAMSON, APPELLANT.

458 N.W.2d 236

Filed July 27, 1990. No. 89-1164.

Criminal Law: Evidence: Appeal and Error. In reviewing a criminal case for alleged insufficiency of the evidence, the State is entitled to have all relevant evidence favorable to the State treated as true, as well as to have every beneficial inference reasonably deducible from that evidence.

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

Christopher I. Hansen, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

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

WHITE, J.

Appellant, Stephen M. Williamson, was charged in the district court for Lancaster County with the offense of first degree sexual assault on a child, a Class II felony. A jury found him guilty of the offense as charged. The trial court sentenced him to a term of 15 to 40 years in the Nebraska Department of Correctional Services. Williamson appeals. We affirm.

A number of errors are assigned, which we condense as follows: The district court's (1) admission in evidence of letters written by the appellant after the offense and discovered by penal authorities during regular mail inspection; (2) admission in evidence of the victim's reports of the incident; (3) refusal to give instructions on lesser-included offenses; and (4) failure to dismiss the information and subsequent failure to grant posttrial motions based on insufficiency of evidence to sustain a conviction.

In reviewing a criminal case for alleged insufficiency of the evidence, the State is entitled to have all relevant evidence favorable to the State treated as true, as well as to have every beneficial inference reasonably deducible from that evidence.

State v. Katzman, 228 Neb. 851, 424 N.W.2d 852 (1988).

The evidence discloses that on November 27, 1987, the victim, a 10-year-old male, accompanied his stepfather, Williamson, in his car to an abandoned residence near Pioneers Park in Lincoln, Nebraska. The victim was "made" to go by Williamson. On arrival, the victim was ordered into the back seat of the car and directed to remove his clothing. Williamson lowered his trousers to his knees and directed the victim to lie down on his back. Williamson then "[p]ut his mouth on [the victim's] private." The victim testified that his penis went inside Williamson's mouth. The victim told his mother that "Steve done it again" and testified that Williamson had on a number of occasions "touched [the victim's] private" with "[h]is hand and mouth." The victim's brother testified that Williamson had fondled him a number of times.

The offenses against the victim were discovered on the inspection of Williamson's mail by authorities at the penal complex. The receipt in evidence of the pertinent parts of those letters is the subject of the first assignment of error. In a letter dated June 11, 1988, Williamson wrote the following:

> Have you been thinking about what we talked about with [the victim] & [the victim's brother] if so who first you & them or me & one of them? . . . i can'nt help but wander what it would be like you with one of them or what it would be like with all 4 four of us at once. don't you? First it will be me & you then you & them then me & them then all 4 four ok? . . . Are you still going to get [the victim's brother's] hole biger with your finger & dildoe so when i get out he fittes in without ripping him open . . . .

On June 26, he wrote:

> It hert me to much keeping it from you about [the victim] & [his brother] thats why i told you ok? But i at least would like to put it in [the victim] & [his brother] one time ech befor i stop all together ok? I can'nt stop right away but with your help i'll be able to stop shortly after being out of hir ok? thats the only help i need to stop fucking around with them & that is from you benita. ok pleas?

Counsel for appellant contends that the receipt of the letters was error, since the excerpts referred to planned future acts and

therefore did not have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Neb. Rev. Stat. § 27-401 (Reissue 1989), and, further, that the letters were an impermissible attempt to show evidence of other crimes or wrongs simply to demonstrate that Williamson was a bad person. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have no hesitancy in agreeing with the trial court that the evidence was relevant under § 27-401 and, further, that the evidence was admissible as tending to prove intent, motive, or plan. We further observe that at least significant portions of the excerpts were admissible as admissions by a party. See Neb. Rev. Stat. § 27-801(4)(b)(1) (Reissue 1989).

Even if the letters were admissible, appellant contends that the probative value of the letters is substantially outweighed by the danger of unfair prejudice.

The letters admitted at trial were clearly damning. Indeed, all evidence tending to establish guilt and especially incriminating admissions can be said to be prejudicial. See *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). Can it be said that this prejudice is caused by the damaging contents of the letters themselves or by some improper basis? The former is demonstrably true. The trial court did not err in admitting the letters. The first assignment is meritless.

The second assignment of error relates to the admission in evidence of certain reports of the incident made by the victim or others. The appellant's counsel argues that since corroboration is no longer required in sexual offense cases, Neb. Rev. Stat. § 29-2028 (Reissue 1989), reports of the crime to others are inadmissible.

Initially, we note § 29-2028 does not make testimony concerning corroboration inadmissible; the statute only states

that corroboration shall not be *required*. We note further that the statements were offered not for the truth of the assertions, but were offered to prove that the statements were made, and thus they are not hearsay. See Neb. Rev. Stat. § 27-801 (Reissue 1989). See, also, *State v. Wilson, supra*. In any event, the evidence which appellant finds objectionable was in response to questions asked of the victim by appellant's counsel. No evidence of reports to others was proffered by the State on direct examination. However, on cross-examination the following questions and answers were elicited by the defense:

> Q. Okay. You had mentioned earlier that Leroy Painter is your grandpa?
>
> A. Yes.
>
> Q. Is that right?
>
> A. Yes.
>
> Q. And have you ever talked with Leroy Painter about any of this?
>
> A. I don't think so.
>
> Q. Have you ever talked with your Grandma Charlotte about any of this?
>
> A. No.
>
> . . . .
>
> Q. . . . When you were in Omaha, do you remember if you ever told anybody about being abused in any way, anybody in the school system that you were hit by anybody?
>
> A. No.

In response, the State on redirect asked the victim about reports made to others. The trial court did not abuse its discretion by allowing the fact of reports to others to be testified to by the victim. The second assigned error is without merit.

In his third assignment of error, appellant contends the trial court erred in refusing to instruct on the lesser-included offenses of second or third degree sexual assault or sexual assault of a child. The appellant did not testify, and the only evidence offered tended to prove (if believed) the commission of sexual assault of a child in the first degree. So far as is pertinent here, Neb. Rev. Stat. § 28-319 (Reissue 1989) provides: "(1) Any person who subjects another person to

sexual penetration and . . . the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-318 (Reissue 1989) states that "[s]exual penetration shall mean . . . fellatio."

As no contrary evidence of a lesser charge was presented which would produce a rational basis whereby the jury could have found the appellant guilty of the lesser charge and innocent of the greater, the failure to submit a lesser-included charge was not erroneous. *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978); *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983). The third assignment of error has no merit.

The fourth assignment of error relates to whether the evidence, if believed, was sufficient to prove the defendant guilty of the crime charged. In light of the favorable view we take of the State's evidence after conviction, it is obvious that this assignment is also without merit.

Therefore, all assignments of error having been found to be without merit by this court, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TED SALTZMAN, APPELLANT.

458 N.W.2d 239

Filed July 27, 1990. No. 89-1195.

1. **Criminal Law: Verdicts: Appeal and Error.** A verdict in a criminal case will be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact.
3. **Convictions: Circumstantial Evidence: Proof.** One accused of a crime may be convicted on the basis of circumstantial evidence if the evidence, viewed as a whole, establishes the guilt of the defendant beyond a reasonable doubt; the

State is not required to disprove every hypothesis except that of guilt.

4. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
5. **Criminal Law: Circumstantial Evidence: Intent: Proof.** Whether a criminal defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence.
6. **Criminal Law: Intent: Intoxication.** The fact that an accused, at the time of the criminal act charged, was drunk or intoxicated does not constitute, as a matter of law, a defense to an offense which requires proof that the defendant possessed some intent.
7. _____: _____: _____. Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.
8. **Criminal Law: Intent.** The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1989) does not require an intent to execute the threats made; rather, it requires the intent to terrorize another as a result of the threat or a reckless disregard of the risk of causing such terror.
9. _____: _____. The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1989) requires not that the recipient of the threat be terrorized; rather, it requires that the actor have the intent to terrorize the recipient as a result of the threat.

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

David L. Kimble, of Souchek & Kimble, for appellant.

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

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

PER CURIAM.

Following a bench trial, defendant-appellant, Ted Saltzman, was adjudged guilty of three counts of committing terroristic threats, in violation of Neb. Rev. Stat. § 28-311.01 (Reissue 1989). Saltzman urges that the evidence was insufficient to support the convictions. The record failing to support that assignment of error, we affirm.

The charges for which Saltzman was convicted arise from a number of telephone calls he made to three individuals living in

Milford, Nebraska. Each of the individuals had been involved in a case in which Saltzman was originally charged with a 1986 sexual assault of an 11-year-old girl.

One of the recipients of Saltzman's calls was Connie Miller, a protective services worker with the Department of Social Services who, since the time of the 1986 assault, had been working with the 11-year-old girl. Miller testified that one of her duties, after the assault was discovered and the child was removed from her mother's home, was to prevent Saltzman, who was then living with the girl's mother, from having contact with the girl during visitations between the girl and her mother. According to Miller, Saltzman would accompany the mother to visitations and, while waiting for her, sit in the vehicle in which they came or walk around the outside of the courthouse where the visitations were held.

Saltzman telephoned Miller's residence on April 29, 1988, at 10:40 p.m. After Miller answered the telephone, Saltzman told her, "[Y]ou're gonna die, you bitch!" and then hung up. Miller testified that she did not recognize the voice but that the caller was an adult male who sounded as if "he was trying to disguise his voice." After the initial telephone call, Miller's household received five or six more calls during which, after she, her husband, or her daughter answered, the caller would say nothing and then hang up. Miller testified that the initial call upset and annoyed her and that although she was not terrified, she considered the call a threat.

On the same evening between 9:30 and 11:05 p.m., Saltzman also made six telephone calls to the residence of Lowell Sellmeyer, the chief of police for the city of Milford, who had investigated the charges against Saltzman. During the second call, which was the first call the chief answered, Saltzman stated, "[Y]ou're going to die. I'm going to blow up your house." According to Sellmeyer, the caller used

> a lot of profanity and said that he was going to get even. I said, well, why — what do you want to get even about? I questioned him as to why he was mad at me. And I didn't recognize his voice right away, but he mentioned that I had set him up and I had set up other persons like — and he mentioned the name, Dennis Stutzman. He said that he

> was gonna get even. And he said, you setted me up. And I think it was at that time that I kinda suspected that it was Ted Saltzman.

During the conversation, Saltzman talked about the specifics of the case involving the 11-year-old girl and said that

> he had not had sex with her and we had make it look like . . . he had. And then he went through the same jargon again about blowing up the house and we were going to die and he's going to get even. He mentioned that he was also going to get the mayor and the county attorney. And he mentioned the county attorney by name.

Saltzman made similar statements throughout the remaining calls.

Sellmeyer testified that he had previously talked to Saltzman over the telephone and that he eventually recognized the voice as Saltzman's "[b]ecause of his particular way of speaking." According to Sellmeyer, "it was definitely Ted Saltzman making all of the calls." Sellmeyer further related: "I thought that I detected maybe that [Saltzman] had been using alcohol and may have been under the influence." There was also evidence that during one of the calls, Saltzman realized that two other officers were listening to the conversation, became apologetic, stated that he was confused, and agreed he needed to seek counseling. Sellmeyer stated that he was not terrified by the calls but was intimidated, threatened, and annoyed.

About 2 months later, Saltzman telephoned Barbara Johnson. Johnson testified that she had become involved in the sexual assault case against Saltzman when her daughter, a friend of the victim's, "told me some things that Ted was doing to her girl friend and she was upset over it. And it was happening at times when my daughter was spending the night over there." Johnson reported the incidents to the police, and an investigation was conducted on the basis of her report. Subsequently, Johnson testified against Saltzman.

According to Johnson, Saltzman called her residence on July 9, 1988, at about 9:45 p.m. Johnson testified that she answered the telephone, recognized the voice as Saltzman's, and then gave the receiver to her ex-husband, who testified that he also recognized Saltzman's voice and that Saltzman stated "he was

going to get my wife and kids." According to Barbara Johnson, Saltzman had previously telephoned her and threatened her and her children. She testified that she was upset, angry, and felt threatened because of the call on July 9.

The Milford police were able to trace the calls made to Sellmeyer's residence and discovered that the calls originated from an address in Lincoln, Nebraska, where Saltzman resided at the time. Larry Wentink, an area manager for Lincoln Telephone Company, testified that during April 1988, Saltzman had telephone service at the Lincoln address but that his service was disconnected in May. Saltzman's long-distance telephone records show that on April 29, 1988, six long-distance calls were placed from his telephone number to Sellmeyer's telephone number, and eight long-distance calls were placed to Miller's telephone number.

Saltzman's brother testified that during April 1988, he, his fiancee, and a friend also lived at the Lincoln address with Saltzman. According to the brother, when he was discussing the April telephone bill with the friend, the friend admitted that he had made the calls to Milford on April 29, 1988, and stated that he would pay for them. The brother admitted when cross-examined by the State, however, that when he arrived home on the evening of April 29, Saltzman was talking on the telephone, and when the brother asked Saltzman to whom he was talking, Saltzman said, "Sellmeyer."

Saltzman contends that the State did not present sufficient evidence to sustain his convictions for committing terroristic threats on any of the three counts alleged in the information. We therefore recall that a verdict in a criminal case will be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. In determining the sufficiency of the evidence to sustain the conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. *State v. Wright, ante* p. 564, 456 N.W.2d 288 (1990); *State v. Badami, ante* p. 118, 453 N.W.2d 746 (1990); *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

One accused of a crime may be convicted on the basis of circumstantial evidence if the evidence, viewed as a whole, establishes the guilt of the defendant beyond a reasonable doubt. The State is not required to disprove every hypothesis except that of guilt. *State v. Badami, supra.*

Section 28-311.01 provides in relevant part: "(1) A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another . . . or (c) In reckless disregard of the risk of causing such terror . . . ."

Saltzman first urges that the evidence to support his conviction for telephoning Barbara Johnson's residence and making terroristic threats is lacking in that the State failed to prove a threat to commit a crime of violence or that he had the requisite intent.

In the first regard, Saltzman claims that his statement to Johnson's ex-husband that he was going to get the ex-husband's wife and children does not constitute a threat to commit a crime of violence within the purview of the Nebraska Criminal Code. Contrary to Saltzman's claim, the evidence presented was sufficient for the trier of fact to conclude that Saltzman, in retaliation for Barbara Johnson's involvement in the sexual assault case, was threatening to commit a crime of violence against her and her children.

