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JERRY L. JACOBSON, APPELLANT, V. MARGARET L. HIGGINS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, AND DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEES.

500 N.W.2d 558

Filed May 28, 1993. No. S-90-053.

1. **Equity: Licenses and Permits: Revocation: Appeal and Error.** In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles.
2. **Administrative Law: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
3. **Judgments: Convictions: Pleas.** The mere entry of a guilty plea, standing alone, is insufficient to support a judgment of conviction.
4. **Motor Vehicles: Records: Statutes.** The requirements for driving abstract records are governed by statute.
5. **Convictions: Motor Vehicles: Records.** An abstract for conviction of traffic violations must include all necessary information as to (1) the parties to the case, (2) the nature of the offense, (3) the date of hearing, (4) the plea, (5) the judgment, and (6) the amount of the fine or forfeiture.
6. **Licenses and Permits: Revocation: Proof: Appeal and Error.** A licensee whose driver's license has been revoked by the Department of Motor Vehicles under the point system has the burden of proof on appeal to the district court.
7. **Proof: Evidence.** Production of prima facie proof on an issue shifts to an adversary the burden of producing evidence to the contrary.
8. **Trial: Evidence: Appeal and Error.** In order for a defendant to contend on appeal that a trial court erred in the admission of evidence, the defendant must have objected to the admission at the time the evidence was introduced.
9. _____: _____: _____. When counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Custer County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Brad Roth, of Sennett & Roth, for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellees.

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

FAHRNBRUCH, J.

Jerry L. Jacobson seeks further review of a Nebraska Court of Appeals decision that affirmed the revocation of his driver's license because he accumulated 12 points due to traffic violations.

We reverse the decision of the Court of Appeals and remand the cause with directions.

FACTS

On May 5, 1989, Jacobson's driver's license was revoked pursuant to Neb. Rev. Stat. § 39-669.27 (Reissue 1988) by Margaret L. Higgins, director (Director) of the Department of Motor Vehicles (DMV). Higgins ordered Jacobson's license revoked for 3 years because he accumulated 12 traffic violation points within the 2 previous years. The normal 6-month revocation, see § 39-669.27, was increased because Jacobson had had a prior license revocation within the previous 5 years. See Neb. Rev. Stat. § 39-669.30 (Reissue 1988).

The Director found that Jacobson had accumulated a total of 13 traffic violation points after allegedly being convicted of 8 separate traffic violations between April 6, 1987, and December 2, 1988. Section 39-669.27 requires only 12 traffic violation points for revocation of a motor vehicle operator's license.

At issue are violations reported to the Director regarding Jacobson's alleged convictions that resulted in (1) two points for speeding in Nuckolls County on April 6, 1987; (2) two points for speeding in Platte County on November 23, 1987; and (3) one point for speeding in Wyoming on November 28, 1987.

Jacobson appealed his license revocation to the district court for Custer County, where the order of the Director was affirmed. The Court of Appeals affirmed the judgment of the district court. See *Jacobson v. Higgins*, 1 NCA 1791 (1992). We

granted Jacobson's petition for further review.

ASSIGNMENTS OF ERROR

Jacobson claims that the Court of Appeals erred in (1) determining that the Director properly relied on a driving abstract from Nuckolls County, notwithstanding the fact that the abstract did not show judicial acceptance of Jacobson's guilty plea, and notwithstanding the Court of Appeals' ruling in *City of Beatrice v. Dienstbier*, 1 NCA 532 (1992); (2) sustaining the order of the Director, because the abstract from the State of Wyoming did not clearly indicate that Jacobson's conviction was a result of forfeiture of a bond; and (3) sustaining the order of the Director, because the Platte County abstract was not certified by a judge or clerk of that court.

STANDARD OF REVIEW

In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the Director. See Neb. Rev. Stat. § 60-4,105(1) (Cum. Supp. 1992). An appellate court's review of a district court's review of a decision of the Director of DMV is de novo on the record. *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988).

NUCKOLLS COUNTY ABSTRACT

Jacobson claims that the Court of Appeals erred in holding that the Director properly relied upon a driving abstract from Nuckolls County in assessing points against his driver's license. He argues that (1) the Court of Appeals' holding in his case is contrary to its holding in *Dienstbier* and (2) a guilty plea alone may not be used to support a judgment of conviction in the absence of a judicial acceptance of that plea. These arguments arise from the Court of Appeals' statement in *Dienstbier* that "[w]henever a guilty plea is utilized to support a judgment of conviction it must appear from the record that there was a judicial acceptance of that plea. Neb. Rev. Stat. § 39-669.22 (Reissue 1988)." 1 NCA at 534.

In *Jacobson*, 1 NCA at 1793, the Court of Appeals held that

> the requirement of § 39-669.24 that an abstract of conviction contain a record of the judgment is satisfied if

> the abstract of conviction contains a record of the judgment of conviction. [Citations omitted.] *The statutes contain no requirement that there be a record of acceptance of the guilty plea, and the cases construing the statutes do not impose such a requirement.*

(Emphasis supplied.) To resolve the apparent conflict, we first examine the Court of Appeals' holding in *Dienstbier* in light of this court's holdings in two prior cases.

In *Hyland v. State*, 194 Neb. 737, 235 N.W.2d 236 (1975), Hyland's motor vehicle operator's license was revoked under the point system. The abstracts for three of the violations relied upon each indicated a waiver, plea of guilty, and payment of a fine and court costs by Hyland. None of the three abstracts indicated the date of violation or the offense with which Hyland was charged. Moreover, "[t]he record and abstract in each of the three cases [did] not show an acceptance of the plea of guilty *nor the entry of any judgment of conviction*." (Emphasis supplied.) *Id.* at 738, 235 N.W.2d at 237.

The State urged that Hyland's waiver of appearance and plea of guilty be treated as a judgment of conviction. This court refused to draw that inference. We stated that there was no authority to support such a position "where there [was] no acceptance of the guilty plea and no record of a conviction or judgment of conviction by the court." *Id.* at 740, 235 N.W.2d at 238. This court held that such records were insufficient to support the abstracts of conviction and the order revoking Hyland's motor vehicle operator's license. The court's analysis makes it clear that acceptance of a guilty plea and entry of a judgment of conviction are two separate actions of the court and that it is a *judgment of conviction* which is statutorily required to be shown by the record.

In *Miller v. Peterson*, 208 Neb. 658, 305 N.W.2d 364 (1981), this court relied on *Hyland* to determine whether points had been properly assessed against Miller's motor vehicle operator's license. The record contained a certified copy of the docket sheet *which had been completely filled out but had not been signed by a judge*. There was also a waiver and plea of guilty signed by Miller. The court found the absence of the judge's signature was fatal to consideration of the abstract, and it

refused to speculate whether the judge had acted on the plea and simply neglected to affix his signature or whether no action had been taken and the case was actually still pending.

Although in its opinion this court did not state a rule on judicial acceptance of a guilty plea, the following appeared in the first syllabus point of the case:

> Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea.

Miller stands only for the proposition that there can be no judicial acceptance of a guilty plea in the absence of an official judgment of conviction. As Jacobson correctly argues, the mere entry of a guilty plea, standing alone, is insufficient to support a judgment of conviction. Neither *Hyland* nor *Miller* addresses the issue of whether the court is required to check a box on the abstract form indicating acceptance of a guilty plea, nor may either case be read to require such an entry.

Next we turn to the question of whether the Court of Appeals properly applied the *Miller* rule to *Dienstbier*. Unlike the present case, in which Jacobson claims there was no judicial acceptance of his guilty plea, Dienstbier conceded that the county court had accepted his guilty pleas and had entered judgments of conviction. Apparently, the issue was whether the singular word "offense" on Dienstbier's citation was capable of being interpreted to mean that Dienstbier had pled guilty to two offenses. The Court of Appeals held that it could be, and affirmed Dienstbier's convictions.

Because Dienstbier conceded that the county court had accepted his guilty pleas and had entered a judgment of conviction, neither of those issues was before the Court of Appeals. The *Miller* rule was not necessary to the determination of any issue before that court in *Dienstbier*, and we disaffirm such language while noting that this has no effect on the Court of Appeals' holding in that case. Having determined that no case law requires an abstract of conviction to formally indicate judicial acceptance of a guilty plea in

addition to a judgment of conviction, we find that the Court of Appeals' holding in *Jacobson* is not inconsistent with its previous holding in *Dienstbier*.

However, this does not end our analysis. As this court noted in *Hyland*, and as the Court of Appeals recognized in its *Jacobson* opinion, the requirements for driving abstract records are governed by statute. The Court of Appeals incorrectly concluded that Jacobson's Nuckolls County abstract was statutorily adequate. Neb. Rev. Stat. § 39-669.22 (Reissue 1984), which set forth the recordkeeping and reporting requirements for traffic offenses at the time Jacobson received his Nuckolls County citation, states: "Every court in this state *shall make complete records*, including the judgment of conviction and orders of probation, of every case in which a person is charged with violation of [certain traffic laws] . . . ." (Emphasis supplied.)

Section 39-669.22 must be read in conjunction with Neb. Rev. Stat. § 39-669.24 (Reissue 1988), which mandates that courts of the state use standard forms for abstracts of conviction in order to ensure uniformity of recordkeeping of driver's license suspensions and revocations. Section 39-669.24 specifies that an abstract for conviction of traffic violations must include all necessary information as to (1) the parties to the case, (2) the nature of the offense, (3) the date of hearing, (4) the plea, (5) the judgment, and (6) the amount of the fine or forfeiture. Considering the two statutes together, it is apparent that the "complete records" required by § 39-669.22 must include "all necessary information" enumerated in § 39-669.24. Judicial acceptance of a guilty plea is not among the necessary information required by § 39-669.24. To the extent that the first syllabus point in *Miller* is inconsistent with § 39-669.24, by its requiring an abstract of conviction to indicate judicial acceptance of a guilty plea in addition to an official judgment of conviction, that construction is disapproved.

We now analyze Jacobson's Nuckolls County abstract for compliance with the requirements of § 39-669.24, bearing in mind that a licensee whose driver's license has been revoked by DMV under the point system has the burden of proof on appeal

to the district court. See *Lutjemeyer v. Dennis*, 186 Neb. 46, 180 N.W.2d 679 (1970).

In his petition on appeal, Jacobson alleged that the revocation of his motor vehicle operator's license was unwarranted due to the fact that, inter alia, the abstract of conviction from Nuckolls County was insufficient to support his conviction. The transcript of Jacobson's revocation hearing, provided to the district court by DMV at Jacobson's request, contained a photocopy of the Nuckolls County abstract. Much of that abstract is illegible.

In the district court, Jacobson's abstract of judgment from Nuckolls County was offered by counsel for the State as exhibit 4. Jacobson's counsel objected to the offer on foundation, stating, "[T]here is no acceptance of the plea in this exhibit." Exhibit 4 was received in evidence. In its order of December 15, 1989, affirming the order of the Director, the court found that "[w]hile Appellant argues that the Nuckolls county conviction is deficent [sic] for lack of acceptance of a plea, the abstract does show a finding of 'guilty'. This is sufficent [sic] under Section 39-669.24 NEB. REV. STAT. (Reissue 1988)."

Our de novo review of the record reveals that exhibit 4 is also a photocopy of the Nuckolls County abstract and that the photocopy suffers from the same shortcomings as the copy of the abstract in the transcript, that is, much of it is illegible. Both copies indicate that the party is Jerry L. Jacobson, that the offense is "speeding 66 mph in 55 mph zone," and that Jacobson entered a plea of guilty by waiver on June 4, 1987. It is impossible to determine from the state of the record whether the Nuckolls County court accepted Jacobson's guilty plea or whether a finding of guilty was made. The most that can be said is that the abstract indicates that the court assessed a "$13.00 fine and $21.00 costs."

We could perhaps conclude from the court's assessment of a fine that it found Jacobson guilty. However, this court is not at liberty to indulge in speculation while ignoring the clear requirements of § 39-669.24 that an abstract of conviction include *both* the judgment *and* the amount of fine or forfeiture. Effect must be given, if possible, to all parts of a statute; no sentence, clause, or word should be rejected as meaningless or

superfluous if it can be avoided. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990).

Because the statutorily required judgment of conviction does not appear on the face of the Nuckolls County abstract, Jacobson has made out a prima facie case of its invalidity. Production of prima facie proof on an issue shifts to an adversary the burden of producing evidence to the contrary. See *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). By introducing into evidence largely illegible photocopies of Jacobson's Nuckolls County abstract, the State failed to meet its burden, and the district court and the Court of Appeals erred in finding that the Nuckolls County abstract shows a judgment of conviction. The Director was not entitled to rely on the Nuckolls County abstract in revoking Jacobson's motor vehicle operator's license because it contained no judgment of conviction, and such reliance constitutes reversible error.

WYOMING FORFEITURE

Jacobson next argues that his Wyoming conviction was not validly assessed against his driver's license because the ticket did not clearly indicate whether a guilty or not guilty plea was entered or whether the conviction resulted from a forfeiture of bond. The record shows that on November 28, 1987, Jacobson received a ticket in Carbon County, Wyoming, for speeding 71 m.p.h. in a 65-m.p.h. zone in violation of Wyoming statute "31-5-301biii." The front of the ticket indicates that Jacobson was to appear in court on January 7, 1988, that he posted a $10 bond, and that he was permitted to forfeit his bond "in lieu of appearance." The back of the ticket is titled at the top "Abstract of Court Record." A square marked "Forfeiture" is checked and dated January 4, 1988. The abstract indicates that $5 was allocated to "Fine/Forfeiture" and $5 to "Court Costs," for a total of $10, the amount of Jacobson's bond.

The Wyoming abstract clearly indicates a forfeiture. It cannot be seriously argued otherwise. Whether Jacobson's forfeiture of bond in Wyoming may be used to assess points against his Nebraska driver's license is governed by the provisions of the Driver License Compact (Compact), in

addition to § 39-669.27.

The Compact, which has been adopted by both Nebraska and Wyoming, states in relevant part:

> ARTICLE I
> Definitions
>
> As used in this compact:
>
> . . . .
>
> (c) *Conviction means a conviction of any offense related to the use or operation of a motor vehicle* which is prohibited by state law . . . or a *forfeiture of bail, bond, or other security* deposited to secure appearance by a person charged with having committed any such offense, and which conviction or forfeiture is *required to be reported to the licensing authority*.
>
> ARTICLE II
> Reports of Conviction
>
> The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. Such report shall clearly identify the *person* convicted; describe the *violation* specifying the section of the statute . . . violated; identify the *court* in which action was taken; indicate whether a *plea of guilty or not guilty* was entered, or the conviction was a result of the *forfeiture of bail, bond or other security*; and shall include any *special findings* made in connection therewith.
>
> ARTICLE III
> Effect of Conviction
>
> . . . .
>
> (b) . . . [T]he licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state.

(Emphasis supplied.) 2A Neb. Rev. Stat. app. T at 897-98 (Reissue 1989).

Thus, according to the provisions of the Compact, for Jacobson's Wyoming abstract to be used to assess traffic violation points in Nebraska, the following requirements must be met: (1) The Wyoming action must meet the Compact's

definition of "conviction"; (2) the conviction or forfeiture must be one which is required to be reported to Wyoming's licensing authority; (3) the Wyoming report of conviction must contain the information required by article II of the Compact; and (4) Nebraska law must provide that the conduct in question, i.e., forfeiture of bond, may be used to assess points against Jacobson's license.

Jacobson's forfeiture of bond in Wyoming is a conviction as that term is defined by article I(c) of the Compact. We therefore turn to the next step in our analysis and inquire whether Wyoming law requires a forfeiture of bond to be reported to the Wyoming licensing authority.

For the purpose of the Driver's License Act, Wyo. Stat. § 31-7-101 et seq. (Cum. Supp. 1987), § 31-7-102(a)(iv) defines "conviction" to include "an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court." Section 31-7-126 states:

> Every court having jurisdiction under any statute of this state . . . regulating the driving of motor vehicles, shall forward to the division [designated to administer the Driver's License Act] within ten (10) working days from the date of conviction a record of the conviction of any person in the court for a violation of any of those laws or ordinances . . . . The court shall also forward to the division a report of any violation by any person of a written promise to appear in court as given to the arresting officer upon the issuance of a traffic citation and any failure to appear in court at the time specified by the court.

The Carbon County court was required by this statute to report Jacobson's forfeiture of bond to the Wyoming licensing authority.

The third step of our analysis requires examination of the Wyoming abstract, exhibit 2, for the information required by article II of the Compact. The front of exhibit 2, which is labeled "Driver Licensing Abstract" at the bottom, identifies Jerry L. Jacobson as the defendant and indicates that "[t]he defendant did unlawfully commit the following offense against the peace and dignity of the State of Wyoming[:] Speeding

71/65, Radar 0800 in violation of W.S. . . . No. 31-5-301biii." Both the front and the back of exhibit 2 indicate the court to be Carbon County court, State of Wyoming. As already discussed, the abstract indicates that Jacobson forfeited his bond in lieu of appearance in court. We find that the Wyoming abstract meets the requirements of article II of the Compact.

Finally, article III(b) of the Compact requires that we turn to the Nebraska statutes to determine whether Jacobson's forfeiture of bond in Wyoming may be used to assess points against his driver's license in Nebraska. Neb. Rev. Stat. § 39-669.26(10)(c) (Supp. 1987), the statute in effect at the time of Jacobson's Wyoming citation, provided for one point to be assessed against the license of one convicted of speeding not more than 10 m.p.h. over the limit of 65 m.p.h. on the Interstate highways. See, also, Neb. Rev. Stat. § 39-662(2)(f) (Reissue 1988).

Section 39-669.26 further provides that "the forfeiture of bail not vacated shall be regarded as equivalent to the conviction of the offense with which the operator was charged." Nebraska law therefore gives effect to Jacobson's forfeiture of bond in the Wyoming court, and the director correctly assessed one point against Jacobson's Nebraska driver's license upon receipt of the abstract from the State of Wyoming.

PLATTE COUNTY ABSTRACT

Finally, Jacobson argues that the Director improperly relied on a driving abstract from the Platte County court which was not certified by a judge or the clerk of the court. The record shows that the Platte County abstract of judgment was received by the district court as exhibit 3 after Jacobson's counsel indicated he had no objection to the exhibit.

In order for a defendant to contend on appeal that a trial court erred in the admission of evidence, the defendant must have objected to the admission at the time the evidence was introduced. See Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989). When counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and,

for that reason, not admissible. See *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984). Jacobson waived his objection to the admission of the Platte County abstract by stating he had no objection to exhibit 3, and, therefore, this assignment of error is without merit.

CONCLUSION

Because the State failed to meet statutory requirements that Jacobson had accumulated 12 traffic violation points, the lower appellate courts erred in affirming the revocation of Jacobson's motor vehicle operator's license by the Director of DMV. The decision of the Court of Appeals is reversed, and the cause is remanded to that court with directions to reverse the decision of the district court for Custer County and to order the district court to enter judgment in favor of Jacobson.

REVERSED AND REMANDED WITH DIRECTIONS.

MARK VANDEWALLE, APPELLANT AND CROSS-APPELLEE, V. ALBION NATIONAL BANK, A NATIONAL BANKING ORGANIZATION, APPELLEE AND CROSS-APPELLANT.

STEVEN VANDEWALLE, APPELLANT AND CROSS-APPELLEE, V. ALBION NATIONAL BANK, A NATIONAL BANKING ORGANIZATION, APPELLEE AND CROSS-APPELLANT.

500 N.W.2d 566

Filed May 28, 1993. Nos. S-91-095, S-91-096.

1. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Appeal and Error.** As to matters of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
3. **Res Judicata: Judgments.** The federal law of res judicata is to be examined and applied when a state court is faced with the issue of determining the preclusive effect of a federal court's judgment.

4. _____: _____. Under federal law, a final judgment on the merits precludes the relitigation of a claim on any grounds raised before or on any grounds which could have been raised in the prior action.
5. **Res Judicata: Judgments: Parties: Actions.** Under federal law, the doctrine of res judicata bars relitigation of a claim if three requirements are met: (1) The prior judgment was rendered by a court of competent jurisdiction, (2) the decision was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases.
6. **Res Judicata: Judgments.** Under federal law, a determination that claims are barred by res judicata is a final judgment on the merits.
7. **Res Judicata: Judgments: Summary Judgment.** Under federal law, a judgment entered on a motion for summary judgment is just as binding for res judicata purposes as a judgment entered after a trial of the facts.
8. **Judgments: Collateral Attack.** A judgment, even if erroneous, is not subject to collateral attack unless it is void, such as would be the case where a judgment is entered without jurisdiction over the person or subject matter.
9. **Judgments: Actions.** Under federal law, when a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
10. _____: _____. Under federal law, what constitutes a transaction or series of connected transactions is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.
11. **Res Judicata: Claims.** Under federal law, whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based upon the same factual predicate.
12. **Liability: Actions.** Under federal law, that a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims; this remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or a different kind of relief.
13. **Parties.** Under federal law, privity does not exist merely because parties happen to be interested in the same question or in proving or disproving the same state of facts.
14. _____. Under federal law, close family relationships are not sufficient by themselves to establish privity with the original suit's party.
15. **Res Judicata: Collateral Estoppel: Parties.** Under federal law, parties not actually named in the original case may be subject to the bar of res judicata if they are in privity to the original parties; there is no definition of "privity" which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity

between the issues in controversy and a showing that the same parties in the two actions are really and substantially in interest the same.

16. **Judgments.** Under federal law, when two actions are pending at the same time, the first of the two judgments announced has a preclusive effect.

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

Michael B. Kratville, of Kratville Law Offices, for appellants.

J. Mark Barnett, of Jewell, Gatz, Collins, Fitzgerald & DeLay, and Gerald M. Stilmock, of Tessendorf, Milbourn, Fehringer, Stilmock & Peetz, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASES

These consolidated appeals arise from the summary judgments entered in favor of the Albion National Bank, the defendant-appellee in each of two separate but interrelated suits. In case No. S-91-095, the trial court dismissed the suit brought by the plaintiff-appellant, Mark VanDeWalle. In case No. S-91-096, the trial court dismissed the suit brought by the plaintiff-appellant, Steven VanDeWalle. The numerous assignments of error asserted in each case merge into a single operative claim: that dismissal of the suit was erroneous. Since in each instance we affirm the judgment of dismissal, we do not address the cross-appeal the bank asserted in each case.

II. SCOPE OF REVIEW

We begin by recalling once again that summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Viking Broadcasting Corp. v. Snell Publishing Co., ante* p. 92, 497 N.W.2d 383 (1993); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). See *Amco Ins. Co. v.*

Norton, ante p. 444, 500 N.W.2d 542 (1993).

As to matters of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *Universal Assurors Life Ins. Co. v. Hohnstein, ante* p. 359, 500 N.W.2d 811 (1993); *Professional Firefighters of Omaha v. City of Omaha, ante* p. 166, 498 N.W.2d 325 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

III. FACTS

Paul and Carol VanDeWalle and their appellant sons farmed and raised livestock. Although the parents and sons managed separate operations, it was common for them to trade machinery and equipment "back and forth."

The parents had borrowed money from the bank to finance their agricultural operations and were obligated to the bank on 16 promissory notes totaling in excess of $700,000. Notwithstanding that the father thought he was current on all of his obligations, the bank succeeded in obtaining a writ to replevin the parents' assets. Representatives of the bank and of the sheriff's office then proceeded to the parents' farmstead and took possession of cattle and machinery, some of the latter being claimed to have been owned solely by the sons. The cattle were later returned to the parents.

The four VanDeWalles have proved to be a pertinaciously litigious clan. First, the parents filed an adversary proceeding in the U.S. Bankruptcy Court for the District of Nebraska against the sheriff, the deputy sheriff, and the county, claiming that their seizure of the property was illegal and that their treatment of the property diminished its value. On defendants' motion, the bankruptcy court dismissed the proceeding.

Next, the sons filed an action in the U.S. District Court for the District of Nebraska at Omaha, asserting eight different bases of recovery, viz, (1) deprivation of civil rights under 42 U.S.C. § 1983 (1988); (2) deprivation of civil rights under 42 U.S.C. § 1985 (1988); (3) violation of constitutional due process; (4) gross negligence on the part of the county; (5) gross negligence by the sheriff and deputy sheriff; (6) tort of outrage; (7) abuse of process, including malicious prosecution by the bank; and (8) violation of the Racketeer Influenced and

Corrupt Organizations Act (RICO), see 18 U.S.C. § 1964 (1988).

Finding that the sons' complaint contained "virtually identical allegations with respect to the § 1983 claim in an adversary proceeding in [the] Bankruptcy Court" filed by the parents, the judge presiding over this Omaha federal suit found that the allegations of the parents' bankruptcy court complaint with respect to the ownership of the property in question were patently at odds with the allegations of the sons' complaint in that regard. He also found that the sons had failed to state claims upon which relief could be granted under §§ 1983 and 1985, constitutional due process, or RICO. Finally, the judge concluded that

> [i]n light of this Court's dismissal of plaintiffs' claims upon which federal jurisdiction is premised, plaintiffs' pendent state claims will also be dismissed. This Court does not have jurisdiction over plaintiffs' pendent state claims absent an independent federal question. . . . Ordinarily, if federal claims are subject to dismissal, pendent jurisdiction should not be exercised. . . .

(Citations omitted.) Accordingly, the judge dismissed the suit. The sons then moved for reconsideration, whereupon the judge granted them time within which to file an amended complaint. After the sons failed to amend, the judge again dismissed their suit.

Each of the sons then filed in the state district court the suits which are the subjects of these appeals. Following a series of amendments to their original petitions, each of the brothers ultimately pled that the bank tortiously interfered with his business relationship, converted his property, acted negligently, and maliciously prosecuted him.

After the sons filed their state suits, the parents chose to again try their luck in what they apparently came to regard as the litigation lottery by bringing suit in the U.S. District Court for the District of Nebraska at Lincoln against the bank, the sheriff, the deputy sheriff, and the state district court, alleging an unreasonable seizure, denial of due process, violation of § 1983, conversion, and deprivation of their rights, privileges, and immunities under state law.

Before the sons' state court suits were adjudicated, the judge

presiding over the Lincoln federal suit dismissed the parents' claims against the state district court for failure to state a claim and, relying upon the previous bankruptcy proceeding and Omaha federal suit, also granted the sheriff's, the deputy sheriff's, and the bank's motions for summary judgment. In doing so, the judge wrote that the case was "an attempt by the plaintiffs to have their case heard once more in a different forum . . . ." The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal without a published opinion. *Vandewalle v. Albion Nat. Bank*, 938 F.2d 186 (8th Cir. 1991).

IV. ANALYSIS

If, as the bank claims, any of the federal proceedings have a preclusive effect, the bank is entitled to judgment as a matter of law in the suits now before us.

1. Nature of Res Judicata

We thus begin by studying the doctrine of res judicata, which is a firmly rooted rule of " 'fundamental and substantial justice,' " not " 'a mere matter of practice or procedure inherited from a more technical time than ours.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 37 S. Ct. 506, 61 L. Ed. 1148 (1917).

The doctrine "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate[,] protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

As observed by Judge Learned Hand, res judicata " 'must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.' " *Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184, 189 (2d Cir. 1955), *cert. denied sub nom.*, *Walsh v. Lyons*, 350 U.S. 825, 76 S. Ct. 52, 100 L. Ed. 737.

We have said that the doctrine

> "is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .
>
> "Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause."

Ballard v. Giltner Pub. Sch., 241 Neb. 970, 973-74, 492 N.W.2d 855, 857 (1992), quoting *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988).

2. THE FEDERAL DOCTRINE

Because it is the federal law of res judicata that is to be examined and applied when a state court is faced with the issue of determining the preclusive effect of a federal court's judgment, we examine federal decisions germane to the issue at hand. *Aerojet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975), *cert. denied sub nom.*, *Metropolitan Dade County v. Aerojet-General Corporation*, 423 U.S. 908, 96 S. Ct. 210, 46 L. Ed. 2d 137, *reh'g denied* 423 U.S. 1026, 96 S. Ct. 470, 46 L. Ed. 2d 400; *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714 (Tex. 1990); *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982).

Under federal law, a final judgment on the merits precludes the relitigation of a claim on any grounds raised before or on any grounds which could have been raised in the prior action. *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982); *Federated Department Stores, Inc. v. Moitie, supra*. The doctrine of res judicata bars relitigation of a claim if three requirements are met: (1) The prior judgment was rendered by a court of competent jurisdiction, (2) the decision was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases. *Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797 (8th Cir. 1992); *Mills v. Des Arc Convalescent Home*, 872 F.2d 823 (8th Cir. 1989); *Headley v. Bacon*, 828 F.2d 1272 (8th Cir. 1987). Cf. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983).

3. THE LINCOLN FEDERAL SUIT

With the foregoing in mind, we turn our attention to the parents' Lincoln federal suit, the last-filed federal action.

(a) Competency of Jurisdiction

The first requirement for the application of res judicata, that the questioned prior decision be rendered by a court of competent jurisdiction, is not contested and is clearly satisfied.

(b) Final Judgment on Merits

The second requirement, that there be a final judgment on the merits, has also been met. As to the suit against the state district court, it is well established that a dismissal for a failure to state a claim (Fed. R. Civ. P. 12(b)(6)) is a final judgment on the merits for res judicata purposes. *Federated Department Stores, Inc. v. Moitie, supra*; *Carter v. Money Tree Co.*, 532 F.2d 113 (8th Cir. 1976), *cert. denied* 426 U.S. 925, 96 S. Ct. 2636, 49 L. Ed. 2d 380.

Moreover, because res judicata is a substantive rule, *Federated Department Stores, Inc. v. Moitie, supra*, we conclude that under federal law, a determination that claims are barred by res judicata is likewise a final judgment on the merits. See, also, *Reeves & Co. v. Lamm Bros.*, 135 Iowa 201, 112 N.W. 642 (1907) (judgment on plea in bar constitutes final judgment on merits). Neither is there any question that under federal law, a judgment entered on a motion for summary judgment is just as binding for res judicata purposes as a judgment entered after a trial of the facts. *Ruple v. City of Vermillion, S.D.*, 714 F.2d 860 (8th Cir. 1983), *cert. denied* 465 U.S. 1029, 104 S. Ct. 1290, 79 L. Ed. 2d 692 (1984). Thus, the dismissal of the claims against the bank, the sheriff, and the deputy sheriff is likewise a final judgment on the merits.

Nor is the sons' contention that the judgment in the Lincoln federal suit is erroneous of any moment. Their position is that as all the pendent state claims in the Omaha federal suit were dismissed because of a lack of jurisdiction, the judgment in that regard was not on the merits and thus could not be relied upon in the Lincoln federal suit. However, our law is that a judgment, even if erroneous, is not subject to collateral attack unless it is void, *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484

(1989), such as would be the case where a judgment is entered without jurisdiction over the person or subject matter. See, e.g., *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

(c) Sameness of Cause of Action and Parties

The third requirement, that the same cause of action and the same parties or their privies be involved in both cases, is not as manifest, but is nonetheless present as well.

(i) Cause of Action

With respect to the sameness of the cause of action, it has been observed that although "[t]he parameters [sic] of a 'claim' cannot be stated with mathematical precision," *Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982), the U.S. Court of Appeals for the Eighth Circuit has adopted the approach advocated in the Restatement (Second) of Judgments in determining whether two separately asserted claims arise from the same cause of action for res judicata purposes. *Poe v. John Deere Co., supra*. That position holds:

> "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."

Poe v. John Deere Co., 695 F.2d at 1106, quoting Restatement (Second) of Judgments § 24(1) (1982). Accord, *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990), *cert. denied* 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 48; *Murphy v. Jones*, 877 F.2d 682 (8th Cir. 1989). What constitutes a " 'transaction' " or " 'series of connected transactions' " is " 'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " *Poe v. John Deere Co.*, 695 F.2d at 1106, quoting the Restatement, *supra*. "Put another way, whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of

operative fact or are based upon the same factual predicate." *Murphy v. Jones*, 877 F.2d at 684-85.

As do the present suits, the Lincoln federal suit sought to litigate the alleged illegal seizure and detention of the property of the four VanDeWalles, thereby attempting to right the perceived wrongs flowing from the bank's replevin.

Nor does it matter that several different claims are involved.

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

The Restatement, *supra*, § 24(2) at comment *c*. at 200.

(ii) Parties

The parties in the federal suit and the present suits are obviously not the same; whereas it was the parents who brought the Lincoln federal suit, it is the sons who are the plaintiffs here. But while "[p]rivity does not exist merely because parties happen to be interested in the same question, or in proving or disproving the same state of facts," *Headley v. Bacon*, 828 F.2d 1272, 1277 n.4 (8th Cir. 1987), and close family relationships are not sufficient by themselves to establish privity with the original suit's party, *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860 (5th Cir. 1985), nonetheless, parties not actually named in the original case may be subject to the bar of res judicata if they are in privity to the original parties.

> There is no definition of "privity" which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same.

Lowell Staats Min. Co. v. Philadelphia Elec. Co., 878 F.2d 1271, 1274-75 (10th Cir. 1989).

Although the allegations in the suits at issue directly

contradict the claims in the Lincoln federal suit on the matter of the ownership of the property replevied, the facts remain that the parents and sons had a close, mutual relationship with respect to the property and that all three suits arise out of the same occurrence. As noted by one commentator, "it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper." 18 Charles A. Wright et al., Federal Practice and Procedure § 4449 at 418 (1981). Under the circumstances, the entire VanDeWalle clan is in privity for the purposes of these suits.

Nor is it material that the sons filed their initial petitions in the suits at issue before the parents filed their federal action, for between two actions pending at the same time, the first of the two judgments announced has a preclusive effect. *Unger v. Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982), *cert. denied* 460 U.S. 1102, 103 S. Ct. 1801, 76 L. Ed. 2d 366 (1983); the Restatement, *supra*, § 14.

4. Other Actions

In view of the determination that the present suits are barred by the judgment in the Lincoln federal suit, we do not concern ourselves with the preclusive effects, if any, of the bankruptcy proceeding and the Omaha federal suit.

V. JUDGMENT

The VanDeWalle clan having had its days in court, and preclusion being thus proper, the judgment of the trial court is affirmed.

AFFIRMED.

Margaret M. Iverson, appellee, v. City of North Platte, Nebraska, a municipal corporation, appellant.

500 N.W.2d 574

Filed May 28, 1993. No. S-91-219.

1. **Special Assessments: Proof: Appeal and Error.** In an appeal from a levy of special assessments, the party contesting the assessment has the burden of showing invalidity.

2. **Special Assessments: Appeal and Error.** In an appeal from a levy of special assessments, the appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof.
3. **Special Assessments: Statutes: Legislature.** Both the language of Neb. Rev. Stat. § 18-2001 et seq. (Reissue 1991) and its legislative history indicate that although the gap and extend law is an exception to the rule that property owners must consent to special paving assessments, the exception is a limited one.
4. **Special Assessments: Municipal Corporations: Appeal and Error.** The power and authority delegated to municipalities to construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved in favor of the taxpayer.
5. **Special Assessments: Estoppel: Liability.** Where special assessments against property to pay the cost of paving are void, knowledge of the improvement will not estop the owner from avoiding liability therefor, and such assessments cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands.
6. **Ordinances: Taxation: Parties.** All taxpayers who might be affected in some way by the decision in a suit to declare an ordinance creating a paving district void are not indispensable parties to the suit.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Douglas L. Stack, of Girard and Stack, P.C., for appellant.

Jess C. Nielsen, of Nielsen & Birch, for appellee.

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

WHITE, J.

This is an appeal from the district court for Lincoln County's granting of appellee Margaret M. Iverson's motion for summary judgment. Appellee filed a combined petition in error and petition on appeal challenging the creation of a gap paving district by the City of North Platte (City). She contended that the City exceeded its statutory authority to create gap paving districts under Neb. Rev. Stat. § 18-2001 et seq. (Reissue 1991) when it "stacked" multiple districts. Accordingly, appellee claimed, the City was without authority to assess her property for the resulting paving project. The district court granted

appellee's motion for summary judgment, whereupon the City timely appealed to this court. We affirm.

The appellee is the owner of a hayfield adjacent to Pacific Street in North Platte, Nebraska. Prior to 1989, Pacific Street was an unpaved road. On February 7, 1989, the mayor and city council of North Platte passed a resolution creating gap paving districts Nos. 140 and 141 in order to pave two one-block sections of Pacific Street:

> The Mayor and Council hereby find and determine that it is necessary and advisable that the City, under the authority granted by §§18-2001 to 18-2003 inclusive, R.R.S. Neb., 1943 as amended, cause the following unpaved streets within the City to be improved by grading, curbing, guttering and paving, together with necessary appurtenances, to-wit: Pacific Street from Second Street to Third Street [and] Pacific Street from Front Street to Sixth Street....

Also on February 7, the mayor and council passed an ordinance "For the Creation of Paving District No. 744 in the City of North Platte . . . Ordering the Construction of Street Improvement Therein," to pave Pacific Street from 3d Street to 4th Street. Additionally, on August 1, the mayor and council passed a resolution creating gap paving district No. 143 (No. 143) in order to pave Pacific Street from 4th Street to 6th Street.

Through the creation of these regular and gap paving districts, the City paved Pacific Street for a total of five blocks, including that part of the street which was adjacent to appellee's property. On December 5, counsel for appellee appeared at the city council meeting to object "to the creation of Gap Paving District No. 143 and the assessment of any of the cost of paving to" appellee's property. Thereafter, on December 19, appellee's property was assessed $12,146 for her share of the paving done pursuant to No. 143. The property, according to the county's valuation, was worth $10,465.

On January 3, 1990, appellee, in compliance with Neb. Rev. Stat. § 25-1931 (Reissue 1989), filed a combined petition in error and petition on appeal in the district court for Lincoln County. The petition contended that the City erred in attempting to create No. 143 and in attempting to assess part of

the costs resulting therefrom against appellee's property. The district court found that the City had improperly used the gap paving provisions of § 18-2001 et seq. to "circumvent the necessity of creating a paving district which would require consent of the landowners prior to its initiation," and it granted appellee's motion for summary judgment. The City appeals.

Before we address the City's assignments of error concerning the district court's holding, we first dispose of appellee's argument concerning the City's authority to initiate improvements on property outside of its corporate limits. The appellee contends that the City was without authority to assess her property because, although it is situated along North Platte's corporate limits, it lies outside those limits and could not be improved by the City. However, Neb. Rev. Stat. § 16-617 (Reissue 1991) provides that the mayor and council of a city of the first class such as North Platte "shall have power to make improvements of any street . . . which divides the city corporate area and the area adjoining the city . . . ." The record shows that appellee's land lies next to Pacific Street where it divides the city corporate area from the area adjoining the city. Accordingly, under § 16-617, the City acted within its authority when it made the disputed improvements on Pacific Street.

The appellee further contends that although § 18-2003 authorizes the mayor and council to "levy and collect special taxes and assessments upon the lots and parcels of real estate *adjacent to or abutting upon* the portion of the street or alley thus improved," the City could not assess appellee's property because it is not "adjacent to or abutting upon" Pacific Street. Appellee argues that because the City purchased a 20-foot-wide strip of her property along Pacific Street in 1985 to be dedicated for a right-of-way for Pacific Street, her land is no longer "adjacent to or abutting upon" the improved Pacific Street, but instead is separated from it by the 20-foot buffer. Accordingly, appellee argues that she cannot be assessed for improvements thereon. Such an argument ignores the meaning of "adjacent," however. This court defined the term in *Freeman v. City of Neligh*, 155 Neb. 651, 659-60, 53 N.W.2d 67, 72 (1952), where we stated:

> In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W.

> 1047, this court said: "The word 'adjacent,' in the popular sense thus used, obviously means something in addition to, or different from, 'abutting.' * * * In construing the word 'adjacent,' it was said in Dunker v. City of Des Moines, 156 Ia. 292: 'The word "adjacent" is, at least, somewhat indefinite. Ordinarily, it means "to lie near, close, or contiguous." Webster. Even in its strictest sense it means no more than lying near, close, or contiguous, but not actually touching.' This definition is approved in Hennessy v. Douglas County, 99 Wis. 129; Northern P. R. Co. v. Douglas County, 145 Wis. 288."

Under the above definition, appellee's land is clearly adjacent to Pacific Street as required under § 18-2003. Accordingly, ignoring for the moment the considerations addressed below, the City did have the authority to assess appellee's property for adjacent street improvements. We turn, then, to the City's assignments of error.

The City contends that the district court erred in (1) finding that any and all assessments arising from No. 143 are void, (2) finding that the City exceeded the limitations imposed on it by § 18-2001 et seq., and (3) misapplying the law to the facts.

In an appeal from the levy of special assessments, the party contesting the assessment has the burden of showing invalidity. *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). In all appeals of such actions, the appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof. *Garden Dev. Co. v. City of Hastings*, 231 Neb. 477, 436 N.W.2d 832 (1989); *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); Neb. Rev. Stat. § 19-2422 (Reissue 1991); Neb. Rev. Stat. § 25-1925 (Reissue 1989).

A municipality desiring to specially assess property owners for the cost of street improvements must rely on one of three methods to do so. The first two of these, the "objection method" and the "petition method," involve creating formal street improvement districts. Under the objection method, a

street improvement district is created by ordinance of the mayor and city council. Notice of the created district must be published, and if written objections to the district are filed by owners of more than 50 percent of the front footage, the ordinance is repealed. If objections are not received, the work is done and the property owners are assessed the cost. See Neb. Rev. Stat. §§ 16-619 to 16-622 (Reissue 1991).

Under the petition method, a street improvement district must be created if the owners of three-fourths of the property fronting the street petition for such improvement. A district is then created, the work done, and all of the owners of front footage are assessed in the same manner as under the objection method. See Neb. Rev. Stat. § 16-624 (Reissue 1991).

Gap paving districts, conversely, require no approval by the property owners. They are statutory creations which allow a city to "fill in the gaps" between paved streets without giving adjacent property owners the right of remonstrance or protest. Cities need merely decide unilaterally to pave the gaps, and the cost is then assessed against the property owners. The relevant statute provides in part:

> Any city or village may, without petition or creating a street improvement district . . . pave any portion of a street otherwise paved so as to make one continuous paved street, but the portion to be so improved shall not exceed two blocks including intersections or thirteen hundred and twenty-five feet whichever is the lesser, and such city . . . may also . . . pave any unpaved street . . . which intersects a paved street for a distance of not to exceed one block on either side of such paved street.

§ 18-2001.

Section 18-2002 similarly allows a city to pave "any side street or alley within its corporate limits connecting with a major traffic street for a distance not to exceed one block from such major traffic street." Section 18-2003 authorizes the special assessments for the improvements made pursuant to § 18-2001. Section 18-2004 provides that nothing in §§ 18-2001 to 18-2004 shall be construed to repeal or amend any statutes not specifically repealed, and provides that §§ 18-2001 to 18-2004 shall be construed as an independent and complete act.

These statutes are frequently referred to as the "gap and extend law."

In the case at bar, the City paved five blocks of Pacific Street by utilizing three gap paving districts and one regular paving district. Approval by the affected property owners was therefore needed only for the single regular paving district. See §§ 16-619 to 16-622.

The paving project was achieved by a number of actions taken by the City. First, on February 7, 1989, the City passed a resolution creating gap paving districts Nos. 140 and 141. These districts, created under the provision of § 18-2001 which allows a city to pave any unpaved streets which intersect a paved street for a distance of one block on either side of such paved street, made up one paved block each on either end of the five-block paving project. On the same day, the City passed an ordinance under §§ 16-619 to 16-622 creating paving district No. 744, which added another block of pavement onto the block created by No. 140, for a total of two blocks paved on the south end of Pacific Street. This left a gap of two blocks unpaved between the north end of No. 744 and the south end of No. 141. On August 1, 1989, the City filled this gap by passing a resolution creating No. 143, which began at the south end of No. 141 and continued for two blocks to the north end of No. 744.

The appellee contends that the paving of Pacific Street resulted from the City's " 'scheming' to close a 6-block [sic] gap" on the street. Brief for appellee at 9. While we stop short of accusing the City of so scheming, we do find that the City impermissibly attempted to use § 18-2001 to pave two blocks of Pacific Street when it created No. 143.

Both the language of § 18-2001 et seq. and its legislative history indicate that although the gap and extend law is an exception to the rule that property owners must consent to special paving assessments, the exception is a limited one. *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979). The gap and extend law was introduced as L.B. 243 in 1964. The introducer, Sen. Albert A. Kjar, provided the following as the bill's statement of intent:

> Hard surface paving in most cities and villages was constructed, one district at a time and, consequently, there

> are frequently gaps in municipal paving systems of one or two blocks and due to the owner's unwillingness to cooperate in completing this improvement, it remains a traffic hazard as well as remaining an incompleted improvement.

Statement of Purpose, L.B. 243, Committee on Public Works, 73d Leg. (Feb. 8, 1963).

As noted by the district court, further reading of the statute's history "leaves the clear impression that the legislature was only passing a provision which would allow municipalities to fill in gaps of only two blocks, and not a provision which would allow a municipality to build gap upon gap and thereby pave an area longer than two blocks."

In 1974, the Legislature proposed to amend § 18-2001 to increase the distance in feet that a gap district could improve a street. The bill also sought to allow the greater of the distance in feet or the number of blocks to control in regard to the size of gap that could be paved, instead of the lesser. The change in distance was approved, while the attempt to allow the greater of the two measures to control failed. Although the floor debate on these matters is indicative of the limitations of the gap and extend law, the importance of the debate to this case concerns the intent behind the legislation and whether a municipality could tack gaps upon gaps in order to eliminate the requirement of obtaining approval of the people affected by a paving district.

When asked if tacking "two blocks on two blocks . . . is . . . acceptable," Sen. Harold T. Moylan, who introduced L.B. 652, responded that the "portion to be so improved shall not exceed two blocks." Floor Debate, 83d Leg., 2d Sess. 5004 (Jan. 24, 1974). Sen. David H. Stahmer, a proponent of the bill, also added that its purpose was "strictly to close a gap. Not to make extensions . . . ." *Id.* at 5007. Additionally, Sen. Herbert J. Duis, another proponent of the bill, in response to a question of whether the statute could be used to pave an interminable distance of a street over time, stated that in order to pave more than a single gap, a city "would have to create paving districts in [a] comprehensive plan." *Id.* at 5009.

The power and authority delegated to municipalities to

construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved in favor of the taxpayer. *Garden Dev. Co. v. City of Hastings*, 231 Neb. 477, 436 N.W.2d 832 (1989); *Turner v. City of North Platte, supra*. It is clear that the Legislature intended that the gap and extend procedure be used only to fill one- or two-block unpaved gaps which exist between paved streets. To pave areas beyond these restrictions, a municipality must receive the approval of the affected property owners through one of the two statutory methods set out above.

In the present case, the City used § 18-2001 improperly to pave a three-block area with two gap paving districts, Nos. 141 and 143. In effect, the City attempted to circumvent the necessity of creating a paving district which would require consent of the landowners prior to its initiation. This is clearly a gap-stacking strategy of the type which the Legislature intended to prevent and not a legitimate use of the gap and extend law. Allowing a municipality to exceed the specific limitations of the act would defeat and run afoul of the purpose and intent of the Legislature in establishing the gap paving district statutes. Therefore, having failed to comply with the requisites of the various statutes authorizing special assessments, the City was without authority to make the levy in question.

The City argues that No. 143 paved only a one-block area which when combined with No. 141 resulted in a two-block area being paved. Thus, the City's reasoning goes, while it may not have been in the interest of civic economy to create two gap paving districts for a single two-block area, the two-block area is still within the guidelines of § 18-2001. This argument hinges on the premise that the No. 143 project on Pacific Street, from 4th Street to 6th Street, is one block long. The City claims that, because 5th Street has not yet been extended through this undeveloped area, the area from 4th Street to 6th Street is only one, albeit large, block. We disagree. Assuming, arguendo, that the numeration of the streets is extraneous, the plat of the area clearly shows that 4th Street to 6th Street is intended to be a two-block area which will have 5th Street running through it

when the area is developed. We therefore find the City's argument to be unpersuasive and determine that No. 143 covers a two-block area.

The City also appears to contend that appellee, having been aware of the work and having received its benefits, is estopped from protesting the special assessment. This court has held in numerous cases that " 'where special assessments against property to pay the cost of paving are void, knowledge . . . of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. . . .' " *Turner v. City of North Platte*, 203 Neb. 706, 714-15, 279 N.W.2d 868, 873 (1979). See, also, *City of McCook v. Red Willow County*, 133 Neb. 380, 275 N.W. 396 (1937); *Batty v. City of Hastings*, 63 Neb. 26, 88 N.W. 139 (1901); *Leavitt v. Bell*, 55 Neb. 57, 75 N.W. 524 (1898); *Harmon v. City of Omaha*, 53 Neb. 164, 73 N.W. 671 (1897). This argument is also without merit.

The City further contends that declaratory relief should not have been granted by the district court because not all taxpayers affected by the assessment were joined as parties, as required by Neb. Rev. Stat. § 25-21,159 (Reissue 1989) of the Uniform Declaratory Judgments Act. The City argues, without citing any authority, that the order of the district court declaring that "any and all assessments arising from Gap Paving District No. 143 are void" is overbroad because no other affected taxpayers were joined as parties to the action. Such an argument is without merit. This court has stated that "[i]n a taxpayer's action potentially all of the taxpayers and citizens are parties." *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 850, 83 N.W.2d 904, 910 (1957). However, the fact that a number of taxpayers may be potential parties does not mean that they are *indispensable* parties. "There is no requirement that all taxpayers who might be affected in some manner by the result of the litigation be made parties to the action." *Christensen v. City of Tekamah*, 230 Neb. 576, 579, 432 N.W.2d 798, 800 (1988).

Accordingly, we affirm the decision of the district court that the creation of No. 143 was improper and that any and all

assessments arising from it are void and may not be collected by the City.

AFFIRMED.

STRUVE ENTERPRISES, INC., APPELLEE, V. THE TRAVELERS INSURANCE COMPANY, APPELLANT.

500 N.W.2d 580

Filed May 28, 1993. No. S-91-510.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
2. **Stipulations.** The general rule is that parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.
3. **Contracts.** When a dispute sounds in contract, it is to be treated as one at law.
4. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, which is entitled to every reasonable inference deducible from the evidence.
5. **Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
6. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusions independent from the conclusions reached by the trial court with regard to these questions.
7. **Insurance: Contracts: Words and Phrases.** In regard to an insurance policy, "cancellation" means the termination of a policy prior to the expiration of the policy period by act of one or all of the parties.
8. **Insurance: Contracts.** The continuance of an insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased.
9. _____: _____. The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments.
10. **Insurance: Contracts: Brokers.** As a matter of law, the failure of an independent insurance broker to provide coverage (or otherwise serve the broker's client) is not imputable to the insurer issuing the policy.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions to dismiss.

Anne E. Winner and, on brief, Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

James C. Zalewski, of Erickson & Sederstrom, P.C., for appellee.

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

FAHRNBRUCH, J.

Contending that an insurance policy issued by it had lapsed, The Travelers Insurance Company (Travelers) appeals a district court declaratory judgment requiring it to pay workers' compensation benefits to an injured employee of Struve Enterprises, Inc. (Struve), of Deshler, Nebraska.

We agree with Travelers that Struve's failure to pay the premium when a new policy was issued constitutes a lapse, rather than a cancellation, of the policy. Accordingly, we reverse the judgment of the district court for Thayer County and remand the cause with directions to dismiss.

Struve builds and manages apartment houses, publishes a newspaper, and operates several movie theaters. It is owned by Harold Struve and his wife, Lois, each of whom owns 50 percent of the company's shares.

About July 1, 1987, Struve purchased from Travelers a workers' compensation insurance policy, numbered 6-UB-882G023-5-87, covering the period from July 1, 1987, to July 1, 1988. The policy premium for that period was paid in full. Included in the policy was a "Nebraska Cancelation and Nonrenewal Endorsement," which reads, in part:

> We may cancel this policy. We must mail or deliver to you advance written notice stating when the cancelation is to take effect. *If we cancel because you do not pay all premium when due, we will mail the notice of cancelation at least ten days before the cancelation is to take effect.*

(Emphasis supplied.)

On May 26, 1988, Travelers sent Struve a "Workers Compensation Insurance Plan Letter." The letter stated that Struve's workers' compensation policy for the year July 1,

1988, to July 1, 1989, would be numbered 6-UB-882G023-5-88 and that that policy would be a renewal of policy number 6-UB-882G023-5-87. The letter billed Struve $5,161 for workers' compensation coverage for the period of July 1, 1988, to July 1, 1989. The May 26 letter further stated that "[*t*]*he premium must be paid by the 'due date'* [*July 1, 1988*] *to keep the insurance in force.*" (Emphasis supplied.) It is uncontroverted that (1) the notice was received by Struve, (2) payment was never made to Travelers, and (3) no further notices or reminders were sent to Struve by Travelers.

On November 20, 1989, approximately 17 months after the original policy term expired, a Struve employee was injured and a workers' compensation claim was filed with Travelers. After being informed that Struve's workers' compensation insurance coverage was no longer in effect, Lois Struve discovered in her company's files the May 26, 1988, notice sent by Travelers.

Struve filed a petition in district court alleging that Travelers had never provided a "notice of cancellation" as required by the policy. Struve requested a judgment declaring that (1) the policy was not properly canceled and was in effect at the time of the injury in question and (2) Travelers was liable to Struve for all sums paid and to be payable to the injured employee under the Nebraska Workers' Compensation Act. Struve also requested costs and attorney fees incurred by it.

In its answer, Travelers claimed that Struve's policy was no longer in effect due to Struve's failure to pay the premium required to keep the policy in full force and effect. Travelers requested a declaration that it had not provided coverage to Struve at the time of the injury to Struve's employee.

The parties entered into a joint stipulation that, inter alia, (1) the matter was an equity matter to be tried to the court without a jury, (2) the matter would be submitted to the court without personal appearance of counsel, and (3) the entire evidentiary record would consist of depositions and exhibits identified and referenced in the depositions and answers by Travelers to an interrogatory.

Based upon the stipulated record, the district court found that Travelers had canceled Struve's workers' compensation insurance policy without giving Struve the notice required by

the policy and by Neb. Rev. Stat. § 44-379 (Reissue 1988). The court found that, therefore, the policy was not properly canceled and was in effect at the time of the employee's injury. The court stated that

> [e]quity requires a holding for [Struve] because of two reasons: (a) the whole idea of insurance is to spread the risk; and (b) by reason of the regulation of the insurance industry and the acts of the industry, the ordinary customer reads the words to mean that his insurance will not lapse or be cancelled without a final and clear cut reminder.

Travelers was ordered to reimburse Struve for all costs incurred in its payments to the injured employee plus any future costs to the extent that Travelers would have been required to cover under the policy, less the annual premiums that would have been charged to Struve for the years 1988 and 1989. Costs of the action were also assessed to Travelers.

Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., ante* p. 194, 498 N.W.2d 333 (1993). The parties stipulated that this case was an equity case. The general rule is that parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978).

When a dispute sounds in contract, the action is to be treated as one at law. See *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993).

> In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. . . . In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. . . . When a declaratory judgment action presents questions of law, an appellate court has an

> obligation to reach its conclusions independent from the conclusions reached by the trial court with regard to these questions.

(Citations omitted.) *Id.* at 469, 495 N.W.2d at 487.

Travelers assigns as error the district court's finding that Travelers canceled Struve's policy. The court relied on the clause in the policy that requires Travelers to give at least 10 days' notice if Travelers canceled the policy due to nonpayment of premium. However, as pointed out in *Peterson v. Cornhusker Cas. Co.*, 238 Neb. 173, 175, 469 N.W.2d 553, 555 (1991), in regard to an insurance policy, "cancellation means the 'termination of a policy prior to the expiration of the policy period by act of one or all of the parties' " (quoting *Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W.2d 218 (Mo. App. 1973)). In this case, the policy simply lapsed at the end of the policy period. The continuance of the insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Struve admits receiving the notice from Travelers stating that the policy was about to expire and that payment had to be received by July 1, 1988, for Travelers to continue its workers' compensation insurance coverage of Struve. Struve simply failed to pay the premium due for the following year and for the year after that. The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments. *Id.*

We disagree with the district court that § 44-379 requires Travelers to give a notice of noncoverage to Struve. The statute provides that, on a policy of liability insurance, "the insurer shall give the insured sixty days' written notice prior to cancellation or nonrenewal of such policy, except that the insurer may cancel upon ten days' written notice to the insured in the event of nonpayment of premium. Such notice shall state the reason for cancellation or nonrenewal." This provision applies to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an

automatic termination by expiration of the policy period. See *Sampson v. State Farm Mut. Ins. Co.*, 205 Neb. 164, 286 N.W.2d 746 (1980) (construing Neb. Rev. Stat. § 44-516 (Reissue 1988), which required 10 days' notice of cancellation for nonpayment of automobile insurance premiums, as being inapplicable to a termination of the policy through expiration of the policy period). Although *Sampson* dealt with an automobile liability policy, we see no reason why the same rule should not apply to workers' compensation insurance policies.

Struve argues that there was an established course of dealing between Struve and Travelers which should result in liability on the part of Travelers. However, no course of dealing was established between Struve and Travelers because (1) any course of dealing was between Struve and Struve's independent insurance agent, who was not Travelers' agent, and (2) the 1987-88 policy year was the first period in which Travelers undertook to insure Struve. Therefore, there was no prior course of conduct with Travelers concerning the renewal of any policy. Moreover, as a matter of law, the failure of an independent insurance broker to provide coverage (or otherwise serve the broker's client) is not imputable to the insurer issuing the policy. See *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992).

The district court was clearly wrong in finding that Travelers failed to properly cancel its workers' compensation policy with Struve and therefore remained liable to Struve. Our holding that no cancellation of the policy occurred is dispositive of the remaining assignments of error. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD EDWARD ELLEN, APPELLANT.

500 N.W.2d 818

Filed May 28, 1993. No. S-92-933.

1. **Sentences: Appeal and Error.** Except under certain circumstances when the Supreme Court is reviewing a sentence of death, it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.
2. _____: _____. To the trial court and not to an appellate court is entrusted the power to impose sentences for the commission of crimes against the State; the judgments of that court cannot be controlled or interfered with in the absence of an abuse of discretion.
3. _____: _____. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
4. **Criminal Law: Sentences: Intoxication.** Where one deliberately pursues a course to voluntarily become intoxicated, particularly where the defendant is aware of his propensity to violate the law when drunk, there is little that can be said in his behalf in mitigation of the crime or the punishment.
5. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Harry A. Moore, Madison County Public Defender, for appellant.

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

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

LANPHIER, J.

Contending that the sentences imposed by the Madison County District Court are excessive, defendant, Richard Edward Ellen, appeals his sentence of life imprisonment for second degree murder and his consecutive sentence of 5 to 15 years for first degree assault. We affirm.

BACKGROUND

The events leading to the murder of Lonnie Edwards took place on the evening of July 18, 1989, in Madison, Nebraska. On that night, defendant and several other employees of Mid-American Carnival went into the city of Madison, visiting several bars. At one of these establishments the group encountered other workers from the carnival, including Charlie Tidwell and the victim, Edwards. Edwards offered defendant and his friends a pitcher of beer, which defendant refused. Edwards persisted in his offer, as did defendant in his refusal, which eventually led to an argument in which defendant told Edwards to sit down and quit bothering him. Later that evening, Edwards approached defendant's wife and asked her to dance. When she refused, Edwards insulted her, using an obscenity.

Prior to leaving the bar for the evening, defendant made a comment to Tidwell about killing a "nigger," evidently in reference to Edwards. On the way home, defendant further remarked that he should hit Edwards "in the head and throw him in the river and get rid of him." After returning to the carnival encampment, defendant, Tidwell, and a number of others continued to drink at defendant's trailer. Following further discussion, defendant decided to confront Edwards. He left his trailer, picked up an ax or mallet handle which he used as part of his carnival exhibit, and walked to a nearby bridge, where he saw Edwards. Defendant approached Edwards, whereupon an argument ensued concerning the "incidents" which had taken place earlier that evening. Defendant hit Edwards two or three times with the handle, apparently breaking Edwards' arm. Tidwell may have also struck Edwards with the handle at this time. Either defendant or Tidwell then discarded the handle, and both returned to defendant's trailer.

Arriving at the trailer, defendant and Tidwell removed their bloodied shirts, put them in a bag, and gave the bag to defendant's stepdaughter to discard. When the stepdaughter returned from disposing of the clothes, she informed defendant that Edwards was in the trailer compound telling others that defendant had broken Edwards' arm. An autopsy would later confirm that Edwards' left arm had been broken. After hearing

the stepdaughter's story, defendant and Tidwell went outside, where they located Edwards, and either one or both of them again assaulted Edwards by striking him with their fists. At this point, it was approximately 3 a.m. on July 19.

Edwards was then, either by force or persuasion, placed in a truck by defendant and Tidwell, on the pretense that they would take him to a hospital. Driving with the truck's lights off, defendant proceeded a short distance on a paved road and then turned onto a field access road. Defendant and Tidwell then pulled Edwards out of the truck. After dragging him down a hill, either defendant or Tidwell proceeded to strike Edwards in the head with a 4-foot-long metal bar, bludgeoning him to death. An autopsy indicated that Edwards had sustained intense and severe blows to the head, several of which penetrated his brain, and one of which cut halfway through his brain stem.

After returning to the carnival encampment, defendant fled Madison during the early morning hours of July 19. He eventually arrived in Oregon, where he lived under an alias for nearly 2 years. On June 7, 1991, defendant surrendered to Oregon authorities after seeing himself on the television program "America's Most Wanted." Defendant was arraigned in district court on October 23, on an information charging him with first degree murder. At his arraignment on the information, defendant stood mute. The district judge entered a plea of not guilty for defendant.

A plea agreement was later reached between defendant and the prosecutor, and on July 16, 1992, defendant pled guilty to second degree murder and first degree assault in exchange for the State's dropping the first degree murder charge. Second degree murder is a Class IB felony, Neb. Rev. Stat. § 28-304(2) (Reissue 1989), which carries a maximum penalty of life imprisonment and a minimum penalty of 10 years' imprisonment, Neb. Rev. Stat. § 28-105(1) (Reissue 1985). First degree assault is a Class III felony, Neb. Rev. Stat. § 28-308 (Reissue 1989), which is punishable by a maximum period of 20 years' imprisonment, a $25,000 fine, or both, with a minimum period of 1 year's imprisonment, § 28-105(1). On September 19, 1992, defendant was sentenced to life imprisonment on the

second degree murder charge and 5 to 15 years' imprisonment on the first degree assault charge, with the sentences to run consecutively. Defendant appeals his sentences to this court.

ASSIGNMENT OF ERROR

Defendant assigns a single error, contending that "[t]he sentences imposed upon [him] are excessive, and the District Court abused its discretion in imposing such sentences."