Similarly meritless is Saltzman's claim that the evidence fails to establish that he possessed the requisite intent. When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. See, *State v. Broussard, ante* p. 809, 457 N.W.2d 457 (1990); *State v. Swigart,* 233 Neb. 517, 446 N.W.2d 216 (1989); *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987); *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980). Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. See *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989). Considering the language Saltzman used and the circumstances of the past relationship between Saltzman and Johnson, the evidence is sufficient to

support a conclusion that in making the threat to Johnson's ex-husband, Saltzman possessed, out of a sense of revenge, the intent to terrorize Johnson, her ex-husband, and her children. Therefore, there was sufficient evidence to sustain Saltzman's conviction on this count.

Saltzman next urges that the State failed to prove that he was the person who telephoned Miller in that Miller could not identify the caller's voice, the call was placed from a residence Saltzman shared with three other people, one of whom admitted making the call, and there was no evidence that Saltzman "bore [Miller] any ill will." Brief for appellant at 8. There was evidence, however, that Saltzman telephoned Sellmeyer on the same night he had telephoned Miller and accused Sellmeyer of "setting him up" in the sexual assault case. This evidence, along with the evidence that the call to Miller originated from a residence where Saltzman was residing, is sufficient for the trier of fact to conclude that Saltzman was the one who telephoned Miller as a result of her connection with the sexual assault victim. Again, the evidence is sufficient to sustain Saltzman's conviction on this count.

Finally, Saltzman claims that the State failed to prove that he had "the intent to terrorize another" when he telephoned Sellmeyer. Brief for appellant at 10. In this regard, Saltzman urges that "it is difficult to see how this drunken, confused man could have intended seriously to do anything to anyone after verbally warning anyone and everyone who would listen to him on the 29th of April, 1988." Brief for appellant at 10.

If Saltzman's claim is that he was intoxicated and confused and therefore unable to form the requisite intent, that claim fails. The fact that an accused, at the time of the criminal act charged, was drunk or intoxicated does not constitute, as a matter of law, a defense to an offense which requires proof that the defendant possessed some intent. *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). See, also, *State v. Reynolds, ante* p. 662, 457 N.W.2d 405 (1990). Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged. *State v. Reynolds, supra*; *State v. Lesiak*, 234

Neb. 163, 449 N.W.2d 550 (1989); *State v. Hoffman, supra.* There is no evidence as to how much, if any, alcohol Saltzman drank before making the calls to Sellmeyer, but there is evidence that Saltzman was able to dial Sellmeyer's telephone number and talk coherently to him about past events. Such evidence provided the trier of fact with sufficient circumstantial evidence to conclude that Saltzman was able to form the intent to terrorize Sellmeyer as a result of making threatening telephone calls to him.

If Saltzman's claim is that he lacked the intent to execute his threats, he misconstrues the terroristic threats statute. The crime does not require an intent to execute the threats made; rather, it requires, as relevant here, the intent to terrorize the recipient as a result of the threat, see *State v. Willett, supra*, or a reckless disregard of the risk of causing such terror. Saltzman told Sellmeyer, "[Y]ou're going to die," and threatened to "blow up [Sellmeyer's] house." Further, Saltzman informed Sellmeyer that "he was going to get even" because Sellmeyer had "setted [him] up" on the sexual assault charge. This evidence is sufficient to support a conclusion that Saltzman intended to terrorize Sellmeyer because of Sellmeyer's investigation of the sexual assault charges against him.

Lastly, Saltzman presumably makes the claim that the evidence shows Sellmeyer did not feel terrified. Again, Saltzman misconstrues the terroristic threats statute. The statute requires not that the recipient of the threat be terrorized; rather, it requires, in relevant part, that the actor have the intent to terrorize another as a result of the threat. The record contains sufficient circumstantial evidence to support a conclusion that Saltzman had the requisite intent. Therefore, there is sufficient evidence to support Saltzman's conviction on this count as well.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. SCHWAB, APPELLANT.

458 N.W.2d 459

Filed July 27, 1990. No. 89-1289.

1. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if the evidence, viewed as a whole, establishes guilt beyond a reasonable doubt.
2. **Criminal Law: Intent: Circumstantial Evidence: Proof.** Whether a criminal defendant possesses the requisite state of mind is a question of fact which may be proved by circumstantial evidence.
3. **Criminal Law: Indictments and Informations: Proof.** Whether two charges constitute the same offense is determined by whether each charge requires proof of different facts; if so, the two charges do not constitute the same offense.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

Bruce Dalluge, of Morrissey, Morrissey & Dalluge, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

PER CURIAM.

Pursuant to pleas, defendant-appellant, James E. Schwab, was adjudged guilty of theft by shoplifting, in violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1989), and of theft by receiving stolen property, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1989). He was thereafter sentenced to consecutive terms of imprisonment for a period of 1 year on each conviction. Schwab now urges, in summary, that the trial court erred in (1) accepting invalid pleas and (2) imposing sentences which subject him to double jeopardy. We affirm.

In connection with the first summarized assignment of error, Schwab contends that his pleas were not entered voluntarily because the trial court "did not review the factual basis of the two charges to determine if [he] could be convicted and punished for the two charges." Brief for appellant at 2.

Upon the trial court's inquiry as to the factual bases for the pleas, the prosecutor reported that on the day in question

Schwab entered a store, took certain merchandise, concealed it, and departed the store without paying for it. The prosecutor also informed the court that on the same day, Schwab's companion also took some merchandise from the same store and gave the items to Schwab, who accepted possession of them knowing them to have been stolen. Schwab expressly agreed with the prosecutor's statements and announced that he was "willing to stand on" his pleas.

Section 28-511.01 provides, in relevant part, that one commits the crime of theft by shoplifting when, "with the intent of appropriating merchandise to his or her own use without paying for the same," he or she "[c]onceals or takes possession of the goods or merchandise of any store . . . ." Section 28-517 provides, in relevant part, that one commits a theft if he or she "receives . . . stolen movable property of another knowing that it has been stolen . . . ."

Bearing in mind that one accused of a crime may be convicted on the basis of circumstantial evidence if the evidence, viewed as a whole, establishes guilt beyond a reasonable doubt, and that whether a criminal defendant possesses the requisite state of mind is a question of fact which may be proved by circumstantial evidence, *State v. Saltzman, ante* p. 964, 458 N.W.2d 239 (1990), the factual bases supplied by the prosecutor and Schwab adequately support the trial court's adjudications of guilt.

The contention that the trial court did not properly review the factual bases merges with the second summarized assignment of error, which, as noted earlier, claims Schwab was impermissibly twice put in jeopardy for the same offense in the sense that he has been subjected to multiple punishments for but one crime. Assuming, but not deciding, that his voluntary pleas of guilt do not foreclose Schwab from asserting such a claim, the fact is that the claim is without merit.

Relying on *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), Schwab argues that he cannot be convicted of both theft and receiving the very same stolen goods. While that may well be so, that is not what is involved in this case. As *Brown* and *State v. Stabler*, 209 Neb. 298, 306 N.W.2d 925 (1981), note, whether two charges constitute the

same offense is determined by whether each charge requires proof of different facts; if so, the two charges do not constitute the same offense. Schwab was convicted in the one instance for the theft he himself committed and in the other instance for having taken possession of different property he knew to have been stolen by another. Since those different facts were involved, the two charges did not constitute the same offense, and Schwab was not subjected to multiple punishments for the same crime.