STANDARD OF REVIEW

"Except under certain circumstances when the Supreme Court is reviewing a sentence of death, *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate." *State v. Hall*, 242 Neb. 92, 95, 492 N.W.2d 884, 886 (1992). We have long adhered to the doctrine that to the trial court and not to an appellate court is entrusted the power to impose sentences for the commission of crimes against the State, and the judgments of that court cannot be controlled or interfered with in the absence of an abuse of discretion. See, *State v. Hall, supra*; *Wright v. State*, 45 Neb. 44, 63 N.W. 147 (1895). We have also declared that "[a] sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court." *State v. Coleman*, 241 Neb. 731, 733, 490 N.W.2d 222, 224 (1992). See, also, Neb. Rev. Stat. § 29-2308 (Supp. 1991). With these maxims in mind, we turn to our review of defendant's sentences.

THE SENTENCES

Defendant argues that the sentences imposed by the district court "are excessive, and are an abuse of discretion by the district court; a sentence of 10 years should have been imposed on Count I [second degree murder], and a sentence of one year should have been imposed on Count II [first degree assault]." Brief for appellant at 13. Defendant bases this argument almost exclusively on a claim that on the night in question, he was acting under the "extreme influence of alcohol." *Id.* At no point, however, does he contend that he was unaware of what he was doing due to his use of alcohol or that his intoxication

prevented him from having the requisite mens rea for the offenses to which he pled guilty. The defendant merely concludes that his intoxication "should have been considered by the sentencing court as a factor in strong mitigation of his punishment." *Id.* We disagree.

In *State v. Gamron*, 186 Neb. 249, 251, 182 N.W.2d 425, 427 (1970), this court held: "Where one deliberately pursues a course to voluntarily become intoxicated, as here, particularly where defendant was fully aware of his propensity to violate the law when drunk, there is little that can be said in his behalf in mitigation of the crime or the punishment." In the instant case, the record shows that defendant perceives himself as having an alcohol problem. He also acknowledges that he is inclined to become abusive when he drinks too much. Nevertheless, the evidence shows that defendant had been drinking throughout the day on July 18, 1989, and that he continued doing so until the early morning hours of July 19, when the murder of Edwards occurred. As this court further stated in *Gamron*, "The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated." *Id.* See, also, *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986) (defendant's intoxication apparently regarded as an aggravating condition rather than a mitigating one). Therefore, while we do not hold that intoxication can never be considered a mitigating circumstance, we find defendant's contention that his drinking be considered such in the present case unpersuasive.

In determining an appropriate sentence, the district court conducted an extensive sentencing hearing, which generated some 221 pages of material. In addition, pursuant to Neb. Rev. Stat. § 29-2261 (Reissue 1989), a presentence report containing 87 pages of information was prepared by the Nebraska Probation System and delivered to the court. The presentence report indicated that defendant had numerous police contacts dating back to 1972, including arrests for loitering, resisting arrest, and theft of services, as well as three arrests for driving while intoxicated and numerous arrests for public intoxication. Further, defendant's military service record indicated that while he was in the U.S. Marine Corps, he was court-martialed twice

for breaking restrictions, theft, and being absent without leave. Defendant spent 4 months in the Portsmouth Naval Prison for these infractions before receiving an undesirable discharge in 1970. These myriad offenses, while generally petty and nonviolent in nature, nonetheless constitute a history of criminal activity, a circumstance which may be considered by a sentencing court. See *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992).

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* From the facts and circumstances of this case, the district court determined that the complained-of sentences were appropriate, finding that "a lesser sentence would depreciate the seriousness of the offense and promote disrespect for the law." Had defendant been convicted of the original charges brought against him, and had he been given the maximum sentence, he would have faced the death penalty. See, Neb. Rev. Stat. § 28-303 (Reissue 1989); § 28-105(1). Due to his plea bargain, defendant has thus already received a substantially reduced penalty by escaping the possibility of being sentenced to death.

CONCLUSION

Defendant's sentences were clearly within the statutory limits of the penalties for the crimes to which he pled guilty. The sentences are not excessive and do not constitute an abuse of discretion by the trial court, which determined that defendant's cruel, violent, brutal, and senseless acts "deserve the most serious of consequences." Accordingly, the sentences imposed by the district court are affirmed. The motions filed by defendant after submission of this appeal are overruled as moot.

AFFIRMED.

CITY OF FORT CALHOUN, A MUNICIPAL CORPORATION, AND THE FORT CALHOUN VOLUNTEER FIRE DEPARTMENT, APPELLEES, V. TARI COLLINS AND JUDY WHITE, APPELLANTS.
TARI COLLINS AND JUDY WHITE, APPELLANTS, V. CITY OF FORT CALHOUN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

500 N.W.2d 822

Filed June 4, 1993. Nos. S-90-761, S-90-1030.

1. **Fair Employment Practices: Discrimination.** It is an unlawful employment practice under the Nebraska Fair Employment Practice Act for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin. Neb. Rev. Stat. § 48-1104(1) (Reissue 1988).
2. **Fair Employment Practices: Words and Phrases.** "Employer" is defined as a person engaged in an industry who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Neb. Rev. Stat. § 48-1102(2) (Reissue 1988).
3. _____: _____. An employee is an individual employed by an employer. Neb. Rev. Stat. § 48-1102(6) (Reissue 1988).
4. **Federal Acts: Civil Rights: Fair Employment Practices.** Since the Nebraska Fair Employment Practice Act is patterned after title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988), it is appropriate to consider federal court decisions construing the federal legislation.
5. **Fair Employment Practices.** Volunteers are not employees under the Nebraska Fair Employment Practice Act.
6. **Federal Acts: Civil Rights: Fair Employment Practices.** Volunteers who receive no direct or indirect financial benefit, fringe benefits, or reimbursement for expenses and who contribute assistance on a purely voluntary basis are not employees within the meaning of title VII of the Civil Rights Act of 1964.
7. **Federal Acts: Civil Rights: Fair Employment Practices: Discrimination.** The objective of title VII of the Civil Rights Act of 1964 was the elimination of discrimination in employment.
8. **Firefighters: Due Process.** Training and workers' compensation insurance do not give a volunteer firefighter a property interest in membership in the volunteer fire department that is protected by due process.
9. **Limitations of Actions: Civil Rights.** Under 42 U.S.C. § 1986 (1988), there is a 1-year statute of limitations for an action for conspiracy to deprive another of his or her constitutional rights.

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

Ralph E. Peppard for appellants.

Lawrence R. Brodkey, of Brodkey Law Offices, and James M. Egr, of Egr & Birkel, for appellees.

Dennis E. Koley for amicus curiae Nebraska State Volunteer Firefighters Association.

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

BOSLAUGH, J.

These cases, which were consolidated in this court for briefing and argument, present the question of whether volunteer firefighters are employees within the meaning of the Nebraska Fair Employment Practice Act.

Case No. S-90-761 began as a proceeding before Nebraska's Equal Opportunity Commission (Commission) upon complaints filed by Tari Collins and Judy White, whose applications for membership in the Fort Calhoun Volunteer Fire Department (Volunteer Fire Department) were denied. The complainants alleged that they had been refused membership because they were women.

After a lengthy hearing before an examiner, the Commission found in favor of the complainants. Upon appeal to the district court, the court found that the Commission lacked subject matter jurisdiction and that the order of the Commission was not supported by the preponderance of the evidence, and the court reversed the order of the Commission. From that judgment, the complainants have appealed to this court.

We review the appeal from the judgment of the district court reversing the order of the Commission de novo on the record. *McCamish v. Douglas Cty. Hosp.*, 237 Neb. 484, 466 N.W.2d 521 (1991).

Case No. S-90-1030 was an action in the district court filed by the complainants against the City of Fort Calhoun, Nebraska (City); the Fort Calhoun Rural Fire Protection District (Fire District); and the Fort Calhoun Fire and Rescue Department, also known as the Fort Calhoun Volunteer Fire Department, seeking injunctive relief and damages for sex discrimination pursuant to 42 U.S.C. § 1983 (1988). The case actually originated as a counterclaim in another action brought

by the City against the Commission. The complainants obtained permission to sever their counterclaim and docket it separately as an independent action. The fifth amended petition filed by the complainants also contained allegations that the complainants "have a proprietary interest in membership in said Volunteer Fire Department"; that the members of the Volunteer Fire Department are agents of the City and the Fire District; and that the members of the Volunteer Fire Department conspired to deny the complainants membership in the department because of their sex, which denied the complainants equal protection under the law. The trial court sustained demurrers to the fifth amended petition and dismissed the petition. From that judgment, the complainants have appealed.

The controlling issue in these cases is whether a volunteer firefighter is an employee.

The Volunteer Fire Department is an unincorporated association of volunteer firefighters and rescue squad personnel. It serves the City and the Fire District. The members of the Volunteer Fire Department receive no pay for their services.

The City is a municipal corporation and a city of the second class. It has no separate or organic fire department, nor has it authorized one. An interlocal cooperation agreement between the City and the Fire District relates to joint use of a fire station being constructed in Fort Calhoun to house equipment owned by the City and the Fire District and used by the Volunteer Fire Department. The City is required by statute to provide workers' compensation insurance and term life insurance for the members of the Volunteer Fire Department; however, the City has no right or authority to control the activities of the Volunteer Fire Department.

The complainants, Collins and White, along with Randy Hammon, applied for membership in the Volunteer Fire Department in November 1986. In December 1986, the members of the Volunteer Fire Department voted on the applications, and all three applicants were denied membership because none of them received the required two-thirds majority of the members voting at that meeting.

At the time of Collins' and White's applications, the Volunteer Fire Department had more than 15 volunteer firefighters on its rolls for each day of 20 or more calendar weeks for 1986 and 1985.

Collins and White were the first and only women who had ever applied for membership in the Volunteer Fire Department. They both admitted that election to membership in the Volunteer Fire Department is a "popularity contest" and that they neither suffered nor sustained any economic harm from their failure to be elected to membership.

The record shows a variety of reasons as to why the members did not vote in favor of Collins' and White's membership in the Volunteer Fire Department.

Following its review of the Commission's decision, the district court found that the Commission did not have subject matter jurisdiction, that the Nebraska Fair Employment Practice Act was not intended to include within its coverage unpaid volunteers or the volunteer organizations to which they belong, and that the recommended orders of the successor hearing examiner for the Commission were not supported by a preponderance of the evidence because the selection process of the Volunteer Fire Department in the appellants' case was the same as the procedure followed for other applicants and was not based upon gender or discriminatory practice, but was merely a "popularity contest."

The appellants assign as error the district court's (1) reversing the Commission's order, (2) determining that the Commission did not have subject matter jurisdiction, (3) determining that benefits received by the volunteer firefighters do not confer economic benefits upon the recipients, (4) finding that the appellants did not prove sexual discrimination by a preponderance of the evidence, (5) not reversing the order and remanding the matter back to the Commission for a determination of the appellants' entitlement to punitive damages, and (6) not limiting its review to a review for error on the record.

Since we believe that the controlling issue in these cases is whether a volunteer firefighter is an employee within the meaning of the statutes involved, we limit our discussion to that

issue and the matter of the statute of limitations.

The Nebraska Fair Employment Practice Act provides in part:

> It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin.

Neb. Rev. Stat. § 48-1104 (Reissue 1988).

"Employer" is defined as a "person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Neb. Rev. Stat. § 48-1102(2) (Reissue 1988). Governmental agencies and political subdivisions are considered employers under the statute regardless of the number of employees. *Id.* According to the statutory definition, an employee is "an individual employed by an employer." § 48-1102(6).

Since the Nebraska Fair Employment Practice Act is patterned after title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988), it is appropriate to consider federal court decisions construing the federal legislation. *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984).

A number of U.S. district courts have considered the question as to whether title VII protection extends to volunteers and have determined that volunteers are not employees under the act. See, *Tadros v. Coleman*, 717 F. Supp. 996 (S.D.N.Y. 1989); *E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F. Supp. 1430 (S.D. Fla. 1989); *Schoenbaum v. Orange Cty. Ctr. for the Performing Arts*, 677 F. Supp. 1036 (C.D. Cal. 1987); *Smith v. Berks Community Television*, 657 F. Supp. 794 (E.D. Pa. 1987); *Beverley v. Douglas*, 591 F. Supp. 1321 (S.D.N.Y. 1984).

In *Berks Community Television*, the court found that volunteers who received no direct or indirect financial benefit, fringe benefits, or reimbursement for expenses and who

contributed assistance on a purely voluntary basis were not employees within the meaning of title VII. The *Berks Community Television* case was an action in which the plaintiff alleged that the defendants had discriminated against the plaintiff in violation of the Civil Rights Act of 1964. The court sustained a motion to dismiss on the ground that the court lacked subject matter jurisdiction.

In its opinion, the court reviewed the authorities and pointed out that "[t]he legislative history indicates the objective of Title VII was the elimination of discrimination in employment." *Smith v. Berks Community Television*, 657 F. Supp. at 795. The court further stated:

> In determining whether an individual is an employee for Title VII purposes, "one must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate." *Armbruster* [*v. Quinn*], 711 F.2d 1332, 1340 [(6th Cir. 1983)].
>
> Unpaid volunteers are not susceptible to the discriminatory practices which the Act was designed to eliminate.

Smith v. Berks Community Television, 657 F. Supp. at 795.

In the present cases, the appellants argue that because the Volunteer Fire Department reimburses its members for emergency medical technician training and because the members are provided workers' compensation insurance and term life insurance by the City, the reasoning of the *Berks Community Television* court is inapplicable.

The insurance coverage for the members of the Volunteer Fire Department is required by statute to protect the members during the course of their service. The compensation insurance only covers injury or death while they are on a call for the Volunteer Fire Department. In *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359 (3d Cir. 1993), the U.S. Court of Appeals for the Third Circuit held that training and workers' compensation insurance did not give a volunteer firefighter a property interest in his membership in the volunteer fire

department that was protected by due process because there was no benefit from them unless one was injured while working as a volunteer firefighter.

In *Hall v. Delaware Council on Crime and Justice*, 780 F. Supp. 241 (D. Del. 1992), the plaintiff argued that volunteers who received reimbursement for some expenses associated with their volunteer work should be considered employees for title VII purposes. The court concluded that the " 'remuneration' received by the DCCJ volunteers is insufficient to consider these volunteers employees for purposes of Title VII." *Hall v. Delaware Council on Crime and Justice*, 780 F. Supp. at 244.

In these cases, the Volunteer Fire Department does not fall within the definition of "employer" because it does not have any employees. The insurance covering the members of the Volunteer Fire Department and the reimbursement they receive for emergency medical technician training are insufficient to change their status from volunteers to employees for purposes of the Nebraska Fair Employment Practice Act.

The appellants argue that even if the Volunteer Fire Department is not an employer for purposes of the act, the City is, and, therefore, the Commission had jurisdiction of their claims. The City is an employer only for purposes of furnishing workers' compensation benefits. The members of the Volunteer Fire Department do not qualify as employees so that they may bring a claim under the statute.

In *Tadros v. Coleman*, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989), the U.S. District Court for the Southern District of New York held that a volunteer is not an employee and thus cannot maintain an action under title VII because "[a] Title VII plaintiff is only an 'employee' if the defendant both pays him and controls his work." In the present cases, it is clear that the City neither pays the members of the Volunteer Fire Department nor controls their work.

The district court was correct in its determination that the Commission lacked subject matter jurisdiction to hear the appellants' claim.

It is unnecessary to consider the complainants' other assignments of error relating to the district court's reversal of the Commission's order.

In the action for injunctive relief and damages in the district court, the petition was dismissed after the district court had sustained the appellees' demurrers to the appellants' fifth amended petition and the appellants failed to plead further.

In that case, the appellants' original petition was filed on October 5, 1988. In their fifth amended petition, the appellants alleged three causes of action for violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1986 (1988).

The appellees demurred on the basis that the first cause of action failed to state sufficient facts to state a cause of action and that the second and third causes of action were barred by the statute of limitations and failed to state sufficient facts to state a cause of action.

The district court found that the complainants had not alleged a legally protected right; that the various items alleged in paragraph 9 of the complainants' fifth amended petition did not constitute compensation, nor did the loss of any of those items constitute any pecuniary loss to the complainants; and that the causes of action were barred by the statute of limitations.

The appellants assign as error the district court's sustaining the appellees' demurrers, its findings, and its consideration of facts not alleged on the face of the petition.

For their first cause of action in the fifth amended petition, the complainants allege that they were denied employment by the appellees on the basis of sexual discrimination, suffered the loss of compensation and benefits associated with being a volunteer firefighter, suffered loss of reputation, suffered loss of personal dignity, and suffered mental anguish, in violation of §§ 1981 and 1983. The complainants' alleged loss of compensation consisted of life insurance, health insurance, reimbursement for expenses, and specialized skill and training.

As the district court found and as we have stated above, the complainants' alleged damages are not pecuniary in nature because the utility and value of the alleged benefits are tied directly to the position of a volunteer firefighter. See *Versarge v. Township of Clinton New Jersey, supra*. Furthermore, the U.S. Court of Appeals for the Ninth Circuit has held that volunteer status is not a constitutionally protected property interest.

Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992).

The district court did not err in its findings and in sustaining the appellees' demurrers to the first cause of action.

The complainants' second and third causes of action allege that the appellees conspired to deprive the complainants of their right to equal protection under the law pursuant to §§ 1985 and 1986.

Section 1986 provides a 1-year statute of limitations for an action for conspiracy to deprive another of his or her constitutional rights. The district court found and the complainants admit in their brief that since the first petition was filed October 5, 1988, the second and third causes are barred by the statute of limitations because the vote denying the complainants membership in the Volunteer Fire Department took place on December 11, 1986, as alleged in the fifth amended petition.

The district court did not err in sustaining the demurrers to the second and third causes of action on the ground that they were barred by the statute of limitations.

The complainants also contend that the district court improperly considered evidence pertaining to their claims before the Commission in sustaining the demurrers. There is nothing in the record which shows that the district court's decision to sustain the demurrers was based on anything other than what was alleged on the face of the fifth amended petition. Since we have previously determined that the district court's decision to sustain the appellees' demurrers was proper, this argument is without merit.

The judgment of the district court reversing the order of the Commission and the judgment dismissing the fifth amended petition are affirmed.

AFFIRMED.

LANPHIER, J., not participating.

CAPORALE, J., concurring.

So far as I can determine from the record, a member of the Fort Calhoun Volunteer Fire Department need not die in the course of performing firefighting duties in order for the beneficiary to become entitled to the proceeds of the term life

insurance policy with which the member is provided. I thus disagree with the majority's conclusion that providing members such insurance coverage does not constitute compensation for services rendered. See *E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F. Supp. 1430 (S.D. Fla. 1989) (on motion for summary judgment, members of family business not receiving salary but assumed to receive other unspecified forms of support from operation of business determined to be employees).

However, because the City of Fort Calhoun, the entity which pays that compensation, has no right to control the activities of those members, I agree with the majority's determination that the city is not the members' employer. See *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983) (generally, control or right of control chief criterion in determining whether one is an employee).

Moreover, at least so far as the record is concerned, the Fort Calhoun Rural Fire Protection District, the entity which along with the city levies the taxes which fund the volunteer department, see Neb. Rev. Stat. §§ 35-106 and 35-502 (Reissue 1988), does not have the right to control the members' activities. Thus, neither is the protection district the members' employer.

The remaining party, the Fort Calhoun Fire and Rescue Department, appears from the record to be nothing more than a name applied to a group of members who function as providers of emergency firefighting and medical services.

Thus, the members have no employer, and, accordingly, they cannot be employees. It may seem anomalous indeed that our statutes permit a group whose activities are funded with public monies to be responsible to no one but itself, but such is the situation. For that reason, I agree with the majority's judgment.

WHITE, J., joins in this concurrence.

CENTRAL STATES RESOURCES, CORP., AN IOWA CORPORATION, APPELLANT, V. FIRST NATIONAL BANK IN MORRILL, NEBRASKA, APPELLEE.

501 N.W.2d 271

Filed June 4, 1993. No. S-90-1124.

1. **Limitations of Actions: Time: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations normally will not be set aside by an appellate court unless clearly wrong. However, when reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings.
2. **Loans: Sales: Banks and Banking: Agents: Title.** A participated loan results in the sale of a designated percentage of the loan to the participating bank with the lead bank acting as the participant's agent to collect and forward the appropriate repayments and to service the loan, but the participant does not acquire full legal title to the loan and attendant documents; such title rests in the lead bank.
3. **Trusts: Property: Title.** A constructive trust is imposed upon one who has acquired legal title to property under such circumstances that one may not in good conscience retain the beneficial interest in the property; in that situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.
4. **Loans: Banks and Banking: Assignments.** Under a participation agreement, a "downstream" bank is akin to an assignee of a promissory note who stands in the shoes of the assignor and obtains the right, title, and interest that the assignor had at the time of the assignment.
5. **Limitations of Actions: Principal and Agent: Time.** When an agent is specifically appointed to collect money and remit it to the principal after deducting his or her charges, no time having been stated when the remittance is to be made, the statute of limitations begins to run in favor of the agent from the time such agent receives the money. Mere silence or concealment by the agent without affirmative misrepresentation will not toll the statute.
6. **Loans: Time.** The duty to pay loan participants arises when proceeds are derived from the participating loan.
7. **Limitations of Actions: Principal and Agent: Agency: Time: Accounting.** Where there is a general or continuing agency, a statute of limitations does not commence to run until the agency is terminated, so that unless the death of one of the parties occurs, the termination of a continuing agency cannot be effective so as to set the statute in motion until an accounting is had or a demand for an accounting made and refused, or there is an express repudiation of agency communicated to the principal.
8. **Actions.** A cause of action accrues when the aggrieved party has the right to institute and maintain suit.
9. **Limitations of Actions: Assignments.** An assignee of the Federal Deposit Insurance Corporation stands in the shoes of that agency and thus receives the

benefit of the 6-year statute of limitations provided by 12 U.S.C. § 1821(d)(14) (Supp. I 1989).

10. **Pleadings: Appeal and Error.** An issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal. However, an appellate court is obliged to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.

11. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.

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

Paul A. Zoss, of Adams, Howe & Zoss, P.C., for appellant.

Richard A. Douglas, of Nichols, Douglas and Kelly, P.C., for appellee.

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

HASTINGS, C.J.

Central States Resources, Corp. (Central States), appeals the judgment dismissing its cause of action as to count VII entered by the district court following a bifurcated trial on the applicability of the statute of limitations.

On January 5, 1983, the Bank of Gering (Gering) purchased from Minatare State Bank (Minatare) a $227,000 participation in loans of $327,300 which were made by Minatare to Harlan Deines on January 4, 1983. A participation agreement involves a lead bank which makes a loan and sells a portion of it to another bank. First National Bank in Morrill (FNBM) is the successor in interest of Minatare, which held Deines' loan.

This participation agreement involved two notes, the first in the principal amount of $88,000, evidenced by note No. 17067, dated May 27, 1982, and the second evidenced by note No. 17441, dated December 4, 1982, which was made in the amount of $239,300. The terms of the participation agreement provide that all advantages derived from the loans or any security therefor shall be shared ratably in the proportion which its unpaid respective participations bear to the entire face amount. The participation certificate executed by Minatare certified to

Gering as follows:

> Undersigned warrants the validity of all said notes and guarantees all signatures thereon and the validity of the Truth-In-Lending Disclosure Statement; and knows of no defect therein or defense thereto. Undersigned elects the same as a note or notes under any guaranties applicable thereto and confirms that all payments of interest, all advantages derived from the above or any security pledged therefor, including the exercise of any banker's lien or right of setoff, shall be shared in such manner that each bank shall share such payments and advantages ratably in the proportion which its unpaid respective participations in this loan shall bear to the entire unpaid amount of the loan. All payments of principal and expenses of collection shall be shared in the same manner.

Gering State Company was the holding company, owned and operated by H.L. McKibbin and his wife and son, which held more than 80 percent of the outstanding stock of Gering, as well as over 80 percent of Minatare.

Gering was closed and placed into a Federal Deposit Insurance Corporation (FDIC) receivership on July 31, 1986. On April 20, 1988, Central States purchased the loan participation certificate at issue from FDIC. The petition, filed by Central States against FNBM on June 5, 1989, followed by a later-filed amended petition, prayed for an accounting and an order requiring FNBM to pay Central States a share of the payments received by Minatare on the loan.

FNBM's answer alleged as an affirmative defense that Central States' claim was barred by the applicable statute of limitations, which Central States denied in its reply. The trial court heard only the issue of the statute of limitations as provided by Neb. Rev. Stat. § 25-221 (Reissue 1989). That section provides that any party may move that the issue of the bar of the statute of limitations be tried separately. The court held that the cause of action listed in count VII was barred by the applicable statute of limitations. Neb. Rev. Stat. § 25-205 (Reissue 1989) provides for a bar of 5 years on an agreement in writing. The action was ordered dismissed. Following a denied application for new trial, Central States appeals. The primary

question before this court is whether Central States' cause of action had accrued prior to June 5, 1984, and whether it is barred.

Central States assigns as error the ruling of the district court (1) that the cause of action accrued when the sale proceeds were received by Minatare, rather than when the proceeds were applied to the note, and by inference, the court's failure to apply the appropriate statute of limitations, and (2) that the claim for a share of a "beet check," a money order purchased by Deines and payable to Minatare, had accrued prior to June 5, 1984.

Deines filed for bankruptcy on June 10, 1983. Following the November 15, 1983, discharge from bankruptcy, the Deines farm was sold for $67,536.50 by means of an auction on February 18, 1984. The proceeds were placed in a separate account in Minatare entitled "Harlan Deines Farm Sale," and a separate ledger was used to record the payment of sale expenses. The sale resulted in net proceeds of $45,683.04 after deducting the value of another person's property also included in the sale, as well as various sale expenses. The net proceeds eventually were applied to the note of Deines held by Minatare.

McKibbin, former president and board member of both Gering and Minatare, testified that upon receipt of the funds, the normal procedure in the payment of participation funds consisted of the loan officer's dividing the proceeds according to the participation agreement. When asked whether he had made demand upon Minatare to receive any of these sale proceeds, he stated that he "didn't personally make any demand, I really wasn't up on the account. The loan officers were handling it and it didn't come to my attention."

Gary Kelley, vice president of Gering during the incidents at issue here, also served both on the board of directors and as administrative vice president at Minatare for the final 6 or 7 months of 1985, then as president of Minatare from January 1986 until January 1989, when Minatare merged with FNBM. Kelley testified that as an officer of Gering, he assisted Minatare's employee who officially acted as clerk for the Deines auction and was aware of the fact that money was received by Minatare on the sale. He admitted that he made no demand for

proceeds of that particular sale.

It is the contention of FNBM that the net proceeds of $45,083.04 remaining in the "Harlan Deines Farm Sale" account as of April 24, 1984, were on that date applied to the note. This claim is supported by exhibit 119, which is on letterhead of Minatare, is dated April 24, 1984, and contains a breakdown of the various items in the Deines account along with the notation that the net proceeds were applied to the note. Additionally, McKibbin testified as follows: "Q. Does that show—a bank record show that that's applied to the note? A. It says here applied to note, 45,683.04, that closed the account out." McKibbin also testified that he did not think any of those funds were paid to Gering. Kelley testified that he did not know why all of the "$45,000" was applied to Morrill's debt and none to Gering's.

Central States asserts that the proceeds were not actually applied to the loan until May 1985, after all other expenses arising from the Deines sale had been paid, and it further alleges that Gering had no right to demand the money until Minatare had paid itself by applying the proceeds to the indebtedness.

Exhibit 105 is a four-page document entitled "Harlan Deines 109-136," which appears to be ledger sheets relating to this loan or, as testified to by McKibbin, "just a recap of the results of the account." The first entry was made on March 2, 1978, and thereafter follow various debits and credits entered in handwriting through September 6, 1983, showing a balance of $326,178.06 as of that date. There then appear, in typewriting, chargeoffs to Gering of $32,000, $97,500, and $97,500, dated, respectively, December 1, 1983; August 10, 1984; and May 6, 1985. Chargeoffs to Minatare appear as $20,000 and $33,495, made on January 2, 1984, and December 31, 1984, respectively, leaving a balance due of $45,683.06. McKibbin disclaimed any knowledge of these latter entries, testifying that "I never saw this before. Before yesterday, I mean."

The final entry on exhibit 105, also entered in typewriting, shows "5-23-85 Applied proceeds from Harlan Deines Farm Sale account, credit $45,683.06, balance 0." McKibbin agreed that exhibit 105 was Minatare's "real bank account record of the Deines account . . . where the bank would actually record

payments and advances on that line of credit" and that the ledger showed that the $45,683 stayed in the farm sale account until May 23, 1985.

In addition, a balance of $47,705.09 was carried on Minatare's monthly statements of the "Harlan Deines Farm Sale" account until the May 31, 1985, statement, on which a deposit of $3,000 was shown to have been made on May 7, and on which checks issued for $45,683.06 on May 13 and $5,022.03 on May 24 reduced the account to a zero balance.

Additionally, exhibit 121A is a photocopy of a check dated April 24, 1984, in the amount of $45,683.06, drawn on Minatare and payable to Minatare. McKibbin testified that the bank's records reflect that the check for $45,683.04, dated April 24, 1984, was applied to the note the same date the check was drawn and that since there was no "clearing bank," the funds belonged to the bank when the negotiable instrument was received.

However, the other part of exhibit 121A is entitled "Commercial Loan Note Payment," with the account name of Harlan Deines, showing a credit of $45,683.06, and with handwriting stating "Paid from Farm Sale Acct." The date shown is May 23, with the year missing, the extreme right-hand side of the copy apparently having been eliminated in the photocopying process.

Also paid on the indebtedness to Minatare to the credit of Deines was the sum of $10,200.01, represented by a money order drawn on Minatare, payable to Minatare, and purchased by Deines with proceeds of his beet check. Minatare had a perfected security interest in Deines' beet crop, as evidenced by the financing statement and security agreement in the record. According to the testimony of McKibbin, this money order was issued by Minatare on September 1, 1983.

Central States accurately contends that the record discloses that the proceeds of the beet check represented by the bank money order were not actually and specifically applied to Deines' note until June 12, 1985. By way of further explanation, exhibit 124 consists of a photocopy showing a bank money order register No. 5503, dated September 1, 1983, purchased by Deines, payable to Minatare, in the face amount

of $10,200.01; official check debit No. 5503, dated June 12, 1985, disclosing that it was to replace lost or destroyed check No. 5503; and a credit account, "Reserve For Bad Debts," dated June 12, 1985, for "Partial Recovery Harlan Deines, $10,200.01."

It is readily apparent that the funds represented by the Deines farm sale and the proceeds of the beet check were received by FNBM in some form more than 5 years before the filing of this action on June 5, 1989, although neither item was specifically applied to Deines' note account with Minatare until later dates, each within the 5-year period.

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Frezell v. Iwersen*, 231 Neb. 365, 436 N.W.2d 194 (1989); *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 433 N.W.2d 509 (1988). However, when reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings. *L.J. Vontz Constr. Co. v. City of Alliance, ante* p. 334, 500 N.W.2d 173 (1993).

A participated loan results in the sale of a designated percentage of the loan to the participating bank with the lead bank acting as the participant's agent to collect and forward the appropriate repayments and to service the loan, but the participant does not acquire full legal title to the loan and attendant documents; such title rests in the lead bank. *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993). In such case, a constructive trust is imposed upon one who has acquired legal title to property under such circumstances that one may not in good conscience retain the beneficial interest in the property; in that situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof. *Northern Bank v. Federal Dep. Ins. Corp., supra*. Under a participation agreement, a "downstream" bank is akin to an assignee of a promissory note who stands in the shoes of the assignor and obtains the right, title, and interest that the assignor had at the time of the assignment. Therefore, as an assignee of FDIC,

Central States obtained FDIC's right to assert that claim in a court of law. See *Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App. 1992). See, also, *Federal Deposit Insurance Corp. v. Bledsoe*, 61 U.S.L.W. 2662 (U.S. May 11, 1993) (No. 92-1575). This court has held that when an agent is specifically appointed to collect money and remit it to the principal after deducting his or her charges, no time having been stated when the remittance is to be made, the statute of limitations begins to run in favor of the agent from the time such agent receives the money. Mere silence or concealment by the agent without affirmative misrepresentation will not toll the statute. *Campbell v. Roe*, 32 Neb. 345, 49 N.W. 452 (1891). See *Whatley v. National Bank of Commerce*, 555 S.W.2d 500 (Tex. Civ. App. 1977). See, also, *Spann v. First Nat. Bank of Montgomery*, 240 Ala. 539, 200 So. 554 (1941); *Tabata v. Murane*, 24 Cal. 2d 221, 148 P.2d 605 (1944); *Moran v. Schlosberg*, 90 F.2d 408, 67 App. D.C. 163 (1937); *Davenport v. Townsend*, 117 Mont. 75, 157 P.2d 477 (1945); *Jones v. Vanstory*, 200 N.C. 582, 157 S.E. 867 (1931). The duty to pay loan participants arises when proceeds are derived from the participating loan. See *Federal Deposit Ins. Corp. v. Mademoiselle of California*, 379 F.2d 660 (9th Cir. 1967). However, where there is a general or continuing agency, a statute of limitations does not commence to run until the agency is terminated, so that unless the death of one of the parties occurs, the termination of a continuing agency cannot be effective so as to set the statute in motion until an accounting is had or a demand for an accounting made and refused, or there is an express repudiation of agency communicated to the principal. *Grindey v. Smith*, 237 Iowa 227, 21 N.W.2d 465 (1946). A cause of action accrues when the aggrieved party has the right to institute and maintain suit. *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985).

Applying the foregoing principles to the facts of this case, we conclude that the trial court was clearly wrong in counting the running of the statute of limitations, § 25-205, from the time FNBM first received the funds. See, *Frezell v. Iwersen, supra*; *Campbell v. Roe, supra*. Until FNBM actually closed the "Harlan Deines Farm Sale" account and dedicated the funds as

a credit on the Deines loan, no one making an examination of the bank's books without special knowledge could have known that money had been collected on the Deines loan. It was at that point at the earliest, May 28, 1985, that Central States would have been expected to know that FNBM had repudiated its agency by applying the funds solely to its own account. In the same manner, the proceeds from the beet check were not identified to the Deines loan account until a replacement money order had been issued on June 12, 1985.

As a result, the statute of limitations did not begin to run until May 23, 1985, approximately 4 years 1 month before this action was brought.

There is yet another reason why the Nebraska statute of limitations is not effective in this case.

Central States has taken the position that if the statute of limitations has run on its claim under Nebraska law, the claim continues to survive under the 6-year statute of limitations applicable to FDIC and its assignee under federal law. See 12 U.S.C. § 1821(d)(14) (Supp. I 1989), which reads as follows:

> **(A)** . . .
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by [FDIC] as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law. . . .
>
> . . . .
>
> **(B)** . . .
>
> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—
>
> (i) the date of the appointment of [FDIC] as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

The Court of Appeals of Texas held in *Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App. 1992), that Thweatt, by virtue of the fact that he purchased a note from FDIC, became vested with the same rights that FDIC had in the note under both state and

federal law. The court reasoned that the 6-year statute of limitations available to FDIC was also applicable to Thweatt as a transferee. Although § 1821(d)(14) was not enacted by Congress to become effective until August 9, 1989, the federal courts considering this issue have been nearly unanimous in giving the provision retroactive effect. *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478 (9th Cir. 1991); *Federal Deposit Ins. Corp. v. Schoenberger*, 781 F. Supp. 1155 (E.D. La. 1992); *FDIC v. Thayer Ins. Agency, Inc.*, 780 F. Supp. 745 (D. Kan. 1991); *Federal Deposit Ins. Corp. v. Bancinsure, Inc.*, 770 F. Supp. 496 (D. Minn. 1991).

Since *Thweatt, Federal Deposit Ins. Corp. v. Bledsoe*, 61 U.S.L.W. 2662 (U.S. May 11, 1993) (No. 92-1575), has been decided. Whether applying § 1821(d)(14); *Mountain States Financial Resources v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991), regarding FDIC claims; or the reasoning found in the federal statute as to Federal Savings and Loan Insurance Corporation claims, the court held that the assignee of the federal agency stood in the shoes of that agency and thus received the benefits of the 6-year limitations statute.

Even assuming that *Thweatt* alters to 6 years the applicable statute of limitations in the matter before us today, FNBM argues that Nebraska law has always been that a litigant may not change the theory of recovery at the appellate level in hopes that the odds of prevailing will improve. Central States chose not to argue in the trial court for relief under the federal statute. Only § 25-205 was presented at the trial level. FNBM correctly contends that an issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal. See, *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990); *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989).

However, we are obliged to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). As previously stated, FNBM's answer to Central States' amended petition merely alleged a bar of the statute of limitations. This is an affirmative

defense which must be and was raised in the pleadings. Central States in its reply simply denied that allegation. Which statute of limitations applies is a question of law that this court must decide independently of the conclusion reached by the trial court. We hold that the federal statute of limitations for FDIC, as provided by § 1821(d)(14), under which FDIC would also have possessed the right to bring a contract claim, applies to Central States as the assignee of FDIC. See *Federal Deposit Insurance Corp. v. Bledsoe, supra*. Under the federal statute of limitations, no bar is applicable whichever of the two dates is used as the accrual date of the cause of action. 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.

AMERICAN DRUG STORES, INC., DOING BUSINESS AS OSCO DRUG, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

501 N.W.2d 278

Filed June 4, 1993. Nos. S-90-1248, S-90-1249, S-90-1250.

Liquor Licenses: Proof. An applicant for a liquor license has the burden of showing that the issuance of the license is or will be required by the present or future public convenience and necessity.

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

Charles D. Humble and David A. Hecker, of Erickson & Sederstrom, P.C., for appellant.

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

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

HASTINGS, C.J.

These three cases, consolidated for argument, are appeals from the district court in an error proceeding which sustained the action of the city council of the City of Lincoln (City) in denying three of the four applications for liquor licenses filed by American Drug Stores, Inc., doing business as Osco Drug (Osco), under Neb. Rev. Stat. § 53-101 et seq. (Reissue 1988 & Cum. Supp. 1990). On January 22, 1990, in a consolidated hearing, the City denied each of Osco's four class D liquor license applications (for Osco locations at 233 N. 48th Street, 5500 S. 56th Street, 130 N. 66th Street, and 1401 Superior Street in Lincoln, Nebraska). A class D liquor license permits the sale of beer and alcoholic liquor for consumption off the premises only. See Neb. Rev. Stat. § 53-124(5) (Reissue 1988).

Osco asserts that it was diligent in proving each of the 20 criteria listed in Neb. Rev. Stat. § 53-134(2)(a) through (t) (Cum. Supp. 1990). However, although the district court based its decision on § 53-134 and Osco does not challenge that section, the fact remains that it was amended as a part of 1989 Neb. Laws, L.B. 781, which was held unconstitutional in *Kwik Shop v. City of Lincoln, ante* p. 178, 498 N.W.2d 102 (1993). Accordingly, we determine these appeals on the basis of § 53-132 (Reissue 1984). See *Contemporary Indus. v. Nebraska Liq. Control Comm., ante* p. 345, 500 N.W.2d 525 (1993). Although these cases were reviewed by an error proceeding, it is now necessary that we consider them as appeals and review them de novo on the record. See *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992).

The City denied each of Osco's liquor license applications based upon the same five subsections of § 53-134(2), finding (1) that the existing law enforcement resources and services were inadequate; (2) that the police department had issued a negative recommendation for the proposed licenses; (3) that the existing population of the City and the proposed population growth within the area to be served, in each case, were inadequate to support the proposed licenses; (4) that the existing licenses and the class of such licenses all within a 1-mile radius of the proposed locations were adequately serving the area; and (5) that in each case, the area from which the alcoholic liquor was

proposed to be displayed, kept, and sold was not reasonably secured. The City additionally determined that Osco had not demonstrated that the issuance of the licenses was consistent with promoting the health, safety, and welfare of the people of the City.

In the proceedings below, the district court sustained the denial of three of the licenses and overturned the denial of one of the licenses, ordering that the City grant a license for Osco's 1401 Superior Street location. In affirming the denial of the three licenses by the City, the district court rejected the first three and last two findings of the City and held that only the finding that the existing licenses within a 1-mile radius from the proposed locations were adequately serving the areas "is supported by at least 'some competent evidence.' " Osco appeals the three remaining liquor license denials. There has been no cross-appeal by the City.

As previously stated, in deciding these cases we must turn to § 53-132. That section provides in part as follows:

> (2) A retail license . . . shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city . . . where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.
>
> (3) In making its determination pursuant to subsection (2) of this section the commission shall consider:
>
> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city . . . and its

projected growth;

(d) The nature of the neighborhood or community of the location of the proposed licensed premises;

(e) The existence or absence of other retail licenses . . . with similar privileges within the neighborhood or community of the location of the proposed licensed premises;

(f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

(i) The sanitation or sanitary conditions on or about the proposed licensed premises; and

(j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.

We therefore review the record with those criteria in mind.

The record is clear that American Drug Stores (which operates and maintains both Osco and Sav-On Drugs in the Midwest) operates 670 drugstores in 26 states, 580 of which hold liquor licenses. It has in effect in those locations from which alcoholic liquor is now sold detailed rules and regulations, including a cashier handbook, regarding the safe and lawful sale of such beverages. It is clear from the record that Osco's application satisfies the conditions set forth in § 53-132(2)(a), (b), and (c). There is absolutely no evidence to support the City's finding that "the area in which the alcoholic liquor was proposed to be displayed and kept in and sold from was not reasonably secured."

The last statutory requirement for the issuance of a liquor license is subsection (2)(d) of § 53-132, which requires that "the issuance of the license is or will be required by the present or future public convenience and necessity."

An applicant for a liquor license has the burden of showing that the issuance of the license is or will be required by the present or future public convenience and necessity. § 53-132; *Richards v. Neb. Liq. Control Comm.*, 221 Neb. 542, 378 N.W.2d 667 (1985), *overruled on other grounds, R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d

884 (1988); *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983).

The evidence presented by Osco in the form of the City's "circle maps" demonstrated only that its proposed locations were found in well-populated areas and that the proposed 56th Street location had only two package liquor stores within the 1-mile radius, while the 66th Street and 48th Street locations each had three retail alcoholic liquor outlets within a 1-mile radius. The City's evidence disclosed that the population of Lincoln had grown from 128,521 in 1960 to an estimated 185,500 by 1987, with a projected growth rate of 1 percent per year. The affidavit of the clerk for the City showed that all retail liquor licenses had increased from 94 in 1960 to 221 as of 1989.

Although we may note the official published opinions of this court, neither Osco nor the City at the time these proceedings were held could have known of this court's affirmance of the district court's reversal of the denial of four licenses by the Nebraska Liquor Control Commission found in *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993); the affirmance of the district court's reversal of the denial of four licenses by the Nebraska Liquor Control Commission found in *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993); the reversal of the district court's judgment and the ordering of the granting of 10 licenses in *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993); and the reversal of the district court's judgment and the ordering of the granting of two licenses in a memorandum opinion, *Gas 'N Shop v. City of Lincoln, ante* p. xvii (cases Nos. S-91-099, S-92-424, Apr. 28, 1993).

The opinions in *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, *B & R Stores v. Nebraska Liquor Control Comm.*, and *Kwik Shop v. City of Lincoln* and the memorandum opinion in *Gas 'N Shop v. City of Lincoln* indicate that in the first case, over 650 consumers supported the issuance of the licenses; in the next case, over 4,000 signatures of people favoring issuance of the four licenses were in the record; and in the last two cases, apparently there was evidence that many people feel less comfortable buying off-sale beer at a

local tavern or a full-service liquor store than at a convenience store, or that some customers prefer purchasing beer at the same time they purchase other commodities offered by convenience stores.

The record in these cases discloses no similar factors relating to the public convenience and necessity. Osco has failed to meet its burden of establishing that the issuing of these licenses is or will be required by the present or future public convenience and necessity. The district court was correct in affirming the denial of the licenses, and its judgment is affirmed.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

KELLY V. CHRISTIANSON, BY AND THROUGH HER PARENT AND NEXT FRIEND, VIRGINIA L. CHRISTIANSON, ET AL., APPELLANTS, V. EDUCATIONAL SERVICE UNIT NO. 16 ET AL., APPELLEES.

501 N.W.2d 281

Filed June 4, 1993. Nos. S-91-045, S-91-050 through S-91-055.

1. **Political Subdivisions Tort Claims Act: Schools and School Districts.** Because of its composition, powers, and duties, an educational service unit falls under the Political Subdivisions Tort Claims Act.
2. **Actions: Courts: Dismissal and Nonsuit.** It is within the discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action.
3. **Pleadings: Appeal and Error.** An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion.
4. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet.
5. _____. Nebraska has maintained a code-based system of civil procedure.
6. **Pleadings: Words and Phrases.** Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses.
7. **Pleadings.** A petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.
8. _____. The ultimate facts to be established should be alleged in a pleading.
9. _____. Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.

10. _____. A pleading is not to state conclusions of law.
11. _____. The pleading of legal conclusions is insufficient to raise an issue of fact.
12. **Employer and Employee: Negligence: Liability.** An employer is subject to liability for physical harm to third persons resulting from the employer's negligent selection of an improper employee.
13. **Pleadings: Negligence: Proximate Cause.** To state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from such failure.
14. **Employer and Employee: Liability: Negligence: Proximate Cause: Proof.** To impose liability upon an employer for negligently selecting or entrusting work to an employee, a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of injury to another. The employee's characteristic, quality, or deficiency must proximately cause the harm producing injury to another.
15. **Pleadings.** If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the court to have the pleading in that particular made more definite and certain.
16. **Negligence: Pleadings.** A plaintiff's bald assertion that a defendant has failed to exercise ordinary care is insufficient to inform a defendant how such defendant has breached the defendant's duty to the plaintiff.
17. **Pleadings.** Facts which are, or which the law presumes to be, peculiarly within the knowledge of the opposing party may be alleged with less certainty and particularity than would otherwise be necessary, or may be alleged on information and belief, or may even be omitted entirely.
18. **Pretrial Procedure.** A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute.
19. **Actions: Courts: Dismissal and Nonsuit.** Courts have the inherent power to dismiss an action for disobedience of a court order.

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

James R. Welsh, of Welsh & Sibbernsen, for appellants.

Brian D. Nolan, of Hansen, Engles & Locher, for appellees (cases Nos. S-91-045, S-91-052, S-91-054).

William T. Wright, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellees (cases Nos. S-91-050, S-91-051, S-91-053, S-91-055).

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

FAHRNBRUCH, J.

These appeals involve the dismissal of separate actions for damages filed on behalf of seven mentally handicapped individuals who allegedly suffered physical and sexual abuse while enrolled in Educational Service Unit No. 16 (E.S.U.) in North Platte, Nebraska. Three of the individuals also claimed that they were emotionally abused.

All of the claims were denied when they were filed against the State of Nebraska pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), and when they were filed against E.S.U. pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991). Thereafter, a lawsuit was filed in the district court for Lincoln County on behalf of each of the mentally handicapped individuals. E.S.U., two E.S.U. administrators, and the State of Nebraska were named as defendants. The suits were consolidated for hearings on pretrial motions in the district court. The appeals to this court were consolidated for argument and disposition.

In October 1989, following a hearing, the district court sustained a demurrer filed in each case by the State of Nebraska which alleged, inter alia, that the court had no jurisdiction over the subject matter of the action as to the State of Nebraska, since E.S.U. "is not a state agency."

Subsequently, upon the defendants' motions, the trial court ordered the plaintiffs to make their petitions more definite and certain. When the plaintiffs refused to do so, again upon the defendants' motions, the district court struck each plaintiff's petition in its entirety. Thereafter, the court dismissed each of the plaintiffs' petitions without prejudice.

We affirm the district court's dismissal order in each of the cases.

FACTS

Each of the mentally handicapped individuals, hereinafter referred to singularly as plaintiff or collectively as plaintiffs, at various times between 1973 and 1988 attended a School for the Trainable Mentally Handicapped operated by E.S.U. in North Platte, Nebraska. This school was operated and maintained by

E.S.U. to provide custodial and educational facilities for handicapped individuals who fell within the eligibility guidelines of the school.

There are 17 educational service units created by statute. See Neb. Rev. Stat. § 79-2201 et seq. (Reissue 1987). A number of counties are assigned to each educational service unit. Each educational service unit has an elected board with authority to levy taxes, appropriate money, and make expenditures. *Id.* Because of its composition, powers, and duties, an educational service unit falls under the Political Subdivisions Tort Claims Act. § 13-901 et seq.

On April 13, 1989, separate lawsuits were filed on behalf of the seven plaintiffs, six of whom were minors and one of whom was of legal age. Each plaintiff claimed he or she suffered physical and sexual abuse because of the negligence of each of the named defendants. As stated previously, three of the plaintiffs also claimed they were emotionally abused. Additionally, all the plaintiffs alleged the defendants violated their civil rights under 42 U.S.C. § 1983 (1988). The claimed incidents of abuse allegedly occurred as early as 1973 for some plaintiffs and as late as 1988 for other plaintiffs.

Each of the plaintiffs' petitions is separated into "Division One," "Negligence," and "Division Two," "42 U.S.C. Section 1983." In "Division Two," in addition to praying for damages, each plaintiff seeks attorney fees. The "divisions" are not two causes of actions because both divisions are based upon but one set of facts. At most, recovery was sought on two legal theories. In such a situation, under Nebraska law, a plaintiff, if successful, is entitled to but one recovery. We specifically disapprove of the form of the petitions in these cases. The pleading approach used here could result in some degree of chaos both at the trial level and in the analysis on review. See *DeSciose v. Chiles, Heider & Co.*, 239 Neb. 195, 476 N.W.2d 200 (1991).

In each of the plaintiffs' cases, the defendants moved for an order requiring each plaintiff to make his or her petition more definite and certain. Specifically, the defendants asked that each plaintiff specify the name of each person alleged to have abused the plaintiff, the dates of the alleged abuse, and how the

defendants failed to exercise ordinary care to prevent such abuse.

All plaintiffs but one resisted the defendants' motions to make more definite and certain on the basis that the matters the defendants sought to have included in the petitions were matters of evidence and not ultimate fact, and that those matters should be addressed by the Nebraska Discovery Rules. Plaintiff Harold Lutkehus II apparently did not file a resistance. The district court sustained in its entirety the defendants' motion to make Lutkehus' petition more definite and certain, and sustained in part the motions as to the remaining plaintiffs.

A series of amended pleadings was filed in each case, and the defendants continued to meet the plaintiffs' pleadings by filing motions to make more definite and certain. All plaintiffs amended their petitions at least three times, and one plaintiff amended his petition five times. At a hearing on October 15, 1990, all plaintiffs ultimately elected to stand on their pleadings. The defendants then moved to strike each plaintiff's petition. The motions were granted. Between December 5 and 11, 1990, the district court struck all of the plaintiffs' petitions in their entirety and dismissed each of the captioned matters without prejudice. Each plaintiff timely appealed to this court.

ASSIGNMENTS OF ERROR

All the plaintiffs make identical assignments of error. The four assignments of error by each plaintiff combine to assert that the district court erred in dismissing the plaintiff's petition for failure to make the petition more definite and certain. None of the plaintiffs assigned as error the trial court's sustainment of the State of Nebraska's demurrer that alleged that the trial court lacked jurisdiction over the subject matter of the action because E.S.U. was not a state agency.

STANDARD OF REVIEW

It is within the discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action. *Vodehnal v. Grand Island Daily Independent*, 191 Neb. 836, 218 N.W.2d 220 (1974). An order of the district court requiring

a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion. *Id.*

NATURE OF CODE PLEADING

Before turning to the question of whether the district court abused its discretion by dismissing plaintiffs' petitions for failure to obey a reasonable order of the court, we first review the nature and purpose of pleading under the Nebraska statutes.

Generally, the purpose of pleading is twofold: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases. See Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure § 5.2 (1985). This court has held that "[t]he purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet." *Bashus v. Turner*, 218 Neb. 17, 21, 352 N.W.2d 161, 165 (1984).

Modern pleading in the United States falls into one of two general categories. Code or "fact" pleading is based on what is commonly known as the Field Code, the New York Code of Civil Practice enacted into law in that state in 1848. See Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, Civil Procedure § 3.5 (4th ed. 1992). Code pleading attempted to simplify the highly technical common law writ system, and by the late 1930's it had been embraced by a majority of the states. See Friedenthal, Kane & Miller, *supra*, § 5.1.

"Notice" pleading, on the other hand, was first introduced by the Federal Rules of Civil Procedure (FRCP) in 1938. Friedenthal, Kane & Miller, *supra*, § 5.1. The FRCP, which represented an entirely new approach to pleading, have since been adopted in whole or in part by a number of the states. *Id.*

Nebraska adopted a system of code pleading in 1867. See Neb. Rev. Stat. § 25-801 et seq. (Reissue 1989). In 1939, 1 year after the adoption of the FRCP, the Nebraska Legislature authorized and directed the Nebraska Supreme Court to promulgate rules of practice for the state courts. See 1939 Neb. Laws 172, ch. 30, p. 164.

Whether Nebraska should adopt rules of practice based on the federal model was hotly debated by members of the Supreme Court of Nebraska Advisory Committee on Rules of Practice. See, Charles F. Bongardt, *The Final Draft Report, Nebraska Rules of Civil Procedure, "Pro"*, 21 Neb. L. Rev. 76 (1942) (arguing in favor of adoption); Harry W. Shackelford, *Why Adopt New Rules of Pleading and Practice?*, 21 Neb. L. Rev. 94 (1942) (arguing against adoption). Ultimately, the Legislature rejected the Supreme Court's proposed FRCP-based rules. See, 1943 Neb. Laws 145, ch. 63, p. 236; Comp. Stat. § 27-231 et seq. (Supp. 1941). As a result, Nebraska has maintained a code-based system of civil procedure. See § 25-801 et seq.

There are distinctive differences between the pleading requirements of Nebraska as a code pleading state, and the requirements of federal and federal-replica state pleading. Notice pleading requires only that a party set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A litigant is not required to state a cause of action, but must simply give the opposing party sufficient notice of the claim so as to be able to prepare to meet it. Friedenthal, Kane & Miller, *supra*, § 5.7. Although a pleader in notice pleading is required to refer to circumstances and events upon which the claim is based, the pleader is not required to allege a specific fact to cover every substantive element of the claim. *Id.*

In contrast to notice pleading, Nebraska law defines pleadings as "the written statements by the parties *of the facts* constituting their respective claims and defenses." (Emphasis supplied.) § 25-801. A "petition must contain . . . *a statement of the facts constituting the cause of action*, in ordinary and concise language, and without repetition . . . ." (Emphasis supplied.) § 25-804(2). The ultimate facts to be established should be alleged in a pleading. *State ex rel. Warren v. Kleman*, 178 Neb. 564, 134 N.W.2d 254 (1965). Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

A pleading is *not* to state conclusions of law. See, e.g., *State ex rel. Warren v. Kleman, supra*; *Ripp v. Riesland*, 176 Neb. 233, 125 N.W.2d 699 (1964); *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962). The pleading of legal conclusions is insufficient to raise an issue of fact. *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981). See *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985).

The distinctions between the two systems of pleading are not without practical implications for practicing members of the bar and their clients, as well as for the judiciary. When only notice pleading is required, reputedly, practicing lawyers often complain that they do not become fully aware of the issue in many cases until after prolonged discovery. This results in increased costs to the litigants and untoward delay in cases reaching the trial stage. Under code pleading, if the pleadings are properly prepared, the issues are apparent immediately upon the filing of a petition and the filing of an answer. If either a petition or an answer does not clearly set forth a litigant's issues, sustaining a motion to make more definite and certain will expeditiously clarify the issues, save the litigants unwarranted expense, promote judicial economy, and avoid unnecessary delay in a case reaching the trial stage.

It is with the above legislatively mandated and judicially interpreted requirements and purposes of fact pleading, as well as practical considerations, in mind that we analyze whether the district court abused its discretion in dismissing plaintiffs' petitions.

NEGLIGENCE ACTIONS

"Division One" in each of the plaintiffs' petitions is denominated "Negligence." Summarized, each petition alleges that the defendants, individually and through their agents, departments, and employees, negligently operated and maintained the E.S.U. school for trainable mentally handicapped individuals by hiring and retaining certain individuals who were likely to physically and sexually, and in some cases emotionally, abuse the students; by failing to exercise ordinary care to protect the handicapped students from such abuse; and by failing to implement policies and procedures

to prevent, investigate, discover, report, and treat incidents of such abuse. Each petition alleges that the plaintiff was abused by "one or more" individuals. From three to six alleged abusers are named in the petitions.

Nebraska has recognized that an employer is subject to liability for physical harm to third persons resulting from the employer's negligent selection of an improper employee. See *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

To state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from such failure. *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991). Specifically, to impose liability upon an employer for negligently selecting or entrusting work to an employee,

> a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of injury to another. The employee's characteristic, quality, or deficiency must proximately cause the harm producing injury to another.

Greening v. School Dist. of Millard, 223 Neb. at 737, 393 N.W.2d at 58.

The plaintiffs' petitions have adequately set forth facts alleging that the defendants owed a duty of due care to the plaintiffs. However, the facts alleged in the petitions are not sufficiently definite to inform the defendants in what respect they had breached their duty to the plaintiffs or how the defendants' actions were the proximate cause of any of the alleged injury or damage to the plaintiffs.

" 'If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the Court to have the pleading in that particular made more definite and certain. . . .' " *Rhodes v. Crites*, 173 Neb. 501, 506, 113 N.W.2d 611, 615 (1962). Accordingly, the defendants moved that each plaintiff specify in his or her petition how the defendants allegedly failed to

exercise ordinary care, and specify the name of each person alleged to have abused the plaintiff, as well as the approximate dates the alleged acts of abuse took place.

A plaintiff's bald assertion that a defendant has failed to exercise ordinary care is insufficient to inform a defendant how such defendant has breached the defendant's duty to the plaintiff. See *Chmelka v. Continental Western Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984) (stating that if a petition merely alleged that an insured driver was negligent in freeing his vehicle from a ditch, such petition would be subject to a motion to make more definite and certain).

Similarly, by failing to plead the dates on or about when the alleged incidents of abuse allegedly took place and the names of the alleged abusers with specificity, the plaintiffs have failed to advise the defendants of how the negligent retention of certain employees by the defendants proximately caused injury to the plaintiffs. Each petition alleges that the plaintiff was abused during virtually the entire period of time the plaintiff attended the E.S.U. school. These periods of time range from 15 months to 15 years.

Such vague and general pleading does not meet Nebraska's code pleading requirement that the pleading advise the adversary of what issues the adversary must meet. See *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984). For example, the defendants could not prepare to defend upon the basis that a particular individual was not employed at E.S.U. when a particular plaintiff was allegedly abused without knowing when the plaintiff was allegedly abused, and by whom.

The plaintiffs advance two arguments why they should not be required to make their petitions any more definite and certain than they already have. First, they argue that their petitions are definite and certain enough to allow the defendants to answer and defend the matter. In support of this, the plaintiffs rely heavily on federal cases applying Fed. R. Civ. P. 12(e) and its progeny. As previously noted, Nebraska has rejected the liberal pleading requirements of notice pleading. The plaintiffs' first argument on the point is without merit.

Second, the plaintiffs argue that the facts sought by the defendants are matters within the knowledge of the defendants

themselves or are available to the defendants through the discovery process. This court has long held that facts which are, or which the law presumes to be, peculiarly within the knowledge of the opposing party may be alleged with less certainty and particularity than would otherwise be necessary, or may be alleged on information and belief, or may even be omitted entirely. *Graham v. Graham*, 135 Neb. 761, 284 N.W.2d 280 (1939). The plaintiffs' second argument ignores the fact that the discovery process is available to the plaintiffs as well as to the defendants. Although Nebraska has declined to adopt the FRCP, the Nebraska discovery rules for civil cases are, with some modification, based on the federal rules of discovery. See, Nebraska Ct. R. of Discovery, Comment on Civil Discovery Rules (rev. 1992); *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

Under the FRCP and comparable state practice, the scope of discovery is extremely broad. See Jack H. Friedenthal, Mary Kay Kane & Arthur P. Miller, Civil Procedure § 7.2 (1985). Neb. Ct. R. of Discovery 26(b)(1) (rev. 1992), which defines the general scope of discovery for civil cases in Nebraska, states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Consistent with this broad approach to discovery, Neb. Ct. R. of Discovery 27 (rev. 1992) permits a party to perpetuate testimony by taking depositions before an action has even begun. Other Supreme Court rules govern discovery after commencement of the action. See, Neb. Ct. R. of Discovery 30 (rev. 1992) (permitting oral deposition of any person after 30 days from service of summons, and sooner with leave of court);

Neb. Ct. R. of Discovery 31 (rev. 1992) (permitting written depositions); Neb. Ct. R. of Discovery 33 (rev. 1992) (permitting written interrogatories).

"A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute." *Norquay v. Union Pacific Railroad*, 225 Neb. at 536, 407 N.W.2d at 153, citing *Tabatchnick v. G. D. Searle & Company*, 67 F.R.D. 49 (D.N.J. 1975). This is consistent with the general purpose of pleading in Nebraska discussed above, that is, to "frame the issues upon which a cause is to be tried . . . ." *Bashus v. Turner*, 218 Neb. at 21, 352 N.W.2d at 165.

Nonetheless, even though a period of approximately 20 months elapsed from the time the plaintiffs filed their lawsuits in April 1989 until their petitions were dismissed by the district court in December 1990, and even though the plaintiffs had been repeatedly ordered by the court to make their petitions more definite and certain, the records before us reflect that only minimal discovery was attempted by the plaintiffs. In October 1989, the court granted the plaintiffs' counsel permission to inspect, review, and copy the personnel files of all employees, past and present, of E.S.U. Nowhere in the records is there any indication that the defendants or the district court have attempted to hamper any discovery efforts by the plaintiffs. Nor is there any indication in the record that the plaintiffs could not obtain by written interrogatories or by requests for admissions sufficient facts to properly plead their cases. The records before us fail to show why the plaintiffs should be permitted to shift the burden of discovery to the defendants and thus avoid their own duty to plead ultimate facts. Nor do the records show that the defendants are possessed of any more facts concerning the plaintiffs' allegations than are the plaintiffs.

42 U.S.C. § 1983 ACTION

In the second "division" of each petition, each plaintiff has alleged a violation of his or her constitutional rights, including but not limited to rights secured by the 4th, 5th, 8th, 9th, and

14th Amendments to the U.S. Constitution. Incorporating by reference the language of the first "division," each plaintiff alleges a violation of 42 U.S.C. § 1983 in that the actions and conduct of E.S.U.'s employees were done within the scope of their employment, the defendants were acting under color of state law, and the actions and conduct of the E.S.U. employees proximately caused the plaintiff to suffer injury, disability, and impairment of earning capacity. Each plaintiff requested attorney fees pursuant to 42 U.S.C. § 1988 (1988).