Schwab's assertion that our Legislature has eliminated the foregoing rule in theft cases by providing in Neb. Rev. Stat. § 28-510 (Reissue 1989) that "[c]onduct denominated theft in sections 28-509 to 28-518 constitutes a *single offense* embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like" (emphasis supplied) is disingenuous, to say the least. While one may wonder why such an exercise was thought to be necessary, the subject language merely states that the word "theft" includes the various crimes which were once called something else. As evidenced by the sundry statutes defining a variety of conduct as constituting thefts subjecting one to different consequences, the quoted language does not purport to define but a single crime for which only one punishment may be imposed.

The record failing to sustain the summarized assignments of error, the judgments of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE GRANTZINGER, APPELLANT.

458 N.W.2d 461

Filed July 27, 1990. No. 89-1291.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the

evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

2. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
4. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
5. **Police Officers and Sheriffs: Arrests: Drunk Driving.** In order to arrest a person for suspected driving while intoxicated, it is only necessary that the arresting officer have knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime.

Appeal from the District Court for Custer County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Custer County, ROBERT E. WHEELER, Judge. Judgment of District Court affirmed.

Stephen G. Lowe for appellant.

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

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

HASTINGS, C.J.

Following a bench trial in Custer County Court, the defendant, Dale Grantzinger, was convicted of refusing to submit to a chemical test, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1988); having no valid registration, in violation of Neb. Rev. Stat. § 60-325 (Reissue 1988); and failing to carry his driver's license, in violation of Neb. Rev. Stat. § 60-413 (Reissue 1988). The convictions were affirmed by the district court, and defendant appeals.

Defendant assigns as error (1) the failure of the trial court to

grant his motion to dismiss, (2) the failure of the trial court to grant his motion for a new trial, (3) the insufficiency of the evidence to support the convictions, and (4) the trial court's placing undue weight on defendant's alleged involuntary admission to the deputy sheriff that defendant was driving at the time of the incident in question. All four complaints refer to the sufficiency of the evidence. We affirm.

Tom Mayo, a Custer County deputy sheriff, testified that he was dispatched to the scene of a single-vehicle motorcycle accident in Custer County at approximately 8 p.m. on April 2, 1989. When the deputy arrived, he observed a female lying on her back on the west edge of the road and a male, whom he recognized to be Grantzinger, the defendant, behind her and on his knees. The female was having extreme difficulty breathing, and defendant had a bad cut over his right eye and was very bloody.

The deputy asked defendant if he was all right, and he nodded in the affirmative, and the deputy asked defendant if he had been driving, and he nodded in the affirmative. The defendant was then assisted up to the rescue unit by the deputy. The deputy observed that a strong odor of beer was on defendant's breath and that defendant was "very staggery and unsure of his footing," had poor balance, and exhibited a "slowness of speech." Upon being asked, the deputy testified, without objection by the defendant, that in his opinion the defendant was under the influence of alcoholic liquor at that time.

Mayo testified that he knew that defendant rode a motorcycle frequently and that he observed a wrecked blue BMW motorcycle at the scene, which motorcycle he associated with defendant. The deputy then checked the registration on the motorcycle and found that it had expired in 1977.

There was also testimony by Mayo, received without objection, that someone made a statement to him at the hospital that a "Mr. Bernt (sic) had been operating the motorcycle."

At around 9 p.m. at the Broken Bow hospital, Mayo testified, he observed the defendant lying on his back in the x-ray room. Mayo believed that defendant was unconscious or

asleep, as he would not acknowledge Mayo's presence. Mayo read the implied consent advisement to the defendant without receiving a response, and then Mayo requested a doctor to draw a blood sample. At that time, defendant flatly said, "[N]o." Mayo tried to explain to the defendant that he could lose his license if he did not give the blood sample; Mayo offered defendant the option of giving a urine sample, but defendant said he did not care what happened to him and would not give a sample.

The State offered testimony from James Bernt, a friend of the defendant's. Although the interrogation was sketchy, it is a fair summary of Bernt's testimony that defendant arrived at Bernt's home at around 2:30 p.m. on the day of the accident, riding a motorcycle and accompanied by his girl friend. They all apparently went to a bar in Mason City where they played pool and ordered a pizza, and the defendant drank some beer. Bernt, the defendant, and the defendant's girl friend then returned to the vicinity of Bernt's home around 5 or 5:30 p.m., at which time defendant stopped and said he was going to go see another friend and possibly would be back. Bernt said the defendant was on the motorcycle at the time he left, but when asked who was operating the motorcycle when it left, he answered: "When it left I — Truthfully, I don't know. We pulled away and went up the hill towards my house. And Tom knows where that's at, you know, I couldn't see him."

On further examination, Bernt was asked: "Did you previously tell the Deputy Sheriff, Tom Mayo, who's present in the courtroom, that Dale Grantzinger was operating the motorcycle?" He responded: "At that time, yes, that's — I — I — You know, I just assumed that he was 'cuz he'd been on it, you know, that day, all day. And I know Dale, he's, you know, his motorcycle's his motorcycle. But as far as seeing him leave, I can't, you know, I can't tell ya."

Finally, the State offered the testimony of H.F. Kennedy that he had sold or traded a blue 1973 BMW motorcycle, which was the motorcycle about which there had been testimony that day, to defendant sometime during the end of March 1989. Following this testimony, the State rested its case.

According to the defense attorney's statement in the record,

defendant's girl friend died as a result of this accident and was not available to testify. Defendant's motion to dismiss for failure of proof was overruled.

Only the testimony of defendant was presented in his defense. Basically, he stated that he had purchased the BMW motorcycle from Kennedy and that he had been driving it the afternoon of the day of the accident when he went to Bernt's, then to Mason City, and then back to Bernt's. However, he denies any recollection of the accident and any conversation with Deputy Mayo, but has a hazy recollection of being on the county road described by Mayo.

In its judgment order finding the defendant guilty, the trial court made detailed findings of fact and conclusions of law. Included within these findings was a discussion as to the significance to be attached to the affirmative head gesture made by the defendant to the deputy sheriff. The court said, in part: "Although it cannot be said that the admission was made freely, intelligently, and voluntarily, the fact that it was made while under the stress (and shock, if not excitement) of the accident is some assurance of its truthfulness." This statement by the court is apparently what prompted defendant's argument that the court placed undue weight on the defendant's involuntary admission to the deputy sheriff. However, as will later appear in our discussion, consideration of that argument is unnecessary.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Broussard, ante* p. 809, 457 N.W.2d 457 (1990); *State v. Jones, ante* p. 1, 453 N.W.2d 447 (1990).

On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Reynolds, ante* p. 662, 457 N.W.2d 405 (1990).

On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Brown, ante* p. 374, 455 N.W.2d 547 (1990).

Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Trackwell, ante* p. 845, 458 N.W.2d 181 (1990); *State v. Diesing,* 231 Neb. 132, 435 N.W.2d 190 (1989).

In order to establish count I, refusal to submit to testing, it was necessary for the State to prove that the defendant had been arrested for an offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor; that the officer had reasonable grounds to believe that the defendant was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor; and that after being requested to do so, had refused to submit to such test. § 39-669.08.