Unfortunately, the plaintiffs' § 1983 claims suffer from the same deficiencies under code pleading as do their negligence claims. At least some of the federal courts have held that although notice pleading is generally sufficient, a § 1983 plaintiff is subject to heightened pleading requirements and must state in factual detail and with particularity the basis of the claim. See, *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990); *Cohen v. Illinois Institute of Technology*, 581 F.2d 658 (7th Cir. 1978), *cert. denied* 439 U.S. 1135, 99 S. Ct. 1058, 59 L. Ed. 2d 97 (1979); *Breece v. Swenson*, 332 F. Supp. 837 (W.D. Mo. 1971); *MacMurray v. Bd. of Trustees of Bloomsburg S. C.*, 428 F. Supp. 1171 (M.D. Pa. 1977).

The purpose of the specific pleading requirement in civil rights actions is to enable the court to weigh the substantiality of the claim and to identify and dismiss frivolous suits. See, *Boykins v. Ambridge Area School Dist.*, 621 F.2d 75 (3d Cir. 1980); *MacMurray v. Bd. of Trustees of Bloomsburg S. C., supra*. Broad, conclusory allegations and bald assertions do not meet the heightened pleading requirements of a § 1983 claim. See, *Rotolo v. Borough of Charleroi, supra*; *Streetman v. Jordan, supra*; *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978).

In *Hall*, the U.S. Court of Appeals for the Third Circuit held that the plaintiff's amended complaint was sufficiently specific because the plaintiff had alleged "the conduct violating his rights (racially discriminatory activity), time (March 17, 1976), place (King of Prussia) and those responsible (various state and bank officials)." 570 F.2d at 89. Similarly, in *Boykins* the Third Circuit held that the plaintiff had pleaded with specificity

because her complaint had alleged "the conduct, expulsion from the drill team, the improper racial motive, the times and places of the activity complained of, and the persons responsible. . . ." 621 F.2d at 80.

In the present cases, the plaintiffs pled that the times they were allegedly abused included virtually the entire time each plaintiff attended the E.S.U school. The plaintiffs were unable to plead the identities of their abusers beyond the allegation that one or more of several individuals performed the abusive acts. Such pleading does not meet the heightened specificity requirements of § 1983, as demanded by the aforementioned federal courts. The plaintiffs' § 1983 pleadings are insufficient to allow a court of this state to weigh the substantiality of the claims, nor do they comply with this state's code pleading requirements.

CONCLUSION

The plaintiffs elected to stand on their pleadings. Courts have the inherent power to dismiss an action for disobedience of a court order. *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991). The plaintiffs set forth their allegations of negligent hiring and retention of employees by E.S.U. and the violation of the plaintiffs' civil rights under § 1983 in uncertain and indefinite terms. The plaintiffs' petitions do not comply with Nebraska's rules of pleading.

Underlying the court's dismissal of the plaintiffs' petitions without prejudice was the plaintiffs' failure to comply with the order of the court to make their petitions more definite and certain. The trial court gave the plaintiffs every opportunity to properly plead their cases. Ultimately, the plaintiffs refused to further plead as ordered by the court.

In view of the records in these cases, it cannot be said that the trial court abused its discretion in dismissing the plaintiffs' petitions. Therefore, the orders of the district court dismissing the plaintiffs' petitions are affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

These appeals involve an examination of the district court's judgments to determine whether the trial court abused its

discretion in dismissing the actions without prejudice.

> [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.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

Neb. Rev. Stat. § 13-919(5) (Reissue 1991) of the Political Subdivisions Tort Claims Act acknowledges that Neb. Rev. Stat. § 25-213 (Reissue 1989) applies to tort claims brought under the act, and § 13-919(1) specifies that an action under the act must be commenced within 2 years after the cause of action has accrued. Section 25-213 states:

> [I]f a person entitled to bring any action mentioned in this chapter [or] the Political Subdivisions Tort Claims Act . . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

The Christianson petition alleges that the plaintiff, Kelly, "is an incompetent person" within § 25-213. With the exception of Heather Duncan, all other plaintiffs in the several actions are alleged to be within the age of 20 years when their causes of action accrued. Heather Duncan became 21 years old on October 21, 1992. Consequently, the statute of limitations otherwise applicable to commencement of an action under the Political Subdivisions Tort Claims Act is suspended in accordance with § 25-213, so that each plaintiff in these actions is entitled to commence an action against Educational Service Unit No. 16 by refiling an action during the plaintiff's legal disability or within a period of 2 years after the disability has been removed. For that reason, each of the plaintiffs in the present cases may immediately refile an action against the educational service unit inasmuch as dismissal has been without

prejudice. Because each of the plaintiffs in the present appeals may refile an action and achieve his or her day in court on the merits of their respective claims, dismissal has not deprived any plaintiff of a substantial right; hence, an abuse of discretion has not occurred as the result of the dismissal.

The majority's opinion concerning the differences between code pleading and the Federal Rules of Civil Procedure, while interesting reading, is extraneous to the only issue in these appeals, that is, whether the district court abused its discretion in dismissing the cases without prejudice. In light of § 25-213 in relation to the Political Subdivisions Tort Claims Act and in view of the absence of an abuse of discretion by the district court, I concur that the district court's judgments of dismissal should be affirmed.

KERRY P. PETSKA ET AL., APPELLEES, V. OLSON GRAVEL, INC., APPELLANT.

500 N.W.2d 828

Filed June 4, 1993. No. S-91-106.

1. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Rules of Evidence.** Admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is directed to the discretion of the trial court, and absent an abuse of discretion, the trial court's decision on the motion for new trial will be upheld on appeal.
5. **Appeal and Error.** In order to be considered on appeal, error must be assigned and discussed in the appellant's brief.

6. **Verdicts: Juries: Appeal and Error.** A jury verdict is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
7. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
8. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion.
9. **Judgments: Res Judicata.** The doctrine of res judicata simply provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
10. **Judgments: Collateral Estoppel.** Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Daniel M. Placzek, of Luebs, Beltzer, Leininger, Smith & Busick, for appellees.

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

WHITE, J.

Defendant, Olson Gravel, Inc. (Olson), appeals from a jury verdict and the judgment entered thereon which awarded plaintiffs damages in the amount of $50,075.80. We affirm.

In December 1978, appellee Kerry P. Petska entered into a 10-year gravel lease with appellant, Olson. Although Petska was not the owner of the leased premises, he executed the contract with the consent of and on behalf of the landowners, his parents, Donald L. Petska and Norma E. Petska. The lease provided that Olson was granted permission to remove from the leased premises as much sand, gravel, and rocks as could be found. In exchange, Olson was to pay a royalty of 20 cents per cubic yard on gravel removed. The payment due dates for these royalties were set out by the contract as follows:

> 7. Lessee agrees to pay to Lessor a royalty . . . . Said royalty shall be payable to Lessor on July 1st for gravel hauled between January 1st and June 30th of each year, October 1st for the third quarter; and December 31st for the fourth quarter.
>
> 8. Lessee agrees to pay Lessor a gravel royalty prepayment of $5,000.00 per year commencing with the execution of this agreement. Subsequent payments shall be made the 31st of December of each year. If at any time the royalty computed under paragraph 7 hereof exceeds the payments made under paragraph 8, royalty payments shall be made quarterly as scheduled in paragraph 7. In the event the said $50,000.00 credit is not used at the end of ten years, the excess shall be applied to gravel royalty computed during the second ten year period . . . . If Lessee fails to renew the lease into the second ten year period, any of the $50,000.00 credit shall remain with Lessor.

Although the parties executed the lease in 1978, Olson did not commence mining until 1985. It was not until near the end of the 10-year lease term that a dispute arose between the parties over the accounting of the amount of gravel removed from the leased premises. Olson claimed that the royalty prepayments it made pursuant to paragraph 8 of the lease were sufficient to meet the total amount of royalties due. The Petskas claimed that Olson's accounting of the removed gravel was underestimated and that therefore Olson owed additional royalties not covered by the prepayments.

Petska, along with his parents, filed suit against Olson in Valley County District Court. The Petskas' petition alleged two causes of action, one for forcible entry and detainer and a second for recovery of unpaid royalties. Both claims were based upon an alleged breach of the lease by Olson.

The two claims were tried separately. The first cause of action was tried before the court in October 1989. On November 1, after completion of the trial, the district court dismissed the first claim based on its finding that plaintiffs failed to prove Olson had violated any terms of the lease. Yet in the same ruling, the court stated that "there appears to be a dispute as to the accounting of removed material." Olson was then given 10

days to plead or 20 days to answer the second cause of action for recovery of unpaid royalties.

On November 7, Olson filed a demurrer to the Petskas' second cause of action. The demurrer was overruled. On January 19, 1990, Olson filed its answer in which it alleged that under the doctrines of res judicata and collateral estoppel, the trial court's order dismissing plaintiffs' first cause of action operated as a bar to plaintiffs' second cause of action. Olson then moved for summary judgment, asserting that there was no issue of material fact because plaintiffs' claim was barred by the doctrines of res judicata and collateral estoppel. The motion was denied.

The second cause of action was tried before a jury on November 26 and 27, 1990. Plaintiffs' first witness was their expert witness, a land surveyor who was hired by plaintiffs to determine the amount of gravel removed from the leased premises. Plaintiffs' expert testified that 513,782 cubic yards of sand, gravel, and rocks had been removed from the leased premises. Then plaintiffs introduced into evidence royalty summaries which were prepared by Dennis Olson, president of defendant. These summaries stated that defendant had removed only 97,368 cubic yards of sand, gravel, and rocks from the Petskas' land. However, on direct examination by plaintiff, Dennis Olson admitted that the numbers in the royalty summaries indicating the amount of gravel removed from the Petska property from 1985 through 1988 were estimates which he determined by merely looking at the piles of removed gravel. Olson provided no expert testimony, but, rather, relied upon the royalty summaries as evidence of the actual amount of gravel removed. Defendant did provide evidence in the form of canceled checks to support his contention that $50,000 in royalty prepayments required by paragraph 8 of the lease had been paid to plaintiffs.

The jury returned a verdict in favor of plaintiffs and assessed damages in the amount of $50,075.80. The trial court entered judgment on the verdict, awarding plaintiffs $50,075.80 for unpaid royalties. Olson's motions for judgment notwithstanding the verdict and new trial were overruled. Thus, Olson has brought this appeal.

Appellant's first assignment of error contests the trial court's denial of its motion for summary judgment. We have held that a denial of a motion for summary judgment is not a final order and therefore is not appealable. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). Appellant argues that in *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988), this court appeared to apply a contrary rule by reviewing and reversing the lower court's denial of a motion for summary judgment.

In *Wibbels*, defendant served a request for admissions upon petitioner in order to establish proof of his counterclaim against a petitioner in intervention. Petitioner failed to respond within the 30 days required by statute. Thereafter, defendant filed a motion for summary judgment which was based on the admissions in the discovery request. After service of the motion, but prior to the hearing, petitioner sent to defendant responses to the request for admissions. At the summary judgment hearing, petitioner introduced these responses into evidence, but did not explain its previous failure to respond within the time period prescribed by statute. The trial court denied defendant's motion for summary judgment. After trial, the court ruled in favor of petitioner on defendant's counterclaim. In defendant's appeal we held that petitioner's failure to respond within the statutory period conclusively established the requested admissions and that the admissions established the elements necessary for defendant's recovery as a matter of law. Thus, we reversed the trial court's final judgment as well as its denial of defendant's motion for summary judgment.

Although our decision in *Wibbels* appears to recognize a party's right to appeal the denial of a motion for summary judgment, a careful reading of the case reveals that we did not expressly or impliedly authorize such an appeal. This is indicated by the fact that our opinion does not discuss or even mention the rule of law authorizing a party to appeal, posttrial, the denial of summary judgment. Furthermore, in a more recent case, *Commerce Sav. Scottsbluff, supra*, we specifically held that such an order is not appealable.

The law is clear. We need not consider the trial court's denial

of appellant's motion for summary judgment. However, in order to fully address appellant's last assignment of error, we will nonetheless need to discuss appellant's argument in support of its motion for summary judgment, that the doctrines of res judicata and collateral estoppel bar appellees' second cause of action.

Appellant's second and third assignments of error deal with the trial court's admission of and refusal to admit certain documents into evidence. "[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . ." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991). It is not necessary to explain appellant's assignments of error in detail, because we find that the trial court's rulings thereon correctly applied the Nebraska Rules of Evidence.

Appellant's fourth assignment of error concerns the trial court's instructions to the jury. In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991). Appellant argues that the court did not instruct the jury on the proper law of the case because the trial court's instructions failed to address those issues resolved by the order on the first cause of action.

Appellant proposed two jury instructions which the trial court rejected, one for damages and another for the statement of the case. We find that the trial court properly rejected appellant's damages instruction because appellant's instruction basically mirrored the trial court's instruction.

Appellant's statement of the case instruction was also similar to the court's, except that appellant's instruction included a paragraph which set forth several facts that had been "determined as a matter of law" and, therefore, must be accepted as true. Yet appellant fails to provide this court with the basis upon which it asserted that these facts had been

determined as a matter of law. This assertion is again related to the proposition that plaintiff's claim is barred by the doctrine of res judicata, or issue preclusion, which we discuss later in this opinion and reject.

As its last assignment of error, appellant asserts that the trial court erred by overruling its motion for new trial. A motion for new trial is directed to the discretion of the trial court, and absent an abuse of discretion, the trial court's decision on the motion for new trial will be upheld on appeal. *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991); *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989).

Appellant lists, in its brief, a number of issues to be addressed by this court when reviewing the trial court's denial of new trial. However, since appellant fails to provide any discussion to expound on these issues, we are not required to consider this assignment of error. *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988). Nevertheless, in order to assure that this case is given a complete appellate review, we will briefly discuss the issues raised by appellant in its last assignment of error.

These issues primarily challenge the court's judgment and the jury verdict as unsupported by the evidence and contrary to the law. A jury verdict is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). In determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). We find that the testimony of plaintiffs' expert as to the amount of gravel removed from the leased premises constitutes competent evidence upon which the jury could find for plaintiffs. Therefore, since the jury verdict is supported by the evidence, the trial court's judgment, which simply restates the verdict, is also supported by the evidence.

Appellant contends that the verdict and judgment are contrary to the law. There is only one argument in appellant's

brief which could possibly support this contention. That is, under the doctrines of res judicata and collateral estoppel, the trial court's decision on the first cause of action operated as a bar to appellees' second cause of action; thus, pursuant to the law, the court should have dismissed the second claim. The applicability of the doctrines of res judicata and collateral estoppel to this case constitute a question of law. With regard to questions of law, this court is obligated to reach a conclusion independent from the trial court's conclusion. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

The doctrine of res judicata simply provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action. *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989). See *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Both of the claims asserted by plaintiffs were based upon an alleged breach of the lease by defendant. The trial court dismissed the first cause of action upon finding that plaintiffs failed to prove that defendant had breached the lease.

Olson argues that under the doctrines of res judicata and collateral estoppel, this finding in effect barred the second cause of action because such action was also based upon a breach of contract. However, the trial court's order on the first claim specifically stated that there was still a dispute as to the accounting of the gravel. The court was in effect ruling that although the existing evidence shows no breach, whether there is a breach with regard to the accounting of removed gravel is an issue the court will not decide until after trial on the second claim. In other words, the order resolved in Olson's favor all the issues regarding a breach by Olson, except that the trial court did not fully determine the issue of accounting, but, rather, reserved ruling thereon until after trial. This interpretation of the trial court's order is supported by the fact that the order required defendant to file within 20 days an answer on the

second cause of action. We find that the trial court's order on the first claim was not a final judgment on the issue concerning the accounting of gravel. Therefore, the doctrines of res judicata and collateral estoppel are not applicable and do not bar appellees' second claim.

The verdict and judgment in this case are neither unsupported by the evidence nor contrary to the law. All assignments of error are without merit, and accordingly, the decision of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

BELL ABSTRACT & TITLE, INC., A NEBRASKA CORPORATION, AND AMERICAN TITLE INSURANCE COMPANY, A CORPORATION, APPELLEES, V. CARO, INC., A NEBRASKA CORPORATION, APPELLANT.

500 N.W.2d 834

Filed June 4, 1993. No. S-91-321.

1. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
2. _____: _____. In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. _____: _____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

David C. Mussman and, on brief, Richard J. Butler, of Erickson & Sederstrom, P.C., for appellant.

James E. Case for appellees.

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

BOSLAUGH, J.

This case involves a controversy that arose out of the sale of a funeral home in Plattsmouth, Nebraska.

In March 1988, Kucera-Witzenburg, Inc. (Kucera), and Caro, Inc. (Caro), entered into an agreement for the sale of the Caldwell Funeral Home owned by Caro. Bell Abstract & Title, Inc. (Bell Abstract), as an agent for American Title Insurance Company (American Title), issued a title insurance policy naming Kucera as the insured, covering the property sought to be purchased by Kucera from Caro. The title insurance policy and a subsequent lender's title insurance policy recited that the taxes on the property for 1986 and all prior years had been paid. Pursuant to the purchase agreement between Kucera and Caro, a warranty deed was executed in favor of Kucera on March 24, 1988. After closing, Kucera learned that real estate taxes for the years 1984, 1985, and 1986 had not been paid by the former owner of the property but that the property had been sold to a third party at a county tax sale and that the past due taxes were a lien on the property. Bell Abstract failed to show the lien on the title commitment it issued to Kucera. At the trial Jeffrey Bell, an abstracter and title insurance agent for Bell Abstract, testified that he assumed the taxes had been paid by the owner and not by a third party.

The record shows that Caro had entered into a land contract with Glen and Geraldine Kohel for the sale of the same property in 1984. In 1987, the Kohels defaulted on the land contract and the property was deeded back to Caro. In its amended answer, Caro claims that it had no knowledge that the property taxes for the years 1984, 1985, and 1986 had not been paid by the Kohels. No representative of Caro testified at trial.

The purchase agreement between Kucera and Caro provided that "[t]he 1987 real estate taxes on the Business Premises and all prior real estate taxes shall be paid by the Seller." The warranty deed Caro executed and delivered to Kucera included Caro's covenant that the property was free from encumbrances and its covenant to warrant and defend the title against the lawful claims of all persons.

Bell Abstract and American Title then entered into an agreement with Kucera whereby Bell Abstract and American

Title paid the back taxes and Kucera assigned its rights against Caro to Bell Abstract and American Title. Bell Abstract and American Title subsequently sued Caro for $6,594.16, the amount of real estate taxes plus interest they paid for the years 1984, 1985, and 1986. Bell Abstract and American Title alleged that Caro had breached the terms of the purchase agreement and warranty by failing to pay the real estate taxes for those years.

In its answer, Caro alleged that Bell Abstract was negligent in issuing the title commitment and policies without disclosing the unpaid taxes and that any loss Bell Abstract sustained was due to Bell Abstract's own negligence.

After a trial to the court, the district court found in favor of Bell Abstract and American Title and against Caro in the amount of $6,594.16. The trial court also found that the claim against Caro was a liquidated claim and that Bell Abstract and American Title were entitled to prejudgment interest in the amount of $1,925.28.

Caro filed a motion for new trial arguing, among other things, that the award of prejudgment interest was erroneous. The district court sustained Caro's motion for new trial and eliminated the award of prejudgment interest only. Caro has appealed from that judgment.

Caro has asserted that the trial court erred in considering only evidence of Caro's breach of warranty without also considering the fact that any warranty made by Caro to pay back taxes was induced by the negligence of Bell Abstract; in holding that this case is distinguishable from *Leamer Abstracting Co. v. Rosengartner*, 210 Neb. 719, 317 N.W.2d 57 (1982); in concluding that Caro would receive a windfall as a result of Caro's failure to pay back taxes on the property; and in concluding that Caro knew or should have known that the real estate taxes for the years in question had not been paid.

As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993); *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). In a bench trial of a law action, a trial court's factual findings have

the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

Caro argues that *Leamer Abstracting Co.* supports its position that Bell Abstract, not Caro, is liable for the payment of the back real estate taxes. In *Leamer Abstracting Co.*, the plaintiff, Norris G. Leamer, an attorney in South Sioux City, Nebraska, owned Leamer Abstracting Company. Leamer did abstracting work for the sellers of a piece of real estate located along a highway. In doing the abstracting work, Leamer failed to show that a portion of the property had been sold to the State for highway purposes. The deed executed by the sellers to the buyer included the previously sold portion. The buyer of the property later complained about the error, due to the fact that the buyer had not received all of the property described in the deed. Leamer settled with the buyer for $5,000 and took an assignment from the buyer for its claim against the sellers. Leamer then sued the sellers for $5,000, claiming that the sellers had breached the covenants contained in the warranty deed. This court noted that "the negligence of the plaintiff in extending and certifying the abstract is conceded, and the evidence is uncontradicted that the plaintiff and attorney Leamer were both paid agents of the defendants in connection with this real estate transaction." *Id.* at 723, 317 N.W.2d at 59. This court also stated, "It is clear that the defendants intended to sell only the property they owned and that, except for the negligence of the Leamer Abstracting Company, the description in the deed would have been correct and there would have been no loss to anyone." *Id.* at 722, 317 N.W.2d 58. The *Leamer Abstracting Co.* court held that the abstracter could not avoid liability for its own negligence by suing the sellers under a breach of warranty theory.

In the present case, the district court held that the case at bar was distinguishable from the facts of the *Leamer Abstracting Co.* case. In its opinion, the district court stated that the taxes on the property in question for the years 1984, 1985, and 1986

were due and owing at the time the title work was done by Bell Abstract. The court also noted that Caro, as the owner of the property, knew or should have known that the taxes for those years had not been paid. Accordingly, there was no loss occasioned to Caro, since it alone bore the tax obligation as the owner of the property. Caro also had contractually agreed to pay the back taxes on the property in the agreement between Caro and Kucera. Further, Caro warranted to defend the title of the property against the lawful claims of all persons in the warranty deed. The district court concluded that if Caro were not held responsible for the payment of the taxes, Caro would receive a windfall as a result of Caro's own failure to pay the taxes which it had agreed to pay.

In this case Kucera, not Caro, was the named insured under the title insurance commitment and subsequent title insurance policy. Although Bell Abstract may have been negligent by failing to disclose the unpaid taxes, Caro was not damaged by this negligence because Caro, as the owner of the property, had always been obligated to pay the real estate taxes. As stated previously, no representative of Caro testified at trial. There is no evidence that Caro relied on the title commitment before executing the purchase agreement or warranty deed. Caro argues that the Kohels were obligated under a land sale contract to pay the real estate taxes for the years in question. However, in 1987, the Kohels quitclaimed the property back to Caro. There is nothing in the record as to whether Caro and the Kohels resolved or even discussed the unpaid real estate taxes on the property for the years 1984, 1985, and 1986.

Caro's obligation to pay the taxes on the real estate it owned was independent of any negligence on the part of Bell Abstract. Any negligence of Bell Abstract was not a proximate cause of any loss to Caro.

In the purchase agreement with Kucera, Caro covenanted to pay the 1987 real estate taxes on the property along with "all prior real estate taxes." The warranty deed that Caro executed and delivered to Kucera included Caro's covenant to warrant and defend the title to the real estate against the lawful claims of all persons.

The judgment of the district court is affirmed.

AFFIRMED.

CLARENCE TYLER, APPELLANT, V. STRUVE ENTERPRISES, INC., AND THE TRAVELERS INSURANCE COMPANY, APPELLEES.

500 N.W.2d 837

Filed June 4, 1993. No. S-92-685.

Workers' Compensation: Liability. When a worker's right to compensation is not in issue, but there is an issue of liability as between the employer and an insurance carrier, the Workers' Compensation Court may order the payment of compensation to be made immediately by the employer, the insurance carrier, or both. Neb. Rev. Stat. § 48-178.01 (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Robert R. Moodie, of Friedman Law Offices, for appellant.

James C. Zalewski, of Erickson & Sederstrom, P.C., for appellee Struve Enterprises.

Anne E. Winner, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee The Travelers Insurance Co.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workers' Compensation Act.

On November 20, 1989, the plaintiff, Clarence Tyler, was injured as the result of an accident arising out of and in the course of his employment as a property maintenance man by the defendant Struve Enterprises, Inc. On June 12, 1991, the plaintiff filed a petition in the compensation court alleging that he was entitled to compensation from his employer and from The Travelers Insurance Company, his employer's insurance carrier, for the injuries he sustained in the accident of November 20.

While this action was pending in the compensation court, the employer commenced a declaratory judgment action in the district court to determine whether an insurance policy issued to the employer by Travelers was in effect and provided coverage to Struve at the time of the November 20 accident.

Following a hearing before a single judge of the compensation court, the plaintiff recovered an award against

both defendants on February 19, 1992, for temporary total disability and permanent partial disability, together with medical and hospital expenses, penalties for waiting time, attorney fees, and interest. The parties have stipulated that the award by the single judge was correct as to the periods and amounts of disability, medical bills, waiting-time penalties, and attorney fees.

On February 28, 1992, Travelers requested a rehearing, and on May 1, the matter was heard before a three-judge panel. On July 8, following the rehearing, the compensation court dismissed the plaintiff's petition without prejudice on the ground that it lacked jurisdiction to make a final adjudication because of the declaratory judgment action pending between the defendants. From that judgment the plaintiff has appealed.

Neb. Rev. Stat. § 48-178.01 (Reissue 1988) provides that when

> the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer, a carrier, or a risk management pool . . . the Nebraska Workers' Compensation Court may order payment of compensation to be made immediately by one or more of such employers, carriers, or pools. When the issue is finally resolved, an employer, carrier, or pool held not liable shall be reimbursed for any such payments by the employer, carrier, or risk management pool held liable.

Since there is no dispute as to the right of the plaintiff to recover compensation as a result of the November 20 accident, the compensation court on rehearing should have made an award to plaintiff against one or both defendants in accord with the provisions of § 48-178.01, and its order dismissing the petition without prejudice was in error.

The litigation between Travelers and the employer has now been resolved by the decision in *Struve Enter. v. Travelers Ins. Co.*, *ante* p. 516, 500 N.W.2d 580 (1993).

The judgment of the compensation court is reversed, and the cause is remanded to the compensation court with directions to enter an award in favor of the plaintiff and against the defendant Struve Enterprises, Inc., for all compensation to which the plaintiff is now entitled as a result of the accident of

November 20, 1989, together with medical and hospital expenses, penalties for waiting time, interest, and attorney fees as provided in the Nebraska Workers' Compensation Act.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF LOUISE C. WATKINS, DECEASED. MARY ANN STALLINGS ET AL., APPELLANTS, V. RICHARD H. ROBERTS, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUISE C. WATKINS, DECEASED, APPELLEE.

501 N.W.2d 292

Filed June 11, 1993. No. S-90-1036.

1. **Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying an attorney fee will be upheld in the absence of an abuse of discretion by the trial court.
4. **Statutes.** Interpreting a statute presents a question of law for judicial determination.
5. **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.
6. **Decedents' Estates: Costs: Attorney Fees: Evidence.** The "good faith" required in Neb. Rev. Stat. § 30-2481 (Reissue 1989) is an ultimate fact for the court's decision upon all the evidence.
7. **Decedents' Estates: Costs: Attorney Fees: Words and Phrases.** "Good faith," for the purpose of Neb. Rev. Stat. § 30-2481 (Reissue 1989), is honesty in fact concerning conduct or a transaction and is distinguished from mere negligence or an honest mistake.

Appeal from the District Court for Perkins County, JOHN D. KNAPP, Judge, on appeal thereto from the County Court for Perkins County, CLOYD CLARK, Judge. Judgment of District Court affirmed with direction.

Gordon Peterson and Mark Brown, of Orton, Brown, Thomas & Peterson, for appellants.

Patrick R. McDermott for appellee.

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

SHANAHAN, J.

In this appeal, the question is whether a personal representative is entitled to compensation and an attorney fee for the personal representative's lawyer in defending an action brought by devisees to surcharge and remove the personal representative, when the personal representative is surcharged but not removed from the office of personal representative.

At the time of her death on February 24, 1985, Louise C. Watkins owned property valued at approximately $100,000. On April 12, a petition for informal probate of Louise Watkins' will was filed in the county court for Perkins County, and Richard H. Roberts was appointed personal representative of the estate of Louise C. Watkins, deceased. A significant part of the Watkins estate consisted of a dryland quarter section in Perkins County. On May 22, Roberts obtained an appraisal in which a licensed appraiser concluded that the fair market value of the land at the date of Louise Watkins' death was $500 per acre, or $80,000.

Under her will, Louise Watkins extended to Amy May Watkins, Louise's daughter-in-law and surviving spouse of Louise's son, Jay Laurn Watkins, an option to purchase the quarter section anytime within 6 months after Louise's death at the land's appraised fair market value on the date of Louise's death. The will also authorized Amy May Watkins to assign the option to her children. However, Amy May Watkins neither exercised nor assigned the option; therefore, the real estate passed into Louise Watkins' residuary estate for distribution among several devisees. Louise Watkins' will also authorized her personal representative to sell any estate assets at public or private sale without the necessity of court approval for a sale.

After expiration of the option, Roberts contacted Amy May Watkins' children, Mary Ann Stallings, Bruce Watkins, Clinton Watkins, and Douglas Jay Watkins, and inquired whether any of them might be interested in purchasing the quarter section. In January 1986, Douglas Jay Watkins told Roberts that he and

the other children of Amy May Watkins would pay only $200 per acre, or $32,000, for the tract. Roberts considered the proposed price to be inadequate. When other heirs declined to purchase the quarter section and rejected the possibility of a distribution in kind concerning the land, Roberts, on February 5, began running an advertisement in the local newspaper, offering the land for sale to the general public. Subsequently, on April 18, Roberts, in light of the declining value of dry cropland in Perkins County, entered into a contract to sell the quarter section to Vern and Delores Woodmancy for $300 per acre, or $48,000.

On July 14, 1986, Mary Ann Stallings, Bruce Watkins, and Clinton Watkins filed their petition in county court, seeking to restrain Roberts from closing the Woodmancy sale. Douglas Jay Watkins and Amy May Watkins, as plaintiffs, later joined in this action. The petition was amended, alleging acts of negligence and breaches of fiduciary duty by Roberts and seeking to surcharge Roberts for any loss sustained by the estate and remove him as personal representative of the Watkins estate.

On March 12, 1987, the county court ordered that Roberts perform the contract of sale to Woodmancys. However, questions concerning surcharge of Roberts and his removal as personal representative were later disposed in a trial in which much of the evidence consisted of contradictory opinions regarding the value of the quarter section in view of the generally declining real estate values in the area. On June 25, the county court, in its "Judgment Order," concluded that on June 18, 1986, when Roberts sold the quarter section to Woodmancys, the land had a fair market value of $350 per acre, or $56,000; nevertheless, "with falling land prices, it could have been reasonable to sell the land below fair market value; however, it was not reasonable to sell below market value and not give prior notice to the interested parties." The court then concluded that Mary Ann Stallings, Bruce Watkins, and Clinton Watkins had sustained a loss of $1,500 as the result of the Woodmancy sale; surcharged Roberts $1,500, "the same representing $500.00 apiece for Bruce A. Watkins, Clinton Watkins and Mary Ann Stallings"; and ordered Roberts "to

pay said surcharge directly to" Mary Ann Stallings, Bruce Watkins, and Clinton Watkins. The court dismissed the plaintiffs' action for Roberts' removal as personal representative of the Watkins estate.

Amy May Watkins, Mary Ann Stallings, Bruce Watkins, Clinton Watkins, and Douglas Jay Watkins appealed to the district court, which on May 31, 1988, affirmed the county court's judgment concerning the surcharge and removal of Roberts as personal representative.

Amy May Watkins, Mary Ann Stallings, Bruce Watkins, Clinton Watkins, and Douglas Jay Watkins then commenced an appeal to this court and, among their claimed errors, asserted that the county court should have removed Roberts as the personal representative of the Watkins estate and should have surcharged Roberts more than $1,500. That appeal, however, was dismissed for lack of jurisdiction because the appeal was filed out of time. Consequently, the county court's judgment concerning surcharge and removal of Roberts as personal representative became final.

> The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .
>
> Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause.

NC+ Hybrids v. Growers Seed Assn., 228 Neb. 306, 310-11, 422 N.W.2d 542, 545 (1988). Accord *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992). Hence, we express no opinion concerning the correctness of the county court's judgment concerning the surcharge and retention of Roberts as personal representative; instead, we accept the county court's decision in that regard as a final determination on the issues of surcharge and removal of Roberts as personal representative.

On November 7, 1989, as part of his "Formal Petition for Complete Settlement" of the Watkins estate, Roberts requested $7,493.07 as compensation for his services in conjunction with the litigation for his surcharge and removal as personal representative. Roberts also requested $12,089.90 as fees and

costs for his attorney in the litigation. The plaintiffs who had maintained the surcharge and removal actions objected to the requested payments from estate funds on the grounds that Roberts' actions in defending the actions did not "benefit the estate" and were not in " 'good faith.' " Despite the plaintiffs' objections, the county court, after consideration of the evidence concerning compensation of the personal representative and a fee for the personal representative's attorney, allowed compensation and fees as requested. The district court affirmed the county court's judgment. Allowance of that compensation and attorney fee is the subject of the present appeal.

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. See, Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992); *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989); *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987); *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986); *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985). Cf., *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988) (county courts may apply equitable principles to matters within probate jurisdiction); *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985).

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Broekemeier Ford v. Clatanoff, 240 Neb. 265, 267, 481 N.W.2d 416, 418 (1992). Accord, *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992); *Ballard v. Giltner Pub. Sch., supra*. On appeal, a trial court's decision awarding or denying an attorney fee will be upheld in the absence of an abuse of discretion by the trial court. See, *Sports*

Courts of Omaha v. Meginnis, 242 Neb. 768, 497 N.W.2d 38 (1993); *Young v. Dodge Cty. Bd. of Supervisors, supra*; *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987).

Furthermore, "[i]nterpreting a statute presents a question of law for judicial determination." *Sports Courts of Omaha v. Meginnis*, 242 Neb. at 770, 497 N.W.2d at 40. "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). Accord, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Sports Courts of Omaha v. Meginnis, supra*.

The appellants' contentions can be summarized in a single assignment of error: The county court and district court erred in holding that a personal representative who was surcharged but not removed from office is entitled to compensation and a fee for the personal representative's attorney in defending an action for the personal representative's surcharge and removal. The appellants do not contend that the services rendered by the personal representative or his attorney were unnecessary or that the charges for these services were unreasonable. Therefore, the sole issue is whether a personal representative's negligence-based surcharge precludes compensation for the personal representative's services and a fee for the personal representative's attorney.

The appellants suggest "benefit to the estate" as a judicially fashioned criterion to determine whether a personal representative may receive compensation for services rendered. See *Matter of Estate of Flaherty*, 484 N.W.2d 515 (N.D. 1992) (a personal representative's actions must benefit an estate before the personal representative is entitled to compensation). However, we look to Nebraska statutes for the standard to determine whether a personal representative is entitled to compensation. Neb. Rev. Stat. § 30-2480 (Reissue 1989), as a part of the Nebraska Probate Code, states in part: "A personal representative is entitled to reasonable compensation for his services." Additionally, Neb. Rev. Stat. 30-2481 (Reissue 1989) provides: "If any personal representative or person nominated as personal representative defends or prosecutes any

proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." Finding no requirement of a "benefit to the estate" in Nebraska statutes concerning a personal representative's claim for compensation, we reject the criterion suggested by the appellants and use §§ 30-2480 and 30-2481 to decide the issue in this appeal.

In *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985), this court, considering whether a personal representative, as an unsuccessful proponent of a will for probate, and the personal representative's attorney were entitled to compensation, stated:

> Section 30-2481 is authority for a personal representative or a nominated personal representative to recover from the estate the expenses and fees incurred. That person must first establish good faith, and then prove (1) that the claimed expenses and disbursements were necessary and (2) that the attorney fees were necessary and reasonable.

220 Neb. at 169, 368 N.W.2d at 801. The court then discussed the "good faith" requirement of § 30-2481:

> The good faith required in § 30-2481 is an ultimate fact for the court's decision upon all the evidence. *Matter of Estate of Brady*, 308 N.W.2d 68 (Iowa 1981). There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case, including the duties imposed upon him by law.

220 Neb. at 172, 368 N.W.2d at 803.

In *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988), this court held that a person nominated as personal representative under a decedent's will was entitled to an attorney fee incurred in a good faith attempt to probate a will, even though the nominated personal representative was not successful in being appointed as personal representative. We stated that § 30-2481 "specifically provides that whether 'successful or not,' such a nominated person is entitled to receive his necessary expenses, including a reasonable attorney fee, when he prosecutes or defends any proceeding in good faith." 229 Neb. at 408, 427 N.W.2d at 295.

In the present case, we believe the evidence supports the county court's implicit finding that Roberts acted in good faith in defending against the surcharge and removal action. "Good faith," for the purpose of § 30-2481, is honesty in fact concerning conduct or a transaction. See, *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); *Hilton v. Clements*, 137 Neb. 791, 291 N.W. 483 (1940); *In re Estate of Healy*, 247 Minn. 205, 76 N.W.2d 677 (1956). Good faith is distinguished from mere negligence or an honest mistake. See, *Blue Cross and Blue Shield v. Granger*, 461 So. 2d 1320 (Ala. 1984); *Stath et al. v. Williams et al.*, 174 Ind. App. 369, 367 N.E.2d 1120 (1977).

The record contains nothing to indicate that Roberts intentionally caused a loss to the Watkins estate or to any Watkins heir or prolonged litigation in an effort to increase the eventual compensation allowed by the county court. Instead, in an effort to keep the quarter section of farmland in the decedent's family, Roberts negotiated with the appellants regarding a sale of the land to them. Considering the evidence in the light most favorable to Roberts, we cannot say that the county court was clearly erroneous in its conclusion that Roberts acted in good faith; therefore, with Roberts' good faith having been established, see *In re Estate of Odineal, supra*, we find no abuse of discretion in the county court's judgment concerning compensation for Roberts and an attorney fee for Roberts' lawyer.

Having determined that a personal representative's negligence and surcharge do not preclude compensation for the personal representative's services and a fee for the personal representative's lawyer when the personal representative has acted in good faith, we affirm the district court's judgment which affirmed the county court's judgment. However, in view of the time that administration of the Watkins estate has been pending, we direct that the district court, in its mandate to the county court, shall order the county court to conclude administration of the estate of Louise C. Watkins, deceased, within 30 days after issuance of the district court's mandate in this cause.

AFFIRMED WITH DIRECTION.

DEANNA LYNN KNERR ET AL., APPELLANTS, V. MARY JANE SWIGERD, APPELLEE.

500 N.W.2d 839

Filed June 11, 1993. No. S-91-057.

Jurisdiction: Appeal and Error. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.

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

Rex R. Schultze and Maureen L. Allman, of Perry, Guthery, Haase & Gessford, P.C., for appellants.

Karen B. Flowers and James L. Haszard, of McHenry & Flowers, for appellee.

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

LANPHIER, J.

In this action, the plaintiffs-appellants, Deanna Lynn Knerr, Doreen Miller, Patricia Hicks, and Sherri Moore, petitioned the district court for Seward County to declare them the equitable owners of the proceeds of their father's life insurance policy. They had originally been named beneficiaries of their father's life insurance in a property settlement agreement in the district court for Lancaster County, which also provided for child support until the children reached their majority. The district court for Lancaster County, after notice to the plaintiffs' mother, terminated child support and modified the decree to eliminate the requirement that the plaintiffs be named as beneficiaries. The district court for Seward County dismissed the action for lack of jurisdiction. We agree.

BACKGROUND

The parties submitted the case on the following stipulated facts: The plaintiffs are four of the five daughters born from the marriage between John J. Swigerd and the former Evelyn E. Swigerd. On August 27, 1970, the parents were granted a divorce in the district court for Lancaster County. The divorce

decree approved the property settlement agreement entered into by John and Evelyn Swigerd. One of the provisions of the decree required John Swigerd to maintain the plaintiffs as beneficiaries of his employer-provided life insurance policy.

When the plaintiffs reached the age of majority, John Swigerd motioned the Lancaster County District Court to terminate his obligation to pay child support and maintain the plaintiffs as beneficiaries of his life insurance policy. Notice of the motion was sent to Evelyn Swigerd's attorney of record. The Lancaster County District Court granted the motion, and subsequently John Swigerd named his second wife, the defendant, Mary Jane Swigerd, as beneficiary.

When John Swigerd died, the defendant received the proceeds of the insurance policy. Claiming a vested interest in the proceeds under the original divorce decree, the plaintiffs filed a petition in Seward County District Court requesting the court to impress a constructive trust on the proceeds in favor of the plaintiffs. The Seward County District Court dismissed the action for lack of subject matter jurisdiction.

The plaintiffs appeal the judgment of the district court and, in their assignments of error, assert that the court abused its discretion (1) in finding that it lacked subject matter jurisdiction, (2) in failing to find that the plaintiffs had a superior equitable right to the proceeds of the life insurance policy, and (3) in failing to impose a constructive trust.

SUBJECT MATTER JURISDICTION

Citing *Nemec v. Nemec*, 219 Neb. 891, 367 N.W.2d 705 (1985), and *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990), the district court for Seward County found that it had no subject matter jurisdiction over the action because the action was related to a marital relationship and full and complete general jurisdiction over the entire marital relationship and all related matters was vested in the district court for Lancaster County, where the petition for dissolution was filed.

The source of vested jurisdiction in the district court in divorce proceedings is Neb. Rev. Stat. § 42-351 (Reissue 1988). The statute provides that in actions for dissolution,

> the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorneys' fees.

We find that the district court for Seward County was correct in dismissing the action. The plaintiffs urge a construction of the property settlement agreement and subsequent modification which is not apparent from such documents. It would be improper in this case for the district court for Seward County to determine the rights of the parties under a dissolution decree and a modification order issued in Lancaster County. We do not discuss the plaintiffs' remaining assignments of error. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, *ante* p. 351, 500 N.W.2d 520 (1993); *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

AFFIRMED.

SHIRLEY A. PURDY AND ANITA PEARSON, APPELLEES, V. CITY OF YORK, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

500 N.W.2d 841

Filed June 11, 1993. No. S-91-059.

1. **Special Assessments: Proof: Appeal and Error.** In an appeal from a levy of special assessments, the party contesting the assessment has the burden of showing invalidity.
2. **Special Assessments: Appeal and Error.** In all appeals from special assessments, an appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof.

3. **Property: Improvements: Notice.** There is no constitutional requirement that property owners be given notice of the creation of an improvement district, although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement.
4. **Special Assessments: Property: Improvements.** It is a question of fact whether a property which has been specially assessed has benefited or will benefit from an improvement project.
5. **Public Officers and Employees: Appeal and Error.** Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant or operate to defeat the appeal.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded with directions.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

John R. Brogan for appellees.

Richard J. Pedersen and Carol C. Knoepfler, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amicus curiae League of Nebraska Municipalities.

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

LANPHIER, J.

The defendant, the City of York, Nebraska (City), appeals from a judgment of the district court for York County vacating and setting aside a special assessment levied against the property of the plaintiffs, Shirley A. Purdy and Anita Pearson, for the construction of water extension district No. 88-2. The district court found that the ordinance creating water extension district No. 88-2 was null and void because the City failed to comply with the notice provisions of Neb. Rev. Stat. § 16-667.01 (Reissue 1991). We reverse, and remand with directions.

BACKGROUND

The City created water extension district No. 88-2 by ordinance No. 1561 on November 12, 1987. After the adoption of the ordinance, it was published in the York News-Times on November 19, 1987. The City did not mail a copy of the ordinance to the property owners included within district No.

88-2, nor was any other notice of the creation of the district provided.

On June 29, 1989, after the construction required to build district No. 88-2 had been completed, the mayor and city council sat as a board of equalization to levy special assessments against each of the properties included in the district. Notice of this meeting was sent to all affected property owners, including the appellees, by certified mail. The appellees appeared by counsel at this meeting, where their property was assessed $2,476.85. Thereafter, the appellees and some 36 other parties filed a notice of appeal and a cost bond with the city clerk. A petition was then filed with the district court, praying that the ordinance creating district No. 88-2 and the assessments resulting therefrom be declared void.

Trial was held in the district court for York County on October 25, 1990, and on January 8, 1991, the district court found that the failure of the City to mail notice of ordinance No. 1561 to the property owners affected by district No. 88-2, as required by § 16-667.01, rendered the creation of the district null and void. The special assessments resulting from the district were therefore vacated and set aside.

ASSIGNMENTS OF ERROR

The City assigns four errors, contending that the district court erred in (1) exercising jurisdiction over this appeal, as it lacked subject matter jurisdiction; (2) ruling that § 16-667.01 applies to water districts created under Neb. Rev. Stat. § 19-2401 et seq. (Reissue 1991); (3) determining that the creation of district No. 88-2 was null and void; and (4) failing to determine that the appellees' property was now or in the future would be benefited by the water district.

STANDARD OF REVIEW

In an appeal from the levy of special assessments, the party contesting the assessment has the burden of showing invalidity. *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). In all appeals of such actions, an appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to

the conclusion reached by the district court or the fact that there may be some evidence in support thereof. See, *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Garden Dev. Co. v. City of Hastings*, 231 Neb. 477, 436 N.W.2d 832 (1989); § 19-2422; Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992).

NOTICE NOT REQUIRED

The principal issue in this case is whether the City was required to give notice to the property owners in the district at the time ordinance No. 1561 creating district No. 88-2 was enacted. The appellees argue that pursuant to § 16-667.01, notice of ordinance No. 1561 and a copy of § 16-667.01 should have been mailed to them within 20 calendar days of the ordinance's adoption. Section 16-667.01 provides in part: "Upon formation by city ordinance of . . . water service districts *as described by section 16-667*, the city shall mail copies of such city ordinance and this section to the owners of the record title of any property . . . within such district within twenty calendar days of the passage of the ordinance." (Emphasis supplied). The City contends on appeal that because the water district at issue was created under § 19-2401 et seq., notice to the affected property owners under § 16-667.01 was not required. We agree.

This court has recognized three separate avenues by which water districts may be created. See *First Assembly of God Church v. City of Scottsbluff*, 203 Neb. 452, 279 N.W.2d 126 (1979). First, they may be created by cities of the first class under Neb. Rev. Stat. §§ 16-667 (Reissue 1991) and 16-667.01. When a district is created under § 16-667, notice must be given to affected property owners within 20 days of the passage of the ordinance. The formation of the district may thereafter be stopped by petition of a majority of the abutting property owners. See § 16-667.01. Second, water districts may be created under Neb. Rev. Stat. §§ 18-401 to 18-411 (Reissue 1991), which authorize cities of all classes to create water main districts and cause extensions or enlargements of water mains to be made. Notice of the district must then be published, and after such publication, affected property owners have 30 days to file

a written protest. An ordinance creating a district under § 18-401 et seq. may be repealed by a filing of a protest by a majority of the abutting property owners. See § 18-404. Finally, §§ 19-2401 to 19-2407 authorize cities of the first or second class or villages to extend water service by creating water extension districts. Water districts under § 19-2401 et seq. may be created only by petition of the owners of two-thirds of the abutting property or by a positive three-fourths vote of the mayor and city council. No notice of the creation of the district is required. "We think the proper construction of these statutes is that they provide alternative methods for a city of the first class to construct and finance improvements to the water system." *City of Scottsbluff*, 203 Neb. at 456, 279 N.W.2d at 129.

Accordingly, while the City could have established district No. 88-2 under § 16-667 or § 18-401 et seq., where notice would have been required, it chose instead to proceed under § 19-2401 et seq., where the creation of a water district can be accomplished by the adoption of an ordinance by a three-fourths vote of the mayor and city council. The statutory scheme of § 19-2401 et seq. provides in part: "Whenever the mayor and council of any city of the first or second class . . . shall deem it necessary and advisable to extend municipal water service . . . to territory beyond the existing systems, such municipal officials may, by ordinance, create a . . . water extension [district] . . . ." § 19-2402.

> Unless the owners of lots and lands . . . within said extension district, representing not less than two-thirds of the front footage . . . which will become subject to an assessment for the cost of the improvement, shall petition the municipality to lay a . . . water extension main . . . and assess the cost thereof to the abutting lands and lots, such improvement shall not be made until not less than three-fourths of all of the members of the mayor and council . . . by vote, assent to the making of the same . . . .

§ 19-2403.

Ordinance No. 1561, which created district No. 88-2, was adopted by a unanimous vote of the council on November 12, 1987, surpassing the three-fourths requirement of § 19-2403.

After district No. 88-2 was completed, notice of the proposed assessments against the property owners within the district was given by certified mail to all affected property owners. At a meeting on June 29, 1989, the council and mayor, sitting as a board of equalization, met and assessed the properties found to be benefited within the district. The appellees appeared by counsel and participated in the hearing. These actions show substantial compliance with § 19-2401 et seq., as asserted by the City.

A municipality creating a district for water improvement does not have to comply with the requirements of all of the contingent statutes on the subject. As noted above, §§ 16-667, 18-401, and 19-2402 are quite clearly independent, distinct, and complementary statutes. There is nothing in the language of any of these which makes it rely upon the others. The sections are all mutually exclusive, and there is no requirement that a city comply with *all* of them in order to create a water extension district. Compliance with one, as here, is sufficient. Accordingly, we reverse the district court's holding that the City was required to comply with the notice requirements of § 16-667.01 when it created district No. 88-2.

The appellees contend that the City did not provide them with notice of the creation of the district because it "wanted to conceal the creation of the district from the property owners in the district, and thereby avoid a remonstrance." Brief for appellees at 11. In response, we restate the rule set forth in *First Assembly of God Church v. City of Scottsbluff*, 203 Neb. 452, 455, 279 N.W.2d 126, 128 (1979), which provides that "[t]here is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement."

APPELLEES' PROPERTY BENEFITED

The City also assigned as error the district court's failure to determine that the appellees' property was now or in the future would be benefited by district No. 88-2. In their petition, appellees contended that "[t]he assessment against [appellees'] real estate substantially exceeds the amount of any special

benefits accruing to [appellees'] property." This court addressed a similar contention in *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 375, 440 N.W.2d 485, 487 (1989), where we held that "[w]here it is alleged and proven that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void."

Several witnesses, including York's city public works director, the fire chief of the City of York, a professional engineer, and a licensed appraiser testified the appellees received present and likely future special benefits from district No. 88-2. They testified as to numerous benefits which district No. 88-2 would bring to appellees' property, including enhanced fire protection, lower insurance rates, enhanced water quality, economical water service, and enhanced property values. Testimony showed the assessment of $13.50 per frontage foot was more than reasonable when compared with the actual cost of the district.

It is a question of fact whether or not a property which has been specially assessed has benefited or will benefit from an improvement project. See *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977). In the instant case, we find appellees' property will receive special benefits from the improvement project at issue. Accordingly, as appellees failed to prove otherwise, we find their argument to declare the assessment void on this basis to be without merit.

CONCLUSION

As our finding that the City was without a duty to provide notice of the creation of district No. 88-2 is dispositive of the City's additional assignments of error, we do not reach them here. A question has been raised regarding whether a transcript of proceedings was filed in the requisite time so as to perfect the appeal. The transcript is undated, and the clerk of the district court did not stamp the date it was filed. We note in passing that while § 19-2425 undoubtedly requires that an appellant file both his petition on appeal and a transcript of the proceedings within 30 days from the levy of a special assessment, it is also well established that where a duty is placed upon a public

officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant or operate to defeat the appeal. See *Harte v. Gallagher*, 186 Neb. 141, 181 N.W.2d 251 (1970).

The judgment of the district court, which vacated and set aside the special assessment against the property of appellees, is reversed and the cause remanded with directions that the assessment levied by the City be reinstated.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., not participating.

HELEN SCHWINDT, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT H. SCHWINDT, DECEASED, APPELLANT, ROYAL INSURANCE COMPANY OF AMERICA AND WESTERN SUGAR COMPANY, APPELLEES, V. DYNAMIC AIR, INC., A CORPORATION, ET AL., APPELLEES.

501 N.W.2d 297

Filed June 11, 1993. No. S-91-259.

1. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Contracts: Juries: Courts.** When the terms of a contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
5. **Contracts: Summary Judgment.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.

6. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for further proceedings.

Robert P. Chaloupka and Rhonda R. Flower, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

Reed A. Grandgenett, of Gaines, Mullen, Pansing & Hogan, for Tate and Lyle appellees.

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

FAHRNBRUCH, J.

In this appeal, we hold that the trial court erred in granting a summary judgment declaring that none of the defendant-appellees served in this litigation are responsible for the death of Albert H. Schwindt, an employee of Western Sugar Company.

In her district court petition, Helen Schwindt, as personal representative of the estate of Albert Schwindt, claimed that the decedent died as a result of a work-related accident while he was employed by Western. She further claimed that the defendant-appellees were liable by virtue of negligence on the part of Leslie Cole, an employee of at least one of the defendant-appellees'. Throughout this litigation, the defendant-appellees have maintained they had no responsibility for the accident because Cole was on temporary loan to Western.

Since there is a question of fact as to at least one of the defendant-appellees' responsibility for negligence in regard to Albert Schwindt's death, the summary judgment entered by the district court for Scotts Bluff County is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

At all times relevant, Tate and Lyle, PLC, was a British corporation which had a 75-percent ownership interest in Western and had a number of subsidiaries and operating

divisions worldwide. While constructing a multimillion-dollar sugar storage facility at its plant site in Bayard, Nebraska, Western required the services of a project manager. In February 1986, Western and one of the defendant-appellees, Tate and Lyle Agribusiness, entered into an agreement of "secondment" in regard to Cole, one of their agribusiness employees stationed in South Africa. "Secondment" is defined as "the detachment of a person . . . from his regular organization for temporary assignment elsewhere." Webster's Third New International Dictionary, Unabridged 2051 (1981).

The secondment agreement was prepared by Peter Rumbell, Cole's immediate supervisor and the managing director of Tate and Lyle Engineering, an operating division of Tate and Lyle Agribusiness. The agreement provided in part:

> 3. [Cole's] services would be provided to Western Sugars essentially at cost (i.e. to recover Les Cole's salary and other directly related salary expenses) . . . .
>
> . . . .
>
> 6. During the period of the secondment Mr Cole would take his instructions from and act on your behalf. *However, there is a certain degree of corporate responsibility and it is therefore planned that* [*Rumbell*] *will visit Western Sugars to review the work being done by Mr Cole, probably within the first two to three months of the secondment.*
>
> . . . .
>
> 8. During our telephone conversation, we suggested that Western Sugars may wish to consider an incentive scheme whereby any saving achieved on the estimated project capital cost of approx US $3 million should be split 85% Western Sugars 15% TLE. This would provide a very real incentive to ensure that project management / cost control was effectively and efficiently implemented. In the final analysis, we would leave this aspect to your judgement, which would presumably reflect your satisfaction with the way in which the project had been managed. Perhaps this is not an unreasonable suggestion when one considers the fact that Western Sugars are obtaining project management services at a subeconomic

rate equivalent to perhaps a quarter of the commercial cost.

9. If it should become necessary for TLE to withdraw the services of Mr Cole due to health, compassionate or any other reason prior to the completion of the project, then we would endeavour to replace him with a person of similar experience and within the same cost framework.

(Emphasis supplied.)

Gary Maggi, Western's area engineer, confirmed Western's agreement with all the conditions set forth in the secondment agreement except for item No. 8, which item the parties agreed to eliminate from the secondment agreement. Cole was employed as a project manager at the Bayard plant site from February through December 1986.

In her second amended petition, Schwindt alleged that the decedent died December 31, 1987, in an accident arising out of and in the course of his employment with Western. The second amended petition states that sometime prior to the decedent's death, Dynamic Air, Inc., designed, manufactured, and sold to Western a system for transporting and loading sugar through insertion of a tube into trucks or railroad cars. A latching mechanism was required to allow safe delivery of the sugar to a truck or railroad car because the tube delivered the product under such high air pressure that the components could become detached from the conveyances being loaded. The second amended petition alleges that while the decedent was loading sugar into a truck, the tube tore free from the latching mechanism, thereby causing the plate affixed to the end of the tube to swing violently through the air. The plate struck the decedent, causing him to fall off the truck and sustain fatal injuries.

The second amended petition also alleged that the Tate group provided the project manager, Cole, to oversee the construction of the project, including the loading system, and that the group was negligent

a) [i]n failing to provide a project engineer who was reasonably competent to oversee the construction of the project and the installation of "the system" in such a way that it would be reasonably safe for the foreseeable users

[and]

b) [i]n failing to oversee the project and conduct the duties of a project engineer in such a way as to cause the project and "the system" to be installed in such a way as to be reasonably safe for the foreseeable user.

The second amended petition alleged that the Royal Insurance Company of America was the workers' compensation carrier for Western. Royal and Western were named as party plaintiffs in this action because of their workers' compensation subrogation interest. As Western's workers' compensation carrier, Royal paid compensation benefits on account of the decedent's death. The parties' briefs acknowledge that Dynamic Air was dismissed from this litigation after settling with the decedent's estate.

In its answer to the second amended petition, the Tate group denied any negligence on its part or on the part of any of its employees which proximately caused the death of Albert Schwindt. The Tate group also claimed, in part, that (1) Cole was employed by Western and was under the exclusive direction and control of Western in the performance of his duties as project manager; (2) Cole did not exercise any authority or give any directions on behalf of any member of the group in regard to the design, construction, or operation of the sugar storage project; and (3) no member of the group assumed or undertook any obligation to oversee the construction or operation of the sugar storage project.

At the hearing on the Tate group's motion for summary judgment, the group offered into evidence the affidavits of Cole and Rumbell and a portion of the depositions of Maggi and Douglas Lapins, president of Western. Schwindt offered into evidence the remaining portions of the depositions of Maggi and Lapins, an affidavit in opposition to the motion for summary judgment, and portions of Cole's personnel file with the Tate group. These exhibits were all received into evidence. Schwindt was given until January 7, 1991, to submit other depositions. These other depositions are marked with the reporter's initials and dated January 9. A supplemental transcript reflects that they were received into evidence on January 9 and considered by the trial judge.

On January 15, 1991, the trial judge entered a summary judgment in favor of the Tate group. The court stated that "other entities unknown, John Doe I through X, and Les Cole are not summoned; so this order has no effect on them since they are not parties to the case." In finding that Cole was under the supervision and control of Western and that he was performing services on behalf of Western, the court relied on the terms of the secondment agreement. The court stated that "since paragraph 8 never became part of the agreement, Tate & Lyle Engineering had no interest in the performance of Mr. Cole; and the planned visit by Mr. Rumbell never took place."

In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Professional Firefighters of Omaha v. City of Omaha, ante* p. 166, 498 N.W.2d 325 (1993). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *First United Bank v. First Am. Title Ins. Co.*, 242 Neb. 640, 496 N.W.2d 474 (1993).

In this court, Schwindt assigned as error, inter alia, that the trial court erred in granting summary judgment because there was a question of fact regarding the Tate group's control of Cole as evidenced by the agreement. In an affidavit admitted into evidence at the hearing on the Tate group's motion for summary judgment, Rumbell stated that the term "corporate responsibility" contained in item No. 6 of the Tate-Western agreement means only that the Tate group would be responsible for replacing Cole with a suitably qualified and experienced substitute if Cole proved unsuitable in the opinion of Western or if Cole was not prepared to continue working for Western. Rumbell denied visiting the site of the sugar storage project in Bayard at any time.

Lapins, Western's president, testified in his deposition that in his view, Rumbell's use of the term "corporate responsibility"

means that "he [Rumbell] felt he had some responsibility in terms of supervising the project if we did—you know, if they did a lousy job of supervising the project." Asked if Tate would be sued, Lapins replied, "We'd be after them, yeah."

The term "corporate responsibility" is not defined in the agreement. Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993). The agreement states that Cole will take instructions from Western, but that because "there is a certain degree of corporate responsibility," Rumbell would visit Western to review Cole's work. In his deposition, Rumbell stated that any review of Cole's work would have been to ascertain that both Western and Cole were happy with the arrangement. Rumbell testified that his responsibility would have been to replace Cole with someone better suited for the job had either party been dissatisfied. Although the parties subsequently agreed to eliminate item No. 8, which provided for the Tate group to receive a portion of any savings achieved on the project capital cost, item No. 6 was not eliminated.

Taken as a whole, the agreement is ambiguous regarding the amount of control, if any, that the Tate group retained over Cole. When the terms of a contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances. See *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. *Id.* A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989); *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

Viewing the evidence in the light most favorable to Schwindt, we find that (1) the failure to define "corporate responsibility" in item No. 6 of the secondment agreement and (2) varying

reasonable interpretations of the phrase "corporate responsibility" in the secondment agreement present a genuine issue as to material fact regarding the degree of control the Tate group or a member thereof retained over Cole. The trial court erred in granting summary judgment, and its judgment is hereby reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

In view of our holding, Schwindt's remaining assignments of error need not be discussed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., participating on briefs.

THOMAS B. SWEDLUND AND CAROLYN L. SWEDLUND ET AL., APPELLANTS, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION OF THE FIRST CLASS, APPELLEE.

501 N.W.2d 302

Filed June 11, 1993. No. S-91-287.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
3. **Equity: Appeal and Error.** On appeal from a district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Municipal Corporations: Annexation: Statutes.** A city of the first class has the statutory authority to extend its city limits, subject to certain limitations.
5. _____: _____: _____. Municipal corporations must exercise their power to annex territory in strict accord with the statute conferring such power.
6. **Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" have been used synonymously and interchangeably by the Supreme Court.
7. **Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.
8. **Municipal Corporations: Annexation: Boundaries: Words and Phrases.** Sub-

stantial adjacency exists when a substantial part of the boundary of an annexation is adjacent to a segment of the boundary of the city or village. Adjacent means contiguous or coexistent with.

9. **Annexation: Proof.** The use of land for agricultural purposes is not dispositive of the character of the land.
10. **Annexation: Words and Phrases.** The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character.
11. **Ordinances: Proof.** The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellants.

Michael E. Sullivan, Hastings City Attorney, for appellee.

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

FAHRNBRUCH, J.

Eleven landowners appeal a district court for Adams County order finding that an ordinance annexing their property to the City of Hastings (City) is valid and enforceable.

We affirm the order of the district court.

FACTS

On November 14, 1988, the Hastings City Council passed ordinance No. 3088, which annexed an area west of the City. The ordinance contains a single metes and bounds description of the annexed property. The annexed area includes Highland Drive residences, an area of 16 houses where all the appellants, except Blake and Dorothy Mankin, own property; Imperial Village addition, a preliminarily platted development owned by Johnson Imperial Home Company; two small, triangle-shaped properties owned by the Mankins; and the Hastings Regional Center. Johnson Imperial Home Company and the Hastings Regional Center are not parties to this appeal, and no issue has been raised as to the annexation of their properties. We will consider their interests only insofar as necessary to decide the issues that are before us.

In adopting ordinance No. 3088, the Hastings City Council made specific findings that the annexed area is urban and suburban in character and contiguous or adjacent to the City's corporate limits. The council also found that police, fire, and snow removal benefits would be immediately available to the annexed area and that other benefits either were, or would be, available. The council also found that within the annexed area, the users of the city utility services would have the benefit of the lower city utility rates.

In their suit against the City, the landowners requested that the ordinance be declared void and that the City be temporarily and permanently enjoined from enforcing the ordinance. The landowners alleged that the ordinance is invalid because (1) the annexed property is not adjacent and contiguous to the City; (2) the land is rural, used for agricultural purposes, and is not urban or suburban in character; and (3) the City annexed the land solely to increase tax revenue. The landowners also alleged that the ordinance violates article I, §§ 3 and 21, of the Nebraska Constitution and the 5th and 14th Amendments to the U.S. Constitution.

Based upon the evidence, the trial court's personal inspection of the annexed area, and the written arguments of counsel, the district court found the annexed area to be contiguous and adjacent to the City and to be urban and suburban in character. The district court dismissed the landowners' petition. The landowners' motion for a new trial was overruled. They timely appealed to this court.

ASSIGNMENT OF ERROR

The landowners' assignments of error combine to allege that the district court erred in failing to find the annexation ordinance invalid and in failing to enjoin its enforcement, because (1) the annexed area is not contiguous and adjacent to the City, (2) the annexed area is not urban and suburban in character, (3) the annexed area is comprised of and contains agricultural lands that are rural in character and used for agricultural purposes, and (4) the City annexed the property for the primary purpose of increasing tax revenues.

The district court's failure to award attorney fees and costs to

the plaintiffs is also assigned as error. This assignment of error is not discussed in the landowners' brief and, therefore, will not be considered. To be considered by an appellate court, an error must be assigned *and discussed* in the brief of one claiming that prejudicial error has occurred. *Regency Homes Assn. v. Egermayer, ante* p. 286, 498 N.W.2d 783 (1993); *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992); *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991).

SCOPE OF REVIEW

An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. See, *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968); *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). On appeal from a district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992).

CONTIGUOUS AND ADJACENT REQUIREMENT

The City of Hastings is a city of the first class. Neb. Rev. Stat. § 16-101 (Reissue 1991). As such, it has the statutory authority to extend its city limits, subject to certain limitations. Neb. Rev. Stat. § 16-117 (Reissue 1987) provides:

> The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance, except as provided in sections 13-1111 to 13-1118, and amendments thereto, at any time, include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character.

Municipal corporations must exercise their power to annex

territory in strict accord with the statute conferring such power. See, *Johnson v. City of Hastings, supra*; *Doolittle v. County of Lincoln*, 191 Neb. 159, 214 N.W.2d 248 (1974). Thus, we begin our analysis by determining whether the annexation by the City pursuant to ordinance No. 3088 is in accord with the requirement of § 16-117 that annexed land must be contiguous or adjacent to the existing corporate limits of the city.

The landowners argue that their annexed property is not "contiguous or adjacent" to the then-existing corporate limits of the City. They claim that the City annexed a "narrow strip" of agricultural land, the Imperial Village property, in order to reach the landowners' residential property which is located approximately one-half mile west of the previous city limits. If the Imperial Village property, which lies between the former city limits and the landowners' property, is agricultural land which is rural in character, or if it is not contiguous or adjacent to the City, ordinance No. 3088 is invalid.

This court recently discussed the "contiguous and adjacent" requirement in annexation cases at length in *Johnson v. City of Hastings, supra*. The terms "contiguous" and "adjacent" have been used synonymously and interchangeably by the court. *Id.* See, also, *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954). This court has held that "contiguity means that the two connecting boundaries should be *substantially* adjacent." *Johnson*, 241 Neb. at 295, 488 N.W.2d at 23. "Substantial adjacency" exists when " ' "*a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village*. Adjacent . . . means contiguous **or** coexistent with." ' " *Johnson*, 241 Neb. at 296, 488 N.W.2d at 24, quoting *Tichy, supra*.

An examination of the several maps and plats admitted into evidence shows that the annexed Imperial Village property is approximately six blocks wide, not a narrow strip of land as the appellants contend. The entire eastern boundary of the annexed Imperial Village property is contiguous with the entire western boundary of a residential area in west Hastings, and in fact a preliminary plat as an addition to that residential area is on file. This meets this court's definition of "substantial adjacency." The Imperial Village property is adjacent to the

existing boundary of the City as required by § 16-117.

Turning to the remaining properties annexed by ordinance No. 3088, we note that the maps in evidence show the Highland Drive housing area and one Mankin property to be contiguous with the northwest corner of the Imperial Village property. The Hastings Regional Center property is contiguous with the southwest corner of the Imperial Village property. The second Mankin property is a triangular tract of land across 12th Street, north of the existing residential area referred to previously. The south side of the triangle borders 12th Street, which was also annexed by ordinance No. 3088 and which is adjacent to the existing boundary of the City.

All the property annexed by ordinance No. 3088 meets the contiguous and adjacent requirement of § 16-117.

URBAN OR RURAL CHARACTER OF LAND

The appellants also contend that ordinance No. 3088 is invalid because much of the annexed property is not urban or suburban in character, but, rather, is agricultural land which is rural in character. The areas which the appellants allege to be agricultural are the Imperial Village tract and the two Mankin properties, all of which were being farmed at the time of trial.

The use of land for agricultural purposes is not dispositive of the character of the land for the purposes of § 16-117. This court has repeatedly held that " '[t]he use of land for agricultural purposes does not necessarily mean it is rural in character. *It is the nature of its location as well as its use which determines whether it is rural or urban in character.*' " *Omaha Country Club v. City of Omaha*, 214 Neb. 3, 6, 332 N.W.2d 206, 208 (1983), quoting *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968). Accord *Voss v. City of Grand Island*, 186 Neb. 232, 182 N.W.2d 427 (1970).

The evidence reflects that the Hastings airport is located immediately north of the Imperial Village property and immediately east of the Highland Drive housing area. The Highland Drive homes are within three-quarters of a mile of the Hastings airport terminal, and the two Mankin properties are located generally at the south end of the airport property. Orville Stahr, a planning consultant for the City, testified that

the airport is urban in character because its only reason for existence is its proximity to the City.

Stahr testified that the Highland Drive area is "very similar to other suburban areas in the City" and that in his opinion the area would be classified as suburban residential. This classification is supported by the evidence. One appellant who lives in the annexed Highland Drive area testified that he bought his home 10½ years previously and that his home was approximately one-half mile, or six city blocks, from the city limits both at the time he purchased the house and prior to annexation. The Highland Drive homes are within a mile, or 12 city blocks, of the Hastings Imperial Mall, which is located inside the City. The mall provides numerous services, including a movie theater, a restaurant, a full-scale grocery store, and a number of other shops. These are characteristics of an urban area, not a rural area.

Stahr also classified the Imperial Village property as suburban in character. There is a master plan for the area, and development of the area has occurred in stages. A preliminary plat of the development, showing individual residential lots, streets, and storm sewers, was filed in 1979. Particularly noteworthy is the fact that the developer has created a lake in the area, excavating for the lake in order to fill surrounding ground and make it more favorable for residential development. The property is within six blocks of the Hastings Imperial Mall and abuts an established residential development.

Stahr classified the two Mankin properties as being either urban or suburban in character. He based this opinion on the fact that both properties were quite small and unsuitable for extensive agricultural use and on their proximity to the Imperial Village property, which is being planned for residential development. Finally, Stahr testified that the Hastings Regional Center is an urban facility offering urban types of services.

We find, upon a de novo review of the record, that the close proximity of the annexed property to the airport and the shopping mall, the suburban nature of the Highland Drive area, and the development of Imperial Village, which has already commenced, are all indicators of the urban and

suburban nature of the annexed property. The district court correctly found that the annexed property is urban and suburban in character.

PURPOSE OF ANNEXATION

Finally, the landowners claim that ordinance No. 3088 is invalid because the primary purpose of the annexation was to increase tax revenues for the City. The landowners argue that their conclusion is reasonable because the City failed to articulate any valid reason for the annexation, the City has provided no significant services to property owners in the area since annexation, and the landowners' property taxes have risen since the annexation.

The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992); *Bierschenk v. City of Omaha*, 178 Neb. 715, 135 N.W.2d 12 (1965). Therefore, the burden is not upon the City to prove that it *did not* annex the landowners' property for the purpose of increasing tax revenues. Rather, the burden is upon the landowners to prove that the City annexed the property for an impermissible purpose.

The landowners offered no proof that the City annexed their property for the purpose of increasing tax revenues. A Highland Drive homeowner testified that residents of that area were not receiving any city services such as water and sewer, that city police patrol infrequently, that the City has not performed any street repair in the area, and that snow removal is still being done by the county.

However, the City disputed these assertions. The City's manager of utilities testified that water and sewer services were available to the Imperial Village area and that Highland Drive residents would be able to obtain city water and sewer services upon application of the residents and creation of a utilities district. He further testified that electrical service did not change upon annexation, but that residents of the annexed area were automatically switched to a residential urban rate, which is about 15 percent less than the rural rate previously paid.

The City's police chief testified that police patrolled the

Highland Drive area about twice a day, which he considered to be adequate.

The City's engineer testified that to his knowledge, no street repairs had been requested in the annexed area, although some maintenance had been done. In addition, the engineer's department had obtained a reduction of the speed limit on Highland Drive after complaints of excessive speed in the area. Speed limit signs had been installed.

The City's planning consultant, Stahr, who did the annexation analysis, testified that he took revenue issues into consideration, but only from the standpoint of fiscal responsibility. He testified that it would be fiscally irresponsible of the City to annex property for which it could not provide services. Stahr specifically denied that he recommended annexation so that the City could derive tax revenues from the Highland Drive property owners.

Although there exist some factual disputes between the landowners and the City as to the level of services provided to the landowners since annexation, we give weight to the fact that the district court saw the witnesses and made a factual determination in favor of the City. Additionally, the fact that the landowners' taxes increased after annexation is insufficient to prove that the annexation was for the purpose of increasing tax revenues. Accordingly, we find that the landowners have failed in their burden to show that ordinance No. 3088 was enacted primarily or solely for the purpose of raising revenue for the City.

CONCLUSION

Since the landowners failed to prove that ordinance No. 3088 is invalid for any of the reasons they assigned, the district court's order dismissing the landowners' petition is affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

JEAN M. WULFF, ALSO KNOWN AS JEAN M. TIERNEY, APPELLEE, V. STEVEN J. WULFF, APPELLANT.

500 N.W.2d 845

Filed June 11, 1993. No. S-91-292.

1. **Appeal and Error.** An appellate court will not consider assignments of error which are not discussed in the brief.
2. **Divorce: Child Custody: Child Support: Courts: Jurisdiction.** Full and complete general jurisdiction over child custody and support is vested in the district court in which a petition for dissolution is properly filed.
3. **Modification of Decree: Minors.** A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed.
4. **Modification of Decree: Child Support: Proof.** Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification.
5. **Modification of Decree: Child Support: Res Judicata.** In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata.
6. **Child Support: Emancipation: Courts: Jurisdiction.** Where issues of child support and emancipation are integrated, a district court must have the authority to adjudicate both.
7. **Modification of Decree: Child Support: Minors: Emancipation.** A child's status as an emancipated or unemancipated minor is necessarily at issue where the district court finds a material change in circumstances which would justify modification of child support. Thus, in the context of an action for modification of child support, the determination of a child's status as an emancipated minor is not res judicata.
8. **Emancipation.** Whether there has been an emancipation is a question of fact, but what is emancipation is a question of law.
9. **Minors: Emancipation.** Emancipation is not necessarily a continuing status; even if once established, it may be terminated at any time during the child's minority.
10. _____: _____. Giving birth may be one factor to be considered in the determination of whether a minor has achieved a new status or position inconsistent with parental control, but should not alone be dispositive.
11. **Modification of Decree: Child Support.** The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself.
12. _____: _____. When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments.
13. _____: _____. Depending on the equities involved, modification of a child

support order retroactive to the filing date of the application for modification is permissible.

14. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal.

15. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

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

S. Caporale for appellant.

Jean M. Wulff, pro se.

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

HASTINGS, C.J.

The respondent, Steven J. Wulff, has appealed the March 5, 1991, order of the district court entered upon motion of the petitioner, Jean M. Wulff, also known as Jean M. Tierney, which order modified a dissolution decree as previously modified in earlier proceedings.

Although the original decree is not contained in the record, according to an affidavit filed by the respondent, a decree of dissolution was entered by the district court on December 30, 1988. That decree provided that the care and custody of the couple's two minor children be placed with the petitioner and ordered the respondent to pay child support.

On March 5, 1990, the respondent filed a motion to terminate child support. He asserted that since the entry of the decree the parties' elder daughter had become emancipated and no longer lived with the petitioner and that the younger daughter was currently residing with the respondent. It also appears in the record that the elder daughter had moved in with her boyfriend and later gave birth to a baby. A modification of decree was entered by the district court on April 11, which found that custody of the parties' younger minor child should

be granted to the respondent and ordered the petitioner to pay child support of $250 per month for her benefit. It was further ordered that "the parties' oldest child, [name of child], has become emancipated by reason of her moving out of the home and living independently; that the child support obligation for that child shall cease as of April 1, 1990."

The petitioner filed an application to modify the decree on August 31, 1990, asserting that the elder child had moved back into the petitioner's home and that "it would be in the best interests of both minor children if neither party were to pay child support to the other as both parties currently have one child residing with them." A hearing was held on the application to modify on December 13. On March 5, 1991, the district court found that "as of the date of the Application for Modification, the [elder] minor child, [name of child], was not emancipated," and ordered the respondent to pay child support as of the first day of each month after the date of the application for modification, until and including December 1, 1990.

The petitioner adduced evidence that since her daughter had moved back into the petitioner's home, the petitioner had been providing her with board and room and was also helping her daughter with some of the expenses of her baby. The petitioner also agrees that she has not been paying child support to the respondent for the benefit of her younger daughter since she filed the current application for modification and is $1,000 in arrears because of failure to make the September, October, November, and December payments. The evidence discloses that the elder daughter would reach the age of majority, 19 years, on December 24, 1990, the year in which the present hearing was held.

The order of the district court from which this appeal is taken decreed that as of the date of application for modification which was filed on August 31, 1990, the parties' minor child, who had been found emancipated by order of the court on April 11, 1990, was not now emancipated.

The respondent's assignments of error may be consolidated into claims that the court erred (1) in finding that the order which had declared the child emancipated was not res judicata, (2) in failing to find that once a child has become emancipated

that status cannot be changed, (3) in failing to find that a minor's having a baby out of wedlock is a substantial act which emancipates that minor child, and (4) in modifying the decree as to child support retroactively to the date of filing the application rather than prospectively. We affirm.

The respondent also asserts that the district court erred in not sustaining his demurrer ore tenus at the commencement of trial, but does not discuss this assignment of error in his brief. This court will not consider assignments of error which are not discussed in the brief. *Yamada v. Gering Nat. Bank & Trust Co.*, 242 Neb. 834, 497 N.W.2d 1 (1993); *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

Regarding the claim of res judicata, full and complete general jurisdiction over child custody and support is vested in the district court in which a petition for dissolution is properly filed. See *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993). A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification. *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992); *Empfield v. Empfield*, 229 Neb. 83, 425 N.W.2d 334 (1988).

It is true that in the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata. *Shipley v. Shipley*, 175 Neb. 119, 120 N.W.2d 582 (1963).

While the respondent concedes that an order for custody or support is not res judicata where there has been a material change in circumstances, he contends that the district court erred in treating this case as a question of custody or support, rather than as a question of emancipation. He further asserts, in essence, that the district court lacked authority to find that the emancipation had been revoked or rescinded. However, under the above-cited authorities, it is clear that a district court has broad discretion in dealing with matters which affect the care and custody of a minor child. Where issues of child

support and emancipation are integrated, a district court must have the authority to adjudicate both. Cf. *Farmer v. Farmer*, 200 Neb. 308, 263 N.W.2d 664 (1978) (although no paternity action had been brought against the respondent within the time provided by statute, where issue of paternity touched upon minor child's support and future welfare, district court had jurisdiction in action for modification to determine whether respondent was the natural father of the child).

As noted in *Shipley*, an allowance of child support is deemed res judicata in the absence of new facts and circumstances which would justify the modification of the award. However, a child's status as an emancipated or unemancipated minor is necessarily at issue where the district court finds a material change in circumstances which would justify modification of child support. Thus, in the context of an action for modification of child support, the determination of a child's status as an emancipated minor is not res judicata.

In *Wadoz v. United Nat. Indemnity Co.*, 274 Wis. 383, 80 N.W.2d 262 (1957), the Supreme Court of Wisconsin discussed the question of whether a minor's emancipation had been rescinded in the context of a negligence action brought by the parents against a daughter who had left the parental home to enter a convent but had later returned, noting that

> [t]o emancipate means to free or release a child from the parental power, making the person released *sui juris*. . . . "Emancipation," as the term is used in the law of parent and child, means the freeing of the child for the period of its minority from the care, custody, control, and service of its parents. . . . Emancipation of a minor may be partial or complete, express or implied. . . . Complete emancipation gives to the minor his time and earnings and does away with the parent's right of custody and control. . . . The child may be emancipated for the balance of its minority or for a shorter period, and conditionally or unconditionally. . . . Emancipation occurs where the parent renounces all the legal duties and voluntarily surrenders all the legal rights of his position to the child or to others. In determining whether a child has been emancipated, the intention of the parent governs. . . .

> Whether a child has been emancipated must be determined largely on the peculiar facts and circumstances of each case, and therefore is ordinarily a question for the jury. . . . Whether there has been an emancipation is a question of fact, but what is emancipation is a question of law.

(Citations omitted.) *Id.* at 388-89, 80 N.W.2d at 265.

The Wisconsin court further noted that under the law of that state, there could be a mutual resumption of the filial relationship and a return to the status of an unemancipated minor. Although the plaintiffs' counsel in that case had cited authority to support the proposition that emancipation could not be revoked, the court found that in the cases cited by the plaintiffs, either the effort to rescind emancipation had been unilateral or the rights of the minors or third persons acquired during emancipation would have been prejudiced without their consent. The court concluded that "[n]o authorities are cited which indicate that mutual rescission of emancipation is forbidden." *Id.* at 392, 80 N.W.2d at 267.

In *Vaupel v. Bellach*, 261 Iowa 376, 154 N.W.2d 149 (1967), in which the plaintiff brought an action for contribution against a child following judgment against the plaintiff for personal injuries received by that child's mother while she was riding in an automobile driven by her child, the Supreme Court of Iowa similarly found that "[e]mancipation is not necessarily a continuing status, even if once established, it may be terminated at anytime during the child's minority." *Id.* at 380, 154 N.W.2d at 151.

We agree with that proposition. Thus, it was appropriate under the circumstances of this case for the district court to determine as a question of fact whether the child's emancipation had been rescinded as a result of the change in circumstances.

The respondent next contends that a minor child's giving birth and becoming a parent results in emancipation of the minor child. While Neb. Rev. Stat. § 43-2101 (Reissue 1988) provides that "[a]ll persons under nineteen years of age are declared to be minors, but in case any person marries under the age of nineteen years, his or her minority ends," there is no

provision which provides that a minor is irrevocably emancipated by the act of giving birth.

The respondent argues that *Nuckols v. Nuckols*, 12 Ohio App. 3d 94, 467 N.E.2d 259 (1983), is analogous to the instant case. In *Nuckols*, the court found that a parent's responsibility for medical expenses, pursuant to a child support order which had been modified after the effective date of a statute lowering the age of majority to 18, extended until the children reached the age of 21 or became emancipated. The court concluded that upon consideration of the facts and circumstances disclosed in the record, "the trial court properly determined that the parties' daughter, having attained the age of eighteen, became emancipated upon giving birth to her child." *Id.* at 96, 467 N.E.2d at 262. It is not evident from the opinion what other facts and circumstances in the record affected the determination that the daughter had become emancipated upon giving birth.

However, other jurisdictions have found that becoming a parent is not sufficient by itself to result in emancipation. See, e.g., *Griffin v. Griffin*, 384 Pa. Super. 188, 558 A.2d 75 (1989) (in state whose child support statutes do not limit child support to minor children, college student who has had child should not, for that reason alone, be treated differently for purposes of child support for educational expenses from college student who has not had a child); *Doerrfeld v. Konz*, 524 So. 2d 1115 (Fla. App. 1988) (minor child's giving birth and becoming parent was not on its own sufficient to result in emancipation); *In re Marriage of Clay*, 670 P.2d 31 (Colo. App. 1983) (daughter who was dependent upon mother for financial support, had not established own residence, and was not married to or receiving support from father of her child was not emancipated); *Hicks v. Fulton County Department of Family & Children Services*, 155 Ga. App. 1, 270 S.E.2d 254 (1980) (fact that minor abandoned her father's home and bore an illegitimate child did not establish that child had emancipated herself); *French v. French*, 599 S.W.2d 40 (Mo. App. 1980) (daughter's receipt of payments for aid to families with dependent children following birth of her child did not emancipate her).

In *French*, the court noted that emancipation

> may be accomplished by express or implied agreement and it is never presumed. . . . A child becomes emancipated when he marries . . . or when he enters the military . . . . Under those circumstances, the parent or parents are relieved of their duty to support their child because the child has entered into a new relationship, status, or position, which is inconsistent with control and support of the child by the parent.

(Citations omitted.) *Id.* at 41.

Thus, giving birth may be one factor to be considered in the determination of whether a minor has achieved a new status or position inconsistent with parental control, but should not alone be dispositive. The district court did not err in failing to find that a minor child becomes emancipated by giving birth to a child.

As his final assignment of error, the respondent asserts that the court erred in making the modified decree retroactive, rather than prospective.

The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments. *Maddux, supra.*

Upon occasion, depending on the equities involved, this court has approved modification of a child support order retroactive to the filing date of the application for modification. *Maddux, supra.*

Although the district court had found in its order of April 11, 1990, that the elder daughter had "become emancipated by reason of her moving out of her home and living independently," it is evident from the record that she was not self-supporting even at that time and that whatever support she had received from her boyfriend and his mother had since ceased. In its order of March 5, 1991, the district court found

upon consideration of the evidence that as of the date of application for modification, August 31, 1990, the daughter was not emancipated. The testimony adduced at the hearing is consistent with a finding of the child's continuing dependence on the support of her parents. Quoting Annot., 98 A.L.R.3d 334 (1980), this court noted in *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 96, 306 N.W.2d 575, 576 (1981), that

> "even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. . . ."

While the change in circumstances supports the conclusion that the child was not emancipated and that petitioner would be entitled to child support, as noted above, the general rule in Nebraska is to allow modification of a child support order prospectively from the time of the modification order itself. However, the district court's order of March 5, 1991, ordered the respondent to pay child support beginning with the first day of each month following the date of application for modification up to and including December 1, 1990. Although the district court did not cancel or reduce accrued payments due to the respondent from the petitioner, it did order any child support arrearage on the part of the petitioner to be credited to the child support obligation of the respondent.

Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991); *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

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. *Pendleton v. Pendleton*,

242 Neb. 675, 496 N.W.2d 499 (1993); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

The record reflects that the elder daughter was dependent on her parents for support as of the date of application for modification and that the petitioner was continuing to make payments for medical expenses both related to and unrelated to the birth of the daughter's child. As previously stated, the elder daughter attained the age of majority on December 24, 1990. Under these circumstances, the district court did not abuse its discretion in ordering child support payments retroactive to the filing date of the application for modification, until and including December 1, 1990.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES M. RADOSEVICH, RESPONDENT.

501 N.W.2d 308

Filed June 11, 1993. No. S-92-722.

1. **Disciplinary Proceedings: Due Process.** An attorney is entitled to due process of law in a disciplinary proceeding.
2. **Disciplinary Proceedings: States: Proof.** The respondent in a Nebraska reciprocal discipline action, when challenging the process by which he was sanctioned in another jurisdiction, bears the burden of demonstrating the infirmity of that process.
3. **Disciplinary Proceedings: Due Process: States: Proof.** When the respondent in a reciprocal discipline action in Nebraska challenges, on due process grounds, the process by which he was disciplined in the other jurisdiction, the following guidelines govern the hearing before the special master: (1) Respondent's claims that he was denied due process in the course of the other proceeding shall be evaluated solely on the basis of the record of that proceeding; (2) respondent shall bear the burden of proof that he was not afforded due process of law in the other proceeding; (3) if respondent fails to satisfy his burden of proof, a certified copy of the findings of fact of the other proceeding shall constitute conclusive evidence that respondent is guilty of the misconduct charged; (4) the referee shall evaluate respondent's fitness to practice law in Nebraska and what, if any,

discipline would be appropriate; and (5) respondent bears the burden of showing that the discipline to be imposed should be less severe than that imposed in the other state.

4. **Disciplinary Proceedings: States.** Despite a finding that a Nebraska attorney is guilty of the misconduct which led to sanctions in another state, in an action for reciprocal discipline, this court is entitled to make an independent assessment of the facts, an independent determination of his fitness to practice law in Nebraska, and an independent determination of the appropriate measure of discipline in this state.
5. **Disciplinary Proceedings.** Misappropriation of client funds is conduct sufficient to warrant a sanction of disbarment.

Original action. Judgment of disbarment.

Dennis G. Carlson, Counsel for Discipline, for relator.

Charles M. Radosevich, pro se.

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

PER CURIAM.

This is an original action for reciprocal discipline filed against Charles M. Radosevich, a Nebraska attorney, disbarred in Colorado. After conducting a hearing, the special master found Radosevich should be disbarred in Nebraska. Radosevich was then ordered to show cause why the findings of the master should not be adopted. We find Radosevich has not done so; we thus order him disbarred.

Radosevich, an attorney licensed in both Colorado and Nebraska, was disbarred by the Colorado Supreme Court on October 30, 1989. *People v. Radosevich*, 783 P.2d 841 (Colo. 1989). The court based its decision on the recommendation of a disciplinary hearing panel, which found Radosevich had improperly withdrawn approximately $265,000 in client funds for personal use.

A motion for reciprocal discipline was then filed in Nebraska, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1992). Radosevich answered, alleging the Colorado attorney disciplinary scheme was unconstitutional. This court then ordered a hearing to be held on the merits of Radosevich's challenges, as contemplated by *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990).

At the proceeding before the special master, Radosevich raised two due process challenges to Colorado's disciplinary scheme. He first argued that the Colorado disciplinary hearing board was not comprised as required by that state's disciplinary rules. Radosevich next contended that the Colorado disciplinary scheme violated his right to have the final decisionmaker in the disciplinary action actually hear the evidence presented.

After the hearing, the special master rejected both challenges and recommended that Radosevich be disbarred. Radosevich was then ordered to show cause why the special master's findings should not be adopted and why he should not be so disciplined. In his brief to this court, Radosevich's sole assignment of error is that the special master erred in finding that he was not deprived of due process by the Colorado disciplinary proceeding.

Although a judicial determination of attorney misconduct in another state is generally given conclusive effect, this court is entitled, in a reciprocal discipline action, to independently assess the facts and independently determine the appropriate disciplinary action to be taken against the attorney in this state. *Dineen, supra.* Furthermore, while it is unquestioned that an attorney is entitled to due process of law in a disciplinary proceeding, *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), *modified on other grounds*, 392 U.S. 919, 88 S. Ct. 2257, 20 L. Ed. 2d 1380, the respondent in a Nebraska reciprocal discipline action, when challenging the process by which he was sanctioned in another jurisdiction, bears the burden of demonstrating the infirmity of that process. *Dineen, supra.* To that end, we have established certain guidelines to be employed when a hearing is conducted to determine the constitutionality of the other jurisdiction's disciplinary proceeding. As applied to the case at bar, these guidelines provide:

> (1) Respondent's claims that he was denied due process in the course of the [Colorado] proceeding . . . shall be evaluated solely on the basis of the record of that proceeding; (2) respondent shall bear the burden of proof that he was not afforded due process of law . . . in the

> [Colorado] proceeding; (3) if respondent fails to satisfy his burden of proof, a certified copy of the findings of fact of the [Colorado] proceeding shall constitute conclusive evidence that respondent is guilty of the misconduct charged; (4) the referee shall evaluate respondent's fitness to practice law in Nebraska and what, if any, discipline would be appropriate; and (5) respondent bears the burden of showing that the discipline to be imposed should be less severe than that imposed in [Colorado].

Id. at 368, 455 N.W.2d at 181.

We thus turn to Radosevich's arguments. He first argues that he was denied due process because the Colorado hearing board which heard the evidence against him was not constituted in accordance with Colo. R. Civ. P. 241.14 (codified at Colo. Rev. Stat. Ann. ch. 20 (West 1990)).

Under Colorado's disciplinary rules, a three-person hearing board is assigned disciplinary complaints by one of two nine-member hearing panels. See Colo. R. Civ. P. 241.2 and 241.14. The two panels together comprise a grievance committee. Rule 241.2. After the hearing board has heard the complaint, it makes a recommendation to the hearing panel, which then makes its own recommendation to the state supreme court. Colo. R. Civ. P. 241.15. The makeup of the hearing board is dictated by rule 241.14(b), which provides: "At least one member of every hearing board shall be a member of the hearing panel or a former member of the [grievance] committee . . . ."

The record of the Colorado proceeding indicates the members of Radosevich's hearing board were not members of the applicable hearing panel. However, the record contains no evidence of whether the board members were former grievance committee members. Radosevich thus argues that his due process rights were violated because the makeup of the hearing board has not been shown to comply with rule 241.14. We disagree.

As noted before, the record from the Colorado proceeding provides our sole basis for evaluating whether that proceeding afforded Radosevich due process. See *Dineen, supra.* Nothing in the record indicates that the makeup of the hearing board

violated rule 241.14(b)—i.e., nothing indicates that the three board members were *not* former committee members. Radosevich bore the burden of establishing the irregularity, see *Dineen, supra*; he has failed to carry that burden. We thus need not address whether improper composition of the board would, in fact, violate due process. Radosevich's first argument is without merit.

Radosevich next contends that the Colorado disciplinary scheme violated his due process right to have the final decisionmaker in the disciplinary action actually hear the evidence presented. As support for his argument, Radosevich directs us to a case from the U.S. Court of Appeals for the 10th Circuit in which the court also addressed the constitutionality of Colorado's attorney disciplinary scheme. See *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 1984), *cert. denied* 471 U.S. 1016, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985).

In *Razatos*, a suspended attorney challenged the Colorado disciplinary scheme, arguing that it violated due process because "in cases where credibility of witnesses is crucial to the decision, the final arbiters of fact [here, the state supreme court] must see the witnesses and have an opportunity themselves to assess credibility." *Id.* at 1432. Specifically, Razatos contended that the scheme offended due process because the disciplinary rules did not grant the Colorado Supreme Court the power to conduct a de novo hearing.

Rejecting this argument, the 10th Circuit first noted that the failure of the rules to expressly provide for de novo hearings did not mean that the supreme court lacked the power to conduct such a hearing. The 10th Circuit then concluded that the Colorado attorney disciplinary scheme provided sufficient procedural safeguards to alert the supreme court as to when it should exercise its discretion and conduct de novo hearings. The court thus rejected Razatos' challenges. Notably, the 10th Circuit did not reach the question of whether such a hearing was required if the state supreme court rejected the findings of the panel based on credibility assessments.

Radosevich now argues that based on a change in the disciplinary rules, the *Razatos* holding no longer applies, and the Colorado scheme violates due process. His argument

focuses on the fact that under the rules applicable to *Razatos*, at least one member of the hearing board was required to be a member of the hearing panel. See, *id.*; Colo. R. Civ. P. 249 (codified at 7A Colo. Rev. Stat. Ann. ch. 20 (Mitchie 1973)). Under the present scheme, and as is evidenced by Radosevich's hearing board, that requirement no longer applies. See rule 241.14(b) (West 1990). Radosevich continues his argument by alleging that the hearing panel is actually the final decisionmaker in the Colorado disciplinary scheme. He concludes that the status of the hearing panel, in addition to the rule change, renders the Colorado scheme invalid. Again, we disagree.

Initially, we note that both the 10th Circuit Court of Appeals and the Colorado state courts have found the Colorado Supreme Court to be the final decisionmaker in the state's disciplinary scheme. See, *Razatos, supra*; *People v. Johnson*, 627 P.2d 748 (Colo. 1981); *People v. Berge*, 620 P.2d 23 (Colo. 1980). Radosevich offers no authority for his contrary position; we give it no credence.

Furthermore, we find no merit in Radosevich's argument that the intervening rule change has rendered the holding in *Razatos* inapplicable. In its opinion, the 10th Circuit placed no weight on whether a panel member was part of the hearing board. At issue in *Razatos* was the Colorado Supreme Court's use of the hearing board's factual findings. The intervening rule change has not altered the true point of contention in the case—that the supreme court had not observed the witnesses firsthand. Moreover, Radosevich has even less of an argument than did Razatos, for Radosevich stipulated to all material facts; credibility was never an issue. We reject Radosevich's arguments, which are based on *Razatos* and the change in rule 241.14.

Lastly, Radosevich argues that even if *Razatos* applies, the 10th Circuit employed faulty reasoning. He contends that regardless of the Colorado Supreme Court's ability to conduct a de novo hearing, the final arbiter of a disciplinary scheme must hear the evidence presented firsthand. Again, he presents no authority for this proposition. However, at least one court has rejected this argument expressly, while others have impliedly

done so. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976). Cf., *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (addressing rulings on suppression motions); *Razatos, supra*. The master did not err in rejecting this challenge to the Colorado proceeding.

Rejecting Radosevich's due process arguments, we adopt the findings of the special master. We conclude with a quote from the master's report, which further clarifies Radosevich's failure to establish a due process violation:

> [T]he Master has noted that the Respondent appeared and participated in the Colorado disciplinary proceeding, and availed himself of the opportunity to file exceptions in the Colorado Supreme Court to the findings of fact and recommendation of the Hearing Board as adopted by Grievance Committee Hearing Panel B. At no point in those proceedings did Respondent raise his due process concerns or file exceptions to the proceedings on that basis. While that fact does not eliminate the necessity of examining Respondent's due process arguments in this proceeding, the Grievance Committee Panel B and the Colorado Supreme Court was [sic] in a far better position to assess and remedy any such deficiencies than is this Court.

The record does not indicate any lack of opportunity for Radosevich to present his due process arguments in the Colorado proceeding. This court will adopt the findings of the master on these issues, namely, that the record from the Colorado proceeding reflects no deprivation of due process.

As noted previously, despite a finding that a Nebraska attorney is guilty of the misconduct which led to sanctions in another state, in an action for reciprocal discipline, this court is entitled to make an independent assessment of the facts, an independent determination of his fitness to practice law in Nebraska, and an independent determination of the appropriate measure of discipline in this state. *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). We thus turn to the appropriateness of a sanction of disbarment.

Radosevich bears the burden of establishing that the

discipline imposed in this state should be less severe than that imposed in Colorado. See *id.* He has not done so. At the hearing before the master, Radosevich simply testified that the misappropriated funds had been repaid and that his clients had not been damaged. He has not addressed the issue in his brief to this court.

The Colorado Supreme Court found Radosevich guilty of misusing client funds and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *People v. Radosevich*, 783 P.2d 841 (Colo. 1989). Because Radosevich has failed to show that he was denied due process by the Colorado proceeding, we take the Colorado court's findings as conclusive proof that he is guilty of the misconduct charged. See *Dineen, supra.*

The special master found that a sanction of disbarment was appropriate. This ruling finds support in our past decisions. See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991) (disbarring attorney for misappropriating and commingling client funds). Moreover, we have noted that of all the offenses for which lawyers may be disciplined, " ' "stealing from a client must be among those at the very top of the list." ' " *Id.* at 247, 470 N.W.2d at 555 (quoting *The Florida Bar v. McShirley*, 573 So. 2d 807 (Fla. 1991)). We adopt the finding of the special master regarding the appropriate measure of discipline as well.

Having rejected Radosevich's arguments that he was denied due process by the Colorado disciplinary proceeding, we find that he has not established cause that the findings of the special master should not be adopted. We thus order that Radosevich be disbarred pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1992).

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

LORRAINE B. LEMKE AND KENNETH H. LEMKE, APPELLEES, V. METROPOLITAN UTILITIES DISTRICT, A POLITICAL SUBDIVISION, APPELLANT.

502 N.W.2d 80

Filed June 18, 1993. No. S-90-1010.

1. **Political Subdivisions Tort Claims Act: Liability.** Whether undisputed facts demonstrate that liability is precluded by the discretionary function exemption of the Political Subdivisions Tort Claims Act is a question of law.
2. _____: _____. Performance or nonperformance of a discretionary function cannot be the basis for liability under the Political Subdivisions Tort Claims Act.
3. **Governmental Subdivisions: Notice: Negligence.** When (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.
4. **Public Utilities: Negligence.** A gas company must exercise a degree of care commensurate with the hazards of natural gas as a dangerous commodity.
5. _____: _____. On account of the inherent and substantial danger of natural gas, a gas distribution company has a nondelegable duty to exercise due care in the distribution of natural gas.
6. _____: _____. Because a gas company has a nondelegable duty to exercise due care regarding natural gas supplied to a customer, a gas company's duty of care not only pertains to the company's distribution of gas through its pipelines, but extends to distribution through a customer's service line or gas appliance that the company knows, or should know, is unsafe for conducting or using gas.
7. **Public Utilities: Negligence: Liability.** Despite a gas company's nondelegable duty, the company is not liable for injuries from distribution of natural gas if the company has neither knowledge nor the opportunity to learn through reasonable diligence that a dangerous condition exists in the system used for distribution of its gas.

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

Thomas A. Wurtz and Daniel G. Crouchley for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

SHANAHAN, J.

In a negligence action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987), Lorraine B. Lemke and Kenneth H. Lemke obtained judgments against Metropolitan Utilities District of Omaha (MUD), which has appealed.

STANDARD OF REVIEW

"A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987). Accord, *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Broekemeier Ford v. Clatanoff, 240 Neb. 265, 267, 481 N.W.2d 416, 418 (1992). Accord, *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992); *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992).

FACTUAL BACKGROUND

The Lemke House.

Lorraine Lemke resided in Omaha, where she lived in a house owned jointly by her and her husband, Kenneth. In 1968, Lemkes had acquired and moved into an older, previously owned house. Jason, Lemkes' 13-year-old son, also lived in the house, which was originally a single-family dwelling but had been converted into five apartments, that is, two apartments on the main floor, two upstairs, and one in the basement. However, on April 27, 1987, Lemkes had no tenants. The main-floor apartments were served by two natural gas ranges.

Additionally, there was a gas range in the upstairs apartment which Lemkes sometimes used. The ranges were already installed when Lemkes bought the house. At times, the wind blew out the pilot lights on the ranges. Either Lorraine or Kenneth relighted the pilot lights by using a match to ignite a burner on the range. Lemkes needed no major repairs on any of the ranges, although MUD's servicemen were occasionally summoned to make adjustments on Lemkes' gas appliances.

The Explosion.

On April 27, 1987, Lorraine awoke at 6 a.m., got up, walked into Jason's room to awaken him for school, brought in the morning newspaper, and went into the kitchen to read the paper. Throughout this time, Lorraine smelled nothing unusual, but when she later entered the first-floor bathroom, she smelled the odor of gas which she believed had entered through an open bathroom window after emanating from a "truck spilling gas" on a nearby street.

As Lorraine was walking Jason toward the front door so that he might catch a schoolbus at 7 a.m., both Lorraine and Jason smelled gas in the entryway, an odor similar to that detected on previous occasions when a pilot light had gone out on one of the ranges. After Jason boarded the bus, Lorraine took matches from the main-floor kitchen and climbed the stairway to the second-floor apartment which contained a gas range. In that apartment, Lorraine discovered that the range's pilot light was out. She then struck a match, turned one of the burner control knobs to the "on" position, and attempted to light the stove. As she was attempting to light the burner, "the whole stove was engulfed in flames. And then the flames were shooting to the ceiling." Part of the apartment's floor collapsed, and Lorraine fell two floors into the basement, where she staggered up the basement stairs, then went outside and across the street to obtain help. Because her clothing had been incinerated or blown off, a man covered Lorraine with a blanket until the rescue squad arrived.

LEMKES' LOSSES

Injuries and Medical Expenses.

Lorraine Lemke was transported to a hospital, admitted to

its emergency room, and then taken to surgery for medical attention to her burned body. Dr. Joel Bleicher, a specialist in plastic surgery, made the initial diagnosis of Lorraine's condition and undertook treatment of her injuries. According to Dr. Bleicher, Lorraine had sustained second degree burns on her face, third degree burns to both of her hands, and burns on her legs, and had suffered the loss of several fingernails. Also, there was loss of skin on Lorraine's abdomen and chest. Dr. Bleicher determined that Lorraine had suffered burns on 60 percent of her body.

As one of the first steps in treating Lorraine on April 27, Dr. Bleicher commenced debridement (removal of dead tissue) with a dermatome, a "razor blade sharp apparatus that is either oscillated by hand or by some mechanical power apparatus and it shaves the layers of dead skin off the body." Also, Lorraine was placed on a ventilator "to breathe for" her.

On May 1, after additional debridement on Lorraine's legs and torso, skin grafting was undertaken, and the grafts were "stapled into position." The total graft area at that time covered 500 square centimeters on Lorraine's body. On May 5, Dr. Bleicher continued debridement on Lorraine's legs and torso. A catheter was inserted for supplying Lorraine with nutrition and medication. A tracheostomy (surgically opening the trachea) was necessary for "long-term intubation for ventilation" on account of edema or swelling in Lorraine's throat that caused "respiratory insufficiency." Consequently, a tube was inserted into Lorraine's trachea and connected to a ventilator. Also, a laryngoscopy (examination of the interior larynx) was performed to determine whether Lorraine's vocal cords had been damaged by the explosion and fire. A "burn vest" was applied to reduce Lorraine's bodily movement in the areas where the skin grafts had been applied. The catheter was surgically replaced on May 8 and 16. At that time, there was additional debridement and grafting, that is, grafts of 120 square centimeters on Lorraine's right hand and 216 square centimeters on her right thigh. This was a continuation of "numerous reconstructive procedures to obtain skin coverage" in the burned areas. On May 29, Dr. Bleicher performed "several debridements" for grafts to Lorraine's feet.

Throughout this time, Lorraine's condition required attention from several specialists in addition to Dr. Bleicher; for instance, examinations by an internist relative to infection and attendance by a psychiatrist on account of the trauma involved in the entire episode.

Lorraine was confined to intensive care from April 27 to May 20, was assisted by a ventilator from April 27 to May 15, and was fed intravenously from April 27 to June 11. At the hospital, Lorraine also received physical therapy on account of burns and reconstructive surgery. Lorraine was discharged from the hospital on July 8.

According to Dr. Bleicher, the fire caused severe scarring to Lorraine, with obvious discoloration due to "donor sites for skin grafts," and increased Lorraine's risk of skin cancer. Doctor and hospital expenses for Lorraine totaled $144,044. Also, Dr. Bleicher felt that Lorraine would require additional surgery and hospitalization as the result of her injuries sustained in the explosion and fire.

Property Damage.

Additional damages to the Lemkes included total destruction of their house, which had a fair market value of $60,000 before the explosion and fire; loss of personal property valued at $9,362; and demolition costs of $4,300, payable to the city of Omaha.

THE COBRA FLEXIBLE CONNECTOR

Warning from the American Gas Association.

In 1926, MUD became the sole retailer of natural gas for Omaha, and it has been a member of the American Gas Association (AGA) since at least 1965. AGA is a trade organization of natural gas producers, transmission companies, and distributors. MUD belonged to AGA to keep informed of developments in the gas industry, including information regarding dangers in gas distribution.

The Cobra Metal Hose Company manufactured a corrugated metal flexible tubing used to connect a gasline with a customer's appliance. Some flexible connectors, especially those manufactured by Cobra, have a soldered or brazed joint that connects the tubing to fittings for the gasline and

appliance. Between 1961 and 1963, MUD installed at least 4,000 Cobra connectors in homes of MUD customers. However, in 1968, Cobra discontinued manufacturing the flexible connector.

On December 14, 1979, the U.S. Consumer Product Safety Commission (CPSC) sent AGA a letter containing a warning about the dangers of the Cobra flexible connectors. AGA, on December 19, 1979, issued a "Safety Bulletin" to all its members, notifying them of the CPSC letter. Attached to the AGA "Safety Bulletin" was a copy of the CPSC letter and a sample of a "Safety Notice" for warning customers concerning the dangers of flexible connectors.

AGA regularly prepared and distributed a directory to its members. An updated AGA directory was published and sent to all AGA members every 6 months. In January 1980, the directory included a "Special Announcements" section that contained the following:

> NOTICE
>
> The Consumer Product Safety Commission has advised A.G.A. regarding a potential safety problem in reference to a certain type corrugated metal hose. The problem brought to CPSC's attention concerns a gas connector with a button type end fitting brazed directly to the tubing. Our information indicates the unit was manufactured by Cobra Metal Hose in Chicago, Illinois from 1955-1964. Apparently, the brazed construction can deteriorate with age, and with movement or stress, the joint could break allowing escape of gas.
>
> As of January 1, 1968, the ANSI Standard Z21.24 covering metal gas connectors was revised in an effort to prevent this situation.
>
> The specific manufacturer, Cobra, is no longer in business. A.G.A. has sent a special bulletin to all member utility companies advising them of the potential problem and suggesting that they initiate appropriate action within their service area. If you desire further information, please contact your gas company.

Although MUD received the AGA directory, MUD placed the publication in its engineering department's library as a

reference manual in the event that any engineer needed information about a project. Consequently, MUD did not distribute the AGA directory or its information to MUD's service department and its service personnel. Also, MUD did not take any specific steps to warn its customers about the hazards of the Cobra connector. However, MUD did have a program of general information to the public and its customers concerning the benefits and risks involved in using natural gas for home appliances. Illustrations of this general information included a "scratch and sniff" brochure to identify odorized natural gas: "If you ever detect faint whiffs of this odor, investigate. If possible 'follow your nose' to the source. It may be only a pilot light that's out . . . something easily and safely corrected." Also, MUD supplied general safety messages disseminated by the media, such as a newspaper message that informed the general public that a "slight odor near a gas appliance may mean a pilot light needs relighting, and most people can do that." Additionally, MUD used "bill stuffers," a document accompanying a bill sent to a customer for gas service. As bill stuffers for 1986, MUD scheduled several items such as instructions pertaining to planting trees or digging when underground gas mains might be involved, information regarding a "Level Payment Plan" that spread the cost of gas service over 12 months, and general information relative to a sewer use fee and an energy conservation loan fund. Mailing a bill stuffer concerning a free safety inspection in mid-September 1986 was canceled by the manager of MUD's "gas operations," which controlled the mechanical service department and its personnel. MUD's service personnel went to Lemkes' house at least three times after issuance of the AGA warning in January 1980. Those visits involved work on gas appliances, e.g., furnace and water heater, but also included adjustment of a gas range in the Lemke home on February 18, 1986, for which Lemkes paid a service charge.

LEMKES' ACTION AGAINST MUD

Pursuant to the Political Subdivisions Tort Claims Act, Lemkes sued MUD for its negligence concerning the explosion and fire at the Lemke residence. In addition to denying

negligence and alleging Lemkes' contributory negligence as a bar to recovery, MUD claimed that its conduct was exempt from liability in accordance with the Political Subdivisions Tort Claims Act, namely, § 13-910(2), which stated that the act shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused."

THE TRIAL

Lemkes' Witnesses.

At trial, Robert Harrison testified for the Lemkes. Harrison was a consulting engineer who concentrated in gas fires and explosions. According to Harrison, the Cobra connector was an especially bad device because the soldered or brazed joints tended to deteriorate gradually as the result of phosphorus in the solder or brazing alloy, which, over a span of years, is adversely affected by the sulfur added to the natural gas to provide a distinctive odor to the otherwise odorless natural gas. Although there was no record that MUD had ever installed a Cobra connector in Lemkes' house, from photographs taken by MUD's claim adjusters Harrison identified the tubing for the upstairs range as a Cobra connector. Harrison testified that

> the phosphorus was part of the solder or brazing material, the metal that was used. The sulphur comes from the gas, because the mercaptan is a sulphur component odorant put into natural gas . . . . [T]here's a chemical reaction that destroys the integrity of the joint, allowing it to fall apart.

As Harrison explained, in view of the circumstances existing at the Lemke house on the morning of the explosion, gas from an unlighted pilot light would not accumulate in a sufficient quantity to allow an explosion, that is, supply an "explosive mixture." Rather, the source of the gas, resulting in the explosion, was a broken connector between the gasline and the range which Lorraine Lemke attempted to light. The broken connector supplied an "extreme" amount of gas.

Charles Lamar, a consultant who investigates fuel gas accidents, also testified for Lemkes and, in testimony

substantially similar to Harrison's, described "corrosion cracking," that is, failure of a joint involving a Cobra connector as the result of "butt brazing" when "the end of the tubing is pressed against a flat surface and attached to it by brazing." From the MUD photographs, Lamar also identified the Cobra brand corrugated connector between the gasline and the range involved in the explosion at Lemkes' house. Lamar also discounted the possibility that gas from an unlighted pilot light could accumulate in a sufficient volume for the explosion when Lorraine Lemke attempted to light the burner on the range in the upstairs apartment.

MUD's Witnesses.

In its case, MUD presented testimony from its supervisor of engineering operations, who acknowledged that MUD had in fact used Cobra flexible connectors in supplying gas for customers' appliances and that MUD had received the AGA publications. Also, the assistant general manager of operations at MUD testified that MUD had no procedure for distributing AGA information concerning the Cobra connector and never instructed its service personnel to be on the "lookout" for Cobra connectors. MUD's assistant general manager acknowledged that MUD could have instructed its service personnel to check for Cobra connectors when service calls were made for any reason to a customer's home, especially since MUD had used Cobra connectors, and that discovery of a Cobra connector might have resulted in a "red tag" having been placed on an appliance, alerting "the customer that there's a deficiency in their [gas] system" and a need for repair.

One of MUD's expert witnesses, Richard Devine, a safety and technical specialist with Peoples Natural Gas, which serves part of Kansas, Colorado, Nebraska, Iowa, and Minnesota, explained his company's response to the AGA and CPSC warnings. According to Devine, Peoples, early in 1980, sent a notice to its various field offices, explaining the problems with flexible connectors, and in 1984, another notice went out from Peoples' corporate headquarters in the form of a letter over Devine's signature. This letter told various area people that if connectors of the type pointed out in the CPSC notice were

discovered by Peoples' personnel in the course of routine service work, the service personnel were to recommend that the connectors be removed and replaced with safe connectors.

The District Court's Findings and Judgments.

At the conclusion of the evidence, the trial court concluded that the explosion was due to gas escaping from a separation between the Lemke range's flexible connector and the gasline and that MUD, notwithstanding its notice that the flexible connectors were dangerous, negligently failed to inform its customers, including Lemkes, about the hazard involved in Cobra flexible connectors. The court also concluded that MUD was negligent in failing to inform its personnel about the Cobra flexible connectors and failing to instruct them to investigate for Cobra connectors while on the premises for a service call regarding a gas-fueled appliance. Additionally, the court found that Lemkes were not contributorily negligent and awarded damages to them: $800,991 to Lorraine for her personal injury and property loss and $180,875 to Kenneth for his property loss and the medical expenses which he paid on Lorraine's behalf.

ASSIGNMENTS OF ERROR

MUD contends that the trial court erred in (1) failing to apply the discretionary function exemption of the Nebraska Political Subdivisions Tort Claims Act concerning MUD's conduct, (2) holding that MUD owed a duty to notify its customers concerning the hazard involved in a Cobra connector used for a gas appliance, (3) failing to find that Lemkes were contributorily negligent in a degree sufficient to bar recovery, and (4) awarding damages that were excessive or were unsupported by the evidence.

DISCRETIONARY FUNCTION EXEMPTION

MUD contends that liability for Lemkes' damages is barred by the discretionary function exemption of the Political Subdivisions Tort Claims Act, § 13-910(2).

Whether undisputed facts demonstrate that liability is precluded by the discretionary function exemption of the Political Subdivisions Tort Claims Act is a question of law. See *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992).

"Regarding a question of law, an appellate court has an obligation to reach a 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). Accord, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

Performance or nonperformance of a discretionary function cannot be the basis for liability under the Political Subdivisions Tort Claims Act. See *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984). Cf., *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989) (discretionary function exemption of State Tort Claims Act, Neb. Rev. Stat. § 81-8,219(1)(a) (Reissue 1987)); *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984).

Summarizing applicability of the discretionary function exemption of the State Tort Claims Act in *Security Inv. Co. v. State*, 231 Neb. at 546, 437 N.W.2d at 446, we stated:

> [W]e conclude that applicability of the discretionary function exception in the State Tort Claims Act depends on the conduct in question, not on the identity of the actor. . . . Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act. The discretionary function exception of the State Tort Claims Act protects or excepts only governmental decision, action, or conduct based on a permissible exercise of a public policy judgment. The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct.

Although the foregoing was expressed concerning the State Tort Claims Act, the preceding excerpt from *Security Inv. Co.* applies equally well to an interpretation of the identical language used for the discretionary function exemption stated in the Political Subdivisions Tort Claims Act.

As explained in *U.S. v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 1273-74, 113 L. Ed. 2d 335 (1991), concerning the

discretionary function exemption of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1988), which is substantially similar to the Political Subdivisions Tort Claims Act:

> [E]ven "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to shield." [*Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)]. See [*United States v. Varig Airlines*, 467 U.S. 797, 813, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)]. Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *id.*, at 814, 104 S.Ct., at 2765, when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz, supra*, at 537, 108 S.Ct., at 1959.

Applying an analysis similar to that used in *Gaubert*, recent federal decisions have concluded that a governmental decision not to warn concerning a danger which is known to the government but which is unknown to the public is not protected by the discretionary function exemption when the governmental decision does not involve the type of social, economic, or political policy judgment protected by the Federal Tort Claims Act. See, *Andrulonis v. U.S.*, 924 F.2d 1210 (2d Cir. 1991), *judgment vacated and case remanded sub nom. New York State Department of Health v. Andrulonis*, ____ U.S. ____, 112 S. Ct. 39, 116 L. Ed. 2d 18, *reconsidered and reinstated after remand* 952 F.2d 652 (absence of a governmental warning of the hazards associated with use of rabies viral strain was not a discretionary function because negligently withholding a warning did not involve a policy analysis); *Summers v. U.S.*, 894 F.2d 325 (9th Cir. 1990), *opinion amended and superseded by* 905 F.2d 1212 (National Park Service's failure to warn of potential danger of stepping on hot coals after fire rings were permitted on public beach was not a discretionary function because the decision did not involve balancing competing policy considerations); *Boyd v.*

U.S. ex rel. U.S. Army, Corps of Engineers, 881 F.2d 895 (10th Cir. 1989) (Army Corps of Engineers' failure to warn swimmers that boats were allowed in popular swimming area was not a discretionary function because decision did not involve social, economic, or political policy judgment); *Denham v. U.S.*, 834 F.2d 518 (5th Cir. 1987) (Army Corps of Engineers' failure to warn swimmers of submerged concrete anchors in a designated swimming area was not a discretionary act because such conduct was not the type that Congress intended to shield from tort liability); *George v. U.S.*, 735 F. Supp. 1524 (M.D. Ala. 1990) (Forest Service's decision to take no precautions despite knowledge of the presence of a large and aggressive alligator near a designated swimming area was not a discretionary act because the activity in question was not the type that Congress intended to shield from tort liability).

In *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992), we considered whether notifying veterinarians only concerning a pseudorabies outbreak in hogs vis-a-vis notice to individual owners of hogs in the affected area involved a discretionary function exempt from liability under the State Tort Claims Act. In rejecting the State's liability to an owner who was not notified concerning the hog disease, we stated: "The method of notice and to whom the notice would be sent were completely discretionary functions . . . ." 241 Neb. at 763, 491 N.W.2d at 45. Therefore, in *Blitzkie* we held that under the State Tort Claims Act, the State's decision concerning the method for warning about a danger was a discretionary function, but we did not address and, therefore, we did not decide whether a governmental decision not to warn is always a discretionary function. Cf. *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984) (state's department of agriculture had a nondiscretionary duty to notify a rancher concerning a detected cattle disease when state or federal regulations required such notice).

State courts have considered whether governmental failure to warn of a dangerous condition known to the government but unknown to the public is a discretionary function. For instance, in *City of St. Petersburg v. Collom*, 419 So. 2d 1082 (Fla. 1982), the Florida Supreme Court considered the negligence claim of

an individual whose wife and daughter drowned after stepping into a city storm sewer which was not readily apparent. Noting that the storm sewer was, in effect, a hidden trap, the court stated:

> [W]hen a governmental entity creates a *known* dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.

(Emphasis in original.) 419 So. 2d at 1083. A similar rationale was applied in *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982), wherein the plaintiff alleged that the city negligently designed an intersection and failed to install adequate traffic control devices. Acknowledging that in a majority of jurisdictions, the discretionary function exemption protects a governmental decision in planning installation of particular traffic control devices, the Florida Supreme Court stated:

> With regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers and, as such, an operational-level function, to be without merit. . . . In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions.
>
> We also hold that the decision to build or change a road, and all the determinations inherent in such a decision, are of the judgmental, planning-level type. . . . The fact that a road is built with a sharp curve is not in itself a design defect which creates governmental liability. If, however, the governmental entity knows when it creates a curve that vehicles cannot safely negotiate the curve at speeds of more than twenty-five miles per hour, such entity must take steps to warn the public of the danger.
>
> The failure to so warn of a known danger is, in our

> view, a negligent omission at the operational level of government and cannot reasonably be argued to be within the judgmental, planning-level sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity.

419 So. 2d at 1077-78.

Courts in states other than Florida have also held that a governmental decision not to warn the public against a governmentally caused and latent dangerous condition is not a discretionary act. See *Miller v. Grants Pass Irrigation*, 297 Or. 312, 320, 686 P.2d 324, 329 (1984): "If there is a legal duty to protect the public by warning of a danger or by taking preventing measures, or both, the choice of means may be discretionary, but the decision whether or not to do so at all is, by definition, not discretionary." See, also, *Socorro v. Orleans Levee Bd.*, 561 So. 2d 739 (La. App. 1990), *affirmed in part and in part reversed on other grounds sub nom. Socorro v. City of New Orleans*, 579 So. 2d 931 (La. 1991) (city's failure to warn against the danger from submerged rocks in a public diving area, when the city knew or should have known about the danger, was not policymaking or a discretionary decision).

Therefore, we hold that when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. In such a situation, a governmental entity's failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exemption of the Political Subdivisions Tort Claims Act.

Although there is no evidence that MUD installed the Cobra connector to Lemkes' gas range, it is undisputed that MUD installed thousands of Cobra connectors for customers' gas appliances. The 1980 AGA directory and AGA's directories

published semiannually between 1980 and the date of the explosion at Lemkes' house supplied notice to MUD that a serious problem existed as the result of deterioration in Cobra connectors, namely, "the [brazed] joint could break allowing escape of gas." When MUD received information about the dangerous condition or potential hazard involving Cobra connectors but did not disseminate this critical information to its customers who were using gas appliances with Cobra connectors, MUD effectively exerted control in a situation that could eventually culminate in injury to customers who continued to use gas supplied by MUD. Moreover, we believe that MUD's failure to warn its customers can hardly be characterized as a decision based on a legitimate social, economic, or political policy judgment. At best, MUD's conduct might be classified as a decision by default inasmuch as nothing indicates that MUD ever decided to refrain from warning its customers; rather, the absence of a warning resulted from inactivity attributable to an internal lack of knowledge on the part of MUD's personnel at any level or indifference to the warning which MUD had received from AGA. Consequently, in Lemkes' case, the discretionary function exemption under the Political Subdivisions Tort Claims Act is unavailable to MUD.

MUD'S DUTY

MUD contends that it had no duty to notify its customers concerning a potential hazard from Cobra connectors, especially a customer who may not have purchased the connector from MUD.

> "For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. [Citations omitted.]
>
> " ' "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> " 'A duty, in negligence cases, may be defined as an

> obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).
>
> "Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): '[F]oresight of the consequences involves the creation of a duty . . . .' . . ."

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 172-73, 425 N.W.2d 872, 881 (1988) (quoting *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987)). Accord *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). "The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation." 242 Neb. at 792, 496 N.W.2d at 909.

On several occasions, this court has considered the duty of care which a natural gas supplier owes to its customers. As we stated in *Clay v. Butane Gas Corporation*, 151 Neb. 876, 890, 39 N.W.2d 813, 821 (1949):

> "Natural gas is a dangerous agency. Its distribution is accompanied by many possible dangerous consequences, and it is therefore well established that a higher degree of care and vigilance is required in dealing with such agency than is required in the ordinary affairs of life. A degree of care commensurate to the danger involved is required of a distributor of natural gas to avoid injury and damage and, in case of failure to exercise such care, and [in case] injury results, it is liable." Koch v. Southern Cities Distributing Co., 18 La. App. 664, 138 So. 178 [(1931)].

In other cases we have held that a gas company must exercise a degree of care commensurate with the hazards of natural gas as a dangerous commodity. See, *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979) (natural gas is a dangerous commodity; therefore, a gas company must use a high degree of care to prevent injury from gas escaping from the company's lines); *Whittington v. Nebraska Nat. Gas Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964) (a gas company owes a duty to

its customers to exercise a degree of care commensurate with the danger in its gas business); *Reed v. Metropolitan Utilities Dist.*, 173 Neb. 854, 115 N.W.2d 453 (1962) (a gas company must exercise a high degree of care and diligence in handling natural gas as a dangerous commodity). See, also, *Daugherty v. Nebraska Nat. Gas Co.*, 173 Neb. 30, 112 N.W.2d 790 (1961); *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N.W. 836 (1938).

In *Mattson v. Central Electric & Gas Co.*, 174 F.2d 215 (8th Cir. 1949), a school janitor was killed by an explosion of natural gas leaking from a deteriorated service line to the school. The gas company asserted that it owed no duty to maintain the service line owned by the school district. However, the U.S. Court of Appeals for the Eighth Circuit, applying Nebraska law, stated:

> Under the Nebraska decisions the Gas Company could not delegate the duty it owed to the public to exercise proper care to maintain its gas system in a safe condition, but it had the continuing duty to exercise proper care to prevent injury from escaping gas. Hence, the mere fact that the service pipe was paid for and possibly was the property of the consumer, did not shift the duty of exercising proper care. The gas in the service pipe, as before noted, was that of the defendant, and as long as it remained its property it was under the duty of using proper care to protect the public from injury caused by the dangerous propensities of that property. A proper regard for the safety of the public would seem to forbid the owner of such a dangerous agency to avoid liability for damage by simply housing such property in a container belonging to some one else, particularly when the owner of such dangerous agency knows, or is charged with knowledge, that the housing or container facilities are in a decayed, dilapidated and deteriorated condition.

174 F.2d at 222.

The *Mattson* rationale was adopted as the law of Nebraska in *Daugherty v. Nebraska Nat. Gas Co., supra*, in which this court, referring to and quoting extensively from the *Mattson* decision and its exposition of Nebraska law, stated: "[W]e

accept the conclusions of [the *Mattson*] court as our own." 173 Neb. at 33, 112 N.W.2d at 793. Hence, on account of the inherent and substantial danger of natural gas, a gas distribution company has a nondelegable duty to exercise due care in the distribution of natural gas. See, *Hammond v. The Nebraska Nat. Gas Co., supra*; *Whittington v. Nebraska Nat. Gas Co., supra*; *Daugherty v. Nebraska Nat. Gas Co., supra*.