This raises the question as to whether defendant had been lawfully arrested at the time he refused to give a body fluid sample for testing. The arrest of defendant was made at the hospital. At that time, the arresting deputy had been at the scene of the accident, had seen a wrecked motorcycle beside the road, had observed the woman lying on the ground and the defendant on his knees in the vicinity, knew that defendant rode a motorcycle "a lot," had been told at the hospital that defendant was the driver of the motorcycle, and had made observations that defendant carried a strong odor of alcohol on his breath and that defendant was "very staggery and unsure of his footing."

In order to arrest a person for suspected driving while intoxicated, it is only necessary that the arresting officer have knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime. See *State v. Wickline,* 232 Neb. 329, 440 N.W.2d 249 (1989). Based on the deputy's observation

that a single-vehicle accident had occurred; the facts that a wrecked motorcycle which was associated with the defendant was found in the vicinity, that further observation disclosed that the defendant had obviously been involved in some type of accident, and that information from an independent witness or witnesses revealed that the defendant was the driver of the motorcycle involved in the accident; and the deputy's observations as to the alcohol on the breath of the defendant and the conduct suggestive of intoxication on the part of defendant, probable cause existed for the deputy to believe that the defendant was operating a motor vehicle while under the influence of intoxicating liquor.

There was probable cause, even disregarding the head gesture, for Deputy Mayo to place the defendant under arrest for operating a motor vehicle while under the influence of intoxicating liquor and to have "reasonable grounds to believe that [defendant] was driving or was in the actual physical control of a motor vehicle upon a public highway . . . while under the influence of alcoholic liquor." § 39-669.08(2).

The remaining two counts relate to the defendant's failure to have a proper registration for his vehicle and failure to have a valid driver's license on his person on April 2, 1989. The evidence is undisputed that defendant was driving a motor vehicle earlier in the day on April 2. It is equally persuasive from further observations made by Mayo during his investigation at the hospital and from his testimony that defendant had no driver's license on his person and that the vehicle he was driving was not properly registered on the day of the alleged offenses.

Section 60-325 requires that no person shall operate a motor vehicle unless such vehicle shall at all times carry upon it the registration certificate. It goes without saying that such certificate must be current and valid. In the same manner, § 60-413 requires that every person shall at all times while operating a motor vehicle have in his or her possession a valid license card.

Defendant's assignments of error are without merit, and the judgment of the district court, affirming his convictions in the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. FREEZER SERVICES, INC., A NEBRASKA CORPORATION, RELATOR, V. J. PATRICK MULLEN, JUDGE, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

458 N.W.2d 245

Filed July 27, 1990. No. 89-1365.

1. **Attorney and Client: Conflict of Interest.** An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.
2. **Attorney and Client: Conflict of Interest: Presumptions.** Confidences and secrets possessed by an attorney are presumptively possessed by other members of his firm.
3. _____: _____: _____. When an attorney who was intimately involved with particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.
4. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.
5. _____. Mandamus lies only to enforce performance of a ministerial act or duty, and not to control judicial discretion. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
6. _____. It is a general rule in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of a writ of error or an appeal. However, when the remedy, though available, is inadequate, mandamus will lie.

Original action. Peremptory writ issued.

Kevin Colleran, of Cline, Williams, Wright, Johnson & Oldfather, for relator.

Robert M. Spire, Attorney General, and Charles E. Lowe for respondent.

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

WHITE, J.

This is an original action for a writ of mandamus. Relator,

Freezer Services, Inc., a Nebraska corporation, seeks a writ from this court compelling respondent, District Judge J. Patrick Mullen of the district court for Douglas County, Nebraska, to enter an order disqualifying the Omaha, Nebraska, law firm of McGrath, North, Mullin & Kratz, P.C. (McGrath, North), from representing the defendant in a lawsuit pending before Judge Mullen. We hold that a peremptory writ of mandamus should issue directing Judge Mullen to disqualify McGrath, North from further representation of defendant L.C. "Jake" Waller in that litigation.

The factual statement in this case is taken largely from the findings of fact made by a special master appointed by this court. The underlying lawsuit, captioned "Freezer Services, Inc., a Nebraska Corporation, v. L.C. ("Jake") Waller, District Court of Douglas County, Docket 864, Page 666," involves disputes concerning an employment contract between the two parties and certain stock options contained in that contract. The lawsuit has been pending since November 1987, when Freezer Services filed its petition in the Douglas County District Court. Additionally, there have been two other actions between Freezer Services and Waller, or other related parties, arising out of the same basic disputes. In January 1987, Waller filed suit in a Texas federal court against Freezer Services and its principal owner, Charles Myers, among others. That action was eventually dismissed. In September 1987, Waller filed suit in a Nebraska federal court against Myers and related companies, raising claims almost identical to those raised in the Texas litigation.

Starting in 1984 and continuing through June 1989, Freezer Services and Myers were represented by the law firm of North & Black, P.C., of Omaha. North & Black acted as counsel and was in an attorney-client relationship with Freezer Services during all of that period.

In the spring of 1989, Myers became aware of alleged malpractice by John North, Jr., in an unrelated matter involving Myers or his companies. On May 23, 1989, Myers discharged John North, Jr., and North & Black from further representation of Freezer Services and its related company in

Texas. However, it was agreed that North & Black would provide assistance in the pending lawsuits to newly retained counsel for some period of time.

In May 1989, Freezer Services retained the Lincoln, Nebraska, law firm of Cline, Williams, Wright, Johnson & Oldfather (Cline, Williams) to represent it and Myers in the pending litigation, including the action in the Douglas County District Court, which had been tentatively set for trial in July. The trial was continued to October 23.

For some unknown period of time preceding August 31, 1989, North & Black and McGrath, North were negotiating, with the partners and associates of North & Black becoming members of McGrath, North. McGrath, North has represented Waller throughout the state court litigation and also represents Waller in the Nebraska federal court litigation. The lead attorney for McGrath, North in that litigation is Mark F. Enenbach.

On August 31, members of Cline, Williams learned through a report of an employee of Freezer Services that there was a rumor that North & Black had merged or was about to merge with McGrath, North. Kevin Colleran, an attorney with Cline, Williams, called John North, Jr., that same day to inquire whether the rumors were true. North responded that the two firms were not "merging" but that an agreement had been reached whereby John North, Jr., Pamela Black, and other attorneys and employees of North & Black were to become employees of McGrath, North by mid-September 1989.

On September 1, Stephen Nelsen of Cline, Williams telephoned Enenbach to confirm the rumor regarding McGrath, North. Enenbach indicated that several of the attorneys and staff members of North & Black were becoming employees of McGrath, North. Enenbach indicated that he had just heard of the decision to hire these individuals. In this telephone conversation Enenbach indicated that McGrath, North would put into effect procedures to isolate John North, Jr., and other former North & Black employees from involvement with the underlying action. He further indicated that he had spoken with John North, Jr., about these rules and he had agreed to comply with them.