In *Clay v. Butane Gas Corporation*, 151 Neb. at 891, 39 N.W.2d at 821, this court stated:

> While liability of a distributor of gas does not attach, in the absence of a reasonable basis for anticipating danger, that fact does not relieve the distributor from such diligent and adequate inspection of its transportation and service facilities where the reasonable basis to anticipate danger actually exists. [Citation omitted.]
>
> Where a gas company is cognizant of facts which should indicate to it the possibility of accident it may be held liable even though the precise manner in which the harm resulted could not have been foreseen. [Citations omitted.]

Also, as this court expressed in *Clough v. North Central Gas Co.*, 150 Neb. 418, 433, 34 N.W.2d 862, 871 (1948) (quoting *Stephany v. Equit. Gas Co.*, 347 Pa. 110, 31 A.2d 523 (1943)): " 'The responsibility of the gas company arises from knowledge of a dangerous condition and not by reason of the condition.' " Because a gas company has a nondelegable duty to exercise due care regarding natural gas supplied to a customer, a gas company's duty of care not only pertains to the company's distribution of gas through its pipelines, but extends to distribution through a customer's service line or gas appliance that the company knows, or should know, is unsafe for conducting or using gas. See, *Clough v. North Central Gas Co., supra*; *Mattson v. Central Electric & Gas Co., supra*. See, also, *Halliburton v. Public Service Co.*, 804 P.2d 213 (Colo. App. 1990) (gas company which knew of potentially dangerous flexible connectors in its customers' homes had a duty to take corrective action, including a duty to warn). Thus, despite a gas company's nondelegable duty, the company is not liable for injuries from distribution of natural gas if the company has

neither knowledge nor the opportunity to learn through reasonable diligence that a dangerous condition exists in the system used for distribution of its gas.

In view of industrywide "corrosion cracking" in joints with Cobra connectors, AGA warned all its members, including MUD, that Cobra connectors presented a very real danger in the distribution of natural gas. The information which MUD received from AGA placed MUD on notice that its customers who had gas appliances with Cobra connectors would be endangered when the connector separated from a gas service line or appliance. Consequently, when MUD became aware that the distribution of gas through a Cobra connector presented a risk of injury to customers, MUD had the duty to use due care, such as issuance of a warning, to protect customers during its distribution of natural gas through its own system and through a customer's service line for a gas appliance. When MUD's service personnel worked on gas appliances in Lemkes' house and even adjusted some of the Lemke gas ranges in 1986, those service personnel could easily have checked to ascertain whether a Cobra connector linked the gas service line and the range, if the service personnel had been informed about the problem with the Cobra connectors and had been instructed to inspect for presence of the troublesome connectors. Equipped with information about Cobra connectors, MUD's service personnel could have called the problem to a customer's attention, and corrective or preventative action might have been taken. Such a course of action was apparently quite feasible, at least according to MUD's witnesses. Also, bill stuffers and newspaper messages might have been means to inform customers concerning possible problems from flexible metal connectors. However, MUD relegated the AGA information to MUD's engineering library instead of communicating the crucial information to MUD's customers. Thus, MUD failed to warn its customers concerning the dangerous condition and hazard posed by Cobra connectors used in the continuing distribution of gas for customers' appliances. Under the circumstances, the district court correctly concluded that MUD had a duty to warn its customers concerning natural gas conducted through a Cobra connector,

but negligently breached that duty to Lemkes as customers.

CONTRIBUTORY NEGLIGENCE

MUD asserts that Lemkes' contributory negligence was more than slight in comparison with MUD's negligence, and therefore, Lemkes are barred from a recovery. See Neb. Rev. Stat. § 25-21,185 (Reissue 1989).

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

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 850, 438 N.W.2d 485, 490 (1989). Accord, *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990).

A defendant has the burden of proving the affirmative defense of contributory negligence. See, *Jensen v. Archbishop Bergan Mercy Hosp., supra*; *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

> Contributory negligence must always be examined in the light of the particular facts in each case. The duty to make this examination and determination concerning contributory negligence properly belongs to the fact finder unless the evidence compels only one conclusion about which reasonable [persons] cannot disagree.

Ditloff v. Otto, 239 Neb. at 385, 476 N.W.2d at 680. See, also, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

Although an odor of natural gas was present on the morning of the explosion, Lorraine Lemke attempted to relight the gas range's pilot light in the manner which she had previously used when the pilot light had gone out. Moreover, the method used by Lorraine in attempting to relight the range's pilot conformed to the method suggested in MUD's "scratch and sniff" brochure and the newspaper message that "a slight odor near a gas appliance may mean a pilot light needs relighting, and most

people can do that." It is somewhat difficult to characterize Lorraine Lemke's actions as contributory negligence when her conduct was patterned on MUD's expressly suggested direction and approval for relighting a pilot.

On our examination of the record, we cannot conclude that Lorraine Lemke was guilty of negligence as a matter of law and as a bar to recovery. The factual question of contributory negligence was considered by the district court and was answered in favor of Lemkes. Consequently, MUD's assignment of error based on Lemkes' contributory negligence is without merit.

DAMAGES

In its final assignment of error, MUD maintains that the awarded damages are excessive or are unsupported by the evidence.

"A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law." *Rahmig v. Mosley Machinery Co.*, 226 Neb. at 457, 412 N.W.2d at 78. See, also, *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991). The foregoing rule of law is also applicable to a court's award of damages in a negligence action brought under the Political Subdivisions Tort Claims Act.

Evidence in the Lemke case supports the district court's finding that Lemkes had been damaged as a result of the explosion and fire. "Lemkes' Losses," previously mentioned in this opinion, dispels any notion that the district court awarded excessive damages to Lemkes.

CONCLUSION

The district court's judgments for Lemkes are affirmed.

AFFIRMED.

BARBARA A. BAUER, INDIVIDUALLY AS A TAXPAYER AND ON BEHALF OF ALL PEOPLE SIMILARLY SITUATED, APPELLEE, V. LANCASTER COUNTY SCHOOL DISTRICT 001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, ET AL., APPELLANTS.

501 N.W.2d 707

Filed June 18, 1993. No. S-91-300.

1. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Final Orders: Appeal and Error.** An order entering judgment, as provided in Neb. Rev. Stat. § 25-1315.02 (Reissue 1989), or granting or denying a new trial is an appealable order.
4. **Conveyances: Words and Phrases.** A "reservation" is some new thing issuing out of what is granted. It creates a new right in the grantor from the subject of the conveyance, something which did not exist as an independent right before the grant and which is originated by it.
5. **Real Estate: Dedication: Words and Phrases.** A "dedication" of real estate has been defined as a landowner's giving of a right or easement for public use.
6. **Constitutional Law: Legislature.** While some constitutions provide to the contrary, the general rule is that a joint or concurrent resolution adopted by a legislature is not a statute, does not have the force or effect of law, and cannot be used for any purpose for which an exercise of legislative power is necessary.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

Edwin C. Perry, of Perry, Guthery, Haase & Gessford, P.C., and William F. Austin, Lincoln City Attorney, and Dana W. Roper for appellants.

Miles W. Johnston, Sr., and Miles W. Johnston, Jr., for appellee.

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

PER CURIAM.

The appellants claim that the trial court erred in finding that the City of Lincoln does not own Cooper Park and therefore

had no authority to enter into an agreement with the Lincoln Public Schools for use of the parkland.

We reverse the order of the district court for Lancaster County and remand the cause with directions to dismiss the plaintiff-appellee's petition.

FACTS

On June 1, 1989, the City of Lincoln (City) and Lancaster County School District 001 (Lincoln Public Schools, hereinafter LPS) entered into an agreement entitled "Park School Common Facility Agreement." The agreement provided for LPS and the City to "jointly construct, remodel and operate a recreational facility on certain School District and City property, including a portion of Cooper Park."

When the changes in the park were undertaken, Barbara A. Bauer, along with two other plaintiffs (who were subsequently dismissed from this lawsuit and who are no longer parties to this action), filed a petition in the district court alleging that the renovation had destroyed the unique configuration of Cooper Park through demolition of buildings, limestone walls of historical value, and approximately 100 trees. Alleging the agreement was unlawful because the City did not own Cooper Park, Bauer sought to enjoin the defendants from "taking any action in further performance of the objectives" of the agreement. Named defendants in the lawsuit were the City; its mayor, Bill Harris; LPS; and LPS' board president, James Wickless.

The parties stipulated that Bauer is a citizen of the City of Lincoln, that she is a taxpayer, and that she lives approximately 2 miles from Cooper Park.

Following trial, the district court entered an order holding that the City had title to Cooper Park and that the agreement between the City and LPS was valid. The court denied Bauer's request for injunctive relief and dismissed the suit. Bauer filed a motion for new trial. Following arguments on the motion, the district court sustained the motion and entered judgment in favor of Bauer. The court found that the City did not have ownership of the park because the parkland had been "reserved" to the State of Nebraska rather than "dedicated" to

the City. The court, therefore, found that the City had no authority to enter into the agreement, whereupon this appeal was instituted.

ASSIGNMENTS OF ERROR

The appellants assert, in summary, that the district court erred in (1) finding that the State of Nebraska holds title to Cooper Park and that the City does not and (2) finding that Bauer had standing to maintain the action by proving the requisite elements of a resident taxpayer action.

SCOPE OF REVIEW

An action for an injunction sounds in equity. *City of Newman Grove v. Primrose*, 240 Neb. 70, 480 N.W.2d 408 (1992). In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, *Eliker v. Chief Indus., ante* p. 275, 498 N.W.2d 564 (1993); *Helvey v. Dawson Cty. Bd. of Equal.*, 242 Neb. 379, 495 N.W.2d 261 (1993).

APPEALABILITY OF ORDER

Preliminarily, we address Bauer's claim that this appeal is not properly before this court. Bauer's claim overlooks the fact that the trial court found title to the park in the City, denied Bauer injunctive relief, and dismissed her petition. This was a final judgment in the case. Thereafter, the trial court granted Bauer a new trial, found that the City had no title in the parkland, and vacated the prior judgment. The trial court then retained jurisdiction "for the purpose of making a final determination of relief consistent with the request of [Bauer's] petition, the applicable law and evidence to be submitted upon further hearing."

The defendants have appealed the trial court's vacation of the final judgment in favor of the defendants and the trial court's granting of Bauer's motion for a new trial. Neb. Rev.

Stat. § 25-1315.03 (Reissue 1989) provides in part that "[a]n order entering judgment, as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order." See, also, *Morford v. Lipsey Meat Co., Inc.*, 179 Neb. 420, 138 N.W.2d 653 (1965) (holding that an order granting a new trial in a civil action is appealable). Hence, the district court's order of March 18, 1991, granting Bauer a new trial is an appealable order, and her argument that it is not is without merit.

OWNERSHIP OF COOPER PARK

We now turn to the issue of ownership of Cooper Park. All of the land involved in this litigation was acquired by the State of Nebraska through a warranty deed from John Giles on August 2, 1867. Bauer contends that Cooper Park was "reserved" to the State of Nebraska, while the appellants argue that the park was "dedicated" to the City.

This court has held that "[a] reservation is some new thing issuing out of what is granted. It creates a new right in the grantor from the subject of the conveyance, something which did not exist as an independent right before the grant and which is originated by it." *Elrod v. Heirs, Devisees, etc.*, 156 Neb. 269, 272, 55 N.W.2d 673, 675 (1952). Accord *Kozak v. State*, 189 Neb. 525, 203 N.W.2d 516 (1973), *overruled on other grounds, Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982). On the other hand, "[a] 'dedication' of real estate has been defined as a landowner's giving of a right or easement for public use." *Western Fertilizer v. BRG*, 228 Neb. 776, 782, 424 N.W.2d 588, 593 (1988).

To determine the status of Cooper Park, it is necessary to review the history of the park and the legislation which created the City. Shortly after Nebraska achieved statehood in 1867, the Legislature enacted the Seat of Government Act, 1867 Gen. Laws, pp. 858-62 (codified at Gen. Stat. ch. 72, §§ 1-16 (1873)). The act appointed three commissioners to select a site for the seat of government and sites for public buildings of the State of Nebraska and directed the commissioners to "immediately survey, lay off and stake out the said tract of land into lots, blocks, streets and alleys and public squares or *reservations for public buildings*, which said town, when so laid out and

surveyed, shall be named and known as Lincoln." (Emphasis supplied.) 1867 Gen. Laws, § 3, p. 859. The act further provided that plats be made "showing the blocks, lots, streets, alleys, *parks*, squares and *reservations for public buildings*, one of which [plats] shall be recorded in the office of the county clerk." (Emphasis supplied.) 1867 Gen. Laws, § 4, p. 859.

Acting upon the Legislature's mandate, the three commissioners personally visited several proposed sites for the state capital. On August 14, 1867, the commissioners reported to the Legislature that they had selected a site and had that day formally announced the founding of the town of "Lincoln" as the seat of government of Nebraska. See Report of Commissioners to Locate the Seat of Government of the State of Nebraska (1869). A surveyor had already been hired, and a plat of the area was completed. In their official proclamation, the commissioners stated that they had "designated within said location, the reservation for the Capitol Building, State University and Agricultural College. Parks and other reservations contemplated in the aforesaid act . . . will be properly designated upon a plat and file [sic] in the office of the Secretary of State." Report of Commissioners at 6.

The commissioners elaborated on the reservations made, stating that "[*r*]*eservations of nearly 12 acres each* were made for the State House, State University and *a City Park*, these being at about equal distances from each other." (Emphasis supplied.) *Id.* at 7. Other reservations were also listed, and the commissioners requested that the Legislature confirm the commissioners' action "in respect to all of the reservations." *Id.* at 8.

On February 15, 1869, the Legislature responded with a joint resolution which stated in relevant part:

> [T]he report of the Commissioners for the location of Lincoln, the seat of government of Nebraska, and for the erection of public buildings thereat, is hereby accepted, and *all reservations of public squares, streets and alleys, and church lots in Lincoln, together with the general design, is* [sic] *hereby adopted* . . . .

(Emphasis supplied.) Joint Resolution, 1869 Neb. Laws, p. 316 (Feb. 15, 1869).

Bauer argues that the Legislature intended that certain areas of the City, including the park in question, be reserved to the State of Nebraska. We disagree. The Seat of Government Act, by placing "reservations for public buildings" last in a series of areas to be platted, plainly authorized the commissioners to reserve land only for public buildings. 1867 Gen. Laws, §§ 3 and 4, p. 859. That streets, alleys, squares, and parks were not reserved in the Seat of Government Act is consistent with the fact that many such areas in municipal corporations are acquired by voluntary dedication of property to the public by the owner. See 11A Eugene McQuillin, The Law of Municipal Corporations § 33.02 (3d ed. 1991). Although the commissioners' report to the Legislature states that a reservation of nearly 12 acres was made for a "City Park," the commissioners obviously had no authority to make such a reservation, their power, under the Seat of Government Act, being limited to making reservations for public buildings.

Bauer also contends that the Legislature, by accepting the commissioners' report in the joint resolution of February 15, 1869, nonetheless adopted such reservations as mentioned in the report.

> While some constitutions provide to the contrary, the general rule is that a joint or concurrent resolution adopted by the legislature is not a statute, does not have the force or effect of law, and cannot be used for any purpose for which an exercise of legislative power is necessary.

73 Am. Jur. 2d *Statutes* § 3 at 270 (1974). Article II, § 1, of the Constitution of the State of Nebraska as it existed in 1869, required that "the style of every law shall be, '*Be it enacted by the Legislature of the State of Nebraska*.' " The joint resolution states, "*Be it Resolved by the Legislature of the State of Nebraska*." The language of the joint resolution is therefore constitutionally deficient to be enacted as a law. The resolution could not and did not in any way amend or repeal any of the provisions of the Seat of Government Act. Thus, the State of Nebraska did not reserve the park property to itself.

Next, we examine the issue of whether the park was validly dedicated to the City. Rev. Stat. ch. 53, §§ 42 and 43 (1866),

provided:

> Sec. 42. The proprietor of any land may lay out a town, or addition to any town, and he shall cause an accurate map or plat to be made out, particularly describing the lots, streets, avenues, lanes, alleys or other grounds belonging to such town or addition. . . . [A]nd *such plat shall be acknowledged* before some court or officer authorized to take the acknowledgment of deeds or conveyances of real estate, and when such map or plat is made out and acknowledged, the same shall be filed and recorded in the office of the county clerk of the county.
>
> Sec. 43. Such plat and acknowledgment being so recorded, *shall be equivalent to a deed in fee simple* from the proprietor, of all streets, alleys, avenues, squares, parks and commons . . . .

(Emphasis supplied.)

On September 6, 1867, pursuant to the authority granted them by the Seat of Government Act, the three commissioners filed a plat of the City of Lincoln in the office of the county clerk. That plat shows a park designated as "Lincoln Park," now known as "Cooper Park," which is the subject of this lawsuit. Apparently, the plat was never acknowledged as required by §§ 42 and 43, giving rise to a defective statutory dedication of the public areas on the plat. See *Pillsbury v. Alexander*, 40 Neb. 242, 58 N.W. 859 (1894). However, any defects of acknowledgment were subsequently cured by Comp. Stat. ch. 14, § 115 (1881), which provided that "all plats heretofore filed for record, and not subsequently vacated, are hereby declared valid, notwithstanding irregularities and omissions in manner or form of acknowledgement." Bauer has not contended that the plat was ever vacated.

We therefore find that the plat of the City of Lincoln, duly filed with the county clerk and declared valid by § 115, is sufficient to have vested ownership of Cooper Park in the City.

CONCLUSION

Our holding that ownership of Cooper Park is vested in the City is dispositive of this appeal. Therefore, it is not necessary for us to address whether Bauer has standing to bring this

lawsuit.

We reverse the order of the district court granting the plaintiff a new trial and remand the cause to that court with directions to reinstate its order of January 31, 1991, in favor of the defendants and to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF EASTERN NEBRASKA NON-STOCK TRUCKING COOP.

EASTERN NEBRASKA NON-STOCK TRUCKING COOP AND EDWIN VERL ACKLEY, DOING BUSINESS AS ACKLEY & SON, APPELLANTS, V. NEBRASKA BULK TRANSPORTS, INC.; PARRIS TRUCKING, INC.; AND N.W. TRANSFER, APPELLEES.

501 N.W.2d 712

Filed June 25, 1993. No. S-91-460.

1. **Public Service Commission: Appeal and Error.** In an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commission: Jurisdiction.** The Nebraska Public Service Commission has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity, and such proceedings are administrative and legislative in character.

Appeal from the Nebraska Public Service Commission. Affirmed.

Gregory B. Bartels, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellants.

Bradford E. Kistler, of Kinsey Ridenour Becker & Kistler, for appellee Nebraska Bulk Transports.

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

FAHRNBRUCH, J.

In this appeal, we affirm the Nebraska Public Service Commission's denial of the application of Eastern Nebraska Non-stock Trucking Coop (Eastern) to operate as a common carrier.

FACTS

On September 16, 1986, Eastern was incorporated as a cooperative association pursuant to Neb. Rev. Stat. § 21-1401 et seq. (Reissue 1991), the Nonstock Cooperative Marketing Act. The original incorporators of Eastern were Nehawka Farmers Cooperative Company and Greenwood Farmers Cooperative. Soon after its incorporation, Farmers Elevator of Elmwood, another cooperative, joined Eastern.

One purpose of the Eastern corporation, as stated in its bylaws, was to provide transportation and related services to its members. Dennis Hoback, Eastern's general manager, testified before the Nebraska Public Service Commission (PSC) that the corporation was formed to serve the transportation needs of member co-ops, because the co-ops were having difficulty getting goods hauled on a timely basis.

On October 9, 1990, Eastern filed an application with the PSC seeking authority as a common carrier for the transportation of property. Eastern had purchased trucking permit No. M-10218 from Edwin Verl Ackley, doing business as Ackley & Son (Ackley), on September 29 for $500. In Eastern's application to the PSC, it sought to have Ackley's authority transferred to Eastern.

Nebraska Bulk Transports, Inc.; Parris Trucking, Inc.; and N.W. Transfer filed protests to the granting of Eastern's application. Additionally, Nebraska Bulk Transports and Parris Trucking filed a complaint against Ackley alleging that Ackley had suspended and discontinued motor carrier service without obtaining approval of the PSC, in willful violation of both Neb. Rev. Stat. § 75-315 (Reissue 1990) and "Chapter 3, Section 002.01B," of the PSC's Motor Carrier Rules and Regulations. The complainants requested that a consolidated

hearing be held to consider their complaint and Eastern's application, and further requested that the PSC revoke Ackley's certificate. Parris Trucking later withdrew its protest and formal complaint conditioned on the PSC's acceptance of a proposed amendment to Eastern's request.

After the consolidated hearing on Eastern's application and Nebraska Bulk Transport's complaint, the PSC dismissed Eastern's application. The dismissal was based upon an opinion of the Attorney General, Att'y Gen. Op. No. 11 (Feb. 7, 1991), which the PSC had sought and received in connection with a different application. The PSC quoted the Attorney General that "it would be inconsistent with both the language and intent of § 75-309.03 to allow an entity exempted from Commission regulation as a 'transportation cooperative' to also hold a certificate as a common carrier or a permit as a contract carrier."

The PSC also found that Ackley had not suspended motor carrier service, but that he was attempting to retire and sell his authority. The PSC dismissed the formal complaint against Ackley.

Eastern timely appealed the dismissal of its application to this court. The dismissal of the formal complaint against Ackley is not an issue in this appeal.

ASSIGNMENT OF ERROR

Eastern's sole assignment of error claims that the PSC erred in ruling as a matter of law that Eastern's application should be dismissed on the ground that it is inconsistent with the language and intent of Neb. Rev. Stat. § 75-309.03 (Reissue 1990) for a transportation cooperative to hold a certificate of public convenience and necessity.

SCOPE OF REVIEW

In an appeal to the Supreme Court from an order of the PSC, administrative or legislative in character, the only questions to be determined are whether the PSC acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *In re Application of A Touch of Class Limousine, ante* p. 33, 497 N.W.2d 71 (1993); *In re Application of Kilthau*, 236 Neb. 811, 464 N.W.2d 162 (1991).

ANALYSIS

As to the first question, there is no doubt that the PSC acted within the scope of its authority. "The PSC has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity, and such proceedings are administrative and legislative in character." *In re Application of Kilthau*, 236 Neb. at 815, 464 N.W.2d at 166. Therefore, our only inquiry must be whether the order of the PSC denying Eastern a common carrier certificate is reasonable and not arbitrarily made.

Whether a transportation cooperative under § 75-309.03 may also obtain a certificate to operate as a common carrier in intrastate commerce is a question of first impression. Section 75-309.03 provides in relevant part:

> (1) A transportation cooperative consisting of cooperative associations . . . may provide transportation service solely to its member cooperative associations without applying for or receiving a certificate or permit from the commission to provide such service if it meets the following requirements:
>
> (a) The transportation cooperative *has no greater power or purpose other than to provide service to its member cooperative associations.*

(Emphasis supplied.)

The requirement of the statute is clear and is dispositive of the issue before us. To qualify as a transportation cooperative under § 75-309.03(1)(a), the transportation cooperative may have no greater power or purpose than to provide service to the member cooperative associations. The provision of common carrier services to members of the public would vest a transportation cooperative with greater power than to provide service to the member cooperative associations. Therefore, we hold that the granting of common carrier status to a transportation cooperative is inconsistent with the plain language of § 75-309.03(1)(a).

Because common carrier status is inconsistent with Eastern's status as a transportation cooperative, the PSC's order dismissing Eastern's application is reasonable and not arbitrarily made. Eastern's assignment of error is without merit.

CONCLUSION

Having found that the PSC's order was within the scope of its authority and that it was reasonable and not arbitrarily made, we affirm the order of the PSC dismissing Eastern's application for a common carrier certificate.

AFFIRMED.

LONNY R. BOHLING, APPELLANT, V. STATE BOARD OF PUBLIC ACCOUNTANCY OF THE STATE OF NEBRASKA AND THE STATE OF NEBRASKA, APPELLEES.

501 N.W.2d 714

Filed June 25, 1993. No. S-91-1040.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and vacated.

Gary L. Hoffman and Lane D. Edenburn, of Erickson & Sederstrom, P.C., for appellant.

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

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

PER CURIAM.

Because the State Board of Public Accountancy (Board) failed to enter a valid final order revoking Lonny R. Bohling's certified public accountant certificate, neither the district court for Lancaster County nor this court has the authority to rule on the merits of this appeal.

The record reveals that the Board's purported revocation decision was executed by the executive director of the Board. No statutory authority for the executive director to execute an order of revocation has been cited to us, nor have we found any such authority. The power to revoke the certificate of a certified public accountant is in the Board, not in the executive director.

See Neb. Rev. Stat. § 1-137 (Reissue 1991). It therefore follows that it is the members of the Board who agree with the revocation or its chairman who must execute the revocation order. The Board's order should also reflect whether the decision is unanimous and, if not, the number of the members present voting for the revocation.

The decision of the Board was not reduced to a valid final order and was not reviewable by the district court. See Neb. Rev. Stat. § 84-917(1) (Cum. Supp. 1992). Since the district court, acting as an appellate court, lacked the power to adjudicate the merits of the Board's action, a higher appellate court also lacks the power to adjudicate the merits of the case. See *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, *ante* p. 351, 500 N.W.2d 520 (1993).

We hold that the Board failed to enter a valid final order. We, therefore, vacate the purported decision of the Board that was affirmed by the district court.

REVERSED AND VACATED.

WHITE and LANPHIER, JJ., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. J. MARK BARNETT, RESPONDENT.

501 N.W.2d 716

Filed June 25, 1993. No. S-92-459.

Original action. Judgment of probation.

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

PER CURIAM.

Formal charges were filed against the respondent, J. Mark Barnett, by the Committee on Inquiry of the Third Disciplinary District of the Nebraska State Bar Association (Association). The charges alleged one count of neglect of a legal matter and one count of failure to respond to a disciplinary complaint of

the Counsel for Discipline of the Association. The amended formal charges were subsequently filed by the Counsel for Discipline in this court alleging that respondent again failed and neglected to attend to a legal matter entrusted to his care and again failed to respond to the Counsel for Discipline's complaint.

Respondent answered, admitting the allegations of the formal charges and the amended formal charges and admitting violations of Canon 1, DR 1-102(A)(1) and (6); Canon 6, DR 6-101(A)(3); Canon 7, DR 7-101(A)(2); and Canon 9, DR 9-102(B)(4), of the Code of Professional Responsibility. Respondent also alleged in mitigation of the charges that he was suffering from emotional and mental problems. Commencing in March 1991, he experienced abnormal depression, together with the excessive use of alcohol, and subsequently, he admitted himself into a residential alcohol abuse treatment facility. Respondent then alleged that he was now adequately managing the alcoholism and mental depression and was capable of engaging in the practice of law.

This court appointed a referee who, after hearing and receiving evidence, including the submission of a psychiatric report, recommended that respondent be placed on probation for 18 months. It was further recommended that (1) the respondent shall not consume alcohol during the period of his probation, (2) the respondent shall continue as an active participant in Alcoholics Anonymous, (3) the respondent shall continue with medication and therapy as prescribed by his physician, (4) the respondent shall meet with a partner of his law firm at least once per month for the purpose of reviewing the status of each of the respondent's pending cases, and (5) the respondent shall file a written report with the Counsel for Discipline on the first of each month specifically indicating whether he has complied with the conditions of probation.

The court, having been furnished with the opinion of a psychiatrist that the respondent is capable and fit to return to the practice of law and with the agreement of the respondent's law firm, Jewell, Gatz, Collins, Fitzgerald & DeLay, to comply with the terms of the order of probation, accepts the report of the referee and the recommendation, and the respondent is

placed on probation on the terms and conditions as specified above. The respondent is to repay to the Association the costs expended in this proceeding.

JUDGMENT OF PROBATION.

WHITE, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. W.A. HERMAN, RESPONDENT.

501 N.W.2d 717

Filed June 25, 1993. No. S-93-300.

Original action. Judgment of disbarment.

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

PER CURIAM.

In this disciplinary action, the Nebraska State Bar Association (Association) has filed formal charges against attorney W.A. Herman. Herman, despite being personally served with a copy of the charges, has failed to respond. We thus grant the Association's motion for judgment on the pleadings and order Herman disbarred.

On July 24, 1992, the Association's Counsel for Discipline received a complaint alleging misconduct by Herman. After Herman had been informed of the complaint and failed to respond, a formal hearing was held to review the allegations. Following the hearing, the Association's Disciplinary Review Board issued a report in which it found Herman guilty of a number of ethical violations. Concluding its report, the board found that Herman should be disciplined, but that reprimand was inappropriate.

The report and complaint attribute the following acts of misconduct to Herman:

In May 1987, the complainant was injured at work and was subsequently discharged. The complainant (client) subse-

quently retained Herman to handle her workers' compensation and wrongful discharge claims. Pursuant to that agreement, Herman and the client signed a fee agreement in which the parties agreed to a fee of $50 per hour and a $500 retainer for Herman's handling of the workers' compensation suit. The parties also entered into a fee agreement for the wrongful discharge suit.

It appears that Herman did not adequately keep the client apprised of the status of the workers' compensation suit, failing to respond to most of her phone calls and letters. Although the suit was eventually settled, Herman retained a 25-percent contingency fee as his compensation, in direct contravention of the parties' fee agreement. Herman also failed to return any of the $500 retainer.

Following settlement of the workers' compensation suit, Herman again failed to adequately apprise the client concerning the wrongful discharge suit. Herman did have the client write $92 in checks to cover "filing fees" and "sheriff fees," and he eventually had the client sign a petition for the suit. However, despite informing the client to the contrary, Herman failed to file the petition. The client eventually learned that her suit had not been filed and that the limitations period on the claim had run. Herman failed to return any of the $92 in fee payments to the client. Herman also failed to account for the time and costs spent on each litigation.

In its report, the board also recounted a portion of Herman's testimony at the disciplinary hearing. Herman admitted that he had failed to return the $592 to the client. He further stated that the $500 had been used to pay for, among other things, gas. Finally, Herman's testimony indicated that he had deposited the $92 in an account which also contained personal funds.

Based on the preceding findings by the board, formal charges were filed against Herman. Although personally served with a copy of the charges, Herman failed to respond within the required timeframe. The Association thus moved for judgment on the pleadings, pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1992).

We find that the requirements of rule 10 have been satisfied and see no reason that judgment on the pleadings should not be

granted. With regard to the sanction, we find that Herman should be disbarred. Herman's conduct, which the board found to have occurred, violates Canon 1, DR 1-102(A)(1), (4), and (5); Canon 6, DR 6-101(A)(3); Canon 7, DR 7-101(A)(2); and Canon 9, DR 9-102(B)(3) and (4), of the Code of Professional Responsibility. As a result of Herman's actions, his client has been deprived of substantial sums of money and a cause of action. Such conduct cannot and will not be tolerated. We thus order Herman disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LOUIS MICHAEL THRASHER, RESPONDENT.

502 N.W.2d 93

Filed June 25, 1993. No. S-93-301.

Original action. Judgment of disbarment.

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

PER CURIAM.

In this disciplinary action, the Nebraska State Bar Association (Association) has filed a number of formal charges against Nebraska attorney Louis Michael Thrasher. Thrasher, after being given notice through publication, has failed to answer the charges. We thus grant the Association's motion for judgment on the pleadings and order Thrasher disbarred.

In late 1992, the Association's Council for Discipline received a number of letters alleging misconduct by Thrasher. Based on these letters, a formal hearing was held to review the allegations. Although served with notice of the hearing, Thrasher did not appear or respond to the complaints.

On April 12, 1993, the Association's Disciplinary Review

Board filed a report summarizing the allegations of misconduct against Thrasher. From the report and the letters of complaint also contained in the pleadings, the following acts of misconduct have been attributed to Thrasher:

In April 1992, when a uniformed police officer attempted to serve him with a summons, Thrasher twice denied his identity. The officer later verified that the man he had attempted to serve was, in fact, Thrasher.

The report also addressed complaints from two separate litigants whom Thrasher had agreed to represent. Each litigant paid Thrasher a retainer at the beginning of Thrasher's representation. Both parties stated that, following initial discussions, Thrasher had failed to pursue their cases or to return their repeated calls. It is also alleged that the limitations periods ran on both parties' claims and that their retainer monies have not been returned.

The pleadings also indicate that Thrasher was appointed to serve as another complainant's counsel in federal court. Despite repeated requests by the litigant and the court, Thrasher made no contact with the litigant. Ultimately, the litigant received substitute counsel. Thrasher failed to appear at a hearing to show cause why he should not be held in contempt or disciplined for failure to adequately represent the litigant.

Based on the preceding findings by the board, formal charges were filed against Thrasher. Subsequently, additional formal charges were filed alleging that Thrasher had agreed to testify as an expert witness. Thrasher received a fee and a client file in relation to the agreement. The firm which hired Thrasher wrote to the Association stating that Thrasher had failed to contact them or to return the file and fee.

After notice of the charges was mailed to Thrasher's last known address, the notice was returned with indications that Thrasher had moved and left no forwarding address. Notice was then given through publication, pursuant to Neb. Ct. R. of Discipline 10(G) (rev. 1992). After Thrasher failed to answer the charges within the required timeframe, the Association moved for judgment on the pleadings under Neb. Ct. R. of Discipline 10(I) (rev. 1992). The Association has requested a sanction of disbarment.

We find that the requirements of rule 10 have been satisfied, and we see no reason that judgment on the pleadings should not be granted.

With regard to the sanction, we find disbarment appropriate. The allegations against Thrasher, which he has not denied, constitute, at the very least, violations of Canon 1, DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility. As a result of his actions, two individuals have been deprived not only of substantial sums of money, but of their right to pursue legal remedies as well. We find Thrasher's conduct reprehensible and inexcusable. We thus order him disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

JOHN A. WAHRMAN, APPELLEE, V. JOE WAHRMAN, APPELLEE, RAYMOND WAHRMAN, APPELLANT, AND HAROLD WAHRMAN, APPELLEE.

502 N.W.2d 95

Filed July 2, 1993. No. S-91-303.

1. **Quiet Title: Partition: Appeal and Error.** Review on appeal from a quiet title and partition action is de novo.
2. **Trusts: Intent.** The rules of construction for interpreting a trust are applied when the language of a trust is not clear; but if the language clearly expresses the settlor's intent, the rules have no application.
3. _____: _____. The primary rule of construction of a trust instrument is that the court must, if possible, ascertain the intention of the creator of the trust.
4. **Trusts.** As a general rule, the authority of a trustee is governed not only by the trust instrument but also by statutes and common-law rules pertaining to trusts and trustees.
5. **Equity.** Equity considers that done which ought to be done.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Arlan G. Wine for appellant.

Maurice A. Green, of Burger, Bennett & Green, P.C., for appellee John A. Wahrman.

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

WHITE, J.

In 1980, Mary Wahrman, mother of appellees John A., Joe, and Harold Wahrman and appellant Raymond Wahrman, executed an instrument called a "Declaration of Trust" (declaration), which provided that certain real and personal property owned by her was to be held in trust for the benefit of her four sons. This appeal involves a dispute over the ownership of a parcel of land located in Red Willow County, Nebraska, which Mary Wahrman had included in the trust. The other real property placed in the trust is located in Rawlins County, Kansas. The declaration designated Mary Wahrman as the trustee and her four sons as the beneficiaries of the revocable trust. The declaration further provided that upon Mary Wahrman's death the successor trustees, Joe and Raymond Wahrman, were to transfer the trust property to the beneficiaries and thereby terminate the trust. Each beneficiary was given an equal share in the trust property.

Mary Wahrman died in February 1985 while residing in Rawlins County, Kansas. On January 13, 1988, John Wahrman instituted an action in the district court for Rawlins County for a determination of descent of the property belonging to Mary Wahrman at the time of her death and for partition of the real property which passed to her heirs through intestate succession. Raymond, Joe, and Harold Wahrman were named defendants.

Before the Kansas court rendered its decision, Raymond and Joe Wahrman, in an attempt to transfer their mother's real property as provided by the declaration, executed trustee's deeds conveying the land from the trust to the brothers. Raymond Wahrman received all of the land located in Red Willow County, Nebraska, along with a parcel of Kansas land. The other brothers were deeded only Kansas land.

Raymond Wahrman filed a motion for court approval of the trustee's deeds. The Kansas court declared the trustee's deeds and the trust void. In addition, the court found that because

Mary Wahrman's four sons were her sole surviving heirs, each son owned an undivided one-quarter interest in her estate, which included the Kansas and Nebraska land placed in the trust.

On appeal, the Kansas Court of Appeals stated that the trial court was correct in finding the trust void. The court of appeals affirmed the district court's determination on the descent of Mary Wahrman's property and the ownership of the Kansas property.

Thereafter, John Wahrman filed an action in the district court for Red Willow County, Nebraska, to quiet title to and partition a parcel of land located in that county which had been included in the declaration. Raymond, Joe, and Harold Wahrman were again named defendants. John Wahrman asserted that, as illustrated by the Kansas court's decision, each of the brothers own an undivided one-quarter share in the Red Willow County land. Raymond Wahrman timely filed an answer to the plaintiff's petition in which he asserted that the trustee's deed conveying the Nebraska land to him was valid and that, therefore, he was the sole owner. The plaintiff moved for summary judgment, asking the trial court to grant full faith and credit to the Kansas court's determination that the trust and trustee's deeds were void. The plaintiff's motion was denied, and the case proceeded to trial.

The trial court found that the plaintiff and each defendant own an undivided one-quarter interest in the Red Willow County land and ordered partition of the property. In its final decree, the trial court stated that the Kansas court's decision "may be considered by this Court" and that the trustees' authority, if any, ended upon the death of Mary Wahrman. The court also indicated that with regard to the trustees' authority, "no authority exists for a transfer in kind and particularly the transfer such as is involved in this case."

Appellant-defendant, Raymond Wahrman, appeals the district court's decision, assigning as error (1) the trial court's determination that the plaintiff and defendants each own an undivided one-quarter share in the subject property and (2) the trial court's finding that the authority of the trustees ended upon the death of Mary Wahrman.

This appeal arose out of an action in equity to quiet title to and partition a parcel of land. Our review of such an appeal is de novo. *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983) (review of a quiet title action is de novo); *Malcom v. White*, 210 Neb. 724, 316 N.W.2d 752 (1982) (review of a partition action is de novo).

The appellant's assignments of error can be disposed of by addressing one issue: Whether the trustee's deed which transferred the Red Willow County land from the trust to Raymond Wahrman constitutes a valid conveyance so as to vest sole ownership of the land in him. We find that Raymond and Joe Wahrman exceeded the authority given them as successor trustees by conveying the Red Willow County land solely to Raymond Wahrman. Therefore, the deed was not a valid conveyance. We affirm the trial court's determination that each of the four brothers owns an undivided one-quarter interest in the subject land.

Before we discuss that issue, it should be noted that if the Mary Wahrman trust is invalid, it logically follows that any trustee deed arising from the trust also is invalid. Even assuming that Mary Wahrman's declaration established a valid trust, there appears to have been significant alterations to the terms of the document after its execution which are evident upon an examination of the declaration. These alterations were made by typing between the original printed words of the document. For example, the following emphasized sections indicate the alterations made to paragraphs 1 and 4:

> 1. For the use and benefit of the following four (4) persons, in equal shares, per stirpes:
>
> Joseph Wahrman, (my son)
> John Wahrman, (my son)
> Raymond Wahrman, (my son)
> Harold Wahrman, (my son)
>
> Upon my death . . . my Successor Trustee*sis* [sic] hereby directed forthwith to transfer said property . . . unto the beneficiaries . . . . *Or Fair exixtence,* [sic][.]
>
> . . . .
>
> 4. In the event of my death or legal incapacity, I hereby nominate and appoint as Successor Trustee*s* hereunder the

> beneficiary first above-named. *Joseph Wahrman and Raymond Wahrman Co. Trustees.*

(Emphasis supplied.)

The beneficiary "first above-named" is Joseph Wahrman. It appears as though someone was attempting to change the number of appointed successor trustees and include Raymond Wahrman as one of those trustees. However, nowhere on the document or in the record is it indicated that Mary Wahrman authorized this alteration. Furthermore, there is no logical interpretation of the words "Or Fair exixtence [sic]" which were added to the end of paragraph 1.

Notwithstanding the apparent alterations to the declaration, Joe and Raymond, as successor trustees, did not have the authority under the trust to deed an entire parcel of land to just one beneficiary. The rules of construction for interpreting a trust are applied when the language of a trust is not clear; but if the language clearly expresses the settlor's intent, the rules have no application. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992), citing *Conway v. County of Adams*, 171 Neb. 677, 107 N.W.2d 418 (1961). In this case, because the trust instrument appears to have been altered after its execution, we will apply the primary rule of construction in determining the extent of the trustees' authority under the trust.

The primary rule of construction of a trust instrument is that the court must, if possible, ascertain the intention of the creator of the trust. *Karpf v. Karpf, supra*, citing *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 288 N.W.2d 735 (1980). The trust in this case provides that upon Mary Wahrman's death the "Successor Trusteesis [sic] hereby directed forthwith to transfer said property . . . unto the beneficiaries absolutely and thereby terminate this trust." The four beneficiaries (John, Raymond, Joe, and Harold Wahrman) were given an equal share in all the trust property. The declaration merely directed the successor trustees to deed each parcel of land in the trust to the beneficiaries in undivided one-quarter shares. The successor trustees were not authorized to choose which beneficiary would be the sole owner of a certain parcel of land and then deed that parcel accordingly. As a general rule, the authority of a trustee is governed not only by the trust

instrument, but also by statutes and common-law rules pertaining to trusts and trustees. 90 C.J.S. *Trusts* § 246 (1955). The appellant fails to show, and we do not find, that the laws of this state authorized the successor trustees to divide the trust property in the manner set out in the trustee's deeds.

Since Raymond and Joseph Wahrman also are beneficiaries of the trust, there may be an issue as to whether their division of the trust property constituted self-dealing or a breach of the fiduciary duty owed by a trustee. However, we need not address this issue, as it was not presented to us for review.

The declaration clearly provided that upon Mary Wahrman's death the successor trustees were to transfer the property "forthwith" and that after such transfer, the trust would terminate. Raymond and Joseph Wahrman failed to transfer the trust real property "forthwith," which is evidenced by the fact that they did not execute the trustee's deeds until 3 years after Mary Wahrman's death.

Since this action is one in equity, we invoke the well-established maxim that equity considers that done which ought to be done. See *In re Estate of Wiley*, 150 Neb. 898, 36 N.W.2d 483 (1949). The language of the trust is clear. Mary Wahrman intended that upon her death the trust would terminate and that each of her four sons would receive an equal share of the trust property. The declaration did not expressly or impliedly authorize the successor trustees to divide the trust property as set out by the trustee's deeds. Considering done that which ought to be done, this court finds that the purported trust and the successor trustees' authority terminated upon Mary Wahrman's death. Any authority the successor trustees may have received under the trust for the purpose of winding up the trust did not include the power to divide the property in the manner set out in the trustee's deeds. The Red Willow County land is held by the plaintiff and defendants in undivided one-quarter shares.

We affirm the decision of the district court confirming title of the Red Willow County land to be held by each party in undivided one-quarter shares and ordering partition of said property.

AFFIRMED.

LANPHIER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CAREY DEAN MOORE, APPELLANT.

502 N.W.2d 227

Filed July 9, 1993. No. S-43557.

1. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** Appellate courts have three options in death penalty cases where the trial court errs in finding aggravating and mitigating circumstances: First, the court may analyze and reweigh the aggravating and mitigating circumstances to determine whether or not the scale tips in favor of the death penalty; second, the court may conduct a harmless error analysis; third, the court may remand the cause for a new sentencing hearing.
2. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** The aggravating factors of Neb. Rev. Stat. § 29-2523(1) (Reissue 1989) which are applied to determine whether the death penalty is appropriate must be proven beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Proceedings from the U.S. Court of Appeals for the Eighth Circuit. Remanded for resentencing.

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

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

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ., and CHEUVRONT, D.J.

WHITE, J.

This case is before us on the State's motion for the resentencing of Carey Dean Moore. The U.S. District Court for the District of Nebraska granted Moore habeas corpus relief and ordered his death sentence reduced to life imprisonment unless the State initiated capital resentencing proceedings.

Moore was convicted of two counts of first degree murder for the 1979 deaths of Reuel Eugene Van Ness, Jr., and Maynard D. Helgeland. The facts of the crimes are set out in our opinion in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864. A three-judge sentencing panel imposed the death penalty on both counts. On direct appeal, we affirmed the conviction

and sentence. *State v. Moore, supra.* Moore was denied postconviction relief by the district court, and we affirmed. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

The U.S. District Court for the District of Nebraska granted Moore a writ of habeas corpus, finding that the "exceptional depravity" element of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) applied by the sentencing panel to justify the death penalty was unconstitutional.

On appeal by the State, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh'g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). The sole issue on appeal was the constitutionality of the phrase "manifested exceptional depravity by ordinary standards of morality and intelligence" contained in § 29-2523(1)(d). The court of appeals agreed with the district court that this phrase was unconstitutionally vague and further held that the case law interpreting it "provides insufficient guidance to a sentencing body called upon to determine whether a particular murder 'manifested exceptional depravity.' " *Moore v. Clarke*, 904 F.2d at 1233.

On July 1, 1992, the federal district court ordered the death sentence reduced to life imprisonment unless the State filed for capital resentencing proceedings within 60 days. The State timely filed a motion for resentencing, which was granted by this court.

In its motion, the State requests that we define the "exceptional depravity" element of the aggravating circumstance described in § 29-2523(1)(d) to satisfy the federal court's objections as to constitutionality, apply this definition to the circumstances of the case, reweigh all the aggravating and mitigating factors applicable to the imposition of the death penalty, and determine an appropriate sentence. However, this opinion will not reach the issue of constitutionality of the aggravating circumstance described in § 29-2523(1)(d), nor will we determine the propriety of the death sentence in this case. Although we believe, as indicated below, that this court has the authority to resentence Moore, in the interest of judicial economy we remand this cause to the district court for Douglas

County for resentencing.

In *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), we addressed the issue concerning our authority to determine the propriety of a death sentence by reweighing the aggravating and mitigating factors of the case. In Reeves' prior direct appeal, we found that the sentencing panel improperly applied the aggravating circumstance described in § 29-2523(1)(d) and failed to consider a mitigating circumstance. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). After reweighing the aggravating and mitigating factors, we affirmed the district court's conviction and sentence. *Id.* Reeves was denied postconviction relief by the district court, and we affirmed. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). The U.S. Supreme Court granted Reeves' petition for writ of certiorari, vacated our decision on postconviction relief, and remanded the cause to us for reconsideration in light of the Court's decision in *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990). On remand, we analyzed the implications of *Clemons* and found:

> In summary, *Clemons* . . . sets forth three options available to appellate courts in death penalty cases where there has been an error concerning the trial court's finding of aggravating and/or mitigating circumstances. First, the court may analyze and reweigh the aggravating and mitigating circumstances itself to determine whether or not the scale tips in favor of the death penalty. Second, the court may conduct a harmless error analysis to determine whether or not error by the district court in finding aggravating or mitigating circumstances has prejudiced the rights of the defendant. Third, the court may remand the cause for a new sentencing hearing.

State v. Reeves, 239 Neb. at 423, 476 N.W.2d at 834.

Moore questions the authority of this court to resentence him. As indicated in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), we have the authority to resentence by analyzing and reweighing the aggravating and mitigating factors of the case.

It should be noted that in another Nebraska death penalty case the U.S. Court of Appeals for the Eighth Circuit held that

Clemons did not authorize this court to reweigh when the sentence imposed was based entirely on invalid considerations. *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 2950, 124 L. Ed. 2d 697. In our opinion disposing of Rust's direct appeal, we acknowledged that this court had on the same day in another case held that facts indicating the existence of an aggravating factor must be proven beyond a reasonable doubt. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198. Recognizing that the sentencing panel may not have applied this newly mandated burden of proof, we reviewed the evidence and concluded that the aggravating factors had been proven beyond a reasonable doubt. *State v. Rust, supra*. After reweighing the mitigating and aggravating factors, we affirmed the conviction and sentence. Subsequently, Rust sought and received habeas corpus relief from the federal district court. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. *Rust v. Hopkins, supra*. That court's decision was based in part upon its finding that *Clemons* did not authorize appellate court reweighing to cure a sentencing panel's failure to apply the correct burden of proof. *Rust v. Hopkins, supra*.

> We recognize, of course, that an appellate court is fully competent to "cure" some sentencing deficiencies in capital cases. However, we think such appellate remedies are appropriate when the initial sentencing was tainted by relatively minor errors . . . . We do not believe that *Clemons* or any other decision on this issue supports the proposition that an appellate court can provide an adequate "cure" when the entire first tier of the sentencing process was invalid.

Rust v. Hopkins, 984 F.2d at 1493.

In addition to the foregoing, the court of appeals held that our reweighing in this case was unconstitutional because it eliminated Rust's statutory right to an appellate review of his sentence. "Here, the action of the appellate court in curing these deficiencies by stepping in the shoes of the sentencing panel, creates an additional violation by eliminating the possibility of appeal." *Id.* at 1495. The court simply addressed

this issue in a short paragraph without expounding on its application to other resentencing or reweighing situations. The court of appeals' decision does not fully examine the constitutionality of appellate court reweighing under Nebraska's two-tiered sentencing system.

Notwithstanding the distinguishable facts between the *Rust* case and this case, we are not bound to follow the federal court's interpretation of *Clemons* over our own, nor must we apply to all other death penalty cases the court of appeals' holding that our reweighing in *Rust* was unconstitutional under Nebraska's two-tier system.

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, ____ U.S. ____, 113 S. Ct. 838, 846, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring). See, also, *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 29 L. Ed. 2d 505 (1974) (Rehnquist, J., concurring); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied* 402 U.S. 983, 91 S. Ct. 1658, 29 L. Ed. 2d 148 (1971).

The court of appeals' interpretation of *Clemons*, as set out in *Rust*, does not govern our decision in this case. We believe our analysis in *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), is accurate and controlling. However, we acknowledge that if this court reweighed the aggravating and mitigating factors and resentenced Moore, the federal court would likely reverse pursuant to *Rust*. Therefore, it is futile for us to proceed with the resentencing.

We have remanded this cause not pursuant to the court of appeals' decision in *Rust*, but because, absent a U.S. Supreme Court decision as to the propriety of appellate court reweighing, it would be a waste of judicial resources for this court to render an opinion which will subsequently be overturned on a writ of habeas corpus by the federal courts. We

remand this cause to the district court for Douglas County for resentencing, in the interest of judicial economy.

REMANDED FOR RESENTENCING.

SHANAHAN, J., concurs in the result.

BAKER'S SUPERMARKETS, INC., A NEBRASKA CORPORATION, APPELLEE, V. ALBERT L. FELDMAN AND MEYER H. FELDMAN, COTRUSTEES, APPELLANTS.

502 N.W.2d 428

Filed July 9, 1993. No. S-90-1000.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the courts below.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus may not be appealed, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions, may determine the controversy which is the subject of those motions, and may make an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just.
4. **Judgments: Appeal and Error.** The rule that a party who accepts the benefits of a judgment in its favor may not appeal therefrom applies only where the judgment benefits the party seeking to appeal and not where compliance is involuntary or compelled.
5. **Appeal and Error.** An error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause, constitutes plain error for consideration on further review.
6. **Contracts: Time.** Instruments made in reference to and as part of the same transaction are to be considered and construed together; that the instruments were made or dated at different times is not significant if they are related to and

were part of the transaction.

7. **Contracts.** A contract must be construed as a whole, and, if possible, effect must be given to every part thereof.
8. _____. In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.
9. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
10. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
11. **Contracts: Intent.** If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract.
12. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, MILLER-LERMAN, Judge, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals affirmed as modified.

James D. Sherrets and Karl D. Vogt, of Sherrets Smith & Gardner, P.C., for appellants.

Ray R. Simon and John C. Brownrigg, of Erickson & Sederstrom, P.C., for appellee.

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

CAPORALE, J.

The plaintiff-appellee lessee, Baker's Supermarkets, Inc., sought a declaration that it had not breached its lease and an injunction preventing the defendant-appellant lessors, the cotrustees of an unnamed trust, Albert L. and Meyer H. Feldman, from interfering with the rights of Baker's in the demised premises. The Feldmans in turn counterclaimed for damages and restitution of the demised premises. Each of the parties moved for summary judgment; the district court sustained the motion of Baker's and denied the Feldmans' motion, thereby dismissing their counterclaim. The Feldmans then appealed, asserting that the district court had erred in, among other things, holding that Baker's was not required to

continuously occupy and use the demised premises and was not obligated to pay a penalty for its failure to do so, and in dismissing their counterclaim. Baker's, on the other hand, contended that by accepting rental payments as ordered by the district court, the Feldmans had forfeited their right to appeal. The Nebraska Court of Appeals rejected the contention made by Baker's, but found the lease to be ambiguous, determined that summary judgment was for that reason inappropriate, and thus reversed the judgment of the district court and remanded the cause for further proceedings. Baker's then petitioned this court for further review on the sole basis that the Feldmans had waived their right to appeal. We now affirm the judgment of the Court of Appeals as modified in this opinion.

We begin our review by recalling once again that the construction of a contract is a matter of law in connection with which we, as an appellate court, have an obligation to reach an independent correct conclusion irrespective of the determination made by the courts below. See, *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993); *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

We also recall that summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *VanDeWalle v. Albion Nat. Bank, ante* p. 496, 500 N.W.2d 566 (1993); *Amco Ins. Co. v. Norton, ante* p. 444, 500 N.W.2d 542 (1993); *Viking Broadcasting Corp. v. Snell Publishing Co., ante* p. 92, 497 N.W.2d 383 (1993).

Although the denial of a motion for summary judgment is not a final order and thus may not be appealed, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions, may determine the controversy which is the subject of those motions, and may make an order specifying the facts which appear without

substantial controversy and directing such further proceedings as it deems just. *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991). See, also, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified on other grounds* 242 Neb. 97, 490 N.W.2d 461; *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989).

Sometime prior to 1965, Baker's began negotiating with the Feldmans' predecessor in interest to lease space as a tenant at an Omaha shopping center. They reached an agreement for a term of 15 years, which was reduced to writing and executed by the parties on June 10, 1964. This document was replaced by an instrument dated June 25, 1965, for a like term, to commence on the completion of 20,934 square feet of building space to be constructed in the same shopping center by the predecessor. The motivation for the execution of the June 25, 1965, replacement instrument is not clear, but the parties treat the June 25 instrument as controlling. Thus, we refer to this instrument as the "original lease."

On June 23, 1977, Baker's and the Feldmans as the successors in interest to the original lessor executed a supplemental agreement to the original lease. The supplemental agreement provided for the addition of 7,800 square feet to the demised premises. It also increased the monthly rent, extended the term for 15 years following completion of the addition, and granted Baker's the option of two successive 5-year extensions.

The original lease provides, in relevant parts:

> (2) Nature of Business and Restrictions.
>
> [Baker's] shall conduct in and upon the premises a retail grocery supermarket and there shall be no restriction or limitation upon the articles sold therein, except that no prescription drugs shall be sold. [The Feldmans' predecessor] covenants that it will not lease any portion of the shopping center to any other person, firm or corporation to be used in the sale of groceries, meats and produce, or any of such lines, except for a delicatessen, which delicatessen shall occupy an area not to exceed twenty-five hundred (2500) square feet.
>
> . . . .

(15) Continued Occupancy.

[Baker's] covenants to, and it is of the essence of this lease, that [Baker's] shall, continuously and uninterruptedly during the term of this lease, occupy and use the premises for the purpose hereinabove specified, except while premises are untenantable by reason of fire or other unavoidable casualty, and in this connection, it is agreed that in case of breach of this covenant, [Baker's] shall, in addition to the rental hereinabove provided for, pay to the [Feldmans' predecessor] monthly a sum equal to twenty-five (25%) per cent of the monthly rental stipulated herein, for each and every month during which the premises are not so continuously and uninterruptedly used and occupied, as liquidated damages for [Baker's] breach of covenant, it being recognized by the parties that the exact amount of damages to the [Feldmans' predecessor] on account of such breach cannot be accurately ascertained. This provision shall, however, in no wise abridge or affect any other right or remedy which the [Feldmans' predecessor] may have on account of or in connection with [Baker's] breach of this covenant.

The preamble of the supplemental agreement declares:

WHEREAS, [the Feldmans are] . . . bound by a certain lease agreement dated the 25th day of June, 1965, by virtue of which certain premises . . . were leased to Baker's . . . and which lease agreement . . . is by this reference deemed incorporated herein to all intents and purposes as if set forth verbatim as a part hereof, and

WHEREAS, the parties hereto have agreed to alter, modify, as well as supplement the [original lease] to the extent herein specifically provided and to affirm the same in all other respects.

The supplemental agreement also reads, in other relevant parts:

Additional Rent and Additional Rent Adjustment

2.01 Beginning with the sixtieth (60th) day next following the substantial completion of the [addition] the rent provided in the [original lease] shall be altered and modified. The annual rental shall be increased thereafter

> by the product derived by employing the square foot floor area of the [addition] as the multiplicand and $4.25 as the multiplier, such product, referred to hereafter as the "Additional Rent" . . . .
>
> . . . .
>
> 7.01 At any time subsequent to the fifth (5th) year following the Term Commencement Date, Baker's may from time to time assign or sublet its interest in this lease and the Leased Premises to any person, firm or corporation for any lawful retail purpose not in violation of any existing use restrictions herein contained or theretofore granted by [the Feldmans] to any other occupant of the Shopping Center. . . .
>
> . . . .
>
> 7.03 The provisions of this Supplement shall, where in conflict, supersede those of the [original lease]. In other respects, the terms and provisions of the [original lease] are affirmed by the parties and shall be and remain fully effective between them.

While Baker's made rental payments, it, in June 1990, ceased operating its retail grocery store at the demised premises, vacated the premises, and opened a new retail grocery store in a competing shopping center. It also removed shelving, refrigerated units, compressors, and other items.

In the course of these proceedings, the district court issued a temporary restraining order which directed the parties to preserve the status quo by requiring Baker's to continue paying the rent due under the lease, without prejudice "to the respective contentions or positions of any of the parties." In entering its summary judgment in favor of Baker's, the district court ordered that the temporary restraining order become a temporary and permanent injunction preventing the Feldmans "from affecting [Baker's] continued rights in the [demised] premises." The district court also dismissed the Feldmans' counterclaim, which sought restitution of the premises and damages resulting from the actions of Baker's.

With the foregoing matters in mind, we next turn our attention to whether, as Baker's claims, the Feldmans waived their right to appeal. Pointing out that the Feldmans have

accepted the rental payments the district court ordered it to pay, Baker's attempts to invoke the rule that a party who accepts the benefits of a judgment in its favor may not appeal therefrom. *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951). See, also, *Giese v. Giese, ante* p. 60, 497 N.W.2d 369 (1993); *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992); *Hormandl v. Lecher Constr. Co.*, 231 Neb. 355, 436 N.W.2d 188 (1989).

The most obvious flaw in this contention is that the Feldmans are not appealing from a judgment in their favor. The judgment was adverse to them, denying them damages and restitution of the demised premises. Moreover, by incorporating the terms of the temporary restraining order, the judgment in favor of Baker's maintains the status quo throughout the course of this litigation by providing that the required rental payments be made without prejudice to the rights of any party. As noted in *State ex rel. Douglas v. Ledwith*, 204 Neb. 6, 281 N.W.2d 729 (1979), the rule which Baker's seeks to invoke applies only where the judgment benefits the party seeking to appeal and not where compliance is involuntary or compelled.

Thus, the Feldmans have not, by accepting the rental payments, waived their right to appeal.

That determination brings us to a question of first impression: May this court, upon conducting further review of a decision of the Court of Appeals, look beyond the error assigned in the petition seeking such?

Neb. Ct. R. of Prac. 2F(3) (rev. 1992) provides that the petition for further review and supporting memorandum brief "shall set forth specifically and in detail the error alleged to have been made by the Court of Appeals" and further requires that the memorandum brief discuss any error assigned. Moreover, Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) requires an appellant's brief to contain a separate and concise statement of each error about which complaint is made. And we have held that in accordance with the provisions of that rule, in order to be considered by an appellate court, an error must not only be assigned, but it must be discussed in the brief of the complaining party. See, *Hamilton v. City of Omaha, ante* p. 253, 498 N.W.2d 555 (1993); *Shelter Ins. Co. v. Frohlich, ante*

p. 111, 498 N.W.2d 74 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). However, rule 9D(1)d also provides that we may, at our option, notice a plain error not assigned. *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988).

We have also written, however, that plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

We now hold that an error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause, constitutes plain error for consideration on further review.

We thus consider the correctness of the Court of Appeals' determination that the lease is ambiguous and requires explanation through parol evidence. Instruments made in reference to and as part of the same transaction are to be considered and construed together; that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973).

Furthermore,

> A contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 96 N.W.2d 721 (1959). . . .
>
> In interpreting contracts, the court as a matter of law must first determine whether the contract is

> ambiguous. . . .
>
> An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. . . . "The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous." . . . If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract. . . .
>
> . . . .
>
> . . . The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

Crowley v. McCoy, 234 Neb. 88, 91-93, 449 N.W.2d 221, 224-25 (1989).

In applying the foregoing rules, we again note that the preamble of the supplemental agreement recites that to the extent specifically provided, the parties altered, modified, and supplemented the original lease. The final paragraph of the supplemental agreement provides that where in conflict, the supplemental agreement supersedes the original lease, but that in other respects the terms and provisions of the original lease stand affirmed and shall be and remain fully effective. Thus, the original lease controls except in those instances in which the supplemental agreement specifically altered or modified it.

As set forth earlier in this opinion, paragraph 7.01 of the supplemental agreement permits Baker's, after the fifth year following the term commencement date, to assign or sublet the leased premises "for any lawful retail purpose not in violation of any existing use restrictions herein contained or theretofore granted by [the Feldmans] to any other occupant of the Shopping Center." The plain and ordinary meaning of this language permits the demised premises, after the specified 5-year period, to be used for other than a retail grocery supermarket, but does not obviate the continuous occupancy requirement of paragraph 15 of the original lease.

Thus, the Court of Appeals committed plain error in ruling that the lease is ambiguous. Baker's has breached the lease by

failing to maintain continuous occupancy.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the district court and remanding the cause for further proceedings is affirmed as modified in accordance with this opinion. That is to say, the judgment in favor of Baker's is to be vacated, set aside, and held for naught; the Feldmans' counterclaim is to be reinstated; and a trial is to be had on the matter of the Feldmans' damages.

AFFIRMED AS MODIFIED.

WHITE and LANPHIER, JJ., not participating.