Some time after conferring with Nelsen on September 1, Enenbach circulated a memorandum, dated September 5, to all attorneys and all McGrath, North support staff. That memorandum reads in full:

> This office represents L. C. "Jake" Waller who is presently involved in litigation in state and federal court against Charles Myers and entities which he has an interest in, including Freezer Services, Inc. of Texas, Freezer Services, Inc., Freezer Services of Kansas, Superior Industries, Freezer Services of Arkansas, and American Freezer Services, Inc.
>
> Myers and those entities were formally [sic] represented by the law firm of North & Black, P.C., whose attorneys and staff are becoming employees of this firm. The attorneys and staff will move into our building on or about October 1, 1989.
>
> With respect to this litigation or any other matter regarding Messrs. Myers and Waller or the listed entities, the following rules will apply:
>
> 1. You should not discuss this litigation or any matters which might relate in any way to Mr. Myers or the entities listed with any members of North & Black, P.C. who become employees of this firm. This includes any staff members of North & Black, P.C.
>
> 2. Do not request any information or documents from these new employees.
>
> 3. All files regarding this litigation will remain in my office in a locked file cabinet under my control.
>
> 4. Members of the law firm North & Black, P.C. who become employees of this firm and any of its staff will be advised of these procedures.
>
> 5. Any other new employees of this firm will be advised of these procedures as well.
>
> If anyone has any questions, please see me.

Despite the screening mechanism, Freezer Services insisted that the new relationship between McGrath, North and former North & Black attorneys and employees created an irresolvable conflict of interest if McGrath, North continued to represent Waller in the pending lawsuit. McGrath, North disagreed with

Cline, Williams' assessment, however, and declined to withdraw as counsel for Waller because of the hardship on Waller. On September 21, 1989, Freezer Services filed a motion in the Douglas County District Court, requesting that McGrath, North be disqualified from further participation in Waller's defense. Evidentiary hearings on this motion were held before Judge Mullen on September 26 and October 2. On October 6, Judge Mullen entered an order overruling the motion to disqualify McGrath, North as Waller's counsel in the state court litigation. However, Judge Mullen, at the same time, also specifically ordered:

> (1) Any person in any way connected with the firm of McGrath, North, Mullin & Kratz, P.C. shall not communicate with any person formerly associated in any way with the firm of North & Black, P.C. concerning this litigation or any other matter which might relate to L.C. Waller or Charles Myers or any of Charles Myers' related entities.
>
> (2) Any person previously connected in any way with the firm of North & Black, P.C. shall not communicate with any person connected with the firm of McGrath, North, Mullin & Kratz, P.C. concerning this litigation or any other matter which might relate to L.C. Waller or Charles Myers or any of Charles Myers' related entities.
>
> (3) All files and related data shall remain under the exclusive control of attorney Mark F. Enenbach.
>
> (4) Any new employees of McGrath, North, Mullin & Kratz, P.C. shall receive a copy of this order.
>
> (5) Any files or data regarding any of the above referred to matter which are under the control of former members of the firm of North & Black, P.C. shall remain off the premises of McGrath, North, Mullin & Kratz, P.C.

Freezer Services was dissatisfied with Judge Mullen's order and attempted to appeal directly to this court. That appeal was dismissed by this court on November 16, 1989. Freezer Services also filed an application for leave to file an original action of mandamus in this court, and on November 17 we issued an alternative writ of mandamus directed to Judge Mullen. A showing in opposition to issuance of a writ of mandamus was

filed on behalf of Judge Mullen on December 11. We then appointed, on December 20, Lancaster County District Judge Earl J. Witthoff as a special master to "conduct an evidential hearing and make findings of fact" in the mandamus action. On January 24, 1990, respondent filed a motion in limine to prohibit relator from offering into evidence at the hearing before the special master any evidence which was not offered and received into evidence in the district court on relator's motion to disqualify counsel. The motion in limine was sustained. The special master held an evidentiary hearing on February 13, 1990, and made findings of fact.

There are three issues presented in this original action for a writ of mandamus: first, whether Judge Witthoff properly sustained the motion in limine, thereby limiting the evidence which he considered in making the factual findings; second, whether this action for a writ of mandamus should be considered by this court; and third, whether this court should issue a peremptory writ of mandamus, thereby mandating the disqualification of McGrath, North from further participation in the underlying action.

We will initially consider the third issue. To resolve this broad issue we must first resolve the narrower issue of whether a law firm which represents one party in a pending lawsuit must be disqualified from further representation of that party when the law firm hires attorneys and personnel who have worked closely with and represented the opposing party in that same litigation.

Initially, it is clear that an attorney or attorneys may not represent a party whose interests are directly adverse to a former client's and where the subject matter involved is the same as that for which the attorney or attorneys represented the former client. North & Black had been in an attorney-client relationship with Freezer Services from 1984 to June 1989. Most significantly, however, John North, Jr., was intimately involved with the litigation currently pending before Judge Mullen on behalf of Freezer Services. North and the other North & Black attorneys cannot switch sides in the course of the litigation and represent an adverse party in the same litigation. Such representation would be repugnant to the principles of

loyalty and confidentiality underlying the attorney-client relationship and is prohibited by the Code of Professional Responsibility and the common law of this state. See Canons 4, 5, and 9 of the Code of Professional Responsibility. As we stated long ago in *Baker v. Farnsworth*, 117 Neb. 504, 221 N.W. 17 (1928): "Public policy forbids an attorney from representing a party to litigation, over objection, where the subjects involved are the same or inseparably related, against an adversary whom the attorney previously served." (Syllabus of the court.) That principle was reiterated in *Federal Trust Co. v. Damron*, 124 Neb. 655, 664, 247 N.W. 589, 592 (1933), where we stated that

> [a]n attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.

But see *Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92 (1975) (an attorney is not barred from representing a subsequent client against a former client if the duties required of him do not conflict with those involved in the first employment). Additionally, Freezer Services did not consent to such a representation. Although a client's consent after full disclosure may make the representation ethically proper, such representation is disfavored in this state. See *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562 (1987), where we stated with respect to concurrent representation: "Representation of multiple parties is not prohibited per se, but this court disapproves the actions of an attorney in representing conflicting interests in litigation, even with the consent of the clients involved." (Syllabus of the court.) In the present case it is clear that at least John North, Jr., must be disqualified.

We must next consider whether John North, Jr.'s, disqualification must be imputed to McGrath, North. As stated in *Kearns v. Fred Lavery/Porsche Audi Co.*, 573 F. Supp. 91, 96 (E.D. Mich. 1983):

> Confidences and secrets possessed by an attorney are presumptively possessed by other members of his firm. *See Trone v. Smith,* [621 F.2d 994 (9th Cir. 1980)]; *Westinghouse Electric Corporation v. Kerr-McGee*

> *Corporation*, [580 F.2d 1311 (7th Cir. 1978)]; *Schloette* [sic] *v. Railoc of Indiana, Inc.*, [546 F.2d 706 (7th Cir. 1976)]; and DR 5-105(D) of the Code of Professional Responsibility.

As used in this opinion, "confidences" refers generally to both "confidences" and "secrets" as defined in the code. See Canon 4, DR 4-101(A), of the Code of Professional Responsibility. The presumption of shared confidences has two levels in cases where an attorney leaves one firm and joins another firm, and where the second firm represents an interest adverse to an interest represented by the first firm. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984). On the first level, the attorney who leaves the first firm is presumed to have acquired client confidences during his tenure at that firm, regardless of whether the attorney was actually privy to any confidential communications. On the second level, it is presumed that the attorney has shared or will share those client confidences with members of any subsequent firm where the attorney becomes employed. The two presumptions can have particular significance when the attorney joins the second firm. In some factual situations the second firm might be disqualified by reason of a double presumption of shared confidences which works to impute disqualification to that firm. But see *Panduit Corp., supra* (under certain facts, the double imputation theory would invent conflicts where none exist). That situation, however, is not presented in this case. The evidence clearly demonstrates that John North, Jr., has actual knowledge of Freezer Services' confidences directly related to the Waller litigation pending before Judge Mullen. The first level of the presumption of shared confidences is therefore not implicated, and we will focus on the presumption's second level.

The principle that client confidences are presumptively shared by other firm members is reflected in Canon 5, DR 5-105(D), of the Code of Professional Responsibility, which provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." The knowledge possessed by John North, Jr., regarding the Waller

litigation, acquired through his representation of Freezer Services, is imputed to McGrath, North, and, under a literal interpretation of DR 5-105(D), the firm must be disqualified from further representing Waller in the litigation against Freezer Services.

Recognizing these principles, however, the respondent maintains DR 5-105(D) does not mandate disqualification of a firm in every case. Respondent maintains that McGrath, North does not have to be disqualified from representing Waller as long as former North & Black personnel and attorneys, especially John North, Jr., can be effectively screened from the rest of McGrath, North with regard to this litigation. Respondent contends that McGrath, North's in-house screening procedure and the October 6 screening order create an impenetrable "Chinese wall" between former North & Black attorneys and personnel and McGrath, North attorneys and personnel. In support of this proposition, respondent has relied on *Nemours Foundation v. Gilbane, Aetna, Federal Ins.*, 632 F. Supp. 418 (D. Del. 1986); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds* 449 U.S. 1106, 101 S. Ct. 911, 66 L. Ed. 2d 835 (1981); *NFC, Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332 (D. Mass. 1983). In those cases the courts refused to disqualify an entire firm when an attorney who joined the firm had at least some knowledge about the litigation due to some level of involvement with the opposing party in the same or related litigation. The courts permitted the establishment of a Chinese wall to screen the disqualified attorney from the rest of the firm.

In the cases where the subsequent firm has not been vicariously disqualified, the implicit or explicit analytical linchpin is a determination that the presumption of shared confidences has been or can be rebutted. There is a strong trend in the federal courts holding that the presumption is rebuttable. See, *Smith v. Whatcott*, 757 F.2d 1098 (10th Cir. 1985); *U.S., Lord Elec. Co. v. Titan Pacific Const.*, 637 F. Supp. 1556 (W.D. Wash. 1986), and cases cited therein. See, also, Annot., 51 A.L.R. Fed. 678 (1981). The analytical framework to rebut the presumption can be fairly formalistic. For example, in *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983), the court enunciated a

three-step analysis to determine whether a firm must be vicariously disqualified. In the first step the court determines whether a substantial relationship exists between the subject matter of the prior and subsequent representations.

The second and third steps in *Schiessle* concern the two levels of the presumption of shared confidences mentioned above. The second step in the analysis requires the court

> to ascertain whether the presumption of shared confidences which arises from our determination that the representations are substantially related has been rebutted with respect to the prior representation. In other words, we must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior law firm received from the party now seeking disqualification of his present firm. The evidence presented to rebut this presumption must "clearly and effectively" demonstrate that the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior representation.

Id. at 420.

In the third step, the court must determine whether the presumption of shared confidences has been rebutted with respect to the subsequent representation. The court must determine whether the knowledge of the "confidences and secrets" of the former client which the attorney brings with him has been passed on to or is likely to be passed on to the members of the second firm. The court commented that

> [i]n *LaSalle Nat. Bank*, 703 F.2d at 259, we held that the presumption of shared confidences could be rebutted by demonstrating that "specific institutional mechanisms" (e.g. "Chinese Walls") had been implemented to effectively insulate against any flow of confidential information from the "infected" attorney to any other member of his present firm. Such a determination can be based on objective and verifiable evidence presented to the trial court and must be made on a case-by-case basis. Factors appropriate for consideration by the trial court might include, but are not limited to, the size and

> structural divisions of the law firm involved, the likelihood of contact between the "infected" attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected" attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation.

717 F.2d at 421.

This three-step approach was adopted by the U.S. Court of Appeals for the Sixth Circuit in *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222 (6th Cir. 1988). Some authorities, such as those cited by respondent, have adopted a flexible, amorphous approach. The U.S. Court of Appeals for the Second Circuit, in *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), has expressed its approval of the use of screening in situations where a former government attorney has joined a private firm, where the firm's continued representation results in no "threat of taint" to the trial process.

Similarly, in *Nemours Foundation v. Gilbane, Aetna, Federal Ins.*, 632 F. Supp. 418 (D. Del. 1986), a case not involving a former government attorney, the court stated at 425:

> There is now an explicit exception to imputed disqualification. The Rules, unlike the Code, sanction the use of a screening mechanism in appropriate circumstances, specifically referring to former government attorneys. Rule 1.11 [of the Delaware Lawyers' Rules of Professional Conduct] states: "A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom."

The court added:

> The rigid formalism underlying Canon 9's injunction against an "appearance of impropriety" is strongly rejected in favor of a new philosophy of pragmatism which balances the expectations of confidentiality of a

> former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys, particularly associates, from one private law firm to another.

Id.

The court held that "an appropriate screening mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under Rule 1.10 in cases where the disqualified attorney's conflict of interest originated in private practice." *Id.* at 428.

In *NFC, Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332 (D. Mass. 1983), the court stated that, although ethical standards should not give way to a "balancing of the harms" analysis, "care should be taken to avoid applying the disqualification sanction of the Code in a mechanical, computerized fashion. Rather, the factors affecting a particular set of relationships should be carefully analyzed with the purpose of arriving at an individualized judgment and a truly responsive remedy." *Id.* at 334. The court found that "a detailed court-ordered and supervised embargo on any communications" between the second firm and the disqualified attorney was an acceptable alternative to disqualification, implicitly allowing the use of screening procedures to rebut the presumption of shared confidences. *Id.*

In the present case respondent is in essence asking this court to adopt a rule whereby the presumption of shared confidences in the subsequent representation can be rebutted by showing that "specific institutional mechanisms," such as the Chinese wall, have been implemented to prevent the flow of confidences from the disqualified attorney to the rest of the firm. Although such a rule might be appropriate in a particular case, we decline to adopt that rule here.

While there is no Nebraska authority regarding the propriety of screening measures when one attorney must be disqualified, we do not find the authorities relied upon by respondent persuasive for the situation presented in this case. At a minimum, those cases are factually distinguishable from the present case by the level of the "infected" attorney's involvement in the litigation. A more perplexing factual

situation is presented here due to North & Black's, but especially John North, Jr.'s, deep involvement in the Waller litigation on behalf of Freezer Services. The litigation for which McGrath, North represents Waller is not only substantially related to John North, Jr.'s, former representation, it is the same. We therefore hold that when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation. This rule is consistent with Canons 4, 5, and 9 and DR 5-105(D) of the Code of Professional Responsibility, *Baker v. Farnsworth*, 117 Neb. 504, 221 N.W. 17 (1928), and *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N.W. 589 (1933). Through this rule the court, the parties, and the public can be assured that client confidences will be secure and will not pass, intentionally or inadvertently, from one party to an opposing party in the same litigation.