E'LINDA L. THORNBURG AND DEAN E. THORNBURG, WIFE AND HUSBAND, APPELLANTS, V. ROBERT L. HAECKER AND JOYCE E. HAECKER, HUSBAND AND WIFE, ET AL., APPELLEES.

502 N.W.2d 434

Filed July 9, 1993. No. S-91-061.

1. **Adverse Possession: Equity: Appeal and Error.** Adverse possession actions are equitable in nature; therefore, an appellate court reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court.
2. **Adverse Possession: Proof: Time.** One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the full 10-year statutory period.
3. **Adverse Possession.** The sufficiency of the possession required to establish title by adverse possession is dependent upon the character of the land and the use which can reasonably be made of it.
4. _____. Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period.
5. **Adverse Possession: Landlord and Tenant.** A tenant may adversely possess real property in the name of his landlord.
6. **Adverse Possession.** In order to tack the possession of predecessors in title, each predecessor occupant must show derivative title from his predecessor in order to link his possession with that taken under a previous entry.
7. **Adverse Possession: Boundaries.** Where a fence is constructed as a boundary line, even though it is not the actual boundary, and a party claims ownership of land up to that fence for the statutory period, that party gains title to such land by adverse possession.

8. **Adverse Possession: Evidence.** While the law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the disputed property for the purposes for which it is adapted, there must be an element of exclusivity under a claim of ownership.
9. **Adverse Possession.** Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the District Court for Gage County, WILLIAM B. RIST, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Ronald G. Sutter, of Everson, Wullschleger, Sutter, Korslund & Willet, for appellants.

Gary G. Thompson for appellees.

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

LANPHIER, J.

Defendants, Robert L. Haecker, Joyce E. Haecker, Leroy C. Haecker, Mary M. Haecker, and Anna T. Haecker, seek further review of a judgment of the Nebraska Court of Appeals which quieted title to certain real estate in the plaintiffs, E'Linda L. Thornburg and Dean E. Thornburg. The Court of Appeals' holding reversed a judgment by the district court for Gage County which found that as neither party regarded a fence line as the boundary between their properties, the Thornburgs could not now claim that their use of the disputed property up to that fence line was under a claim of ownership. The case now comes before this court on the Haeckers' petition for further review. We reverse the judgment of the Court of Appeals.

BACKGROUND

The Gage County properties at issue in this case were originally part of one large tract of land owned by Gilbert Essam. Essam sold the northern parcel of the land to Clarence and Anna Haecker in 1960. Already in existence at that time was a fence which ran east to west across the property. This fence meandered north of the actual boundary line of the property as it was divided after the 1960 sale and was intended

to keep livestock out of a nearby creek, ravine, and wooded area to the south of the fence. Clarence Haecker immediately began keeping cattle, and then sheep, on the area north of the fence.

In 1963, Essam sold the southern portion of the property to E'Linda Thornburg's parents, Warren and Ester Evans. The Evanses leased the southern tract to E'Linda and Dean Thornburg from 1965 until 1973, after which time the Evanses gave the Thornburgs the land. From 1965 to 1982, the Thornburgs pastured cattle on the southern tract up to and around the fence line. It appears, however, that by the 1970's much of the original fence line was in such a deteriorated condition as to be either nonexistent or at least no longer suitable to contain livestock.

Anna Haecker testified that although they were aware of the fence, she and her husband, Clarence, did not consider it the boundary line between the properties. They used a ravine on the south side of the fence as a garbage dump and ran a sewer line from their home into a ditch which was also on the south side of the fence. Dean Thornburg testified that he and Clarence Haecker had a conversation in 1977 or 1978 in which they both agreed that they were uncertain as to where the boundary line was.

From 1983 to 1989, the Thornburgs rented part of the Haeckers' property, including that by the fence line, to pasture cattle. Dean Thornburg testified that when he rented the Haeckers' property he "had no idea that [the fence] was the boundary." In 1990, Thornburg noticed red marker flags near the northern end of his property and, upon talking to the Haeckers, was notified that a survey had been conducted to establish the boundary for a new fence line. The Haeckers intended to move the fence to the actual property line so they would have better access to water. It appears that Thornburg consented to this move as long as the survey was correct.

When Thornburg saw that the fence was being moved considerably south of the old fence line, he approached the Haeckers. Thornburg wanted to make some type of arrangement where the new fence would follow the old fence line, stating that "if [the Haeckers] were giving up more land

than I was giving up on the new boundary, that I would make a settlement with them." No settlement agreement was reached, however.

The new fence was erected on the surveyed line in the spring of 1990, and the Thornburgs thereafter initiated this action to quiet title to the land north of their property up to the old fence line. The district court determined that as neither party regarded the fence as the actual property line, the Thornburgs had not adversely possessed the land. The Court of Appeals reversed the district court's decision (*Thornburg v. Haecker*, 2 NCA 84 (1993)), whereupon the Haeckers petitioned this court for further review.

ASSIGNMENTS OF ERROR

The Haeckers assign six errors in their petition for further review, alleging that the Court of Appeals erred in (1) finding that the Thornburgs' claim of title began in 1965; (2) finding that *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969), was persuasive authority; (3) finding that the Thornburgs had run cattle up to the fence line with a claim of title based thereon; (4) finding that the fence line was well established and recognizable as a claim of title; (5) failing to recognize that the Haeckers had exercised the rights of ownership over the land to the south of the fence; (6) failing to require actual, continuous, exclusive, notorious, and adverse possession as a requirement to establish adverse title. We will address these allegations in the order in which they were assigned.

STANDARD OF REVIEW

Adverse possession actions are equitable in nature; therefore, we review the record de novo and reach an independent conclusion without reference to the findings of the trial court. *State Nat. Bank & Trust Co. v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984); *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981).

ANALYSIS

We have continuously held that one who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous,

exclusive, notorious, and adverse possession under claim of ownership for the full 10-year statutory period. *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *Paasch v. Brown*, 217 Neb. 761, 351 N.W.2d 74 (1984). The sufficiency of the possession is dependent upon the character of the land and the use which can reasonably be made of it. *Schaneman v. Wright, supra*; *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985). Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Nichol v. Hettinger*, 225 Neb. 812, 408 N.W.2d 302 (1987). It is in light of these propositions that we examine the case at bar.

Beginning of Thornburgs' Claim of Title

The Haeckers first contend that the Court of Appeals erred in finding that the Thornburgs' claim of title began in 1965. The record shows, however, that Dean Thornburg began pasturing cattle on the disputed property in 1965, when he and his wife were tenants on the southern tract. We have held that pasturing cattle on a disputed tract supplies the possession necessary to sustain a claim of adverse possession. *State Nat. Bank & Trust Co. v. Jacobsen, supra*. Although the Thornburgs' possession from 1965 to 1973 was had when they were tenants of the Evanses, the statutory clock was nevertheless set in motion in 1965. A tenant may adversely possess real property in the name of his landlord. See *Bryan v. Reifschneider*, 181 Neb. 787, 150 N.W.2d 900 (1967).

The Thornburgs became the owners of the southern tract in 1973. Therefore, to sustain their claim of ownership by adverse possession from 1965 to 1975, it is necessary for the Thornburgs to tack on the adverse possession of the land by their predecessors in title, the Evanses. In order to tack the possession of predecessors in title, each predecessor occupant must show derivative title from his predecessor in order to link his possession with that taken under a previous entry. *Bryan v. Reifschneider, supra*.

In the case before us, the Thornburgs cannot claim that privity exists with their grantors as to land beyond that described in the deed because of the deed alone.

> [T]o permit tacking of successive adverse possession of grantees of an area not within the calls of a deed or contract, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantees as successors in ownership, possession, and claim.

Rentschler v. Walnofer, 203 Neb. 84, 93, 277 N.W.2d 548, 554 (1979). "Privity means privity of possession. It is the transfer of possession, not title, which is the essential element." *Bryan v. Reifschneider*, 181 Neb. at 792, 150 N.W.2d at 904. Here, it is clear that possession of the land up to the fence was maintained for the same purposes and by the same persons for at least a 10-year period, even though legal title changed hands in 1973. The necessary privity between the successive possessive interests therefore existed, and the Thornburgs met the 10-year statutory requirement of possession in 1975.

The Haeckers also argue that the Thornburgs could not have possessed the property during this period because the evidence does not show where the fence was at this time. We disagree. The evidence shows that the fence line was well established from 1965 through at least 1975. After that time, sections were moved, replaced, or simply deteriorated to the point that it could no longer be considered a fence. However, this would have occurred after the statutory period and is therefore of no moment to this issue. Accordingly, we find the Haeckers' first assignment of error to be without merit.

Hostile Possession

The Haeckers' next three assignments of error can be distilled into one: The Court of Appeals erred in finding that the fence was considered a boundary line by the parties. The Court of Appeals and the Thornburgs rely heavily upon cases which have held that where a fence is constructed as a boundary line, even though it is not the actual boundary, and a party claims ownership of land up to that fence for the statutory period, that party gains title to such land by adverse possession. See, *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969); *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961). These cases are easily distinguished from the one at bar, however,

because the parties therein recognized and acknowledged a fence line as the true boundary line. Here, there is no evidence which tends to show that the parties at any time regarded the fence in question as a boundary line.

As noted above, Anna Haecker, who lived on the northern tract from 1960 through 1989, testified that although she was aware of the fence, she never considered it the boundary line between the properties. Neither is there any indication that the Thornburgs ever believed the fence to be the boundary between the properties. In fact, Dean Thornburg testified that he and Clarence Haecker had a conversation in 1977 or 1978 in which they both agreed that they were uncertain as to where the boundary line was located. While such evidence is not determinative of Thornburg's state of mind concerning the fence from 1965 to 1975, it is indicative of the ambivalence that the parties felt concerning the fence and the true boundary line.

In addition, as noted below, evidence that both parties used the disputed land further diminishes the Thornburgs' argument that the fence line was recognized as a boundary by the parties. This court has held:

> "Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property."

Berglund v. Sisler, 210 Neb. 258, 262, 313 N.W.2d 679, 682 (1981) (quoting *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978)). The Thornburgs' failure to assert their ownership of the property up to the fence line further evidences the fact that they did not recognize the fence as a boundary line. Accordingly, the Court of Appeals' and the Thornburgs' reliance upon *McCain* and other cases where a fence was recognized by all parties as a boundary line was misplaced.

EXCLUSIVITY OF POSSESSION

The Haeckers' fifth assignment of error alleges that the Court of Appeals erred in failing to recognize that the Haeckers had exercised the rights of ownership over the land to the south of the fence. The evidence shows that the Haeckers used the disputed property as a garbage dump throughout the Thornburgs' claimed period of adverse possession and also that they ran a sewer line from their residence which emptied onto the property during the same period in which the Thornburgs used the property. While the law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, there must be an element of exclusivity under a claim of ownership. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). We have held that where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party. *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). The record here fails to show exclusive possession or use by the Thornburgs, and the Court of Appeals was therefore incorrect in finding otherwise.

ELEMENTS OF ADVERSE POSSESSION

As their last assignment of error, the Haeckers allege that the Court of Appeals erred in "failing to require actual, continuous, exclusive, notorious and adverse possession as a requirement to establish adverse title." We agree that the Court of Appeals failed to recognize that all of the above elements must exist before title may be had by adverse possession. "Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period." *Nichol v. Hettinger*, 225 Neb. 812, 815, 408 N.W.2d 302, 305 (1987). It is for this reason that we must reverse the judgment of the Court of Appeals and dismiss the Thornburgs' petition.

The record clearly shows that not all of the criteria for adverse possession have been established in favor of the Thornburgs. While the Thornburgs were in actual and continuous possession of the disputed property for the statutory period, they failed to meet the requirements of

exclusive possession and notorious possession under a claim of ownership. As the element of exclusivity was discussed above, we turn now to the requirement of notorious possession under a claim of ownership.

The case of *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981), is controlling. In *Berglund*, as in this case, none of the parties actually knew where the true boundary line was until the properties were surveyed shortly before the action was initiated. Additionally, as here, the adverse claimants in *Berglund* demonstrated that their occupation of the land in dispute was not intended to be hostile when they attempted to purchase the property from the record owner. We held that while these factors were not individually determinative on the issue, when they were viewed as a whole it was clear that the claimant lacked the adverse and hostile intent to possess the land. Accordingly, in addition to the exclusivity requirement, the Thornburgs also lacked the required adverse or hostile possession of the disputed property.

CONCLUSION

The Thornburgs failed to show by a preponderance of the evidence that they had met each element of adverse possession for the required period. As a result, the Thornburgs have no claim of ownership to any of the land lying north of the common boundary between the parties as described in their respective deeds as surveyed and presumably as divided by the present fence line. The Thornburgs' claim to the disputed area by adverse possession should therefore be denied. The Court of Appeals' judgment is reversed, and this cause is remanded to the Court of Appeals with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN A. WOLF, TRUSTEE IN BANKRUPTCY, APPELLANT AND CROSS-APPELLEE, V. DORIS DEGNER AND EDGAR DEGNER, WIFE AND HUSBAND, APPELLEES AND CROSS-APPELLANTS, AND EDGAR AND ALLEN SCHARDT, INC., A NEBRASKA CORPORATION, APPELLEE.

502 N.W.2d 440

Filed July 9, 1993. No. S-91-075.

1. **Fraud: Conveyances: Debtors and Creditors: Standing.** Under the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. § 36-601 et seq. (Reissue 1988), only a creditor has standing to bring an action to set aside an allegedly fraudulent conveyance.
2. **Bankruptcy: Fraud: Conveyances: Debtors and Creditors: Limitations of Actions: Time.** Although 11 U.S.C. § 108(a) (1988) extends the time within which a trustee may commence an action on behalf of a debtor in bankruptcy in conjunction with a pending bankruptcy proceeding, § 108(a) does not affect the statute of limitations applicable under state law pertaining to a trustee's action commenced on behalf of creditors to set aside an allegedly fraudulent conveyance.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with direction.

William J. Panec for appellant.

Rollin R. Bailey, of Bailey, Polsky, Cope, Wood & Knapp, for appellees Degner.

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

SHANAHAN, J.

John A. Wolf, trustee in bankruptcy, brought an action to set aside two allegedly fraudulent conveyances from Doris Degner to her husband, Edgar Degner. The district court found that Doris' conveyance of her lots in Deshler, Nebraska, rendered her insolvent and was made with the intent of hindering, delaying, and defrauding her creditors. However, the court found that Doris' conveyance of her interest in farmland was not fraudulent as to her creditors.

STANDARD OF REVIEW

An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. In an appeal of an equitable action concerning a fraudulent conveyance, an

appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

BACKGROUND

When Doris and Edgar Degner married each other on May 7, 1982, Doris had children from her previous marriage and owned a farm northwest of Deshler, two lots in Deshler, and various other assets. At the time of his marriage to Doris, Edgar owned a quarter section of land near Carleton, Nebraska.

In a deed dated May 18, 1982, Edgar conveyed his Carleton quarter section to "Edgar Degner and Doris Degner, husband and wife, as joint tenants with rights of survivorship and not as tenants in common" to ensure that the tract would belong to Doris after Edgar's death.

On March 25, 1985, Doris deeded the Deshler lots to Edgar in repayment of Edgar's business loans to Doris and her son. By a quitclaim deed on April 23, Doris reconveyed the Carleton quarter section to Edgar so that he could sell the land. The deeds for the Deshler lots and the quarter section were recorded in the county clerk's office on April 23.

When Doris signed both of the deeds, her assets included her farm which was appraised at approximately $158,000, a 1981 Pontiac automobile with undisclosed value, and various household goods of undetermined value. Doris' liabilities included a debt of $36,155 owed to Superior-Deshler Co. (Superior), indebtedness of $15,182 to Nebraska Security Bank (Bank), and a $138,000 mortgage on her real estate.

Doris filed for bankruptcy on June 3, 1987. At a July 22 meeting attended by her creditors, including Superior and the Bank, Doris disclosed that she had reconveyed the Carleton quarter section to Edgar. The bankruptcy court discharged Doris as a bankrupt on November 4. Subsequently, on December 8, 1988, Edgar contracted to sell the Carleton

quarter section. On January 18, 1989, the trustee executed a release, disclaiming any interest in the Carleton quarter section. The Bank and Superior then filed a motion to compel the trustee to bring an action to set aside Doris' conveyances to Edgar. The bankruptcy court granted the motion and authorized the trustee to commence an action based on Doris' alleged fraudulent conveyances, but required the Bank to pay all expenses incurred in the litigation if the action was unsuccessful.

ACTION TO SET ASIDE DORIS' DEEDS

On May 24, 1989, the trustee filed the present action to set aside Doris' conveyances to Edgar. In their amended answers, Degners pleaded the statute of limitations contained in Neb. Rev. Stat. § 25-207 (Reissue 1989), that is, an action for relief on the ground of fraud must be brought within 4 years, but the cause of action shall not be deemed to have accrued until discovery of the fraud. Notwithstanding Degners' assertion of the statute of limitations under § 25-207, the district court concluded that Doris' conveyance of the Deshler lots was fraudulent and set aside that conveyance, but further concluded that Doris' conveyance of the Carleton quarter section was not fraudulent as to her creditors.

ASSIGNMENTS OF ERROR

Wolf contends, inter alia, that the district court erred in determining that Doris' deed of the Carleton quarter section to Edgar was not made for the purpose of hindering, delaying, and defrauding Doris' creditors.

In their cross-appeal, Degners contend that the court erred in failing to find that the action was barred by the statute of limitations expressed in § 25-207.

STATUTE OF LIMITATIONS

Because the conveyances in question were made more than 4 years before the trustee brought this action to set aside those conveyances, Degners contend that the 4-year statute of limitations in § 25-207 bars the trustee's action. As trustee, Wolf contends that the Bankruptcy Code, namely, 11 U.S.C. § 108(a) (1988), tolled the state statute of limitations. Section

108(a) provides:

> If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which *the debtor* may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

(Emphasis supplied.) Thus, § 108(a) extends the time for a trustee's filing an action on behalf of a debtor and allows the trustee to bring suit within 2 years after the order for relief, provided that the statute of limitations applicable to the action has not expired before the bankruptcy petition is filed. See 2 Collier on Bankruptcy ¶ 108.02 (15th ed. 1993). Wolf contends that because his petition to set aside Doris' conveyances was filed within 2 years after Doris filed her petition in bankruptcy and, thus, within the 2-year period established by § 108(a), the Nebraska 4-year statute of limitations under § 25-207 was tolled by federal law.

The following is a recapitulation of the relevant transactions and their dates:

March 25, 1985	Doris conveys the Deshler lots to Edgar
April 23, 1985	Doris conveys her interest in the Carleton quarter section to Edgar
April 23, 1985	Doris' deeds to Edgar are recorded in the county clerk's office
June 3, 1987	Doris files her petition in bankruptcy
July 22, 1987	Doris informs her creditors about the conveyances to Edgar
November 4, 1987	Bankruptcy court issues its order discharging Doris from her debts
May 24, 1989	Trustee files the petition to set aside Doris' conveyances to Edgar

A trustee's power to set aside a transfer of property arises under § 544(b) of the Bankruptcy Code, which provides that

"[t]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title . . . ." 11 U.S.C. § 544(b) (1988). The applicable law in Degners' case is Neb. Rev. Stat. § 36-609 (Reissue 1988), the law in effect both when the conveyances were made and when Wolf filed his petition, which provides:

> (1) Where a conveyance or obligation is fraudulent as to a creditor, *such creditor*, when his or her claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
>
> (a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his or her claim
>
> . . . .

(Emphasis supplied.) Thus, under the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. § 36-601 et seq. (Reissue 1988), only a creditor has standing to bring an action to set aside an allegedly fraudulent conveyance. Doris' petition in bankruptcy does not alter the situation or preclude applicability of Nebraska law in an action to set aside an allegedly fraudulent conveyance. As Collier points out in his treatise on bankruptcy, "[S]ection 544(b) does not create in the trustee any independent right or power of action with which to challenge an allegedly invalid transfer. Like Prometheus bound, the trustee is chained to the rights of creditors . . . ." 4 Collier on Bankruptcy, *supra*, ¶ 544.03 at 544-17. See, also, *In re Mahoney, Trocki & Associates, Inc.*, 111 B.R. 914 (Bankr. S.D. Cal. 1990) (§ 108(a) applies to prepetition common-law tort and contract claims created and defined by state law and to other prepetition actions where applicable nonbankruptcy law prescribes a statute of limitations). Thus, as we interpret § 108(a), the statute's objective is preservation of a debtor's claim which otherwise might become time-barred and, therefore, unenforceable after commencement of a bankruptcy proceeding. Therefore, we hold that although § 108(a) extends the time within which a trustee may commence an action on

behalf of a debtor in bankruptcy in conjunction with a pending bankruptcy proceeding, § 108(a) does not affect the statute of limitations applicable under state law pertaining to a trustee's action commenced on behalf of creditors to set aside an allegedly fraudulent conveyance.

At first glance, some recent federal decisions may appear at odds with our holding. For example, in *In re Numedco, Inc.*, No. 91-0223S, 1991 WL 204908 (Bankr. E.D. Pa. Oct. 7, 1991), involving fraudulent concealment by the defendants, the court held that § 108(a) tolled the state statute of limitations. However, in *In re Numedco, Inc.*, the court specifically noted: "As no less than the caption of this proceeding bears out, the Plaintiff is proceeding 'on behalf of' the Debtor. Therefore, it is apparent that the Plaintiff must stand in the shoes of the Debtor, subject to any defense of limitations which could be asserted against the Debtor." 1991 WL 204908 at 5. Similarly, in *Wood & Locker, Inc. v. Doran and Associates*, 708 F. Supp. 684 (W.D. Pa. 1989), the court held that the state statute of limitations period was extended by § 108(a) because the plaintiff, which had filed a petition for chapter 11 reorganization, was the debtor in possession and, thus, enjoyed all the rights granted to a trustee under § 108(a). Thus, unlike *In re Numedco, Inc.* and *Wood & Locker, Inc.*, which pertain to an action by or on behalf of a debtor in bankruptcy, in the present appeal, Wolf, as trustee, is proceeding on behalf of creditors against Doris as a debtor in bankruptcy and has not commenced an action for the bankrupt-debtor, as evidenced by the Bankruptcy Court's order authorizing Wolf to file his petition on behalf of Doris' creditors.

Because 11 U.S.C. § 108(a) did not toll the 4-year statute of limitations set forth in § 25-207, the statute of limitations prescribed by § 25-207 barred Wolf's action as a trustee to set aside Doris' deeds to Edgar. For that reason, the district court should have entered judgment, as a matter of law, for Degners. Consequently, we need not discuss Wolf's assignments of error or the additional assignments of error alleged in Degners' cross-appeal.

Therefore, we reverse the judgment of the district court and remand this cause to the district court with direction to enter

judgment dismissing Wolf's action which is barred as a matter of law under § 25-207.

REVERSED AND REMANDED WITH DIRECTION.

ED MILLER & SONS, INC., A NEBRASKA CORPORATION, APPELLEE, V. GEORGE F. EARL, APPELLANT.

502 N.W.2d 444

Filed July 9, 1993. No. S-91-222.

1. **Limitations of Actions.** Traditionally and generally in Nebraska, a cause of action accrues when an injury occurs and the aggrieved party, therefore, has a right to institute and maintain a suit for redress.
2. **Limitations of Actions: Breach of Contract.** A cause of action for breach of contract accrues as soon as the breach occurs.
3. **Leases.** A covenant to repair imposes on a lessee the affirmative duty to maintain and repair the premises.
4. **Limitations of Actions: Breach of Contract: Leases.** A cause of action based on breach of a covenant to repair in a lease accrues when the party obligated to repair anticipatorily repudiates the covenant; fails to undertake the repairs within a reasonable time; or, after undertaking to repair, abandons the repairs before completion.
5. **Limitations of Actions: Breach of Lease.** When a lessee during the term of a lease breaches a covenant to repair the leased premises, the lessor may bring an action as soon as the breach occurs.
6. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he or she would have occupied if the contract had been performed, that is, to make the injured party whole.
7. _____: _____. As a general rule, a party injured by a breach of contract is entitled to recover all damages which are reasonably certain and which are naturally expected to follow the breach.
8. **Breach of Lease: Damages.** Generally, in a lessor's suit brought before expiration of a lease's term, the measure of damages for a lessee's breach of a covenant to repair the leased premises is the reduction in value of the lessor's reversion, that is, the difference in the value of the premises with and without repairs.
9. _____: _____. In a lessor's suit before expiration of a lease's term, when repair costs provide a reasonably accurate measure of damages to a lessor as a result of a lessee's breach of a covenant to repair and do not result in a windfall to the lessor, repair costs may be used as the proper measure of damages.
10. **Claims: Recoupment: Words and Phrases.** A counterclaim seeks an affirmative judgment and need not arise out of the same transaction or occurrence which is

the basis of a plaintiff's action. Recoupment, on the other hand, must arise out of the same transaction or occurrence which is the basis of a plaintiff's action and is merely defensive, that is, does not seek an affirmative judgment in the action.

11. **Limitations of Actions: Claims: Recoupment.** A counterclaim, seeking an affirmative judgment or relief, is barred by a statute of limitations unless the counterclaim is filed within the applicable statutory period for commencement of an action. Unlike a counterclaim that seeks an affirmative judgment, the defense of recoupment is not barred by a statute of limitations.
12. **Fraud: Words and Phrases.** Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact.
13. **Fraud: Proof.** To recover in an action for fraud based on misrepresentation of a material fact, a plaintiff must prove that (1) the defendant represented a material fact; (2) the represented fact was untrue; (3) the defendant knew that the represented fact was untrue, recklessly made the representation as a positive assertion without knowledge concerning the truth of the representation, or made the representation negligently as the result of a lack of reasonable care in ascertaining the fact represented or in the absence of skill and competence required by a particular business or profession; (4) the misrepresentation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the misrepresentation; and (6) as the result of such reliance, the plaintiff was damaged.
14. **Fraud.** To constitute fraud, a misrepresentation must be an assertion of fact, not merely an expression of opinion.
15. _____. Fraud cannot be predicated on mere "sales talk" or "puffing."

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

Robert G. Dailey, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Kevin R. Hopp, of Richards, Riekes, Brown & Zabin, P.C., for appellee.

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

SHANAHAN, J.

George F. Earl appeals from judgments of the district court for Douglas County which awarded damages to Ed Miller & Sons, Inc. (Miller), in an action for breach of a lease.

STANDARD OF REVIEW

"An action for damages resulting from a breach of contract is a law action." *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970,

973, 492 N.W.2d 855, 857 (1992). Accord *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985).

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Broekemeier Ford v. Clatanoff, 240 Neb. 265, 267, 481 N.W.2d 416, 418 (1992). Accord, *In re Estate of Watkins, ante* p. 583, 501 N.W.2d 292 (1993); *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992); *Ballard v. Giltner Pub. Sch., supra*.

"When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law." *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 241, 383 N.W.2d 29, 31 (1986). "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). Accord, *In re Estate of Watkins, supra*; *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

BACKGROUND

Miller's premises, leased to Earl, consisted of shop facilities on a 4 1/2-acre site and an asphalt parking lot composed of 2 to 3 inches of asphalt laid over a 6- to 8-inch bed of crushed rock. From 1974 to 1983, Miller used the premises in its construction business. During this time, Miller performed routine maintenance on the parking lot, including application of hot tar each spring and fall to fill cracks in the lot. In 1983, when the lot was in good repair, the premises were turned over to Earl under a 5-year lease which, at Earl's option, was extended for an additional 5 years. The lease contained the following:

> In consideration of the foregoing demise and the rate of

> rental herein stipulated, the Lessee agrees during the term of this lease, at his own expense, to keep in good and substantial order and repair and to make all necessary repairs, renewals, replacements and decorations upon or in connection with said premises, including all . . . heating equipment . . . and all other equipment, fixtures and appurtenances . . . .
>
> . . . .
>
> . . . The Lessor . . . shall have the right to enter said premises at all reasonable times, to examine or . . . to make such repairs . . . .

Additionally, paragraph 31 of the lease stated:

> The Lessee shall have full and complete responsibility for maintenance, replacement and repair of all buildings and other improvements contained within the property including by way of example and not by way of limitation all parking areas, roadways, external building surfaces, roofs and other improvements on the property as well as all items specified in paragraph 6 of this lease during the term of this lease and any extensions thereof. In the event of failure of Lessee to so maintain, replace or repair any such items, the Lessor may cause such work to be done and the cost thereof with interest at sixteen percent (16%) shall be additional rental due and payable forthwith hereunder. It is mutually agreed that such maintenance, repairs and replacements required will be that which will reasonably maintain the property in its present condition, reasonable wear and tear excepted.

After 1983, the parking lot began to deteriorate. According to a paving contractor who inspected the lot for Miller in July 1990, the lot was "rough and deteriorating" and had large areas that required an overlay of new asphalt. One area had deteriorated so badly that it needed to be torn up and completely replaced. Deterioration was not caused by ordinary wear and tear; rather, the deterioration was caused by failure to fill cracks in the asphalt, thereby allowing water to seep beneath the asphalt, soften the subbase, and cause additional extensive cracking and large holes in the asphalt surface. Miller made, and Earl refused, several demands that Earl repair the lot.

From October 1988 to September 1991, rent on the premises was $5,000 per month. However, in addition to his refusal to repair the parking lot, in 1989 Earl began withholding rent to cover the cost of other repairs to the premises. In December 1989, Earl withheld $3,035 from rent for the cost of repairs to the shop's roof and replacement of two furnaces. Earl also withheld $1,320 in March 1990 for the cost of replacing a roof, $5,000 in October 1990 for part of the cost of painting a building, and $3,885 in November 1990 for the remaining cost of painting the building and for the cost of replacing another roof. Additionally, Earl refused to pay $1,164 in premiums for casualty insurance on the premises for the period from May 15, 1990, to May 15, 1991, as required by the lease.

PLEADINGS AND TRIAL

In December 1989, Miller sued Earl and, in an amended petition filed on November 28, 1990, sought damages for unpaid rent ($13,240), insurance premiums paid by Miller ($1,164), and the projected cost of repairing the parking lot ($23,238).

In his answer, filed on December 28, 1990, Earl alleged that Miller had misrepresented the condition of the premises and that such misrepresentation induced Earl to enter the lease and later necessitated $13,240 in repairs by Earl, entitling him to a "setoff" in that amount against any rent due under the lease. Also, Earl's pleading included a counterclaim in which Earl alleged Miller's misrepresentation of the premises and sought rescission of the lease or damages based on the difference in rental value, that is, the rental value of the premises if the property had been as represented versus the actual rental value in view of the misrepresented condition.

At trial, Miller presented evidence that Earl failed to pay rent of $13,240 and had failed to pay the casualty insurance premiums of $1,164. Also, Robert Miller, an officer of the Miller corporation, testified that the leased premises diminished in value by $50,000 as a result of the damaged parking lot. The estimated cost of repair to the asphalt parking lot ranged between $23,000 and $24,000.

According to Earl, Miller misrepresented the condition of

the premises by stating, before the lease was signed in 1983, that the premises were in "first class condition." Sometime around January 1, 1984, Earl discovered that furnaces in the shop were inoperable as the result of problems with the gaslines for the furnaces.

The district court awarded judgments to Miller in accordance with Miller's prayer for damages ($37,642) and dismissed Earl's counterclaim.

ASSIGNMENTS OF ERROR

Earl contends that the district court erred in (1) awarding Miller damages for the estimated cost of repairs to the parking lot when Miller had not actually repaired the lot; (2) using repair costs as the measure of damages for breach of a covenant to repair rather than damages based on the diminished value of Miller's reversionary interest; (3) failing to find that the damage to the parking lot resulted from reasonable wear and tear; and (4) failing to allow recoupment as the result of Miller's misrepresentation or failing to order relief, either rescission or damages, based on Miller's misrepresentation concerning the leased premises.

ACTION FOR BREACH OF A LESSEE'S COVENANT TO REPAIR

Earl refers to paragraph 31 of his lease:

> The Lessee shall have full and complete responsibility for maintenance, replacement and repair of all buildings and other improvements contained within the property including . . . all parking areas . . . . In the event of failure of Lessee to so maintain, replace or repair any such items, the Lessor may cause such work to be done and the cost thereof with interest at sixteen percent (16%) shall be additional rental due and payable forthwith hereunder.

Earl then focuses on the second sentence in paragraph 31 and argues that this provision requires that Miller must actually complete repairs to the parking lot before Miller can sue for damages from the breach of the covenant to repair. In other words, actual repairs are a condition precedent to accrual of a lessor's cause of action for breach of a covenant to repair leased premises.

Traditionally and generally in Nebraska, a cause of action accrues when an injury occurs and the aggrieved party, therefore, has a right to institute and maintain a suit for redress. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). Consequently, a cause of action for breach of contract accrues as soon as the breach occurs. See *id.*

Paragraph 31 of the Miller-Earl lease contains two distinct and unambiguous provisions pertaining to repair of the premises. First, Earl must maintain and repair the leased premises. Second, on Earl's failure to maintain and repair the premises, Miller may enter the premises, cause necessary repair work to be done, and charge the cost of repairs as additional rent. Thus, the first provision of paragraph 31, as a covenant to repair, imposes on Earl the affirmative duty to maintain and repair the premises. See *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980) (a covenant to repair imposes on a lessee the affirmative obligation to make necessary repairs).

Considering a breach of covenant to repair, the court stated in *Middendorf v. Fuqua Industries, Inc.*, 623 F.2d 13, 18 (6th Cir. 1980): "[A] covenant to keep the premises in repair is breached at any time during the term that reasonably necessary repairs are not made by the lessee, and the lessor may bring an action for this breach forthwith rather than waiting until the end of the term." See, also, *Corbett v. Derman Shoe Co.*, 338 Mass. 405, 155 N.E.2d 423 (1959) (a lessor is entitled to maintain an action for breach of a covenant to repair as soon as the lessee fails to repair the premises); *Avelez Hotel Corp. v. Milner Hotels*, 227 Miss. 808, 87 So. 2d 63 (1956) (during a lease's term, a lessor's cause of action accrues when the lessee breaches a covenant to repair the premises; therefore, the lessor need not wait until the end of the lease's term before commencement of an action); *McKinney v. White Sewing Machine Corp.*, 32 Ohio Op. 2d 306, 200 N.E.2d 596 (1964) (a lessor has a cause of action for breach of a covenant to repair which occurs during the leasehold term). Hence, a cause of

action based on breach of a covenant to repair in a lease accrues when the party obligated to repair anticipatorily repudiates the covenant; fails to undertake the repairs within a reasonable time; or, after undertaking to repair, abandons the repairs before completion. See, *Hilliard & Bartko v. Fedco Systems*, 309 Md. 147, 522 A.2d 961 (1987); *Antigua Condominium v. Melba Investors*, 307 Md. 700, 517 A.2d 75 (1986). We hold, therefore, that when a lessee during the term of a lease breaches a covenant to repair the leased premises, the lessor may bring an action as soon as the breach occurs.

The second provision of paragraph 31 in the Miller-Earl lease provides that rather than bringing an action for breach of the covenant to repair, Miller had the option to enter and repair the premises and then charge Earl with the cost of repairs as additional rent. Consequently, under the provisions of the lease, at any time during the term of the lease Miller could bring an action for Earl's breach of the covenant to repair the premises or cause repairs to be made and charge Earl with additional rent based on the cost of the repairs made.

DAMAGES: REPAIR COSTS V. DIMINISHED VALUE

If a lessee breaches a covenant to repair during the term of a lease, what remedy is available to the lessor?

Earl argues that diminution of Miller's reversionary interest, not the cost of repairs to the parking lot, is the only measure of damages for a lessee's breach of a covenant to repair. This court has not previously determined the proper measure of damages for a lessee's breach of covenant to repair leased premises during the term of a lease.

In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he or she would have occupied if the contract had been performed, that is, to make the injured party whole. See, *Ducheneaux v. Miller*, 488 N.W.2d 902 (S.D. 1992); *Macal v. Stinson*, 468 N.W.2d 34 (Iowa 1991). See, also, *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988); *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987); *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433

(1980); *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980); Restatement (Second) of Contracts § 347 (1981). Cf. *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 289, 363 N.W.2d 148, 151 (1985): "As a general rule, a party injured by a breach of contract is entitled to recover all damages which are reasonably certain and which are naturally expected to follow the breach."

Generally, in a lessor's suit brought before expiration of a lease's term, the measure of damages for a lessee's breach of a covenant to repair the leased premises is the reduction in value of the lessor's reversion, that is, the difference in the value of the premises with and without repairs. *Matter of D. H. Overmyer Co., Inc.*, 12 B.R. 777 (Bankr. S.D.N.Y. 1981), *aff'd* 30 B.R. 823 (Bankr. S.D.N.Y. 1983); *Middendorf v. Fuqua Industries, Inc.*, 623 F.2d 13 (6th Cir. 1980); *Tobin v. Union News Co.*, 18 A.D.2d 243, 239 N.Y.S.2d 22 (1963), *aff'd* 13 N.Y.2d 1155, 196 N.E.2d 735, 247 N.Y.S.2d 385 (1964); *Corbett v. Derman Shoe Co.*, 338 Mass. 405, 155 N.E.2d 423 (1959); *National Bank v. Voigt Estate*, 357 Mich. 647, 99 N.W.2d 504 (1959); *Gold Min. & Water Co. v. Swinerton*, 23 Cal. 2d 19, 142 P.2d 22 (1943); *Pennsylvania Cement Co. v. Bradley Contracting Co.*, 11 F.2d 687 (2d Cir. 1926). One rationale for this general rule is that in situations involving long-term leases, awarding the current cost of repairs to the leased premises would give the lessor a windfall because the lessor would receive the current cash value of repairs rather than the present worth or discounted value of repairs at the end of the lease's term. *Matter of D. H. Overmyer Co., Inc., supra*; *Corbett v. Derman Shoe Co., supra*; *Pennsylvania Cement Co. v. Bradley Contracting Co., supra*. Another rationale for the general rule is that if repair costs were awarded, there would be no guarantee that the lessor would use the amount awarded to actually make repairs. *Matter of D. H. Overmyer Co., Inc., supra*; *Middendorf v. Fuqua Industries, Inc., supra*; *National Bank v. Voigt Estate, supra*; *Gold Min. & Water Co. v. Swinerton, supra*; 49 Am. Jur. 2d *Landlord and Tenant* § 957 (1970). However, in a lessor's suit before expiration of a lease's term, when repair costs provide a reasonably accurate measure of damages to a lessor as a result of a lessee's breach of a covenant to repair and do not result in a windfall to the lessor, repair costs may be used as the proper

measure of damages. See, *Matter of D. H. Overmyer Co., Inc., supra*; *Bowes v. Saks & Company*, 397 F.2d 113 (7th Cir. 1968).

Here, the only evidence of the leased premises' diminished value is Robert Miller's uncontroverted testimony that the value of the leased premises was diminished by $50,000 as the result of the damaged and unrepaired parking lot. Thus, damages awarded on the basis of the premises' diminished value would have provided an award significantly greater than an award based on the cost of repair. Moreover, the damaged parking lot was inspected in 1990, approximately 3 years before expiration of the lease's term, and repairs to the lot were estimated to cost between $23,000 and $24,000. Given the cost of repairs at a time shortly before expiration of the lease, Miller would obtain no windfall recovery through an award based on the estimated cost of repairs to the premises. Because the repair costs provided a reasonably accurate measure of damages without a windfall to Miller, the district court did not err in using the repair costs as a basis for the damages awarded to Miller.

REASONABLE WEAR AND TEAR

Earl asserts that the district court erred in failing to find that the damage to the parking lot resulted from reasonable wear and tear. "Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). Accord, *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). Whether damage to the parking lot resulted from reasonable wear and tear or resulted from a breach of the covenant to maintain and repair the premises was a factual question for the district court, which concluded that the damage was caused by Earl's failure to maintain and repair the parking lot. The district court's factual determination concerning the cause of damage to the parking lot is not clearly erroneous.

EARL'S ASSERTION OF FRAUD

Earl claims that Miller's fraudulent representation that the premises were in a "first class condition" serves as a defense to Miller's breach of contract action and also provides a basis for Earl's counterclaim.

Statute of Limitations.

Under Neb. Rev. Stat. § 25-207 (Reissue 1989), an action for relief on the ground of fraud must be brought within 4 years after perpetration of the fraud, but the cause of action is not deemed to have accrued until discovery of the fraud. "*Discovery*, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer." *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985). Accord *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992).

Recoupment and Counterclaim.

In an attempt to circumvent the statute of limitations, Earl pleaded the defense of recoupment, which has been described as a

> "[d]efalcation or discount from a demand. A keeping back something which is due, because there is an equitable reason to withhold it. . . ."
>
> . . . .
>
> " 'Recoupment' differs from 'set-off' in this respect: that any claim or demand the defendant may have against the plaintiff may be used as a set-off, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action. . . ."

In re Estate of Massie, 218 Neb. 103, 109, 353 N.W.2d 735, 740 (1984), *overruled on other grounds, In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (quoting Black's Law Dictionary 1439-40 (4th ed. 1957)). See, also, 80 C.J.S. *Set-Off and Counterclaim* § 2 (1953).

Recoupment may be distinguished from a counterclaim. A counterclaim seeks an affirmative judgment and need not arise out of the same transaction or occurrence which is the basis of a plaintiff's action. Recoupment, on the other hand, must arise out of the same transaction or occurrence which is the basis of a plaintiff's action and is merely defensive, that is, does not seek an affirmative judgment in the action. See *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

A counterclaim, seeking an affirmative judgment or relief, is

barred by a statute of limitations unless the counterclaim is filed within the applicable statutory period for commencement of an action. See *Katskee v. Nevada Bob's Golf of Neb., supra.* Unlike a counterclaim that seeks an affirmative judgment, the defense of recoupment is not barred by a statute of limitations. See, *id.*; *In re Estate of Massie, supra*; *Mobil Oil Corp. v. Grantham*, 200 Neb. 782, 265 N.W.2d 669 (1978); *Nathan v. McKernan*, 170 Neb. 1, 101 N.W.2d 756 (1960); *Kaup v. Schinstock*, 88 Neb. 95, 129 N.W. 184 (1910). Therefore, although Earl's defense of recoupment based on misrepresentation is not barred by the statute of limitations, Earl's counterclaim for misrepresentation is barred by the statute of limitations in § 25-207.

Misrepresentation of a Material Fact.

Earl's allegation of fraud is based on Miller's statement that the premises were in a "first class condition."

"Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact." *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 162, 421 N.W.2d 766, 770 (1988). Accord *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990).

To recover in an action for fraud based on misrepresentation of a material fact, a plaintiff must prove that (1) the defendant represented a material fact; (2) the represented fact was untrue; (3) the defendant knew that the represented fact was untrue, recklessly made the representation as a positive assertion without knowledge concerning the truth of the representation, or made the representation negligently as the result of a lack of reasonable care in ascertaining the fact represented or in the absence of skill and competence required by a particular business or profession; (4) the misrepresentation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the misrepresentation; and (6) as the result of such reliance, the plaintiff was damaged. See, *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Edwin Bender & Sons v. Ericson Livestock Comm. Co., supra*; *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403,

390 N.W.2d 487 (1986).

Earl's defense of recoupment necessitated that he prove those elements required in a plaintiff's successful action for fraud based on a misrepresentation of fact. Although in the first instance Earl alleged Miller's fraud as a basis of recoupment and later as a basis for rescission of the lease or an award of damages, the statute of limitations, § 25-207, removes any necessity for discussion of Earl's failure to elect remedies under his counterclaim. See *Christopher v. Evans*, 219 Neb. 51, 54, 361 N.W.2d 193, 195 (1985):

> A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.

Accord, *Gitschel v. Sauer*, 212 Neb. 454, 323 N.W.2d 93 (1982); *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

To constitute fraud, a misrepresentation must be an assertion of fact, not merely an expression of opinion. *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985); *Maser v. Lind*, 181 Neb. 365, 148 N.W.2d 831 (1967); *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964); *Nathan v. McKernan*, 170 Neb. 1, 101 N.W.2d 756 (1960); *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960); *Cook Livestock Co., Inc. v. Reisig*, 161 Neb. 640, 74 N.W.2d 370 (1956). Hence, fraud cannot be predicated on mere "sales talk" or "puffing." *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943); *Aron v. Mid-Continent Co.*, 143 Neb. 87, 8 N.W.2d 682 (1943). As Judge Learned Hand stated concerning sales talk or puffing:

> There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend

> their absence than to be understood as having any relation to objective truth.

Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918), *cert. denied* 247 U.S. 507, 38 S. Ct. 427, 62 L. Ed. 1241.

The district court could have reasonably found, based on the evidence, that Miller's statement that the property was in "first class condition" was an expression of opinion and mere puffing relative to the prospective lease. See, *Baldwin v. Priem's Pride Motel, Inc.*, 224 Kan. 432, 580 P.2d 1326 (1978) (statement that house would be in first-class condition was puffing); *Strother Ford, Inc. v. Bullock*, 142 Ga. App. 843, 237 S.E.2d 208 (1977) (statement that car was in A-1 condition was puffing); *Randall v. Smith*, 136 Ga. App. 823, 222 S.E.2d 664 (1975) (statement that car was in good condition and suitable for driving was puffing). We cannot say that the district court erred as a matter of law in deciding against Earl on his allegation that Miller had misrepresented a material fact as an inducement to the lease. Moreover, implicit in the district court's judgment adverse to Earl on his defense of recoupment is a finding that Miller had not misrepresented a material fact concerning the leased premises, a finding which is not clearly erroneous. As previously noted, Earl's counterclaim is barred by the statute of limitations. Consequently, the district court did not err in dismissing Earl's defense of recoupment and Earl's counterclaim based on fraudulent misrepresentation.

AFFIRMED.

IN RE ESTATE OF ANNA MARIE MITHOFER, DECEASED. GERTRUDE L. CONNOT AND MILLARD H. MEYERS, INDIVIDUALLY AND AS COPERSONAL REPRESENTATIVES OF THE ESTATE OF ANNA MARIE MITHOFER, DECEASED, APPELLANTS, V. CLAYTON MEYERS ET AL., APPELLEES.

502 N.W.2d 454

Filed July 9, 1993. No. S-91-325.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record.
2. **Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined.
3. **Stipulations: Parties: Trial.** All stipulations and private agreements or understandings of counsel or of parties to a suit, unless made in open court during the trial, must be reduced to writing and signed by the parties or counsel for the parties making the same.
4. **Stipulations: Parties: Trial: Courts.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.
5. **Stipulations: Parties: Courts: Good Cause.** Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.
6. **Stipulations: Parties.** Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
7. **Compromise and Settlement.** An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys.
8. _____. A settlement agreement made in open court on the record, agreed to by all of the parties to the litigation and approved by the court, is enforceable.
9. **Contracts: Compromise and Settlement: Pleadings.** After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense where fraud, mistake, or duress in procuring the contract is not pleaded.

Appeal from the District Court for Keya Paha County, EDWARD E. HANNON, Judge, on appeal thereto from the County Court for Keya Paha County, AUGUST F. SCHUMAN, Judge. Judgment of District Court affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, and James F. Brogan for appellants.

Mark Kozisek, of Palmer & Kozisek, P.C., for appellee Clayton Meyers.

Forrest F. Peetz, of Peetz and Peetz, for appellees Edna Osburn, George Meyers, and Melvin Meyers.

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

FAHRNBRUCH, J.

The issue in this appeal is whether a party may withdraw from a settlement the party agreed to on the record in open court.

Under the facts of this case, we agree with the district court for Keya Paha County that the Keya Paha County Court did not err in denying the appellants, Gertrude L. Connot and Millard H. Meyers, leave to withdraw from the settlement stipulation they made on the record in open court.

BACKGROUND

The appellants' mother, 90-year-old Anna Marie Mithofer, died in 1988. Her will divided her estate among her six children. The will nominated three of her children, the appellants and the appellee Clayton Meyers, as copersonal representatives of Mithofer's estate. In February 1989, Clayton filed a "Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative" in the Keya Paha County Court. He asked the court to appoint all three nominees as copersonal representatives.

On March 3, 1989, the appellants, claiming that Clayton should be disqualified as a personal representative, filed an objection to his being appointed a copersonal representative. The objection was withdrawn on November 17, 1989, and the parties stipulated that the appellants and Clayton should serve as copersonal representatives.

On April 5, 1990, the appellants again petitioned to have Clayton removed as a copersonal representative. They alleged that Clayton had filed a nonitemized $500,000 claim against

Mithofer's estate and that there were a number of irregularities in Clayton's handling of estate matters. Clayton alleged in his answer and counterpetition that the appellants had breached the terms of the earlier stipulation, that they refused to cooperate in the settling of estate matters, and that they refused to return personal property belonging to the estate. A hearing on the petition, answer, and counterpetition was held on April 20, 1990. Each of Mithofer's six children attended the hearing and was represented by his or her respective counsel. The copersonal representatives were also represented by counsel.

At the April 20 hearing, after several hours of negotiation, a stipulation of settlement was agreed to in open court by each of Mithofer's children and the copersonal representatives. It was recorded verbatim and subsequently transcribed by the court's stenographer. The stipulation settled the various disputes among Mithofer's children and how the estate's assets were to be distributed. It is this stipulation that is the subject of this appeal.

After the appellants' attorney dictated the stipulation into the record, it was expressly approved by each of Mithofer's children. It was also approved by the copersonal representatives. The court tentatively approved the stipulation and directed the appellants' counsel to prepare a journal entry to be circulated to all other counsel. The stipulation was journalized by the county court on May 10, 1990.

Prior to May 10, the appellants, individually and as copersonal representatives, filed "Objections to, and Motion for Leave to Withdraw from Open Court Stipulation." They claimed, inter alia, that the stipulation (1) does not address all of the disputed matters regarding the estate; (2) was entered into in haste and without sufficient time for the appellants to analyze and consider the consequences of the settlement's proposals; (3) inappropriately allocates attorney fees to Clayton's attorney, who had filed a claim against the estate on behalf of Clayton; and (4) was violated by Clayton when he removed fixtures from certain real estate which was to be deeded to the appellants. Following a hearing on the appellants' pleadings, the county court denied the appellants' request to withdraw from the stipulation. Inherent in the county court's

rejection of the appellants' request to withdraw from the stipulation is the rejection by that court of all the appellants' reasons for their request to withdraw from the stipulation. The district court affirmed the decision of the county court.

ASSIGNMENT OF ERROR

The appellants assert that the district court erred in affirming the county court's decision denying the appellants' motions for leave to withdraw from the April 20, 1990, stipulation.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992).

ANALYSIS

The appellants' arguments regarding their motion to withdraw from the stipulation are essentially twofold, asserting that (1) the stipulation was entered into in haste, is unjust, and, as journalized by the county court, is materially different from the stipulation dictated into the record; and (2) without being reduced to a writing, the stipulation was not enforceable before final approval was given by the county court.

The appellants argue that the stipulation was entered into without sufficient time for reflection on their part and that it does not adequately address all estate matters. An order is final and appealable when the substantial rights of the parties to the action are determined. *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993). The journalization of the stipulation fixed the parties' interests in the estate property, was a final order, and was appealable for 30 days following the May 10, 1990, journal entry. No appeal of that instrument was taken. The appeal now before us, taken from the December 21, 1990, journal entry denying the appellants' motion to withdraw from the stipulation, was filed in the county court on January 14, 1991. Because no appeal was taken from the May 10, 1990, entry journalizing the stipulation, we will not address the merits of the appellants' arguments regarding the accuracy and appropriateness of the journalized stipulation.

The appellants claim they are entitled to withdraw from the stipulation because the stipulation was not reduced to writing pursuant to Neb. Rev. Stat. §§ 30-24,110, 30-24,123, and 30-24,124 (Reissue 1989). Section 30-24,110 provides in part that "competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent . . . in any way that they provide *in a written contract* executed by all who are affected by its provisions." (Emphasis supplied.)

Section 30-24,123 provides in part that

> [a] compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto . . . .

Section 30-24,124(1) states in part that "[t]he terms of the compromise shall be set forth in an agreement *in writing* which shall be executed by all competent persons . . . having beneficial interests or having claims which will or may be affected by the compromise."

In this case, the stipulation was tentatively approved by the court in a formal proceeding, which approval was finalized by the May 10 journal entry. There was a writing made when the stipulation was dictated into the record by the appellants' attorney. The stipulation was expressly agreed to by the appellants.

Neb. Ct. R. of Cty. Cts. 4 (rev. 1992) states that "[a]ll stipulations and private agreements or understandings of counsel or of parties to a suit, *unless made in open court during the trial*, must be reduced to writing and signed by the parties or counsel for the parties making the same." (Emphasis supplied.) We have stated that

> [s]tipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to

> good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.
>
> Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances.

Martin v. Martin, 188 Neb. 393, 397-98, 197 N.W.2d 388, 391 (1972).

In their motions to withdraw from the stipulation, the appellants claim, inter alia, that the stipulation was entered into in haste and contained terms that were ambiguous or unacceptable. At the hearing on the motion to withdraw, the appellants testified that after agreeing to the stipulation, they almost immediately became dissatisfied with its terms, primarily because the terms of the will were not being followed. At the hearing on their motions, the appellants acknowledged that following several hours of negotiation between the parties' attorneys, the appellants heard the stipulation as it was dictated into the record in open court and that they assented to its terms. Furthermore, the appellants admitted that they failed to voice their objections to the stipulation, even though they were aware that Clayton was about to divide and sell a portion of the estate's cattle, an event that did occur following the stipulation and prevented the parties from returning to the status quo. There are no exceptional circumstances in the record which would warrant release of the appellants from their open court stipulation.

The appellants argue that the stipulation is unenforceable as a violation of the statute of frauds because a portion of its subject matter is real estate. The case at hand is analogous to cases on compromise and settlement.

> An alleged oral compromise and settlement agreement *not made in open court* is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or

their attorneys.

(Emphasis supplied.) *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 836, 320 N.W.2d 755, 758 (1982). Conversely, a settlement agreement made in open court on the record, agreed to by all of the parties to the litigation, and approved by the court is enforceable. The stipulation in this case, made on the record in open court, is enforceable and not controlled by the statute of frauds.

After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense where fraud, mistake, or duress in procuring the contract is not pleaded. *Dougherty v. Robson*, 214 Neb. 802, 336 N.W.2d 316 (1983). The appellants did not plead fraud, mistake, or duress.

The district court was correct in affirming the order of the county court denying the appellants' motions to withdraw from the stipulation to which they agreed in open court.

AFFIRMED.

WHITE, J., concurs.

VILLAGE OF BRADY, APPELLEE, V. JACK MELCHER, SR., DOING BUSINESS AS J & B ENTERPRISES, APPELLANT.

502 N.W.2d 458

Filed July 9, 1993. No. S-91-342.

1. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an equity action, an appellate court reviews the record de novo. In such review, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Constitutional Law: Statutes: Ordinances.** The constitutionality of a statute or ordinance is a question of law.
4. **Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.

5. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity. The burden of demonstrating a constitutional defect rests with the challenger.
6. **Municipal Corporations: Ordinances: Public Health and Welfare.** Municipalities may, in the exercise of a valid police power, protect the public health through ordinances that operate within legislative limits.
7. _____: _____: _____. In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations, and ordinances are required for the health, comfort, and safety of the people.
8. **Nuisances.** Ordinarily, a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain or continue a nuisance.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

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

Michael L. Bacon for appellee.

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

BOSLAUGH, J.

This is an action brought by the plaintiff, Village of Brady, Nebraska, against the defendant, Jack Melcher, Sr., doing business as J & B Enterprises, to enjoin and abate an alleged nuisance maintained in the Village of Brady by the defendant. The petition alleged that the defendant was parking, storing, and maintaining, in full view from the public street and nearby properties, numerous automobiles which were not being moved or operated; allowing weeds to grow up around the automobiles and parts; and allowing trash and litter to accumulate on the premises. The petition alleged three separate causes of action, each cause relating to a separate tract of land. The second cause of action was dismissed at the close of the plaintiff's evidence because of lack of evidence as to ownership of that tract of land. The defendant offered no evidence or testimony at trial.

Following the trial, the district court viewed the premises and inspected the property.

On February 13, 1991, the trial court found that as to the first and third causes of action, the vehicles "violates [sic] the ordinances of the Village of Brady, Nebraska, and are

abandoned vehicles within the definition supplied in the ordinance, and, therefore, constitute a nuisance which may be abated." The defendant was ordered to move the vehicles from the properties described in the first and third causes of action and to pay the costs.

On appeal to this court, the defendant has assigned the following errors: (1) The village ordinances referred to in the plaintiff's petition are unconstitutionally vague, overbroad, arbitrary, capricious, and unreasonable, contrary to the U.S. Constitution and the State of Nebraska Constitution; (2) the village ordinances referred in the plaintiff's petition are in excess of statutory authority; (3) the district court erred in not finding that grandfather and proprietary rights existed in the premises prior to the adoption of the relevant ordinances; and (4) the district court's findings and order are not supported by the evidence and by the law.

An action for an injunction sounds in equity. *City of Newman Grove v. Primrose*, 240 Neb. 70, 480 N.W.2d 408 (1992). In an equity action, an appellate court reviews the record de novo. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992); Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992). In such review, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Drew v. Walkup, supra.*

The defendant argues that the ordinances referred to in the plaintiff's petition are unconstitutionally vague, overbroad, arbitrary, capricious, and unreasonable, contrary to the U.S. Constitution and the State of Nebraska Constitution. The constitutionality of a statute or ordinance is a question of law. *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *VanDeWalle v. Albion Nat. Bank, ante* p. 496, 500 N.W.2d 566 (1993).

When passing on the constitutionality of an ordinance, this court begins with a presumption of validity. The burden of demonstrating a constitutional defect rests with the challenger. See, *Howard v. City of Lincoln, supra*; *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991).

The only ordinance challenged as unconstitutional in the defendant's brief is Brady Mun. Code, ch. 6, art. 3, § 6-325 (1983). This ordinance provides:

> No person in charge or control of any property within the Municipality, other than Municipal property, whether as owner, tenant, occupant, lessee, or otherwise, shall allow any partially dismantled, inoperable, wrecked, junked, or discarded vehicle to remain on such property longer than thirty (30) days. No unlicensed vehicle shall be permitted to remain on any private or public property for any length of time; provided, this Section shall not apply to a vehicle in an enclosed building; to a vehicle on the premises of a business enterprise, operated in a lawful place and manner, when such vehicle is necessary to the lawful operation of the business; or to a vehicle in a lawful place and manner by the Municipality. Any vehicle allowed to remain on property in violation of this Section shall constitute a nuisance and shall be abated, and any person violating this Section shall be guilty of a misdemeanor.

In his brief, the defendant makes a broad assertion that the above-quoted ordinance is overbroad and vague and that the ordinance is unconstitutional because it is not rationally related to the protection of the health, safety, and welfare of its citizens.

Brady Mun. Code, ch. 4, art. 3, § 4-301 (1983), generally defines "nuisance" as doing "any unlawful act, or omitting to perform a duty, or suffering or permitting any condition or thing to be or exist, which act, omission, condition or thing either: 1. Injuries [sic] or endangers the comfort, repose, health, or safety of others . . . ." The plaintiff could rationally find that unlicensed vehicles stored on private property, outside of enclosed buildings, could threaten the public health and safety. Vehicles such as those stored on the lots involved in the present case could attract vermin and rats or pose an attractive

nuisance for children. The proscribed conduct in § 6-325 is sufficiently defined and is not arbitrary or vague. In any event, the defendant's lack of evidence at trial and his vague arguments on appeal fail to overcome the ordinance's presumption of validity.

The defendant also argues that the village ordinances referred to in the plaintiff's petition are in excess of statutory authority. Again, it appears that the defendant's argument refers exclusively to § 6-325.

The plaintiff's authority to enact ordinances such as § 6-325 is provided in Neb. Rev. Stat. § 18-1720 (Reissue 1991). This statute provides:

> All cities and villages in this state are hereby granted power and authority by ordinance to define, regulate, suppress and prevent nuisances, and declare what shall constitute a nuisance, and to abate and remove the same. Every city and village is authorized to exercise such power and authority within its zoning jurisdiction.

This court has long held that municipalities may, in the exercise of a valid police power, protect the public health through ordinances that operate within legislative limits. See, *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *McCrea v. Cunningham*, 202 Neb. 638, 277 N.W.2d 52 (1979). " ' "In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people . . . ." ' " *Id.* at 648, 277 N.W.2d at 58, quoting *City of Scottsbluff v. Winters Creek Canal Co.*, 155 Neb. 723, 53 N.W.2d 543 (1952). It is clear that the plaintiff has the authority to enact ordinances to protect the public health and welfare, such as § 6-325. Accordingly, the defendant's argument that the ordinances referred to in the plaintiff's petition are in excess of statutory authority is without merit.

The third error assigned by the defendant is that the district court erred in not finding that grandfather and proprietary rights existed in the premises prior to the adoption of the relevant ordinances. In support of this assertion, the defendant argues that evidence at trial indicated that some, if not all, of the unlicensed vehicles had been on the residential lots involved

in this case since the spring of 1983. Ordinance No. 100, which adopted the Municipal Code of the Village of Brady, was enacted on August 11, 1983. The defendant argues that the passage of a nuisance ordinance may not operate retroactively to deprive a property owner of his vested rights.

This court has previously held that a zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance. See *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990). However, ordinarily, a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain or continue a nuisance. See *City of Lyons v. Betts*, 184 Neb. 747, 171 N.W.2d 792 (1969). Accordingly, the defendant does not have a vested right to maintain or continue a use of his property that constitutes a nuisance.

The defendant's final assignment of error is that the district court's findings and order are not supported by the evidence and by the law. This argument is also without merit. The photographs which were received in evidence at the trial show that the vehicles located on the lots described in the petition were in various degrees of deterioration. Testimony at trial indicated that none of the vehicles on the first and third tracts of land were licensed. The defendant did not appear at trial, nor did he offer any evidence to rebut the evidence presented by the plaintiff. This court also gives weight to the fact that the district court viewed the premises and inspected the property prior to rendering a decision in this case. The plaintiff met its burden of proof that a nuisance existed. Thus, the district court's decision ordering abatement of the nuisance was supported by the evidence and the law.

The judgment of the district court for Lincoln County is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROBERT SCHMAILZL, APPELLEE.

502 N.W.2d 463

Filed July 9, 1993. No. S-92-576.

1. **Constitutional Law: Statutes: Appeal and Error.** Alleged unconstitutionality of a statute presents a question of law, which must be determined by the Supreme Court independent from the conclusion reached by a trial court on the constitutional question.
2. **Due Process: Criminal Law: Statutes: Notice.** Due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.
3. **Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
4. **Constitutional Law: Statutes.** The doctrine of overbreadth pertains to a statute that is designed to burden, punish, or prohibit an activity that is not constitutionally protected, but which includes within its scope activities that are protected by the First Amendment to the U.S. Constitution.
5. **Constitutional Law.** Not all speech is protected by the First Amendment.
6. _____. Speech protected by the First Amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.
7. **Constitutional Law: States.** A state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.
8. **Legislature: Public Health and Welfare: Courts: Appeal and Error.** A legislature has discretion in determining what measures are reasonably necessary to protect public health, safety, and welfare, and a court, in reviewing a legislative act, should not substitute its own judgment for that of the legislature merely because the court may believe that the legislature acted unwisely or improvidently.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Exeption sustained, and cause remanded for further proceedings.