The evidence in the present case shows that Freezer Services and Myers were represented by North & Black from sometime in 1984 and continuing through June 1989, when Myers discharged the firm from further representation. During the 2½ years prior to September 1989, Freezer Services paid North & Black over $600,000 in legal fees. The firm, and especially John North, Jr., was counsel for Freezer Services and Myers in the Nebraska and Texas federal court litigation and in the Nebraska state court litigation. During this litigation, John North, Jr., was deeply involved in preparing and filing pleadings, conducting investigations and discovery, and making trial preparations and developing strategies on behalf of Freezer Services and Myers. John North, Jr., was involved in a number of activities, including correspondence, corporate meetings, telephone conversations, and other matters leading to Waller's termination from employment with Freezer Services, which formed the basis for the present litigation. After Cline, Williams was hired as replacement counsel in May 1989, John North, Jr., transferred his files relating to the

litigation to Cline, Williams and consulted with that firm during May, June, and perhaps into July of that year. By mid-July, no additional services were rendered to Freezer Services by any member of North & Black. John North, Jr., went to work for McGrath, North sometime around September 1, 1989.

The facts in the present case are clear that John North, Jr., was intimately involved with the present litigation on behalf of Freezer Services and Myers and has obtained confidential information pertinent to that litigation. Shortly after being discharged from further employment by Freezer Services and Myers, John North, Jr., and other members of North & Black became employed by McGrath, North, which represents an adverse party, Waller, in the same litigation. Under the rule announced today, the presumption of shared confidences is irrebuttable, and McGrath, North must be disqualified from further representation of Waller.

We also note the decision in *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983). In that case an entire law firm changed sides and, with the assistance of another firm acting as trial counsel, began to represent an adverse party in litigation which was substantially related to the former representation. The court stated at 1267:

> There is an exception [to disqualification] for the case where a member or associate of a law firm (or government legal department) changes jobs, and later he or his new firm is retained by an adversary of a client in his former firm. In such a case, even if there is a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter. [Citations omitted.] The exception is inapplicable here; the firm itself changed sides.

The court also specifically rejected the use of Chinese walls in cases where the firm switches sides: "[A] law firm is not permitted to switch sides if its former representation was substantially related to its new representation, no matter what screens it sets up." *Id.* at 1268. Cf. *Schiessle v. Stephens*, 717

F.2d 417 (7th Cir. 1983). Additionally, the court indicated that where a firm switches sides, Canon 9 alone would be the basis for a strict rule of disqualification:

> While "appearance of impropriety" as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar—by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides. Clients will not repose confidences in lawyers whom they distrust and will not trust firms that switch sides as nimbly as Schwartz & Freeman.

708 F.2d at 1269.

In the present case we are unable to determine from the special master's factual findings whether North & Black was subsumed in its entirety into McGrath, North. In any event, we simply note that where the facts are clear that an entire firm, or a significant portion thereof, has switched sides and now represents an adverse party in the same or closely related litigation, *Analytica* might be persuasive authority to provide an alternative analysis.

We must next address whether a petition for a writ of mandamus is properly before this court. To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. *State ex rel. Stansbery v. Schwasinger*, 205 Neb. 457, 289 N.W.2d 506 (1980); *State ex rel. Doe v. Mid-Neb. Retard. Serv.*, 214 Neb. 381, 333 N.W.2d 909 (1983). Mandamus lies only to enforce performance of a ministerial act or duty, and not to control judicial discretion. *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988); *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986); Neb. Rev. Stat. § 25-2156 (Reissue 1989).

"The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts." *State ex rel. Hilt Truck Line v. Peterson*, 215 Neb. 81, 86, 337 N.W.2d 133, 136 (1983). We also stated in *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979):

> It is a general rule in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of a writ of error or an appeal. However, when the remedy, though available, is inadequate, mandamus will lie.

(Syllabus of the court.)

In light of the rule enunciated today, Judge Mullen has a duty to act which is imposed by law and which was not moot when Freezer Services applied for the writ of mandamus. The duty is clear and absolute; Judge Mullen has no discretion on the facts of this case not to disqualify McGrath, North from further representation of Waller. Additionally, an appeal is an inadequate means to present this issue for review. By the time the issue could be presented to an appellate court, any divulgence of confidences will have already occurred, and an appellate court cannot return the parties to the status quo ante. Relator's petition for a writ of mandamus is properly before this court.

Lastly, relator contends the special master erred in sustaining respondent's motion in limine. By sustaining this motion the special master limited the evidence submitted in the factfinding hearing to the record made before Judge Mullen in the district court. It is not necessary for us to reach this issue. The factual basis before this court is adequate to resolve the underlying issue.

Accordingly, we conclude that a peremptory writ of mandamus should issue directing the district court to disqualify McGrath, North from further representation of Waller in the litigation captioned "Freezer Services, Inc., a Nebraska Corporation v. L.C. ("Jake") Waller, District Court of Douglas County, Docket 864, Page 666."

PEREMPTORY WRIT ISSUED.

HASTINGS, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. VICKI L. KELLY, APPELLANT.
458 N.W.2d 255

Filed July 27, 1990. No. 90-039.

Convictions: Restitution. Under Neb. Rev. Stat. § 29-2280 (Reissue 1989), restitution is restricted to the loss sustained by the victim of the offense for which the defendant has been convicted.

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

Avis R. Andrews for appellant.

No appearance for appellee.

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

PER CURIAM.

The defendant, Vicki L. Kelly, was originally charged with four counts of obtaining property by issuing account-closed checks. Pursuant to a plea agreement, the defendant pleaded guilty to two counts and agreed to pay restitution for all checks then in the office of the Dodge County Attorney. In return, two counts were dismissed, a pending misdemeanor charge was dismissed, and the county attorney agreed not to file additional charges on some 84 checks then in his office. A written stipulation signed by the defendant lists these checks, which with protest fees amounted to $8,829.24.

On December 11, 1989, the defendant was sentenced to concurrent terms of imprisonment for 1 to 2 years and ordered to pay restitution in the amount of $8,239.77 at the rate of $150 per month, commencing on the first day of the second month after her release from imprisonment.

The defendant has appealed and contends that the sentences imposed were excessive.

The offenses involved in this case are Class IV felonies, for which the penalty is imprisonment not to exceed 5 years, a fine of up to $10,000, or both. Neb. Rev. Stat. §§ 28-611(1)(b) and 28-105 (Reissue 1989).

Count I involved a check for $628.68 issued to J.C. Penney for the purchase of jewelry. Count II involved a check for

$802.88 issued to Great Plains Stereo for the purchase of stereo equipment. All of the checks involved in this case were written over a period of approximately 2 weeks.

The defendant is 32 years of age, is married, and has two children. She has a 10th grade education and was unemployed. In 1981, she was placed on probation in Texas for issuing insufficient-fund checks. In addition to writing the checks listed in the stipulation, the defendant admitted to the probation officer that she had written $2,000 in additional checks.

In view of the defendant's record and the circumstances in this case, the sentences imposed were not excessive. However, we note plain error in regard to the matter of restitution.

In *State v. Arvizo*, 233 Neb. 327, 329, 444 N.W.2d 921, 922 (1989), decided September 1, 1989, we held that Neb. Rev. Stat. § 29-2280 (Reissue 1989) restricts restitution to the loss sustained by the victims " 'of the offense for which the defendant has been convicted.' " Accordingly, the judgments are modified by reducing the amount of restitution to $1,431.56. In all other respects the judgments are affirmed.

AFFIRMED AS MODIFIED.

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