C. Jo Petersen, Seward County Attorney, for appellant.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellee.

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

SHANAHAN, J.

Authorized under Neb. Rev. Stat. § 29-2315.01 (Supp. 1991), the State appeals from the decision of the district court for Seward County which dismissed the amended information that charged Robert Schmailzl with making a terroristic threat to certain persons in violation of Neb. Rev. Stat. § 28-311.01(1)(a) and (c) (Reissue 1989), a Class IV felony. The amended information charged that Schmailzl did "threaten to commit [a] crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror." Pursuant to Neb. Rev. Stat. § 29-1808 (Reissue 1989), Schmailzl moved to quash the amended information, facially challenging the constitutionality of § 28-311.01(1) on the ground that the statute is vague and overbroad in that it fails to define what conduct constitutes a threat and allows a felony conviction for threatened conduct which, if the threat were carried out, would be only a misdemeanor.

Section 28-311.01 provides:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.
>
> (2) Terroristic threats is a Class IV felony.

The district court concluded that § 28-311.01(1) "is vague and uncertain in that it fails to define as to what constitutes a threat" and "is overbroad in that it allows prosecution as a felony the threat to commit a misdemeanor crime of violence," infirmities which, in the district court's view, rendered the statute unconstitutional. Consequently, the district court quashed the amended information and dismissed the proceedings against Schmailzl.

On appeal, the State asserts that the district court erred in ruling that § 28-311.01 is unconstitutionally vague and overbroad.

STANDARD OF REVIEW

"Alleged unconstitutionality of a statute presents a question of law, which must be determined by the Supreme Court independent from the conclusion reached by a trial court on the constitutional question." *State v. Crowdell*, 234 Neb. 469, 471, 451 N.W.2d 695, 697 (1990). Accord *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

"Statutes are presumed to be constitutional, and unconstitutionality must be clearly established." *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 374-75, 348 N.W.2d 879, 881 (1984). See, also, *State v. Crowdell, supra*; *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). "One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. at 265, 445 N.W.2d at 288. Accord, *State v. Crowdell, supra*; *State v. LaChapelle, supra*.

VAGUENESS

"[D]ue process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials." *State v. Monastero*, 228 Neb. 818, 833, 424 N.W.2d 837, 847 (1988). Accord *State v. Crowdell, supra*. Although "[s]tatutory notice governing behavior ' "must be unequivocal [such] requirement does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." ' " *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. at 375, 348 N.W.2d at 882 (quoting *Gold v. Lomenzo*, 29 N.Y.2d 468, 280 N.E.2d 640, 329 N.Y.S.2d 805 (1972)).

> "The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . A statute will not be deemed vague if it

> uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .
>
> ". . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute."

State v. Sailors, 217 Neb. 693, 695, 352 N.W.2d 860, 862 (1984) (quoting *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983)).

In *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983), we held that Neb. Rev. Stat. § 28-311 (Reissue 1979), the former terroristic threats statute, was unconstitutionally vague and uncertain in part because that statute failed to define with sufficient specificity the nature of the threat which constituted proscribed conduct. However, in *Hamilton*, we noted that the terroristic threats statute significantly departed from § 211.3 of the Model Penal Code:

> The language of the Model Penal Code is certainly much clearer than that adopted by the Nebraska Legislature. An actor violates the Model Penal Code when he or she threatens to commit any crime of violence, with the intent to terrorize another, regardless of what the outcome of the act will be or of how the victim receives the threat. The Model Penal Code seems to be fairly definite, and not speculative as is the statute in question.

215 Neb. at 698-99, 340 N.W.2d at 399-400.

Section 28-311.01, the current terroristic threats statute enacted in 1986, is a nearly verbatim version of § 211.3 of the Model Penal Code. Subsequent to enactment of § 28-311.01 in 1986, we commented in *State v. Willett*, 233 Neb. 243, 246, 444 N.W.2d 672, 674-75 (1989), that the language of § 28-311.01(1)(a) was "unequivocal" and that "when a person threatens to commit a crime of violence and has the intent to terrorize another as the result of the threat, he or she violates

§ 28-311.01(1)(a)." However, as Schmailzl correctly points out, in *State v. Bourke*, 237 Neb. 121, 124, 464 N.W.2d 805, 807 (1991), this court stated that "[t]he current law [§ 28-311.01 (Reissue 1989)] provides no additional guidance as to what constitutes a threat." In *Bourke*, this court addressed only the constitutionality of § 28-311.01(1)(c), a threat to commit a crime of violence in " 'reckless disregard of the risk of causing such terror or evacuation' " of a building, place of assembly, or facility of public transportation. 237 Neb. at 123, 464 N.W.2d at 807. *Bourke* did not address the constitutionality of § 28-311.01(1)(a), a threat to commit any crime of violence with intent to terrorize another.

Several other state courts have held that the words "threat" or "threaten," when used in statutes similar to § 28-311.01(1), are neither vague nor uncertain. For example, in *Lanthrip v. State*, 235 Ga. 10, 11, 218 S.E.2d 771, 773 (1975), the Supreme Court of Georgia held that

> [t]he unavoidable message of the express language contained in the statute is that one may not communicate to another person a threat to commit a crime of violence, for the purpose of terrorizing that person, without violating the statute. There are no hidden pitfalls or disguised traps into which the unwary may fall and commit the crime. The statute can be read and understood by a person of ordinary intelligence seeking to avoid its violation.

See, also, *People v. Hines*, 780 P.2d 556, 559 (Colo. 1989) ("[a] threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another, by the commission of an unlawful act"); *State v. Porter*, 384 A.2d 429, 434 (Me. 1978) ("[a] communication is a threat if it carries the promise of evil under such circumstances that a reasonable person receiving the communication would believe that such was to ensue at the hands of the communicator, or his allies"); *State v. Gunzelman*, 210 Kan. 481, 486, 502 P.2d 705, 710 (1972) ("[t]he word 'threat' . . . means a communicated intent to inflict physical or other harm on any person or on property"); *Stein v. Commonwealth*, 12 Va. App. 65, 69, 402 S.E.2d 238, 241 (1991) (the word "threat" is an "ordinary,

everyday [word]" whose meaning is plain to a "person of normal intelligence and education"); *United States v. Baish*, 460 A.2d 38, 42 (D.C. App. 1983) ("a person 'threatens' when she utters words, which are intended to convey her desire to inflict physical or other harm on any person or on property, and these words are communicated to someone").

Apart from definitions of "threat" or "threaten" used in judicial opinions, *threat* means

> an indication of something impending and usu. undesirable or unpleasant . . . an expression of an intention to inflict evil, injury, or damage on another . . . expression of an intention to inflict loss or harm on another by illegal means and esp. by means involving coercion or duress of the person threatened . . . something that by its very nature or relation to another threatens the welfare of the latter . . . .

Webster's Third New International Dictionary, Unabridged 2382 (1981). Correspondingly, *threaten* means "to utter threats against : promise punishment, reprisal, or other distress to . . . to promise as a threat . . . to hang over as a threat : menace . . . to announce as intended or possible . . . ." *Id.*

We conclude that the words "threats" and "threatens" are terms of common usage and understanding which supply adequate and fair notice of the conduct prohibited by § 28-311.01(1). Therefore, we hold that § 28-311.01(1), which provides that any person who "threatens to commit any crime of violence," is not unconstitutionally vague.

OVERBREADTH

Schmailzl contends that § 28-311.01(1) is unconstitutional as a result of the statute's "overbreadth, in that it fails to limit the 'crime of violence' to felony crimes and exposes an accused who may only threaten to commit a misdemeanor crime of violence to felony punishment, punishment more severe than had the accused actually committed the misdemeanor crime of violence." Brief for appellee at 7. As an illustration of the preceding proposition, Schmailzl points out that a terroristic threat to commit a crime of violence is punishable as a Class IV felony, but if the threatened crime in the terroristic threat is an

assault in the third degree, that is, intentionally causing bodily injury to another or threatening another in a menacing manner, commission of the threatened assault would be punishable as a Class I misdemeanor. See Neb. Rev. Stat. § 28-310 (Reissue 1989).

However, Schmailzl misperceives the doctrine of overbreadth, which pertains to a statute that is designed to burden, punish, or prohibit an activity that is not constitutionally protected, but which includes within its scope activities that are protected by the First Amendment to the U.S. Constitution. In *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), the U.S. Supreme Court characterized overbreadth as the situation when " 'a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, [and] the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.' " (Quoting *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). See, also, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Constitutional Law ch. 18, § III at 868 (2d ed. 1983). As noted in *State v. Frey*, 218 Neb. 558, 561, 357 N.W.2d 216, 218-19 (1984):

> [A]n enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights. . . .
>
> . . . [I]n a facial challenge to the overbreadth and vagueness of a law . . . our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.

Therefore, § 28-311.01(1), as a part of the terroristic threats statute, is overbroad only if the statute unconstitutionally burdens, punishes, or prohibits the freedom of speech guaranteed by the First Amendment to the U.S. Constitution

and by article I, § 5, of the Nebraska Constitution.

Section 28-311.01(1)(a) prohibits a threat to commit a violent crime when the threat is made with the intention of causing a state of intense fear in another. Content of speech is implicated in § 28-311.01(1)(a) only insofar as content determines whether the communication or expression is a threat to commit a crime of violence.

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310 [, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)].

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

Thus, "not all speech is protected by the first amendment." *State v. Monastero*, 228 Neb. 818, 825, 424 N.W.2d 837, 843 (1988). See, also, *Konigsberg v. State Bar*, 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961). "[S]peech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes." *State v. Monastero*, 228 Neb. at 825, 424 N.W.2d at 843. Further, in recognition that freedom of speech is not absolute, the U.S. Supreme Court stated in *City Council v.*

Taxpayers for Vincent, supra: "It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." 466 U.S. at 804.

"What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). Therefore, by § 28-311.01(1)(a), the state regulates content of speech insofar as the state seeks to prevent injury through production of anxiety in another. The state has a substantial governmental interest in protecting persons against harm and may achieve that legitimate objective by preventing or punishing a terroristic threat, even if speech is used to communicate or express the threat. Because § 28-311.01(1)(a) is narrowly tailored to achieve a substantial and legitimate state interest, the statute is not overbroad.

Although Schmailzl questions the "fairness" in the Nebraska Legislature's making a terroristic threat a felony, while the threatened crime of violence, if committed, would be a misdemeanor, classification of criminal conduct as a felony or misdemeanor is, generally, within the Legislature's discretion. A legislature has discretion in determining what measures are reasonably necessary to protect public health, safety, and welfare, and a court, in reviewing a legislative act, should not substitute its own judgment for that of the legislature merely because the court may believe that the legislature acted unwisely or improvidently. See, *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985); *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983).

CONCLUSION

For the reasons set forth above, we hold that the terroristic threats statute, § 28-311.01(1)(a) and (2), is constitutional. Consequently, we sustain the State's exception to the district court's judgment that § 28-311.01(1)(a) and (2) are unconstitutional.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. PATRICIA A. HILDEBRAND, A SINGLE PERSON, ET AL., APPELLEES AND CROSS-APPELLANTS.

SCOTT S. RUDO, A SINGLE PERSON, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

502 N.W.2d 469

Filed July 16, 1993. Nos. S-90-1067, S-92-169.

1. **Insurance: Contracts.** Interpretation of an unambiguous term or provision in an insurance policy presents a question of law.
2. **Insurance: Contracts: Liability: Public Policy.** Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation not inconsistent with public policy or statute.
3. **Insurance: Contracts: Motor Vehicles: Liability: Public Policy.** A household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN and STEPHEN A. DAVIS, Judges. Reversed and remanded with direction.

Michael F. Coyle, Mary Kay Frank, and Roger L. Shiffermiller, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

P. Shawn McCann and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellees Hildebrand et al.

Raymond Speer and Gregory Garland, of Garland Law, P.C., for appellee Rudo.

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

PER CURIAM.

These cases, consolidated for disposition by this court, are declaratory judgment actions concerning the validity of the household exclusion contained in the State Farm automobile insurance policy involved in each case. In both cases, the district court held that the household exclusion is against public policy

of the State of Nebraska and, therefore, is void. We reverse, and remand with direction.

FACTS

Both actions involved one-vehicle accidents in which the passenger sustained personal injury.

In the Hildebrand case, State Farm sought a declaratory judgment that it had no duty to defend or pay any judgment in regard to any negligence action brought by Patricia A. Hildebrand or her parents concerning a motor vehicle accident that occurred on September 18, 1987. At the time of the accident, Hildebrand was a passenger in a pickup truck which she owned and which was being driven by Susan Walters with Hildebrand's permission. In the one-vehicle accident, the pickup went into a ditch and rolled over, resulting in Hildebrand's personal injury. At the time of the accident, State Farm had liability insurance coverage on the Hildebrand pickup. After Hildebrand and her parents made a claim against State Farm under the personal injury liability coverage of the policy on the pickup, State Farm filed its declaratory judgment action against Hildebrand and her parents.

In the Rudo case, the litigation involved an accident that occurred on September 30, 1989. Before the accident, and so that Scott S. Rudo could finish his senior year of high school in Omaha, Rudo moved in with his brother-in-law, Eric Hayes, and the Hayes family. State Farm had issued a motor vehicle liability policy on a Ford Escort which was owned by Hayes' employer, Roche, Inc., doing business as The Copy Center. Hayes was authorized to use the Escort for both business and personal reasons. After visiting friends and while returning to the Hayes home, Hayes was driving the Escort, in which Rudo was a passenger. When Hayes swerved to miss an oncoming vehicle, the Escort hit some loose gravel, went into a ditch, and overturned, resulting in Rudo's personal injury. After State Farm denied coverage for Rudo's personal injury claim, Rudo brought a declaratory judgment action, seeking a judgment that there was insurance coverage for his injury sustained in the automobile accident.

Pertaining to the motor vehicles involved in both of the

cases, State Farm had issued policies of liability insurance coverage which state that State Farm will "pay damages which an insured becomes legally liable to pay because of . . . bodily injury to others, and . . . caused by accident resulting from the ownership, maintenance or use of your car." (Emphasis omitted.) The policies further state that when "your car" is referred to, "insured" includes "any other person while using such a car if its use is within the scope of consent of you or your spouse." (Emphasis omitted.) Each of the policies also contains the following exclusion, commonly referred to as the "household exclusion," printed in all capital letters: "There is no coverage: . . . . For any bodily injury to: . . . . Any insured or any member of an insured's family residing in the insured's household." (Emphasis omitted.)

Hildebrands and Rudo each moved for a summary judgment. The district courts granted summary judgments, declaring that the household exclusion in the State Farm policies violates Neb. Rev. Stat. § 60-534 (Reissue 1988) (policy contents for proof of financial responsibility under the Motor Vehicle Safety Responsibility Act) and, therefore, violates public policy of the State of Nebraska. In Hildebrands' case, the district court held that the language of the household exclusion clause is not ambiguous and awarded Hildebrands an attorney fee in their action against State Farm.

Section 60-534 is contained in the "Proof of Financial Responsibility" section of Nebraska's Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Supp. 1989), and governs "certified" policies. Section 60-534 states:

> Such motor vehicle liability policy: . . . [S]hall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, against loss . . . for damages arising out of the . . . use of such motor vehicle . . . within the United States of America . . . .

ASSIGNMENTS OF ERROR

In summary, State Farm contends that the district court erred in holding that the household exclusion clause in State

Farm's automobile insurance policies is against public policy and, therefore, is void. State Farm also argues that the district court erred in awarding an attorney fee to Hildebrands.

In their cross-appeal, Hildebrands argue that the household exclusion clause in the State Farm policy is ambiguous.

STANDARD OF REVIEW

Interpretation of an unambiguous term or provision in an insurance policy presents a question of law. See *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988). "In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 265, 445 N.W.2d 284, 287 (1989). Accord *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992). See, also, *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

HOUSEHOLD EXCLUSION

Both Hildebrands and Rudo argue that the household exclusion in State Farm's policies is contrary to Nebraska's public policy evidenced by Neb. Rev. Stat. § 60-302 (Reissue 1988) (proof of financial responsibility for registration of a motor vehicle) and, therefore, is unenforceable. Additionally, Hildebrands argue that as the result of the 1985 amendments to § 60-302, the Legislature elected to treat all motor vehicle liability insurance policies as certified policies, and, therefore, because the household exclusion is not authorized by § 60-537 (permissible exclusions in a certified policy) or § 60-540 (permissible provisions in a certified policy), the household exclusion is invalid.

Section 60-302 provides, in pertinent part:

> No motor vehicle . . . shall be operated on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3. . . .
>
> *All applications for registration of motor vehicles shall be accompanied by proof of financial responsibility.* Proof of financial responsibility shall be evidenced by a copy of proof of financial responsibility filed pursuant to

> subdivision (2), (3), or (4) of section 60-528 bearing the seal of the Department of Motor Vehicles *or* by a certificate or policy of insurance. Such certificate or policy of insurance shall be written by an insurance carrier duly authorized to do business in this state and shall certify that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate or policy shall give the effective dates of such motor vehicle liability policy . . . and shall designate . . . all motor vehicles covered thereby.

(Emphasis supplied.) Section 60-302 contains no other specifications concerning the contents of the insurance certificate or liability insurance policy required for registration of a motor vehicle.

Neb. Rev. Stat. §§ 44-508 and 44-514 to 44-521 (Reissue 1988 & Cum. Supp. 1992) prescribe standard and general requirements for a valid policy of motor vehicle liability insurance in Nebraska and, consequently, do prescribe certain limited requirements for policies of motor vehicle liability insurance. However, these statutes do not mention any exclusion, such as the household exclusion in question, and do not contain any language that prohibits an exclusionary clause in a policy of motor vehicle liability insurance; hence, §§ 44-508 and 44-514 to 44-521 contain no statutory language limiting or prohibiting an insurer's potential liability under the household exclusion clause contained in a motor vehicle policy.

The district courts, relying on the requirements expressed in § 60-534 concerning a policy of motor vehicle liability insurance in reference to proof of financial responsibility, concluded that the household exclusion was invalid. Section 60-534 is part of the Motor Vehicle Safety Responsibility Act and mandates that automobile liability policies provide certain minimum insurance coverage. The Motor Vehicle Safety Responsibility Act provides for suspension of the license of any operator of a motor vehicle involved in an accident in Nebraska that results in bodily injury, death, or substantial property damage when the operator does not have motor vehicle liability insurance or other proof of financial responsibility at the time

of the accident. Suspension continues until the operator provides proof of future financial responsibility. See §§ 60-507 and 60-508.

However, the scope of the Motor Vehicle Safety Responsibility Act is limited. As § 60-533 specifically states:

> *A motor vehicle liability policy, as said term is used in sections 60-501 to 60-569*, shall mean an owner's or an operator's policy of liability insurance, certified as provided in sections 60-529 to 60-531 as proof of financial responsibility, and issued, except as otherwise provided in section 60-531 by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

(Emphasis supplied.) By its own terms, the Motor Vehicle Safety Responsibility Act specifies provisions for only those insurance policies certified pursuant to the act and used for compliance with the act. Consequently, the Motor Vehicle Safety Responsibility Act does not apply to insurance policies that are not used as proof of financial responsibility. Also, § 60-302 does not incorporate the requirements of the Motor Vehicle Safety Responsibility Act as a part of the proof of financial responsibility required to register a motor vehicle.

In *Equity Mut. Ins. Co. v. Allstate Ins. Co.*, 190 Neb. 515, 518-19, 209 N.W.2d 592, 594 (1973), this court noted that

> [w]ith most kinds of insurance the Legislature has specified various requirements as to particular provisions required to be included or omitted. Fire insurance policies, life insurance policies, and health and accident policies all must meet this type of statutory requirement. The statutory requirements for automobile liability insurance with respect to such provisions have been under the Motor Vehicle Safety Responsibility Act. In 1965 the Legislature amended the . . . Act to provide specifically that sections 60-516 to 60-544, R. R. S. 1943, shall not apply to any automobile liability policy which has not been certified as provided by sections 60-528 to 60-531, R. R. S. 1943. As a result of that amendment, this court held in State Farm Mut. Auto. Ins. Co. v. Pierce, 182 Neb. 805, 157 N. W. 2d 399, that the omnibus clause requirement is applicable

> only to automobile liability insurance policies which have been certified as proof of financial responsibility. We held also that a driver exclusion agreement limiting the coverage of an automobile liability insurance policy to a particular driver was not against public policy. *Automobile liability insurance policies which are not certified as proof of financial responsibility, except for minimum coverage limits and uninsured motorist provisions, are subject to virtually no statutory directives.*

(Emphasis supplied.)

More recently, in *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 69, 493 N.W.2d 171, 174 (1992), this court held that § 60-535 pertains "only to policies which have been filed with the Nebraska Department of Motor Vehicles and certified as proof of future financial responsibility pursuant to the requirements of the [Motor Vehicle Safety Responsibility Act]."

As we held in *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 252, 444 N.W.2d 676, 679 (1989), "[t]he parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation . . . not inconsistent with public policy or statute."

Having been directed to no statute which mandates that noncertified automobile liability insurance policies provide categorical coverage for an insured under a policy of motor vehicle liability insurance, we hold that a household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance. For that reason, the district courts erred in their judgments that the household exclusion clause in State Farm's policies violates Nebraska's public policy and, therefore, is void.

IS THE EXCLUSION AMBIGUOUS?

In their cross-appeal, Hildebrands argue that the household exclusion clause in State Farm's policy is ambiguous for two reasons. Hildebrands contend, first, that it is not clear whether

the policy language should be read in the disjunctive or the conjunctive sense and, second, that it would be unreasonable to deny coverage to all parties under the facts of Hildebrands' case.

> An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. . . . An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.

Allstate Ins. Co. v. Farmers Mut. Ins. Co., 233 Neb. at 252, 444 N.W.2d at 678-79.

As noted above, "Section I — Liability — Coverage A" of the State Farm policy states that State Farm will "pay damages which an insured becomes legally liable to pay because of . . . bodily injury to others, and . . . caused by accident resulting from the ownership, maintenance or use of your car." (Emphasis omitted.) The policy further states that when "your car" is referred to, "insured" includes

> 1. you;
> 2. your spouse;
> 3. the relatives of the first person named in the declarations;
> 4. any other person while using such a car if its use is within the scope of consent of you or your spouse; and
> 5. any other person or organization liable for the use of such a car by one of the aboved insureds.

(Emphasis omitted.) Section I of the policy also contains the household exclusion: "There is no coverage: . . . . For any bodily injury to: . . . . Any insured or any member of an insured's family residing in the insured's household." (Emphasis omitted.) Hildebrands argue that it is not clear whether the term "insured" in the household exclusion refers to an insured as defined in the five categories in the above quotation from State Farm's policy, that is, whether the categories are conjunctive or disjunctive. We disagree.

The above-mentioned provisions in State Farm's policy are all part of "Section I — Liability — Coverage A" of the

insurance agreement. Clearly, the household exclusion limits coverage under section I by excluding coverage for bodily injury suffered by *any* insured, which, by definition, includes any person using the named insured's car with the insured's permission. Furthermore, existence or extent of coverage does not determine whether an insurance policy's language is ambiguous. Thus, we find no ambiguity in the language of State Farm's policy and hold that the district court did not err in finding that the policy is unambiguous.

ATTORNEY FEES

Neb. Rev. Stat. § 44-359 (Reissue 1988) provides that the court, "upon rendering judgment *against* [an insurance] company . . . 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." (Emphasis supplied.) Because we have determined that the district court erred in Hildebrands' case by rendering a declaratory judgment against State Farm, Hildebrands are not entitled to an attorney fee authorized by § 44-359. Therefore, we reverse the district court's award of an attorney fee to Hildebrands.

CONCLUSION

Because the household exclusion clause contained in State Farm's policies involved in these proceedings does not violate public policy of the State of Nebraska, the judgment in each of the consolidated cases is reversed, and these causes are remanded to the district courts with direction to enter judgments in favor of State Farm and consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

SHANAHAN, J., concurring.

The district courts' decisions that the household exclusion in the automobile omnibus clause is contrary to the public policy of this state raise several concerns regarding Nebraska's kaleidoscopic collection of statutes regarding liability insurance coverage for motor vehicles, their drivers, and their passengers.

The district courts' decisions are based on the public policy doctrine: A court may refuse to enforce a contractual provision

that violates law or public policy. *The People v. Wiersema State Bank*, 361 Ill. 75, 197 N.E. 537 (1935). Fundamental to the district courts' decisions is the definition or characterization of "public policy." As the court observed in *Alderman et al. v. Alderman et al.*, 178 S.C. 9, 22-23, 181 S.E. 897, 902 (1935):

> "Public policy has been aptly described by one of our judges as 'a wide domain of shifting sands.['] " . . . The term in itself imports something that is uncertain and fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people. . . . For that reason it has frequently been said that the expressive (expression?) public policy is not susceptible of exact definition. But for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the Courts, which is not derived or derivable by clear implication from the established law of the State, as found in its Constitution, statutes, and judicial decisions. . . .
>
> " 'It is the duty of the Legislature to make laws and of the Court to expound them, . . . the subjects in which the Court undertakes to make the law by mere declaration (of public policy) should not be increased in number without the clearest reasons and the most pressing necessity.' " [Quoting from *Magee v. O'Neill*, 19 S.C. 170, 45 Am. Rep. 765 (1883).]

In a somewhat similar expression, the court stated in *Julien v. Model B., L. & I. Asso.*, 116 Wis. 79, 91, 92 N.W. 561, 565 (1902):

> When we leave constitutional limitations out of view, the will of the legislative branch of the government, when expressed, is the highest evidence of public policy. To judicially condemn its expressed will, when exercised within constitutional limitations, would be the plainest kind of usurpation. Baron Parke, in *Egerton v. Brownlow*, 4 H. L. Cas. 122, 123, expressed the same idea substantially thus: "It is the province of the statesman and not of the lawyer to discuss, and of the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge

> to expound the law, to declare public policy as he finds it in the unwritten and written law. Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial notions as to what is best for the public good. An act [speaking of an act *inter partes*] is properly said to be illegal when it is contrary to the principles of established law."

See, also, *Griffith v. Mutual Protective League*, 200 Mo. App. 87, 105, 205 S.W. 286, 291 (1918):

> The public policy of a State is to be found as expressed in its Constitution and laws, and in the decisions of its highest court, and not from general considerations of the supposed public interests and policy of the State beyond what such sources of information make known to the court.

Thus, the potency of public policy comes from moral, economic, institutional, and other social considerations. James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 Geo. Wash. L. Rev. 1570 (1991).

Perhaps cognizant of the foregoing attempts to define "public policy," this court has condemned certain actions that violate Nebraska's public policy; for example, see, *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988) (an employee had a cause of action against an employer for discharging the employee, who had reported the employer's involvement in odometer fraud, which was a violation of Neb. Rev. Stat. § 60-2301 et seq. (Reissue 1984 & Cum. Supp. 1986) and which was punishable as a felony), and *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987) (an employer's discharge of an employee who refused to take a polygraph examination prohibited by the Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. § 81-1901 et seq. (Reissue 1981 & Cum. Supp. 1984) was a violation of Nebraska's public policy). In the realm of insurance, however, courts must be especially careful when basing their decisions on public policy, because " '[i]nsurance is a matter of contract, not sympathy.' " *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 160, 494 N.W.2d 99, 105 (1993) (quoting *St. Paul Fire & Marine*

Insurance Company v. Purdy, 129 Ga. App. 356, 199 S.E.2d 567 (1973)). Moreover, in an area so pervasively regulated, "it is not the function of the judiciary to second-guess the wisdom, policy, or expediency of legislative enactments." *State v. Two IGT Video Poker Games*, 237 Neb. 145, 150, 465 N.W.2d 453, 458 (1991).

Although Nebraska's Legislature has not prescribed a program of compulsory liability insurance to protect those who use this state's public highways and streets, registration of a motor vehicle is conditioned on a showing that the vehicle to be registered is covered by liability insurance. See Neb. Rev. Stat. § 60-302 (Reissue 1988). Also, an owner of a Nebraska-licensed vehicle must have proof of financial responsibility, as required by § 60-302, in the vehicle when operated in Nebraska. Failure to have such certificate or proof in the motor vehicle is a misdemeanor. See Neb. Rev. Stat. § 60-570 (Reissue 1988). Moreover, a driver involved in certain vehicular accidents is required to show proof of insurance. Failure to show proof of financial responsibility will lead to suspension of the operator's license. See Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Supp. 1989). Thus, Nebraska owners and operators of vehicles are statutorily inculcated with the need for liability insurance coverage to protect themselves and other members of the motoring public. To the ordinary owner or operator, the standard insurance policy meets that personal and legal need. However, through smoke and mirrors, the household exclusion of the omnibus clause in the standard insurance policy presents an illusion of insurance. Take, for example, an owner of a vehicle who is riding in a vehicle which the owner has insured under a standard policy that includes the household exclusion. The driver is a member of the owner's household, say a son or daughter, or someone operating the vehicle with the owner's permission, such as a mechanic driving the owner home before embarking on repairs to the vehicle. As a result of the driver's negligence, an accident occurs, and the owner-passenger is seriously injured. In view of today's decision in these cases, the owner's liability insurance provides no coverage for indemnification of the owner's injury and loss.

To avoid the unfortunate result in the preceding illustration,

courts in some states have held that the household exclusion violates public policy. Those decisions, however, are based on certain statutes that required specific insurance; for example, see *Farmers Ins. Group v. Reed*, 109 Idaho 849, 712 P.2d 550 (1985) (Idaho Code § 49-233 (1978) required that "[e]very owner of a motor vehicle . . . shall continuously provide insurance against loss resulting from liability imposed by law for bodily injury or death or damage to property suffered by any person caused by maintenance or use of a motor vehicle," but the household exclusion clause left family members unprotected when another family or household member was driving; therefore, the household exclusion violated statutorily mandated insurance), and *Farmers Ins. Exchange v. Call*, 712 P.2d 231 (Utah 1985) (the Utah Automobile No-Fault Insurance Act mandated that all automobiles registered in Utah be covered by specific types of security in conformity with Utah's Motor Vehicle Safety Responsibility Act, which prohibited the household exclusion clause; hence, the household exclusion clause contravened the Utah Automobile No-Fault Insurance Act).

However, an inspection of the Nebraska statutes concerning liability insurance coverage on motor vehicles culminates in uncertainty regarding specific insurance on vehicles. Section 60-302 contains no specification for the contents of an insurance certificate or policy required for registration of a motor vehicle. Absence of specification in § 60-302 should cause little surprise in view of the other Nebraska statutes pertaining to motor vehicle insurance. Neb. Rev. Stat. § 44-514(1) (Cum. Supp. 1992) states: "Policy shall mean an automobile liability policy providing all or part of the coverage defined in subdivision (2) of this section . . . ." Section 44-514(2) then provides: "Automobile liability coverage shall include only coverage of bodily injury and property damage liability, medical payments, uninsured motorist coverage, and underinsured motorist coverage." Thus, under § 44-514, although an automobile liability policy may include coverage for bodily injury and property damage, medical payments, and damage caused by uninsured and underinsured motorists, none of these permissible coverages are required by law. Similarly,

§ 60-509.01 states that all liability policies delivered or issued in Nebraska must include uninsured motorist coverage, but an insured may reject uninsured motorist coverage. Likewise, the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 to 60-582 (Reissue 1989), requires that all motor vehicle liability policies include underinsured motorist coverage unless such coverage is rejected by the insured.

Section 60-508 of the Motor Vehicle Safety Responsibility Act provides that if an operator "had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident," his or her license will not be suspended following an accident. However, § 60-509 proceeds to state:

> No such policy . . . shall be effective under section 60-508 unless issued by an insurance company or surety company authorized to do business in this state . . . . Every such policy or bond is subject, if the accident has resulted in bodily injury, sickness, disease, or death, to a limit, exclusive of interest and costs, of not less than twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, to a limit of not less than fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident and, if the accident has resulted in injury to or destruction of property, to a limit of not less than twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.

Consequently, for compliance with the Motor Vehicle Safety Responsibility Act, an insurance policy must provide certain minimum coverages to preserve the license of an owner or operator who is involved in an accident within the purview of the act.

For registration of a motor vehicle in Nebraska, § 60-302 does not require any minimum insurance coverage such as that required by the Motor Vehicle Safety Responsibility Act. Although the Legislature obviously hoped to increase the number of insured vehicles on Nebraska's highways and streets, for some unexplained reason, the Legislature settled for

§ 60-302 in its present form without any specificity concerning the precise type of "proof of financial responsibility." Because § 60-302 neither includes the specific and stringent requirements of § 60-509 (contents of a policy for the Motor Vehicle Safety Responsibility Act) nor defines what is meant by "a certificate or policy of insurance," § 60-302 produces a public misperception and the mirage of mandatory insurance coverage. In the final analysis, although § 60-302 requires individuals to show proof of financial responsibility to register their motor vehicles, the statute never defines what is meant by "financial responsibility." This legislative deficiency eliminates any basis for ascertaining Nebraska's public policy concerning liability insurance coverage for motor vehicles. Because Nebraska statutes contain no indication that the provisions of the Motor Vehicle Safety Responsibility Act shall apply to all automobile liability policies, nor any instruction regarding the scope of the financial responsibility required by § 60-302, I am unable to find that the household exclusion, unfair as it is, violates Nebraska's public policy. As one court has noted, " ' "it is the duty of the Legislature to make laws and of the court to expound them, . . . the subjects in which the court undertakes to make the law by mere declaration (of public policy) should not be increased in number without the clearest reasons and the most pressing necessity." ' " *Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 112, 703 P.2d 882, 889 (1985) (Stowers, J., dissenting) (quoting *State v. Lavender*, 69 N.M. 220, 365 P.2d 652 (1961)). In the absence of a legislatively expressed public policy for liability insurance coverage, what might violate public policy remains an open question. For that reason, I concur with the majority.

What is all too obvious is that the various Nebraska statutes on liability insurance coverage for motor vehicles are a series of intermittent skin grafts on an amorphous body of law with the anatomical deficiency of no backbone: Nebraska law contains no specifications concerning the particular insurance coverage that provides "financial responsibility." It is a fact of life in the insurance industry that individuals have little, if any, leverage when purchasing insurance policies. Therefore, if the Legislature believes that the welfare of Nebraska's citizens

requires that all persons operating or riding in automobiles in this state be protected by liability insurance in case of a motor vehicle accident, the Legislature must statutorily express that belief as public policy in Nebraska.

WHITE, FAHRNBRUCH, and LANPHIER, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY E. JOHNSON, APPELLANT.

502 N.W.2d 477

Filed July 16, 1993. No. S-90-1220.

1. **Effectiveness of Counsel: Proof.** The standard of review for a claim of ineffective assistance of counsel is a two-tiered analysis. First, the defendant must show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense of his case.
2. **Pleas: Effectiveness of Counsel: Proof.** When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty.
3. **Effectiveness of Counsel: Presumptions.** With regard to the first part of the ineffective assistance of counsel analysis, there is a strong presumption that counsel's performance was reasonable.
4. **Effectiveness of Counsel: Appeal and Error.** Even if counsel's actions are found to be unreasonable, the judgment will not be set aside unless those actions constitute prejudice.
5. **Search and Seizure: Standing.** Since it is elementary that one has a reasonable or legitimate expectation of privacy in his or her body, there is no question that one has standing to contest the search of his or her person.
6. **Search Warrants.** In order to be valid, a warrant must particularly describe the place to be searched and the persons to be seized.
7. **Search Warrants: Police Officers and Sheriffs.** The particularity requirement for a warrant does not provide that under no circumstances may a warrant be issued for one whom the police cannot identify by name in advance.
8. **Search Warrants.** What will amount to forbidden generality, or insufficient particularity, in a search warrant necessarily depends upon the facts and circumstances of each case.

9. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
10. **Judgments: Evidence: Appeal and Error.** A motion for writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which, if known by the court, would have prevented entry of judgment.
11. **Postconviction: Appeal and Error.** If a defendant is denied his right to appeal because of counsel's failure to timely file notice of appeal, a motion for postconviction relief is the proper means of attacking such denial.
12. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

James C. Stecker, of Robak and Stecker, for appellant.

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

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

PER CURIAM.

Defendant, Timothy E. Johnson, appeals the decision of the district court for Platte County which denied his motion for postconviction relief and for writ of error coram nobis. See Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989) and 49-101 (Reissue 1988). We affirm.

On October 22, 1985, at 7:48 a.m., the Nebraska State Patrol obtained a search warrant for room No. 70 in the Seven Knights Motel, Columbus, Nebraska. The room had been rented by Michael Lutt, whom the State Patrol suspected of involvement in illegal drug activity in the area. The warrant commanded the search of the motel room, Lutt, and "persons unknown." In the evening of October 22, the State Patrol executed a search of the motel room. Lutt and the appellant were the only persons in the room when the State Patrol entered and were immediately searched. The search of the appellant revealed an eyeglass case containing a syringe filled with methamphetamine.

The county attorney's office for Platte County charged the

appellant with possession of a controlled substance other than marijuana. See Neb. Rev. Stat. § 28-416 (Reissue 1985). Since the appellant had twice previously been convicted, sentenced, and committed to prison for terms of not less than 1 year, the county attorney also charged him with habitual criminal status. See Neb. Rev. Stat. § 29-2221 (Reissue 1989). Counsel was appointed, and at his arraignment on April 4, 1986, the appellant entered a plea of not guilty.

The appellant alleges that during discussions with counsel regarding the probable success of a motion to suppress, counsel told the appellant that he had no standing to contest the warrant or the search. The appellant further alleges that counsel threatened to withdraw if the appellant did not plead guilty. The appellant asserts that he felt his only alternative was to plea-bargain with the county attorney, in light of his counsel's advice that a motion to suppress would most likely be denied. Then, on May 14, 1986, pursuant to a three-way plea bargain among the appellant, the county attorney's office, and the U.S. attorney's office, the appellant entered a plea of guilty on both charges. The U.S. attorney's office agreed not to prosecute the appellant for violations of the federal controlled substances laws if he pled guilty to the State's charges. Also as part of the plea bargain, the county attorney agreed to recommend the minimum sentence under the habitual criminal statute. In addition, the start of the appellant's sentence would be delayed to enable him to arrange housing for his girl friend. The court sentenced the appellant to a term of a minimum of 10 years and a maximum of 10 years' imprisonment in the Nebraska Penal and Correctional Complex.

The appellant asserts that he asked his counsel to appeal the conviction and sentence, but counsel refused. Yet, counsel did file a motion to reduce sentence, which the district court denied and we affirmed on appeal. *State v. Johnson*, 225 Neb. xxi (case No. 87-044, May 20, 1987).

After obtaining new counsel, the appellant filed a motion for postconviction relief and for writ of error coram nobis, alleging ineffective assistance of counsel. On May 4, 1989, a hearing was held on the motion. At the close of the appellant's case, the State moved to dismiss the appellant's requests for relief. The

district court dismissed the appellant's postconviction motion for failure to prove a prima facie case, but allowed the hearing to proceed on the writ of error coram nobis. After completion of the hearing, the district court denied the motion for writ of error coram nobis.

On appeal, we vacated the district court's judgment because the court failed to issue specific findings of fact and conclusions of law. *State v. Johnson*, 235 Neb. xxi (case No. 89-817, May 16, 1990). On November 27, 1990, the district court issued its findings of fact and conclusions of law, again denying the appellant's motion. Thus, the appeal now before this court arises out of the district court's second denial of the appellant's motion for postconviction relief and for writ of error coram nobis.

The appellant asserts that the district court erred in (1) granting the State's motion for directed verdict at the completion of the appellant's case on the motion for postconviction relief, (2) finding that the appellant was not denied effective assistance of counsel, and (3) denying the motion for writ of error coram nobis for the failure of the appellant's counsel to appeal the conviction and sentence upon the appellant's request.

The appellant's first and second assignments of error involve the appellant's request for postconviction relief based upon a claim of ineffective assistance of counsel. The standard of review for a claim of ineffective assistance of counsel is a two-tiered analysis. First, the defendant must show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992). Next, the defendant must show that counsel's deficient performance prejudiced the defense of his case. *Id.* When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *Id.*

With regard to the first part of the ineffective assistance analysis, there is a strong presumption that counsel's

performance was reasonable. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Even if counsel's actions are found to be unreasonable, the judgment will not be set aside unless those actions constitute prejudice. *Id.*

We now apply the two-tiered analysis to determine if counsel's actions constituted ineffective assistance. First, was counsel's advice deficient? The appellant alleges that counsel erred in advising him (1) that he had no standing to contest the search by the State Patrol and (2) that a motion to suppress evidence obtained in the search would likely be denied. The record includes testimony by counsel which indicates he in fact advised the appellant that there was no standing to contest the search and that the chance of a successful motion to suppress was slim.

While we agree that a motion to suppress would have been denied, we do not agree that the appellant did not have standing to contest the search. It is not clear from the record whether counsel advised the appellant he did not have standing to contest the search of the motel room, his person, or both. The State Patrol's search of the motel room should be viewed as a separate event from the search of the appellant. The appellant was charged with possession of a controlled substance, methamphetamine, which was discovered during the search of his person, not the motel room. Therefore, a motion to suppress need only attack the constitutionality of the search of the appellant. Since it is elementary that one has a reasonable or legitimate expectation of privacy in his or her body, there is no question that the appellant had standing to contest the search of his person. See *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) (standing depends on whether or not one has a legitimate expectation of privacy). Counsel's failure to recognize that the appellant had standing constituted deficient representation because it did not equal that of a lawyer with ordinary training and skill in criminal law in the area.

The next step in the ineffective assistance of counsel analysis is to determine if counsel's deficient performance prejudiced the appellant's defense; that is, but for counsel's error, would the appellant have chosen to go to trial? The appellant asserts

that he felt his counsel pushed him toward pleading guilty by informing him that a motion to suppress would likely be denied. However, the plea bargain in this case suggests that the appellant chose to plead guilty for additional reasons, such as to avoid federal prosecution, to assure the minimum sentence under the habitual criminal statute, and to have his sentence delayed so that he could arrange housing for his girl friend. We do not find that if counsel had properly advised the appellant on the standing issue, the appellant would have insisted on going to trial. Although deficient, counsel's advice that there was no "standing" did not prejudice the appellant's case.

Furthermore, counsel's advice was not prejudicial because, even if a motion to suppress had been filed, it would have been denied. The appellant argues that a motion to suppress would have been granted because the warrant did not specifically authorize the search of the appellant, nor was there probable cause to support a search without a warrant. The appellant further argues that the State Patrol was not authorized to search his person under the provision of the warrant authorizing the search of "persons unknown" because this provision is prohibited by the Fourth Amendment as it fails to satisfy the particularity requirement. It is a well-established rule that in order to be valid, a warrant must particularly describe the place to be searched and the persons to be seized. *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988). "That is not to say, however, that under no circumstance may a warrant be issued for one whom the police cannot identify by name in advance." *State v. Pecha*, 225 Neb. 673, 679, 407 N.W.2d 760, 764 (1987). " 'What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. . . .' " *Id.* (quoting *People v Nieves*, 36 N.Y.2d 396, 330 N.E.2d 26, 369 N.Y.S.2d 50 (1975)). The facts set out in the affidavit upon which the warrant was issued were sufficient to establish probable cause to search "persons unknown." The affidavit provided that

> a concerned citizen informed . . . that a Michael Lutt of Grand Island, Ne. had registered at the Seven Knights Motel . . . in rooms #55 & 56 on . . . October 18 & 19, 1985

> respectively, and that Michael Lutt acted suspicious and the concerned citizen suspects Michael Lutt of being a drug dealer. Numerous visitors with demeanor related to persons in the drug culture frequented the rooms rented by Michael Lutt.
>
> In checking motel records . . . affiant found that Michael Lutt had rented rooms #55 & 56 on the above noted dates and that phone calls were made from those rooms to persons in the Columbus and Grand Island areas who have a known reputation of drug involvement.
>
> Affiants [sic] search of intelligence records revealed that Lutt had been convicted of numerous drug violations in Nebraska and California . . . .
>
> . . . .
>
> Affiants [sic] further search of intelligence information revealed information from a reliable informant in the Grand Island area who stated that Lutt is actively involved in the distribution and sale of methamphetamine.
>
> Affiant has learned from other State Patrol Investigators who have a working knowledge of drug activity in the Columbus area indicating that a substantial amount of methamphetamine will be available between Oct. 19 & 23, 1985 from an unknown source transporting it to Columbus.
>
> Affiant has determined that Michael Lutt has reserved room #70 at the Seven Knights Motel for October 22, 1985. Affiant believes that a drug transaction will take place there or that drugs will be in Lutts [sic] control or custody.

We find that the State Patrol alleged sufficient facts in the affidavit to establish that they had probable cause to believe there would be "persons unknown," in addition to Lutt, in the hotel room who would engage in illegal drug activity. Therefore, the search of the appellant under the "persons unknown" provision of the warrant was lawful; consequently, a motion to suppress evidence obtained therefrom would be denied.

On appeal from a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are

clearly erroneous. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991). We agree with the district court's finding that the appellant was not denied effective assistance of counsel and, thus, uphold the lower court's dismissal of the appellant's motion for postconviction relief.

In his third assignment of error, the appellant asserts that the motion for writ of error coram nobis should have been granted because he was denied his right to appeal due to counsel's alleged failure to appeal his conviction and sentence. The appellant argues that a motion for writ of error coram nobis is the proper procedure for contesting counsel's failure to appeal. While it is true that the laws of this state recognize a motion for writ of error coram nobis, the appellant's use of the motion is improper.

This court has not specifically rejected the use of a writ of error coram nobis to contest a counsel's failure to appeal as a denial of one's right to appeal. However, we have held that a motion for writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which, if known by the court, would have prevented entry of judgment. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987). Here, the appellant is not presenting facts which were unknown to him at the time of judgment, but, rather, the appellant is simply arguing that his right to appeal was denied due to ineffective assistance of counsel. We have held that if a defendant is denied his right to appeal because of counsel's failure to timely file notice of appeal, a motion for postconviction relief is the proper means of attacking such denial. *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990). The appellant should have argued counsel's failure to appeal as ineffective assistance of counsel in his motion for postconviction relief.

However, even if the appellant had included the appeal issue in his postconviction motion, we find that counsel's actions were not deficient or prejudicial so as to constitute ineffective assistance of counsel. At the postconviction hearing, the appellant testified that he wanted to appeal and that he had

asked counsel several times to file an appeal. However, counsel's testimony indicates that although the appellant had requested an appeal, he agreed that a motion to reduce sentence would be better strategy. Notwithstanding this contradictory testimony, the record clearly shows that the appellant was well aware of his right to appeal and had been adequately advised by counsel on the likelihood of a successful appeal. Counsel only suggested to the appellant that a better strategy than an appeal would be a motion to reduce sentence. The appellant made the ultimate decision on whether or not to file an appeal. "We will not second-guess reasonable strategic decisions by counsel." *State v. Lyman*, 241 Neb. 911, 920, 492 N.W.2d 16, 22 (1993). Furthermore, in light of the strong presumption that counsel's actions are reasonable, we agree with the district court's finding that the appellant, after conferring with counsel, knowingly and intelligently chose not to pursue an appeal from his sentence.

The appellant has failed to prove that counsel's representation constituted ineffective assistance of counsel. We thus affirm the district court's denial of the appellant's motion for postconviction relief and for writ of error coram nobis.

AFFIRMED.

NATIONAL AMERICAN INSURANCE COMPANY OF NEBRASKA, INC., ALSO KNOWN AS COLUMBIA NATIONAL INSURANCE COMPANY OF NEBRASKA, INC., APPELLEE AND CROSS-APPELLEE, V. CONTINENTAL WESTERN INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, AND MICHAEL AMICK ET AL., ECONOMY FIRE & CASUALTY COMPANY, DEFENDANT AND THIRD-PARTY PLATINIFF, AND RITA WELSH, THIRD-PARTY DEFENDANT, APPELLEES, CROSS-APPELLANTS, AND CROSS-APPELLEES.

502 N.W.2d 817

Filed July 16, 1993. No. S-91-001.

1. **Insurance: Contracts.** Interpretation of an unambiguous term or provision in an insurance policy presents a question of law.

2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
3. **Insurance: Contracts: Motor Vehicles: Liability: Public Policy.** The definition of "financial responsibility," used in Neb. Rev. Stat. § 60-501(10) (Reissue 1988), applies only to policies of automobile liability insurance used as proof of financial responsibility specifically required for compliance with the Motor Vehicle Safety Responsibility Act. In all other situations, the parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
4. _____: _____: _____: _____: _____. A household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance.
5. **Reformation: Intent: Proof.** Reformation of a written instrument may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. The mistake must be proven by clear and convincing evidence. The evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.
6. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made; where the terms of the contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Actions: Reformation.** As a general rule, reformation of written instruments may be had by the immediate parties thereto and by those standing in privity with them. A person not a party or privy to the transaction in question with a substantial interest therein may not maintain the action.
8. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
9. **Attorney Fees.** In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
10. **Insurance: Contracts: Attorney Fees.** An attorney fee awarded under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1988) must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Alan L. Plessman for appellant.

William J. Brennan, Jr., of Fitzgerald, Schorr, Barmettler & Brennan, for appellee National American Insurance Co.

Richard J. Rensch and Patrick M. Heng, of Raynor, Rensch & Pfeiffer, for appellees Amick.

Lyman L. Larsen and Daniel P. Chesire, of Kennedy, Holland, DeLacy & Svoboda, for appellees Welsh.

Edward F. Noethe and P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellee Economy Fire & Casualty Co.

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

FAHRNBRUCH, J.

This declaratory judgment action involves whether any of three automobile liability policies issued by separate insurance companies affords coverage for injuries suffered in an accident by the son of an insured under one of the policies. The injured son was a passenger in his family's automobile that was being driven by his friend.

The district court for Douglas County determined that appellant, Continental Western Insurance Company (Continental Western), provided primary liability coverage; that appellee Economy Fire & Casualty Company (Economy) provided secondary coverage; and that there was no coverage provided by appellee National American Insurance Company of Nebraska, Inc. (National American).

We modify the amount of attorney fees Economy was ordered to pay, reverse the judgment of the district court as to Continental Western's liability, and remand the cause with directions.

FACTS

On June 19, 1987, Christopher Welsh, Michael Amick, and a third party were involved in a one-car accident near Spencer,

Iowa. Michael Amick claims he was injured. At the time of the accident, Christopher Welsh was driving a 1985 Volkswagen convertible owned by Kevin and Ann Amick, Michael's parents. The Amicks' automobile was insured under a Continental Western personal automobile liability policy. James R. and Rita Welsh, Christopher's parents, had personal automobile liability insurance with Economy. In addition, James Welsh's law firm, Welsh & Sibbernsen, had a commercial automobile liability policy with National American.

In a separate action, Michael Amick sued Christopher Welsh for the injuries Michael Amick claimed he sustained in the accident. Christopher Welsh's father asked each of the three insurance companies involved here to afford a defense to Michael Amick's suit. Each refused. National American sought a declaratory judgment that its automobile liability policy did not provide coverage for bodily injury to Michael Amick, that the Continental Western and Economy policies provided coverage, and that those companies had a duty to defend Christopher Welsh.

In their cross-petition, the Amicks sought a declaratory judgment that all three policies provided coverage for Michael Amick's claims against Christopher Welsh. The Welshes in their cross-petition sought a declaratory judgment that National American and Continental Western provided coverage. Economy, in its cross-petition, also sought a declaratory judgment that the National American and Continental Western policies provided coverage and that those companies had a duty to defend Christopher Welsh. Economy sued Rita Welsh as a third-party defendant, asking reformation of its policy to show that Economy provided no coverage for Christopher Welsh while he was driving any vehicle and seeking a declaratory judgment that it had no duty to defend Christopher Welsh or to provide coverage to him.

Continental Western, the Amicks' insurer and the appellant in this case, contends that it is not liable under the terms of its policy endorsement "PP 03 26," a household exclusion endorsement, which provides: "We do not provide Liability Coverage for any person for bodily injury to you or any family member." (Emphasis omitted.)

On July 16, 1990, the district court found that endorsement

PP 03 26 was unenforceable because it was contrary to Neb. Rev. Stat. § 60-534 (Reissue 1988). The court further declared that the Continental Western policy provided primary liability coverage up to its policy limits for Michael Amick's claim against Christopher Welsh, that Economy provided secondary coverage, and that the National American policy provided no coverage.

The district court awarded attorney fees of $32,770 in favor of the Amicks and against Continental Western and $16,174 in favor of the Welshes and against Economy. Continental Western, Economy, the Welshes, and the Amicks filed motions for new trial, which were overruled. Continental Western then timely appealed to this court. Economy, the Welshes, and the Amicks cross-appealed.

ASSIGNMENTS OF ERROR

On appeal, Continental Western makes seven assignments of error, which combine to assert that the trial court erred in (1) finding that its endorsement PP 03 26 was void as against public policy and was contrary to § 60-534, (2) awarding the Amicks attorney fees of $32,770 against Continental Western, and (3) overruling Continental Western's motion for new trial.

On cross-appeal, Economy makes seven assignments of error, which combine to allege that the trial court erred in (1) failing to reform the Economy policy to reflect the true intentions of the contracting parties that there was no coverage for Christopher Welsh; (2) awarding attorney fees in favor of the Welshes against Economy; (3) allowing recovery for nontaxable court costs, including expert witness fees, under Neb. Rev. Stat. § 44-359 (Reissue 1988); and (4) failing to reform National American's policy to provide coverage for Christopher Welsh.

The Amicks' sole assignment of error on cross-appeal is that the trial court erred in failing to award attorney fees in favor of the Amicks and against Economy pursuant to § 44-359.

The Welshes' sole assignment of error on cross-appeal is that the trial court erred in failing to grant an award of attorney fees in favor of the Welshes and against Continental Western pursuant to § 44-359.

SCOPE OF REVIEW

"Interpretation of an unambiguous term or provision in an insurance policy presents a question of law." *State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante* p. 743, 746, 502 N.W.2d 469, 471 (1993). Accord *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., post* p. 779, 502 N.W.2d 484 (1993). " 'In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.' " *State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante* at 746, 502 N.W.2d at 471. Accord *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., supra.*

ANALYSIS

FAMILY EXCLUSION ENDORSEMENT

Initially, we determine the effect of Continental Western's endorsement PP 03 26, commonly known as a household exclusion endorsement.

The Amicks' "Select Personal Auto Policy" with Continental Western, in "Part A — Liability Coverage," stated in relevant part: "We will pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." "Insured" is defined by the policy as "[a]ny person using 'your covered auto.' " It is undisputed that Christopher Welsh was driving one of the Amicks' covered automobiles, that he was driving it with Michael Amick's permission, and that Christopher Welsh was an insured under the policy.

However, the liability coverage provided the Amicks by Continental Western at the time of the accident was subject to exclusion endorsement PP 03 26. That endorsement stated: "We do not provide Liability Coverage for any person for bodily injury to you or any **family member**." According to the unambiguous terms of endorsement PP 03 26, Continental Western did not provide liability coverage for bodily injury to Michael Amick, since he was an Amick family member.

The appellees argue that the endorsement is inconsistent with both public policy and the legislative will as contained in § 60-534. Section 60-534 states:

> [A motor vehicle liability policy certified as proof of financial responsibility:] (1) Shall designate by explicit description . . . all motor vehicles with respect to which coverage is thereby to be granted; and (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the . . . use of such motor vehicle . . . .

Today, this court decided the validity of the household exclusion in *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., post* p. 779, 502 N.W.2d 484 (1993), and *State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante* p. 743, 502 N.W.2d 469 (1993). In those cases, we noted that § 60-534 is part of the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988) (providing in § 60-507 for suspension of the motor vehicle operator's license of any operator involved in an accident in Nebraska which results in bodily injury, death, or substantial property damage, if the operator does not have motor vehicle liability insurance or other proof of financial responsibility at the time of the accident, and continuing until the operator provides proof of future financial responsibility).

In *Allied Mut. Ins. Co.*, the court held that

> the definition of "financial responsibility," used in § 60-501(10), applies only to policies used as proof of financial responsibility specifically required for compliance with the Nebraska Motor Vehicle Safety Responsibility Act. In all other situations, "[t]he parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute." *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 252, 444 N.W.2d 676, 679 (1989).

Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., post at 783, 502 N.W.2d at 487.

Therefore,

> a household exclusion clause contained in a policy of

> motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance.

State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante at 749, 502 N.W.2d at 473. Accord *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., supra.*

The Amicks' Continental Western liability insurance was not a policy used as proof of financial responsibility as defined by the Motor Vehicle Safety Responsibility Act. Consequently, endorsement PP 03 26 violates neither public policy nor § 60-534, and coverage for Michael Amick's injuries is expressly excluded by the terms of the Continental Western policy. We reverse the judgment of the district court finding that the Continental Western policy provided coverage for Michael's injuries.

In view of the foregoing holding, we need not reach Continental Western's assigned error appealing the overruling of its motion for new trial.

REFORMATION OF ECONOMY'S POLICY

Economy argues that the district court erred by failing to reform its policy to reflect the true intention of the parties that there be no liability coverage under the policy for Christopher Welsh.

> Reformation [of a written instrument] may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. The mistake must be proven by clear and convincing evidence. [Citations omitted.] The evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.

Jones v. Employers Mut. Cas. Co., 230 Neb. 549, 560, 432 N.W.2d 535, 542 (1988).

Economy does not allege that the Welshes engaged in any

form of fraud or inequitable conduct leading to a unilateral mistake by Economy in the issuance of the policy in question. Rather, Economy contends that there was a mutual mistake because both Economy's underwriter and the Welshes understood that Christopher Welsh was to be totally excluded from liability coverage under the policy.

The record indicates that the Welshes' automobile insurance with a previous insurer was canceled effective October 10, 1986, due to the poor driving records of Christopher Welsh and another of the Welsh children, Amy. The Welshes then applied for insurance with Economy through their agent, Andy Sibbernsen. Andy Sibbernsen testified that Economy agreed to issue a policy to the Welshes only if Christopher and Amy Welsh were excluded from coverage under the policy.

Economy then issued an "Econo-Plan Personal Auto Policy" to James and Rita Welsh, effective December 13, 1986, subject to a named driver exclusion endorsement. The endorsement listed "Amy Welsh and Christopher Welsh, children of insured," as drivers to be excluded under the policy. This policy expired June 13, 1987. The policy was renewed for the period from June 13 through December 13, 1987.

The Economy renewal policy issued to James and Rita Welsh effective June 13, 1987, provided liability coverage for "bodily injury or property damage for which any insured becomes legally responsible because of an auto accident." (Emphasis omitted.) "Insured" was defined in that section of the policy to mean: "You or any family member for the . . . use of *any auto* or trailer." (Emphasis omitted.) (Emphasis supplied.) Absent the named driver exclusion endorsement, Christopher Welsh would have been an insured under the Economy policy while using any automobile by virtue of being a member of the Welsh family.

However, the named driver exclusion endorsement to the policy, dated June 13, 1987, and which was in effect at the time of the accident, stated in part: "[I]t is agreed that all coverage afforded by this policy is void and shall not apply to any claim or suit which occurs as a result of *any covered vehicle* being operated by the following person(s): Christopher - Son of the Named Insured." (Emphasis supplied.) At the bottom of the

exclusion form was a space to indicate acceptance of the endorsement by the named insured, and which was signed "James R. Welsh." James Welsh testified that the signature on the exclusion endorsement was his, although he could not recall if he had read the exclusion. He further testified that he had told an attorney for the Amicks that none of the Welshes' automobile policies would cover Christopher Welsh for the accident in question.

A marketing underwriting manager for Economy testified that it was Economy's intent to totally exclude Christopher and Amy Welsh from coverage under the policy. He conceded that the language of the named driver exclusion endorsements to the Welshes' policy did not exclude nonowned automobiles.

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made; where the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992).

Economy has failed to show by clear and convincing evidence that there was a mutual mistake as to the terms of its exclusion endorsement for Christopher Welsh. Indeed, the terms of the endorsement drafted by Economy are the best evidence of Economy's intent, and the terms of that endorsement are clear: Christopher Welsh was excluded from coverage only for covered vehicles. The Amick Volkswagen was not a covered vehicle under Economy's policy, and Economy's exclusion endorsement therefore was not applicable to that vehicle.

The district court correctly denied Economy's request for reformation of its policy and erred only to the extent that it found Economy's policy provided excess coverage for Christopher Welsh's liability to Michael Amick. Because we have held above that Continental Western's policy provided no coverage, we now hold that Economy's policy provided coverage for Christopher Welsh's liability to Michael Amick.

REFORMATION OF NATIONAL AMERICAN'S POLICY

Economy contends that the district court erred in failing to

reform National American's policy to provide coverage to Christopher Welsh. National American counters that Economy lacks standing to request reformation of National American's policy.

Whether one insurance company may seek reformation of another insurance company's policy is a question of first impression for this court. As a general rule, "[r]eformation of written instruments may be had by the immediate parties thereto and by those standing in privity with them . . . a person not a party or privy to the transaction in question with a substantial interest therein may not maintain the action." 76 C.J.S. *Reformation of Instruments* § 47 at 400-01 (1952).

Other jurisdictions which have considered the issue of reformation of insurance contracts have held that the right to reformation belongs solely to the contracting parties, their assignees, or their intended beneficiaries. See, *Starr v. Nationwide Mut. Ins. Co.*, 548 A.2d 22 (Del. Ch. 1988), *aff'd* 575 A.2d 1083 (Del. 1990) (holding that injured passenger lacked standing to seek reformation of insured's uninsured motorist coverage); *International Service Ins. Co. v. Gonzales*, 194 Cal. App. 3d 110, 239 Cal. Rptr. 341 (1987) (holding that neither accident victim nor former wife of insured had standing to seek reformation of insured's automobile disability policy); *Biondo v Ridgemont Ins Agency*, 104 Mich. App. 209, 304 N.W.2d 534 (1981) (holding that insurance agency that failed to notify company of a change in coverage requested by insured lacked standing to seek reformation of insured's theft insurance coverage).

Economy is not a party to the automobile insurance contract between National American and the Welsh & Sibbernsen law firm, nor is Economy in privity with either of the parties as to that insurance contract. Economy is not an assignee of either party, nor can it be said that Economy is an intended beneficiary of the contract.

Therefore, consistent with the general rule as well as the decisions of other jurisdictions, we hold that Economy lacks standing to seek reformation of National American's policy and that its assignment of error is without merit.

ATTORNEY FEES

Several of the parties have raised assignments of error related to attorney fees, which we consider together. Initially, we consider Economy's claim that the district court's award of fees for the cost of expert witnesses and for photocopying was erroneous because these costs are not recoverable under § 44-359.

Economy cites no authority in support of this proposition, and in fact, previous holdings of this court are to the contrary. See, *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991) (affirming an award of attorney fees which included air travel expenses incurred by the attorney); *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975) (upholding an award of attorney fees of $2,460.51 plus $615.66 for expenses of an undisclosed nature). We perceive no rational basis for distinguishing an attorney's expenses for consultation with an expert or for photocopying from other expenses necessary to a client's representation. This assignment of error is without merit. However, that is not to say that Economy is necessarily liable for these claimed expenses, as we discuss below.

Next, we turn to the issue of attorney fees awarded in favor of the Amicks against Continental Western. Having held that Continental Western is not liable for Michael Amick's personal injuries, we reverse the order of the district court granting attorney fees in favor of the Amicks and against Continental Western in the amount of $32,770. See § 44-359. Obviously, this is also dispositive of the Welshes' cross-appeal claiming that the district court erred in failing to award them attorney fees against Continental Western.

Finally, we address whether Economy is liable to either the Welshes or the Amicks for attorney fees pursuant to § 44-359. Economy appeals the award of attorney fees in favor of the Welshes, arguing that it is not liable for services rendered in connection with Continental Western and National American and that the hourly rates were excessive.

There is no doubt that Economy is liable to the Welshes for attorney fees. "Attorney fees may be awarded under § 44-359 in declaratory judgment actions, [citation omitted] even if it is

the insurer who institutes the action." *Union Ins. Co. v. Bailey*, 234 Neb. 257, 264, 450 N.W.2d 661, 666 (1990). Economy sued its insured Rita Welsh, seeking a declaratory judgment that it was not liable for the defense or coverage of Christopher Welsh.

Additionally, Michael Amick, as an injured party, is a beneficiary of the Welshes' insurance contract with Economy. See *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964). Because the Welshes and the Amicks have prevailed in this action as to Economy, they are entitled to reasonable attorney fees pursuant to § 44-359.

When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992).

In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Schmer v. Hawkeye-Security Ins. Co., supra.*

As Economy correctly argues, an attorney fee awarded under the provisions of § 44-359 "must be *solely* and only for services actually rendered in the preparation and trial of the litigation *on the policy in question*." (Emphasis supplied.) *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 203, 318 N.W.2d 70, 76 (1982). Therefore, any award of attorney fees against Economy for services rendered in the preparation and trial of the litigation on the other two policies constitutes an abuse of discretion, and such fees are hereby disallowed, and the award to the Welshes is modified.

After consideration of the factors to be considered in setting attorney fees, we determine reasonable attorney fees to be $10,000 apiece for the Welshes and the Amicks for legal services rendered in the district court, plus an additional $2,500 apiece for services in this court, all to be paid by Economy.

CONCLUSION

We have fully considered other arguments of the parties and find that they are without merit. The judgment of the district court is affirmed in part as modified and reversed in part, and the cause is remanded to the district court for the entry of judgment not inconsistent with this opinion.

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

WHITE, J., not participating.

ALLIED MUTUAL INSURANCE COMPANY, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

502 N.W.2d 484

Filed July 16, 1993. No. S-91-119.

1. **Insurance: Contracts.** Interpretation of an unambiguous term or provision in an insurance policy presents a question of law.
2. **Insurance: Contracts: Motor Vehicles: Liability: Public Policy.** A household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance.
3. **Insurance.** An insurer's duty to defend is distinct from insurance coverage for a risk.
4. **Insurance: Contracts.** Although an insurance policy itself may impose an obligation to defend and thereby impose a duty greater than the obligation to indemnify a loss, the nature of the duty to defend is defined by the insurance policy as a contract.
5. **Insurance: Contracts: Claims: Liability: Pleadings.** An insurer's decision whether to defend against a claim cannot be based solely on the allegations of a petition; rather, an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.
6. **Insurance: Contracts: Liability: Pleadings.** If, according to facts alleged in a petition and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured.
7. **Insurance: Contracts: Claims.** Although an insurer is obligated to defend all suits brought against the insured, even though groundless, false, or fraudulent,

the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

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

Stephen L. Ahl and Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Patrick W. Healey, of Healey Wieland Law Firm, for appellee.

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

PER CURIAM.

Allied Mutual Insurance Company requested a declaratory judgment concerning an automobile liability policy issued by State Farm Mutual Automobile Insurance Company to Annette Gonzales, who was a passenger in her automobile driven by Laurie Messersmith. Gonzales was injured in a one-car accident resulting from Messersmith's operation of the Gonzales car.

FACTS

At the time of the one-car accident on April 29, 1988, Messersmith, with permission from Gonzales, was driving Gonzales' automobile. Gonzales was a passenger in the automobile and was injured when the automobile left the road. Subsequently, Gonzales sued Messersmith for negligent operation of the automobile and personal injury.

Gonzales' policy stated that State Farm would "pay damages which an insured becomes legally liable to pay because of: . . . bodily injury to others, and . . . caused by accident resulting from the ownership, maintenance or use of your car." The policy further states that when "your car" is referred to, "insured" includes "any other person while using such a car if its use is within the scope of consent of you or your spouse." As the result of Gonzales' consent to Messersmith's using the car, Messersmith was an insured under the State Farm policy issued to Gonzales.

When Gonzales sued, Messersmith tendered the defense to

State Farm. However, State Farm refused to defend Messersmith, claiming that Gonzales was an insured under the State Farm policy which excluded coverage for bodily injuries to any insured: "There is no coverage . . . for any bodily injury to . . . any insured or any member of an insured's family residing in the insured's household." After State Farm's refusal to defend, Allied defended Messersmith and incurred costs of $2,406. Allied then filed suit against State Farm, asking the court to declare that State Farm was obligated to defend Messersmith pursuant to the policy issued to Gonzales and, further, seeking recovery of the costs expended by Allied in defending Messersmith.

The district court found, on the basis of stipulated facts, that the "household exclusion" in State Farm's policy relieved State Farm of its duty to defend Messersmith against Gonzales' bodily injury claim and that the financial responsibility requirements contained in Neb. Rev. Stat. §§ 60-534 to 60-548 (Reissue 1988) did not override the provisions of the exclusion contained in State Farm's policy.

ASSIGNMENTS OF ERROR

Allied argues that the district court erred in (1) holding that the household exclusion clause of State Farm's policy is not contrary to public policy of the State of Nebraska as expressed in Neb. Rev. Stat. §§ 60-302 and 60-501(10) (Reissue 1988) and (2) finding that State Farm had no duty to defend Messersmith against Gonzales' negligence claim.

STANDARD OF REVIEW

Interpretation of an unambiguous term or provision in an insurance policy presents a question of law. See *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988). "In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 265, 445 N.W.2d 284, 287 (1989). Accord, *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). See *Boisen v.*

Petersen Flying Serv., 222 Neb. 239, 383 N.W.2d 29 (1986).

HOUSEHOLD EXCLUSION

Allied argues that the household exclusion clause of State Farm's policy is contrary to the public policy of the State of Nebraska expressed in §§ 60-302 (proof of financial responsibility required for registration of a motor vehicle) and 60-501(10) (definition of "proof of financial responsibility") and, therefore, is unenforceable. Section 60-302 provides, in pertinent part:

> No motor vehicle . . . shall be operated on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3. . . .
>
> *All applications for registration of motor vehicles shall be accompanied by proof of financial responsibility.* Proof of financial responsibility shall be evidenced by a copy of proof of financial responsibility filed pursuant to subdivision (2), (3), or (4) of section 60-528 bearing the seal of the Department of Motor Vehicles or by a certificate or policy of insurance. Such certificate or policy of insurance shall be written by an insurance carrier duly authorized to do business in this state and shall certify that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate or policy shall give the effective dates of such motor vehicle liability policy . . . and shall designate . . . all motor vehicles covered thereby.

(Emphasis supplied.) Section 60-302 contains no other specifications concerning the contents of an insurance certificate or liability policy required for registration of a motor vehicle.

Allied contends that the "proof of financial responsibility" required by § 60-302 is defined in § 60-501(10), which states that "proof of financial responsibility" means

> evidence of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle, (a) in the amount

> of twenty-five thousand dollars because of bodily injury to or death of one person in any one accident. . . .

However, § 60-501 is part of the Motor Vehicle Safety Responsibility Act pertaining to postaccident proof of ability to respond to damages from a motor vehicle accident and is not incorporated into the general registration requirements of § 60-302 or into any other statutory provision in chapter 60, article 3. The Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Cum. Supp. 1992), provides for suspension of the license of any operator of a motor vehicle involved in an accident in Nebraska that results in bodily injury, death, or substantial property damage, when the operator does not have motor vehicle liability insurance or other proof of financial responsibility at the time of the accident. Suspension continues until the operator provides proof of future financial responsibility. See §§ 60-507 and 60-508.

The contentions and arguments of the parties in this appeal are substantially the same as those made in *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 493 N.W.2d 171 (1992), issued on December 18, 1992, after the briefs were filed in this appeal. In *Allied Mut. Ins. Co. v. Musil*, 242 Neb. at 69, 493 N.W.2d at 174, we held that § 60-535 pertains "only to policies which have been filed with the Nebraska Department of Motor Vehicles and certified as proof of future financial responsibility pursuant to the requirements of the [Motor Vehicle Safety Responsibility Act]." Similarly, we hold today that the definition of "financial responsibility," used in § 60-501(10), applies only to policies used as proof of financial responsibility specifically required for compliance with the Nebraska Motor Vehicle Safety Responsibility Act. In all other situations, "[t]he parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute." *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 252, 444 N.W.2d 676, 679 (1989). Thus,

> a household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof

> of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate public policy of the State of Nebraska and is an enforceable provision in a policy of motor vehicle liability insurance.

State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante p. 743, 749, 502 N.W.2d 469, 473 (1993).

DUTY TO DEFEND

Allied also asserts that State Farm had a duty to defend Messersmith against Gonzales' negligence claim. An insurer's duty to defend is distinct from insurance coverage for a risk. Although an insurance policy itself may impose an obligation to defend and thereby impose a duty greater than the obligation to indemnify a loss, see, e.g., *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981), the nature of the duty to defend is defined by the insurance policy as a contract, *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). In determining whether a defense duty exists, "[t]he rule is well settled in Nebraska that an insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured." *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 527, 283 N.W.2d 56, 61 (1979). However, an insurer's decision whether to defend against a claim cannot be based solely on the allegations of a petition. Rather, "[a]n insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Allstate Ins. Co. v. Novak*, 210 Neb. at 195, 313 N.W.2d at 642. Nevertheless, if, according to facts alleged in a petition and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured. See *Thos v. Employers Mutual Cas. Co.*, 215 Neb. 424, 338 N.W.2d 784 (1983). Although an insurer is "obligate[d] . . . to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy." *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 524, 144 N.W.2d 73, 78-79 (1966). Accord *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957).

As discussed above, the State Farm policy included the following exclusion: "There is no coverage . . . for any bodily injury to . . . any insured or any member of an insured's family residing in the insured's household." Gonzales was a named insured on the State Farm policy which covered the automobile involved in the accident. Thus, according to the plain language of the insurance policy in question, State Farm provided no coverage for injuries sustained by Gonzales as the result of the automobile accident; hence, State Farm had no potential liability under its insurance policy issued to Gonzales and properly refused to defend Messersmith.

Consequently, in the present case, since the allegations contained in Gonzales' petition and the facts ascertained by State Farm showed that State Farm had no potential liability under the insurance agreement between State Farm and Gonzales, then State Farm was not obligated to defend Messersmith. See *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990).

CONCLUSION

Because State Farm's insurance policy issued to Gonzales provided no coverage for injuries suffered by Gonzales as an insured, State Farm had no duty to defend Messersmith in a lawsuit brought by Gonzales to recover damages resulting from Messersmith's negligent operation of Gonzales' automobile. Therefore, the district court properly entered judgment for State Farm.

AFFIRMED.

SHANAHAN, J., concurring.

As I stated in my concurrence in *State Farm Mut. Auto. Ins. Co. v. Hildebrand, ante* p. 743, 502 N.W.2d 469 (1993), because the Nebraska Legislature has provided no specifications regarding what particular insurance coverage provides "financial responsibility," we cannot say that the household exclusion violates public policy of Nebraska. Therefore, I renew the concerns expressed in my concurring opinion for *State Farm Mut. Auto. Ins. Co. v. Hildebrand* and incorporate those expressions into this concurrence.

WHITE, FAHRNBRUCH, and LANPHIER, JJ., join in this concurrence.

QUALITY EQUIPMENT COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. TRANSAMERICA INSURANCE COMPANY, A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, ALLSTATE PAVING, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, INTERVENOR-APPELLANT, AND BARAJAS ENTERPRISES, INC., AND TYLER CONSTRUCTION COMPANY, THIRD-PARTY DEFENDANTS, APPELLEES.

502 N.W.2d 488

Filed July 16, 1993. No. S-91-424.

Contractors and Subcontractors: Bonds: Security Interests: Contracts. Under Neb. Rev. Stat. § 52-118 (Reissue 1988), a contractor's bond is security only for material and rental equipment actually used in the performance of a contract described in § 52-118.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

Joseph E. Jones and Dwight E. Steiner, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., and Thomas J. Rooney, of Rooney & Neilson, Ltd., for appellant and intervenor-appellant.

Donald J. Buresh and Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee Quality Equipment Co.

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

SHANAHAN, J.

Quality Equipment Company sued Transamerica Insurance Company on public contractor's bond issued by Transamerica for the contractor, Allstate Paving, Inc., pursuant to Neb. Rev. Stat. § 52-118 (Reissue 1988) for material and equipment furnished to a subcontractor on two highway projects for the State of Nebraska. Section 52-118(1) states:

> It shall be the duty of the State of Nebraska, or any department or agency thereof . . . empowered by law to enter into a contract for the erecting and furnishing, or the repairing of any public building, bridge, highway, or other

> public structure or improvement . . . to which the general provisions of the mechanics' lien laws do not apply . . . to take from the person, persons, firm, or corporation to whom the contract is awarded a bond, in a sum not less than the contract price, with a corporate surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.

Transamerica's bonds expressly secured payment by Allstate and Transamerica "for the payment of material and equipment rental which is actually used or rented in performing the contract."

The district court for Douglas County granted summary judgment to Quality, and Transamerica and Allstate appeal.

FACTUAL BACKGROUND

In 1989, the Nebraska Department of Roads entered into two contracts with Allstate for road repairs to two sections of Interstate 80. In accordance with § 52-118, Transamerica, as surety, issued two bonds for its principal, Allstate, to secure payment for materials in the highway projects.

Barajas Enterprises, Inc., and Tyler Construction Company formed a joint venture and subcontracted with Allstate to perform certain sawing and sealing work on the I-80 projects. Quality supplied the Barajas-Tyler joint venture with material, including nine sets of diamond saw blades and rental equipment for both highway projects. Another supplier, Con-Spec, delivered the same types of material to the joint venture, including six sets of diamond saw blades and equipment. Before completing its work, the Barajas-Tyler venture abandoned the projects.

Quality subsequently sued Transamerica on the bonds, seeking $35,541.90 for materials and rental equipment. Transamerica answered and then tendered the defense of the action to Allstate, which intervened in the action, undertook the defense, and impleaded Barajas and Tyler as third-party

defendants. In its answer, Transamerica asserted that 15 sets of saw blades greatly exceeded the number required for work by the joint venture and that Quality's price was unreasonable. Transamerica also claimed that certain rental equipment was not "actually used" in the projects because the equipment sat idle after the joint venture abandoned its work.

Quality moved for summary judgment against Transamerica and submitted the affidavit of Gabriel Barajas, the president of Barajas Enterprises. In his affidavit, Barajas stated, "All of the materials referred to in Exhibits 'B' through 'Q' and all the rental equipment referred to in Exhibits 'S' through 'W' were delivered to the construction site and were used by the joint venture in its performance of the work under the subcontracts referred to above." Exhibits B through Q included invoices showing that Quality delivered at least nine clipper diamond blades to Barajas. Quality also submitted the affidavit of its salesman, Michael Nowak, who stated that he delivered all the materials in question to Barajas at the construction site and that when the deliveries were made, the joint venture was working at the construction site. Finally, Quality submitted the affidavit of its president, Tyler Bouman, who stated that the charges listed on the attached invoices were "fair and reasonable and were below the manufacturer's suggested retail price."

Transamerica submitted several affidavits in opposition to Quality's summary judgment motion. In his affidavit, Allstate's project superintendent, Terry Kraemer, stated that a second supplier, Con-Spec, delivered six sets of blades to Barajas and that according to the estimates of Quality's own sales representative, the joint venture would have used no more than eight sets of blades to complete the total cutting of 75,000 lineal feet in the project. Kraemer himself estimated that only six sets of blades would have been used for the cutting and that the difference in the number of blades, that is, the number allegedly delivered by Quality vis-a-vis the number required for work in the project, "is too far off to be the result of happenstance. The unaccounted for sets of blades could not have been used for the I-80 projects." Additionally, both Kraemer and E.J. Cruikshank, who in 1989 worked for a company which sold diamond saw blades in California, stated

that the price charged by Quality for the blades was "high and unreasonable."

After considering the affidavits and exhibits submitted by the parties, the trial court concluded that the materials in question had been supplied to and accepted by the joint venture and that, therefore, Quality was entitled to the contract price for those materials.

ASSIGNMENTS OF ERROR

Transamerica and Allstate contend that the district court erred in (1) misconstruing § 52-118 by ruling that delivery of materials to the construction site and the subcontractor's acceptance conclusively established liability under the general contractor's bond, regardless of whether the materials were actually used in work on the highway projects; (2) entering summary judgment for Quality when the evidence indicated that not all the materials supplied at the project could have been used in the project and the equipment rental charges extended beyond the point at which the subcontractor abandoned the project; and (3) refusing to allow Transamerica to amend its answer and assert an affirmative defense of estoppel.

STANDARD OF REVIEW

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988). Accord, *Shelter Ins. Co. v. Frohlich, ante* p. 111, 498 N.W.2d 74 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992).

"On a motion for summary judgment, the question is not

how a factual issue is to be decided, but whether any real issue of material fact exists." *Newman v. Hinky Dinky*, 229 Neb. 382, 385, 427 N.W.2d 50, 53 (1988). Accord, *Dowis v. Continental Elev. Co., supra*; *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992).

"The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted." *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 819, 428 N.W.2d 914, 917 (1988). Accord, *Dowis v. Continental Elev. Co., supra*; *Anderson v. Service Merchandise Co., supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*.

"After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party." *Wilson v. F & H Constr. Co.*, 229 Neb. at 819, 428 N.W.2d at 917. Accord, *Dowis v. Continental Elev. Co., supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*; *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

"Interpreting a statute presents a question of law for judicial determination." *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 770, 497 N.W.2d 38, 40 (1993). "When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). Accord, *Sports Courts of Omaha v. Meginnis, supra*; *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

WAS SUMMARY JUDGMENT PROPER?

Transamerica's bonds were issued in accordance with § 52-118, which, in pertinent part, provides that a public works bond shall apply to "the payment for material and equipment

rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract."

The district court held that because "[i]t is uncontroverted that the plaintiff supplied material to a specific job site for which the defendant supplied a bond [and the] material was duly accepted," Quality was entitled to judgment as a matter of law. Transamerica and Allstate argue that under § 52-118, a contractor's bond secures only those materials which are actually used or rented for the performance of the contract and that the court erred in finding that all the materials were actually used in performing the contract. Quality responds that § 52-118 establishes a presumption that materials that are delivered to the jobsite are actually used in performance of the contract.

Although this court has held that a predecessor of § 52-118, Rev. Stat. § 3840 (1913), as a remedial statute, should be "liberally construed to effectuate [its] purpose," *Iddings Co. v. Lincoln Construction Co.*, 104 Neb. 124, 127, 175 N.W. 643, 644 (1920), both the plain language of the statute and Nebraska case law support Transamerica and Allstate's position. As early as 1915, this court held that "[l]abor and materials *that enter into the structure or are consumed in or about the work* may be recovered for" (emphasis supplied) in an action on a common-law contractor's bond, but that payment

> "for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein"

was not recoverable. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27, 35, 151 N.W. 942, 945 (1915) (quoting *Ninneman v. City of Lewiston*, 23 Idaho 169, 129 P. 1073 (1912). Construing Comp. Stat. § 52-118 (1929), which was a statutory predecessor of § 52-118 (Reissue 1988) and which contained the same pertinent wording as § 52-118 in the present case, this court, in *Kiewit Sons' Co. v. National Casualty Co.*, 142 Neb. 835, 8 N.W.2d 192 (1943), concluded that the key issue in determining whether payment was due under a statutory

public works bond is whether the equipment or material was actually used in construction and repair of a public highway project covered by a contractor's bond. Similarly, in *West v. Detroit Fidelity & Surety Co.*, 118 Neb. 544, 554, 225 N.W. 673, 677 (1929), this court held that "only such 'supplies' *as enter into the performance of the contract* may be charged to the surety." (Emphasis supplied.) Thus, under § 52-118, a contractor's bond is security only for material and rental equipment actually used in the performance of a contract described in § 52-118.

We realize that the Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 1988), in § 52-134(2) of the act, provides: "The delivery of materials to the site of the improvement . . . creates a presumption that they were used in the course of construction or were incorporated into the improvement." However, we are examining quite a different statute, § 52-118, which by its unambiguous language governs a surety bond for a public highway contractor. Section 52-118 does not contain an expression of a statutory presumption as does § 52-134(2). Thus, the presumption extended under § 52-134(2) has been withheld from § 52-118. "[T]he Lord gave, and the Lord hath taken away." *Job* 1:21 (King James). So has the Legislature concerning presumed use of materials in a construction project.

Thus, in the present case, summary judgment was proper only if there was no genuine issue of material fact as to whether the materials and equipment that Quality delivered were actually used by the Barajas-Tyler joint venture on the I-80 projects. Quality maintains that Gabriel Barajas' affidavit conclusively established that all materials delivered by Quality were actually used on the projects. However, Transamerica and Allstate contend that the joint venture could not possibly have used all the materials supplied for the projects. The evidence presented to the district court establishes that both Con-Spec and Quality delivered sets of blades to the Barajas-Tyler venture at the project sites. Moreover, evidence indicates that the joint venture's work on the projects may have consumed between six and eight sets of blades. Con-Spec delivered 6 sets of blades, while Quality delivered 9 sets, for a total of 15 sets of

blades delivered to the joint venture on the projects. Whose six or eight sets of blades were used in the projects? If Con-Spec's six sets were used in what was a six-set project, then none of Quality's blades were used. Also, if six sets of Con-Spec's blades were used in an eight-set project, then only two sets of Quality's blades were used on the projects. Consequently, in that posture of Transamerica and Allstate's evidence, although Quality may have delivered nine sets of blades, either none of Quality's blades or fewer than the number claimed by Quality were used in the projects. On the other hand, as reflected by Quality's evidence, all the blades supplied by Quality may have been used in the highway projects. Arithmetic, based on deliveries and estimated use of the blades, again raises the question: Whose blades were used in the highway projects? Quality points out that parts of Kraemer's affidavit, which raises the question, are not based on Kraemer's personal knowledge as required by Neb. Rev. Stat. § 25-1334 (Reissue 1989) (affidavits for a summary judgment shall be made on personal knowledge, shall set forth facts admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters expressed in an affidavit). Kraemer's estimation of blade life in relation to the highway projects and costs is based on his knowledge and experience as the project superintendent for Allstate. Under the circumstances, Kraemer's affidavit complies with § 25-1334. Whether all the diamond saw blades supplied by Quality were used on the I-80 projects is a disputed issue of material fact; hence, summary judgment was inappropriate under the circumstances of this case. Consequently, we reverse the summary judgment.

AMENDMENT OF PLEADINGS

Transamerica and Allstate also contend that the district court erred in refusing to allow them to amend their answer at the hearing on Quality's summary judgment motion. The district court refused to allow Transamerica and Allstate's proposed amendment because the motion was untimely. Since we have reversed the summary judgment and because Transamerica and Allstate will be able to file a timely motion to amend their answer in any further proceedings, we find it unnecessary to

consider Transamerica and Allstate's assignment of error regarding the district court's denial of Transamerica and Allstate's motion to amend their answer.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EDWARD A. JAKSHA, APPELLANT, V. DEB THOMAS, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES, ET AL., APPELLEES.

502 N.W.2d 827

Filed July 16, 1993. No. S-91-459.

1. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. _____: _____: _____. Where a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to these questions.
3. **Constitutional Law: Legislature.** The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the Constitution.
4. **Legislature: Wages: Words and Phrases.** A legislator must receive his salary and actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature, and, in addition, may receive reimbursement for other expenses incurred in connection with the performance of his duties.

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

John M. Peebles, of Domina & Copple, P.C., for appellant.

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

Charles M. Pallesen, Jr., and Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, for amicus curiae Executive Board, 92d Legislature, State of Nebraska.

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

LANPHIER, J.

This is an action for declaratory judgment by plaintiff-appellant, Edward A. Jaksha, challenging the constitutionality of a statute providing for the reimbursement of certain expenses incurred by the members of the Nebraska Legislature. Plaintiff appeals the district court for Lancaster County's dismissal of plaintiff's second amended petition.

FACTS

Plaintiff is a citizen, resident, and taxpayer of the State of Nebraska. Plaintiff instituted this action against then acting director of the Department of Administrative Services for the State of Nebraska, Deb Thomas; then acting State Treasurer for the State of Nebraska, Frank Marsh; and the Department of Administrative Services. At the time of trial, Thomas had been succeeded by John Rochford. Plaintiff claims that article III, § 7, of the Nebraska Constitution limits the reimbursement of expenses incurred by members of the Legislature to actual expenses incurred in traveling one time to and from each regular or special session of the Legislature. Article III, § 7, as amended in 1988, provides in part:

> Each member of the Legislature shall receive a salary of not to exceed one thousand dollars per month during the term of his or her office. In addition to his or her salary, each member shall receive an amount equal to his or her actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than his or her salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem.

Neb. Rev. Stat. § 50-202 (Reissue 1988) permits reimbursement of expenses incurred by the legislators in the

performance of their duties as members of the Legislature. The Executive Board of the Legislative Council is responsible for defining the expenses which are reimbursable to the individual state senators. On August 11, 1988, the board adopted a "Sessional Expense Reimbursement Policy" for members of the Legislature. The policy permits legislators to receive reimbursement for expenses actually paid or incurred in the performance of their duties as members of the Legislature. The policy provides a cap on the amount of reimbursement. The policy operates in the following manner:

> a) For those senators who reside more than fifty (50) miles from the State Capitol, the Legislature provides reimbursement to the members of an amount equal to the federal reimbursement rate (which currently is $66.00) times the number of legislative days in a regular or special session. In addition, a member receives mileage reimbursement for one round trip per week from the senator's home to the State Capitol at the statutory state mileage reimbursement rate. Members who live beyond the fifty (50) mile radius are entitled to receive the weekly mileage allowance only if they are present for one or more legislative days during that calendar week.
>
> b) For those senators who reside within fifty (50) miles of the State Capitol, the Legislature reimburses a sum of twenty-five dollars ($25.00) times the number of legislative days in a regular or special session. In addition, the member receives mileage reimbursement for those legislative days that he/she actually attends a daily session or a committee meeting on that same day. Mileage is reimbursed at the statutory state mileage reimbursement rate from the senator's home to the State Capitol and back.

The rate established for reimbursement of members who live over 50 miles from the state capitol is based on what the federal government allows for expenses when its employees are in Lincoln on government business. The rate is established by the General Services Administration and covers, among other items, meals and incidental expenses. For those members who live over 50 miles from the state capitol, the rate also covers

lodging. Legislators are required to submit completed reimbursement forms to receive payment for actual expenses incurred during session and the interim period. The policy allows legislators to obtain reimbursement for the period commencing with the first day following the adjournment sine die of the last regular session of the Legislature through the date of the submission of the expense reimbursement form. Thus, any expenses incurred during the interim period would be credited toward the maximum amount which is determined by the number of days a legislator attended a regular or special session. The Department of Administrative Services issues warrants for payment of the expenses, and the State Treasurer countersigns all such warrants.

The amount of reimbursement must not exceed expenses incurred by the members of the Legislature. To that end, the policy requires that each senator maintain expense records. A certified public accounting firm conducts audits of 10 to 12 randomly selected senators twice during each regular legislative session to ensure that the expense reimbursement does not exceed actual expenses incurred by the senators. The record includes two letters from the accounting firm verifying that the expenses incurred by the audited senators were greater than or equal to the reimbursement payments.

The trial court held that the Legislature was authorized to adopt a reimbursement system to provide reimbursement to legislators of actual expenses paid or incurred in the performance of their duties, and found no evidence demonstrating that the reimbursement policy violated article III, § 7, of the Nebraska Constitution.

STANDARD OF REVIEW

In reviewing an equity action for a declaratory judgment, this court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. See, *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). Where a declaratory judgment action presents questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to

these questions. *Robotham v. State, supra.*

We agree with the district court that no evidence supports plaintiff's contention that the reimbursement policy adopted by the Legislature is prohibited by article III, § 7, of the Nebraska Constitution.

HISTORY

In *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984), we declared Neb. Rev. Stat. §§ 50-201 and 50-202 (Cum. Supp. 1982) constitutional under article III, § 7, of the Nebraska Constitution, and held that legislators may receive reimbursement for expenses incurred in connection with the performance of their duties in addition to their salary and actual expenses in traveling by the most usual route once to and returning from each regular or special session. This court defined "expenses" as "the charges incurred by an employee in connection with the performance of his duties, and typically includ[ing] transportation, meals, and lodging while traveling." *Beermann*, 216 Neb. at 856, 347 N.W.2d at 302.

REIMBURSEMENT POLICY

The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the Constitution. *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981). Pursuant to article III, § 7, and § 50-202, the Legislature was authorized to adopt a policy which would reimburse the members of the Legislature for actual expenses they paid or incurred while performing their duties.

Plaintiff contends that the reimbursement policy, which is based on a per diem allowance, is prohibited by article III, § 7, because it permits payment without regard to expenses actually paid or incurred by the legislator receiving reimbursement. In *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 181, 410 N.W.2d 463, 466 (1987), this court noted that under *Beermann*,

> a legislator could only receive $400 per month by way of salary and be reimbursed for expenses actually incurred in the performance of the legislator's official duties. In view of the fact that the moneys to be reimbursed to the

legislator in the performance of official duties for expenses incurred were to be equal to and not in excess of actual moneys paid or incurred by the legislator for and on behalf of the State, the legislator would not be receiving more than $400 per month as salary, plus the return of moneys actually expended on behalf of the State of Nebraska in the performance of official duties.

The reimbursement policy is consistent with the *Beermann* and *Public Emp. Ret. Bd.* cases. Under the policy, legislators must vouch on an expense reimbursement form that the amounts they are claiming have been paid or incurred by them and do not exceed the actual expenses they incurred. In order to receive reimbursement for expenses incurred in the performance of their duties as members of the Legislature, all legislators must complete a standardized reimbursement form. The legislator writes in the number of legislative days attended during the month and the rate at which compensation is allowed. The maximum amount of reimbursement permitted is calculated by multiplying the number of days the member attended a legislative session times the rate of reimbursement as established by the reimbursement policy.

Although the policy employs a per diem system to calculate an individual legislator's maximum reimbursement amount, the per diem is not an automatic payment. It operates as a ceiling on the amount of expenditures which are reimbursable. While the legislators may not be required to specifically enumerate on the form each expense incurred, they are required to maintain records of their expenses to enable verification during auditing. Two audits conducted in 1989, each auditing 12 randomly selected senators, verified that all the expenses paid or incurred by the senators were equal to or greater than the payments received under the reimbursement policy.

Plaintiff provides no evidence that legislators are claiming or receiving more money than necessary to satisfy their expenses in their capacity as legislators. The only evidence produced by plaintiff is an affidavit from Sen. Elroy M. Hefner in which the senator stated that he received and returned $1,184.20 in 1985 because it was in excess of his expenses. The current reimbursement policy was instituted in August 1988. The policy

in place in 1985 is not at issue in this action and is irrelevant to the determination of the validity of the current policy.

TRAVEL EXPENSE

Plaintiff claims that the expense reimbursement policy is in contravention of article III, § 7, because it permits reimbursement for one round trip per week for those legislators residing more than 50 miles from the state capitol, and for those living within the 50-mile radius, the policy provides a daily mileage for those days when the Legislature is in session. Article III, § 7, provides in part: "In addition to his or her salary, each member shall receive an amount equal to his or her actual expenses in traveling by the most usual route *once to and returning from each regular or special session of the Legislature*." (Emphasis supplied.)

Some courts with similar constitutional provisions have invalidated legislative efforts to reimburse legislators for mileage on the basis that travel expenses are personal expenses as distinguished from legislative expenses. Those courts have defined the former as those expenses incurred by a legislator in order to be present at the place of meeting, and the latter as those expenses necessary for the legislator to perform his duty as a legislator. See, *Opinion of the Justices*, 152 Me. 302, 140 A.2d 762 (1957); *Ferris v. Auditor General*, 318 Mich. 528, 28 N.W.2d 899 (1947); *Gallarno v. Long*, 214 Iowa 805, 243 N.W. 719 (1932).

In *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984), we rejected this line of reasoning by holding that a legislator *must* receive his salary and actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature, and, in addition, *may* receive reimbursement for other expenses incurred in connection with the performance of his duties.

The facts of *Beermann* demonstrate that this court considered it constitutionally permissible for legislators to receive reimbursement for all expenses incurred in connection with the performance of their duties, including mileage for round trips made from the legislator's residence to the state capitol. *Beermann* was decided on stipulated facts. Sen. Ernie

Chambers filed five separate claims for mileage and meals reimbursement. Three of the claims were for 10 round trips made between Omaha and Lincoln for the same special session he had attended. The last two were for round trips made for two separate regular sessions. This court disagreed with the district court's finding that under the provisions of article III, § 7, Senator Chambers was entitled only to reimbursement of mileage expenses incurred for one round trip between Omaha and Lincoln for each of the three sessions he attended.

CONCLUSION

Plaintiff has set forth no evidence to support his contention that the reimbursement policy established by the executive board provides reimbursement for expenses which have not been actually paid or incurred by members of the Legislature. The reimbursement policy is in conformance with the provisions of article III, § 7, of the Nebraska Constitution. The decision of the district court must be, and is, affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

GERALD SAYER AND ELIZABETH SAYER, HUSBAND AND WIFE, APPELLANTS, V. LAWRENCE V. BOWLEY AND GERTRUDE C. BOWLEY, HUSBAND AND WIFE, APPELLEES.

503 N.W.2d 166

Filed July 23, 1993. No. S-90-1161.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.
2. **Contracts: Specific Performance.** In an action for specific performance of a contract, the first requirement is the existence of a valid, legally enforceable contract.
3. **Contracts: Specific Performance: Offers to Buy or Sell: Proof.** In an action for specific performance of a contract, the burden of establishing the contract is on the party seeking its specific performance. That party must thus show that there was a definite offer and an unconditional acceptance.
4. **Contracts: Offers to Buy or Sell.** For a binding contract to result from an offer and acceptance, the minds of the parties must meet at every point; nothing can

be left open for future arrangement.

5. **Contracts: Specific Performance: Real Estate.** A contract for the transfer of real property is valid and enforceable if the agreement contains the essential elements of a contract with sufficient certainty and definiteness as to the parties, property, consideration, terms, and time of performance.
6. **Contracts: Parties: Time.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
7. **Contracts: Parties: Intent: Equity.** A court of equity will not enforce a contract unless it is complete and certain in all its essential elements. The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted or left obscure or indefinite so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not a function of a court of equity to make a contract for the parties or to supply any of the material stipulations thereof.
8. **Contracts: Specific Performance: Real Estate: Proof.** A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove, among other things, an oral contract, the terms of which are clear, satisfactory, and unequivocal.
9. **Judgments: Receivers: Appeal and Error.** Just as the determination of the amount of a receiver's compensation is a matter within the discretion of the trial court, so too is the determination of who should bear the expenses associated with the receivership. The court's decision will not be disturbed on appeal absent an abuse of discretion.
10. **Appeal and Error.** Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
11. **Prejudgment Interest.** In order to receive prejudgment interest, a litigant must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1988).

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed in part, and in part reversed and remanded with directions.

John A. Gale, of McCarthy & Gale, for appellants.

P. Stephen Potter for appellees.

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

WHITE, J.

Gerald Sayer and Elizabeth Sayer appeal, among other things, the district court's rulings which denied them

contract-based recoveries in their suit against Lawrence V. Bowley and Gertrude C. Bowley. Pursuant to a jury verdict, the Sayers were awarded $62,844 under a cause of action for a statutory lien. We affirm in part, and in part reverse, and remand with directions.

In late 1988 and early 1989, Gerald Sayer and Lawrence Bowley discussed the Sayers' purchase of the Bowleys' farm. Eventually, Bowley asked his attorney to memorialize the terms of the discussions. This "agreement" was revised several times, but no version was signed by both parties.

According to the Sayers, in reliance on the "contract," they paid the Bowleys $25,000 in earnest money, took possession of the property, made arrangements to farm the land, and incurred a variety of expenses in their preparations. The record indicates that Lawrence Bowley was aware of the Sayers' preparatory actions.

When the parties failed to agree on a contract, the Sayers brought suit requesting specific performance and seeking recovery for unjust enrichment. The Sayers argue that the statute of frauds does not bar enforcement of the oral contract due to part performance or equitable estoppel. After pretrial discussions in which the court apparently raised the idea, the Sayers requested the appointment of a receiver to ensure the harvesting of the various crops. The court later discharged the receiver, who was awarded a fee.

As the proceedings moved forward, the district court ordered the return of the Sayers' earnest money. The court also bifurcated the issues for trial. After the initial trial, at which certain contractual issues were heard, the court found generally in favor of the Bowleys. The court determined that the Sayers had not adequately proved the existence or terms of the alleged oral contract and that, thus, the Sayers could not prevail on the issues of breach of contract and specific performance. The Sayers then filed an amended petition, realleging the cause of action for specific performance and seeking damages for loss of the "benefit of the bargain." The petition also alleged several other causes of action, including statutory lien.

Upon request of the Bowleys, the court struck the Sayers' cause of action based on loss of the benefit of the bargain.

Later, the court dismissed that cause of action at trial.

Following a jury trial, the Sayers were awarded, inter alia, $62,844 under the cause of action for statutory lien. The court awarded the Sayers prejudgment interest on this amount at 6 percent, pursuant to Neb. Rev. Stat. § 45-102 (Reissue 1988). The Sayers were also required to pay the entire receiver's fee of $11,386. The Bowleys were awarded $35,280 on a counterclaim. This appeal followed.

Restated, the Sayers allege that the district court erred by (1) ruling that they could not prevail on the issues of specific performance or equitable estoppel; (2) striking their cause of action which sought damages for loss of the benefit of the bargain and dismissing that cause of action at trial; (3) charging them with the entire receiver's fee; and (4) awarding them prejudgment interest of 6 percent, rather than the 12 percent provided for in Neb. Rev. Stat. § 45-104 (Reissue 1988).

An action for specific performance sounds in equity. *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988). As such, we apply the following standard of review:

> When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

McCook Nat. Bank v. Myers, post p. 853, 858, 503 N.W.2d 200, 204 (1993). Accord, *Eliker v. Chief Indus., ante* p. 275, 498 N.W.2d 564 (1993). We turn to the Sayers' arguments.

The Sayers' first two assignments of error each relate to the propriety of the district court's rulings on the enforceability of the oral agreement and combine to allege that (1) an oral contract was entered into by the Sayers and the Bowleys and (2) in spite of the statute of frauds, that oral contract is enforceable. As to the second portion of their argument, the Sayers assert that the contract may be enforced either because of their part performance or because the Bowleys' actions

equitably estop them from asserting the statute of frauds as a defense.

The Sayers correctly note that an oral agreement for the sale of land is void. See Neb. Rev. Stat. § 36-105 (Reissue 1988). However, before analyzing the effect of part performance and equitable estoppel on this case, we first must determine whether an adequate contract existed to be enforced in equity.

Initially, we note that the Sayers' petition is less than clear as to the agreement they seek to enforce. Although it alleges that the oral agreement arose on April 20, 1989, the petition requests enforcement of a draft contract, an instrument approximately 2 months and five versions removed from the alleged April 20 agreement. Presumably, the Sayers are asserting that the final draft is reflective of the terms of that initial understanding and should thus be enforced.

Our previous decisions provide insight as to the rules and requirements involved in actions for specific performance of contracts. The first requirement is the existence of a valid, legally enforceable contract. The burden of establishing the contract is on the party seeking its specific performance. *Satellite Dev. Co., supra*; *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 316 N.W.2d 744 (1982). That party must thus show that there was a definite offer and an unconditional acceptance. Moreover, for a binding contract to result from an offer and acceptance, the minds of the parties must meet at every point; nothing can be left open for future arrangement. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991); *Satellite Dev. Co., supra*; *Rybin Investment Co., Inc., supra*. Finally, "[a] contract for the transfer of real property is valid and enforceable if the agreement contains the essential elements of a contract with sufficient certainty and definiteness as to the parties, property, consideration, terms, and time of performance." *Satellite Dev. Co.*, 229 Neb. at 781, 429 N.W.2d at 337.

Applying the foregoing rules to the case before us, we agree with the district court that the Sayers failed to establish the existence of a contract definite enough to be specifically enforced. Ignoring for the moment the oral nature of the parties' "agreement," we hold that the evidence was

insufficient to establish a meeting of the minds on several material terms of the contract. Although a complete review of the disparate terms is unnecessary, we will summarize some of the major inconsistencies.

The first major problem with the Sayers' arguments relates to the nature of the agreement itself. Based on the evidence, any oral understanding between the parties sounds very much like an "agreement to agree" rather than a complete contract that could simply be memorialized at a later time. Such an agreement would not be an enforceable contract. See *Alward v. United Mineral Products Co.*, 197 Neb. 658, 661, 250 N.W.2d 623, 625 (1977) ("[a]n agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation").

In their petition, the Sayers allege that the parties had reached an oral agreement, "the terms of which agreement were to be placed in a formal written contract and executed by the parties." While this statement hints that a writing may have been one of the essential terms of the agreement—a term never satisfied—it may also be read as a statement that all material terms had been agreed upon and could simply be placed in written form. The subsequent dealings between the parties, however, belie this notion.

As noted before, following the parties' initial discussions, a contractual document was drafted. This document was not signed, but was changed to reflect disagreements as to terms. Four more drafts, reflecting further revisions, followed. The last draft is the version the Sayers seek to enforce.

When we compare the terms of the initial draft with those of the final draft, it is apparent that during their initial oral discussions, not all material terms had been discussed, or agreed upon, by the parties. For example, only *after* the initial draft did the Sayers become aware of an outstanding mortgage on the realty and a security interest on some of the Bowleys' personal property. However, provisions in that first draft indicated that other encumbrances had been discussed by the parties, as well as which party would be obligated thereon. This indicates that from the outset, the parties had considered encumbrances material enough to warrant discussion and

memorialization. The Sayers' apparent ignorance of one such encumbrance evidences a lack of agreement on a material term.

Furthermore, the record does not indicate that prior to the drafting of the contracts, the parties had agreed on the method of financing the transaction, i.e., whether the note would be secured by deed of trust, mortgage, or installment land contract. Finally, the initial and final draft contracts contain contrary provisions regarding the Sayers' right to prepay the note. The district court also noted a number of other discrepancies between the drafts which we need not list here. Suffice it to say that the conduct of the parties during the drafting of these documents indicates that several important terms had not been discussed or agreed upon at the time of the alleged oral agreement. It matters not that several of the disputes were resolved during the drafting stage. The parties did not sign any of the written contracts; the alleged oral agreement of April 20 is the focus of our concern.

Nor does it matter that the parties apparently did agree on the purchase price, realty, and some terms of payment. The various draft contracts indicate that the amount of downpayment was not always settled. Unlike the situation in a case involving contracts for the sale of goods, we will not read unsettled terms into contracts for the sale of land, especially oral contracts sought to be specifically enforced. We have previously stated that

> [a] court of equity will not enforce a contract unless it is complete and certain in all its essential elements. The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not a function of a court of equity to make a contract for the parties or to supply any of the material stipulations thereof.

Reifenrath v. Hansen, 190 Neb. 58, 62, 206 N.W.2d 42, 44 (1973).

We agree with the district court that the Sayers failed to meet their burden of showing the existence of an oral contract

definite enough in its terms to be specifically enforced. The Sayers' arguments to the contrary are without merit.

With this holding in mind, the Sayers' first two assignments of error are easily answered. In their first assignment, they contend that the district court erred by ruling that they were not entitled to specific performance based on part performance or equitable estoppel. We address these theories in order.

Despite the statute of frauds, an oral contract may be specifically enforced in cases of part performance. Neb. Rev. Stat. § 36-106 (Reissue 1988). However,

> [*w*]*e have consistently required that a party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal*, and that the acts done in part performance were referrable solely to the contract sought to be enforced . . . .

(Emphasis supplied.) *Reifenrath*, 190 Neb. at 63, 206 N.W.2d at 45. Accord, *Yates v. Grosh*, 213 Neb. 164, 328 N.W.2d 200 (1982).

The preceding language refutes the Sayers' argument that the alleged oral contract should be specifically performed. They have not proven the existence of an oral contract or its terms clearly and unequivocally; therefore, we need not reach the issue of the applicability of the doctrine of part performance.

The same holds true for the applicability of equitable estoppel. The Sayers argue that "[t]he doctrine of equitable estoppel precludes Bowley from asserting the defense of the statute of frauds." Brief for appellant at 35. However, we have already found that regardless of the statute of frauds, the Sayers have failed to prove the existence of an oral contract definite enough to be specifically performed. Irrespective of whether equitable estoppel is applied, the Sayers are not entitled to specific performance of the contract.

In their second assignment of error, the Sayers argue that the district court erred by striking the Sayers' cause of action which sought damages for loss of the benefit of the bargain and by dismissing that cause of action at trial. We disagree. Without a contract, the Sayers suffered no loss of any bargain. No such

cause of action arose in this case. The district court did not err in striking the cause of action from the petition and dismissing it at trial.

The Sayers next argue that the district court erred by requiring them to pay the entire receiver's fee of $11,386. Again, we disagree.

Just as the determination of the amount of a receiver's compensation is a matter within the discretion of the trial court, so too is the determination of who should bear the expenses associated with the receivership. The court's decision will not be disturbed on appeal absent an abuse of discretion. See, *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 96 N.W.2d 55 (1959), *reh'g denied and opinion modified* 168 Neb. 803, 97 N.W.2d 583, *overruled on other grounds, Dailey v. A. C. Nelsen Co.*, 178 Neb. 881, 136 N.W.2d 186 (1965); *Lowder v. All Star Mills, Inc.*, 85 N.C. App. 329, 354 S.E.2d 765 (1987); *Theatres of America, Inc. v. State*, 577 S.W.2d 542 (Tex. Civ. App. 1979).

Based on the record, we cannot say that the district court abused its discretion by requiring the Sayers to pay the entire receiver's fee. We realize that the case contains many competing equities. For instance, although the Sayers requested the appointment of the receiver, the district court initially raised the idea. The Bowleys objected to the appointment. Furthermore, although the receiver was effectively protecting approximately $87,000 in expenditures by the Sayers, the Bowleys ultimately received the proceeds of the crops. Finally, each party alleges that the delay necessitating the appointment of the receiver was caused by the other party.

This case does not present a situation in which one party should clearly be required to pay the receivership expenses. See *Theatres of America, Inc., supra* (assigning receivership expenses to the party whose wrongdoing necessitated the receiver's appointment). We find the evidence to be in equipoise as to which party should bear the burden. However, based on our standard of review and our tradition of deference to district court determinations in situations of this sort, we will not disturb the court's ruling on the matter. See *McCook Nat. Bank v. Myers, post* p. 853, 503 N.W.2d 200 (1993). We dispose

of the Sayers' third assignment of error.

In their final assignment of error, the Sayers allege that the district court erred by granting them, on their statutory lien recovery, prejudgment interest at an inadequate rate. The Sayers argue that instead of applying the 6-percent rate from § 45-102, the court should have awarded them prejudgment interest at a rate of 12 percent, pursuant to § 45-104. We find it unnecessary to resolve the dilemma of which interest rate should apply, for, though the issue was not raised by either party, it is clear that *any* award of prejudgment interest was erroneous.

> Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

In re Interest of D.M.B., 240 Neb. 349, 351, 481 N.W.2d 905, 908-09 (1992) (citing *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991)).

This court has previously held that in order to receive prejudgment interest, a litigant must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1988). *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). See, also, *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991). Section 45-103.02, which applies to all causes of action accruing on or after January 1, 1987, provides, in relevant part:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the

commencement of the trial;

(3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and

(4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

The Sayers' cause of action did not accrue until 1989, so § 45-103.02 clearly applies. See Neb. Rev. Stat. § 52-1406 (Reissue 1988). Furthermore, the record contains no evidence that the statute was complied with. Thus, the Sayers were not entitled to any prejudgment interest on their judgment. See, *Elson, supra*; *Knox, supra*. The district court's award of such interest was error.

We affirm the district court's rulings that the Sayers were not entitled to specific performance of the alleged oral agreement and its orders striking their cause of action for damages for loss of the benefit of the bargain. We also affirm the court's determination as to payment of the receiver's fee. However, we reverse the district court's award of prejudgment interest to the Sayers. We remand the cause to the district court with directions to enter judgment in accordance with this opinion.

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

JUDY NICHOLS, APPELLANT AND CROSS-APPELLEE, V. BRIAN BUSSE, APPELLEE AND CROSS-APPELLANT.

503 N.W.2d 173

Filed July 23, 1993. No. S-91-108.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
2. **Actions: Mental Distress.** There are three elements for a cause of action based on the tort of intentional infliction of emotional distress: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in

character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

3. _____: _____. In an action for intentional infliction of emotional distress, the plaintiff's contemporaneous observance of the injury to a third-party victim is not a requirement for recovery.
4. **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.
5. **Mental Distress: Damages: Proof.** The plaintiff in an action for intentional infliction of emotional distress is required to offer sufficient proof of damages so that the jury can reach its award without awarding an uncertain, speculative recovery.
6. **Damages.** The amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation.
7. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
8. **Motions for Mistrial: Waiver.** A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived.
9. **Motions for Mistrial: Appeal and Error.** One cannot ordinarily predicate error on the trial court's failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the court admonishes the jury not to consider such material.
10. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
11. **Motions for New Trial: Appeal and Error.** The district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion.
12. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
13. **Motions for New Trial: Juror Misconduct: Verdicts: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. Additionally, the movant must show that the alleged misconduct resulted in a prejudicial verdict.
14. **Rules of Evidence: Verdicts: Jurors: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 1989) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which entered into the verdict.
15. **Rules of Evidence: Jurors: Words and Phrases.** A juror's intradeliberational

statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute "extraneous" information within the meaning of Neb. Rev. Stat. § 27-606(2) (Reissue 1989).

16. **Juror Qualifications.** The proper time for a party to raise the issue of the potential impact of a juror's specialized knowledge is during voir dire, not after the party accepts the juror with full knowledge that he or she does or may possess specialized knowledge.
17. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. In addition, this court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
18. _____: _____. To construe a statute properly, this court will look to the purpose behind the statute and will give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
19. **Rules of Evidence: Juries: Motions to Strike: Words and Phrases.** The term "extraneous," as employed in Neb. Rev. Stat. § 27-606(2) (Reissue 1989), does not encompass information that has been excluded from jury consideration by a motion to strike.
20. **Verdicts: Jurors: Affidavits.** The rationale behind the strictures on the use of juror affidavits to impeach verdicts is to prevent juror harassment and to free the jury to engage in frank discussions.
21. **Rules of Evidence: Affidavits: Jury Instructions.** Juror affidavits are inadmissible to show that the jury failed to follow the court's instructions.
22. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
23. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
24. **Verdicts: Appeal and Error.** This court will not disturb a jury verdict as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proven that it appears to be the result of passion, prejudice, mistake, or disregard by the jury of the evidence or rules of law.

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

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

Eugene L. Hillman, of McCormack, Cooney, Mooney, Hillman & Elder, and David C. Mitchell, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

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

WHITE, J.

Judy Nichols appeals a jury verdict of $6,200 in her suit against appellee, Brian Busse, for intentional infliction of emotion distress. Nichols appeals, inter alia, the district court's denial of her motions for mistrial and for new trial and the sufficiency of the damages award. Busse cross-appeals, asserting that his motions for directed verdict and for judgment notwithstanding the verdict should have been sustained. We affirm.

I. FACTS

On the evening of October 20, 1989, Nichols' 18-year-old daughter, Shawna, was riding with Busse to a football game. En route, on a county road near Fremont, Busse's vehicle left the road and overturned. Evidence indicates that Shawna suffered severe injuries and died 3 to 5 minutes later.

Busse moved Shawna's body away from his pickup, placing it in a grass-filled ditch approximately 120 yards from the vehicle. The record indicates that Shawna's body was dragged for a portion of that distance. Busse then returned to Fremont, telling no one of the accident. At approximately 5:45 the next morning, Busse telephoned Nichols, claimed that Shawna had stolen his vehicle, and stated that "something horrible has happened." He also contacted the police and reported his vehicle stolen. Over the course of the morning and early afternoon, Busse repeatedly denied any knowledge of the whereabouts of Shawna or his vehicle.

Later that afternoon, following the discovery of the vehicle, Busse told police the truth. Nichols was informed of her daughter's death at approximately 3 o'clock that same afternoon.

Nichols subsequently sued Busse for intentional infliction of emotional distress. The following relevant events occurred during the litigation:

Prior to the trial of the emotional distress action, Shawna's estate, of which Nichols was the personal representative, received a $100,000 wrongful death settlement from Busse. Before the trial Nichols filed a motion in limine seeking to suppress all references to the settlement, as well as any

references to Busse's criminal prosecution. The motion was overruled, but the court indicated that the amount of the settlement was not relevant.

During voir dire, the court asked whether any juror had "a close personal or business relationship" with Busse. Although she did not respond, it later became apparent that juror Weisenberg may have been acquainted with Busse.

In his opening statement, Busse's counsel referred to both the criminal prosecution and the wrongful death suit. Nichols made no objection. Later, on cross-examination, Busse's counsel inquired into the criminal charges against Busse. Nichols' objections for relevance were sustained.

On cross-examination of another witness, the following occurred: Busse's counsel: "Did [Nichols] tell you that day that she had received—or the estate has received one hundred thousand dol-" Nichols' counsel: "I object." Busse's counsel: "-lars?"

Prior to that point, the record contained no evidence of the amount of the wrongful death settlement. After the jury was recessed, Nichols' counsel's motion to strike was granted. However, counsel chose not to move for mistrial until the following morning. In the interim, three witnesses were questioned and Nichols rested. The motion for mistrial, made after counsel consulted with Nichols, was overruled. The court also refused to grant Busse's motion for a directed verdict.

Following the jury's verdict of $6,200 in her favor, Nichols moved for a new trial, citing the comments made by Busse's counsel and alleging juror misconduct. With her motion, Nichols provided an affidavit indicating that juror Weisenberg had opposed awarding Nichols anything. In the affidavit, Weisenberg stated that during deliberations she had recounted the events of a similar accident involving her family. She had also told other jurors that as an insurance company employee, she had witnessed inflated claims. Another juror's affidavit stated that some jurors had discussed the $100,000 settlement figure—in contravention of the court's instructions.

Although it determined that Busse's counsel's reference to the settlement amount was improper, the district court denied Nichols' motion for new trial. The court also denied Busse's

motion for judgment notwithstanding the verdict. This appeal and cross-appeal followed.

Restated, Nichols alleges that (1) the district court erred by not granting her motions for mistrial and for new trial, (2) the court erred in instructing the jury, (3) jury misconduct denied her a fair trial, and (4) the amount of the verdict was insufficient as a matter of law. In his cross-appeal, Busse alleges that Nichols has failed to prove the elements of a cause of action for intentional infliction of emotional distress.

II. CROSS-APPEAL

Busse's arguments on cross-appeal, which attack the sufficiency of Nichols' case, could, if favorably resolved, dispose of this appeal entirely. We therefore address those contentions first.

Specifically, Busse argues that Nichols' case (1) proved no severe emotional distress, (2) established only a wrongful death claim, (3) was based on emotional distress arising out of a desire to punish Busse, (4) was based on emotional distress caused by Busse's assertion of the Fifth Amendment, (5) alleged outrageous actions against a third party when Nichols was not present—and therefore stated no cause of action, and (6) failed to adequately prove the amount of damage caused by Busse. Busse thus concludes that the court erred by denying his motions for directed verdict and for judgment notwithstanding the verdict.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991).

On a motion for 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. Furthermore, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991). In addition, a jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989); *Bell v. Williams Care Center*, 226 Neb. 1, 409 N.W.2d 294 (1987).

With these standards in mind, we turn to Nichols' cause of action. We have delineated three elements for a cause of action based on the tort of intentional infliction of emotional distress:

> (1) [t]hat there has been intentional or reckless conduct; (2) [t]hat the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and (3) [t]hat the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

Gall v. Great Western Sugar Co., 219 Neb. 354, 360, 363 N.W.2d 373, 377 (1985). Accord *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987).

Based on the foregoing rules, we find that the record contains sufficient evidence to support the jury's verdict; the court did not err in denying Busse's motions for directed verdict and for judgment notwithstanding the verdict. The evidence indicates that Busse's actions satisfied the first element of a cause of action for intentional infliction of emotional distress. Busse clearly intended to call Nichols on the phone. Moreover, in dragging and abandoning Shawna's body, concealing his knowledge of the accident, and falsely accusing Shawna of stealing his pickup, Busse's actions were, at best, "reckless." Likewise, the jury could easily have found that, in combination, the foregoing actions were outrageous, atrocious, and beyond the bounds of decency.

We also find that the record contains sufficient evidence to support a finding that Nichols' emotional distress was "so

severe that no reasonable person should be expected to endure it." The endurability of the distress is a factual question for the jury; absent a complete lack of evidence on the issue we will not disturb the jury's finding. See, *Commerce Sav. Scottsbluff, supra*; *Bell, supra*. Nichols substantiated her claims with the testimony of a psychiatrist, who testified regarding Nichols' condition.

The psychiatrist, Dr. William Bruns, testified that Nichols suffered from posttraumatic stress syndrome, an extended form of psychological adjustment disorder coupled with anxiety depression. Dr. Bruns noted that over the 13 months since Shawna's death, Nichols' adjustment disorder/stress syndrome had manifested itself in hypersomnia, insomnia, recurring nightmares, anxiety attacks, depression, and headaches. The doctor had prescribed several medications for Nichols, had seen her every 2 weeks for counseling, and foresaw continued treatment as necessary.

Dr. Bruns also testified that the stress syndrome had been caused at least partially by Busse's actions. Busse presented no rebutting evidence.

Based on the evidence, we cannot say that Nichols failed, as a matter of law, to establish a cause of action for intentional infliction of emotional distress. Specifically addressing Busse's cross-appeal, we reject his arguments that Nichols has not proven severe emotional distress and that the evidence established only a claim for wrongful death. Although some testimony indicated that Nichols wanted to punish Busse and that she suffered anxiety because Busse had invoked his Fifth Amendment protection, Nichols' testimony indicated that those were peripheral concerns. Furthermore, Dr. Bruns testified that the *primary* cause of the severe distress was Busse's actions at the time of Shawna's death.

Busse next argues that by alleging outrageous actions by him against a third party when Nichols was not present, Nichols has stated no cause of action. Busse bases his argument on Restatement (Second) of Torts § 46 (1965), which provides, in pertinent part:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress

to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed *at a third person*, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time . . . .

(Emphasis supplied.)

Busse argues that because Nichols was not present when Shawna's body was mishandled, she cannot recover for her emotional distress. We disagree.

Nichols alleges several actions by which Busse caused her distress. First, he telephoned Nichols at 5:45 a.m., concealed the fact of Shawna's death, and falsely accused Shawna of stealing his vehicle. These actions clearly were directed toward Nichols, not a third person. The distress caused by these actions is not within the ambit of § 46(2). However, Nichols further alleges that Busse's actions at the time of the accident also caused her distress.

The record indicates that at least a portion of the mishandling of Shawna's body—removing it from the vehicle, dragging it across a field, and abandoning it in the ditch—occurred while Shawna was alive. When speaking with police, Busse stated that he carried and dragged Shawna's body away from the vehicle and that "she was having a hard time breathing." In addition, the physician who performed the autopsy on Shawna stated that she lived a short time after sustaining her injuries.

Although we have cited the first subsection of § 46 approvingly, *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975), we have not adopted the second subsection. Moreover, in a case dealing with negligent infliction of emotional distress, we rejected the assertion that to recover, the emotional distress plaintiff must contemporaneously observe the injury to the third-party victim. See *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). See, also, *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). As we have rejected the requirement of contemporaneous observance in "bystander recovery" cases involving negligence, logic dictates that the same rule apply to

situations involving reckless or intentional acts.

In *James, supra*, we based the plaintiff's ability to recover on the foreseeability of the harm suffered, rather than on the plaintiff's presence in the "zone of danger." We set out three requirements that must be shown in order for the plaintiff to recover: (1) that a marital or intimate familial relationship existed between the plaintiff and the victim; (2) that the plaintiff's shock is, in part, a result of the manner in which the plaintiff became aware of the injury to the victim; and (3) that the foreseeable harm to the plaintiff arose from the death or serious injury of the victim. The first and third requirements are objective, while the second is subjective, dependent on the facts of the particular case. See *id.*

Applying these factors to the case at bar, we find that the emotional harm to Nichols caused by Busse's actions was reasonably foreseeable. The first and most important factor, an intimate familial relationship between the victim and the plaintiff, is clearly present. See *James, supra*. The intimacy of a parent-child relationship cannot be questioned. See *id.* In addition, the record indicates that the relationship between Nichols and Shawna was especially close. The third requirement is also met. Busse's actions—removing the body from the vehicle, dragging it across a field, and abandoning it—nullified any chance of Shawna's survival, and thus satisfied the third portion of the *James* test.

Lastly, with regard to her knowledge of the injury, Nichols learned of Shawna's death approximately 1 hour after the discovery of the body. At that time, the police told Nichols "exactly what [they] had found," which would include the location of the body and the evidence that it had been dragged and abandoned. Moreover, the shock Nichols suffered when she learned the details surrounding her daughter's death served as a final blow, exacerbating and finalizing the anxiety which began with Busse's statements to Nichols 9 hours earlier.

For our purposes, the record contains sufficient facts to permit Nichols to recover under the rationale presented by *James*. The record adequately supports the jury's verdict; we reject Busse's argument based on § 46(2).

Busse's final argument relates to Nichols' proof of damages.

Because one of Nichols' assignments of error focuses on a related issue, we address both arguments together. At trial the jury received instruction No. 15, which stated:

> There is evidence that the plaintiff suffered mental anguish and distress as a result of her daughter's death. If you find for the plaintiff, the plaintiff is entitled only to be compensated for that separate mental distress that you find to be proximately caused by the intentional or reckless infliction of emotional distress caused by the outrageous conduct of the defendant.
>
> The right of a person suffering from damages or injury, who is further damaged or injured by reason of conduct of another, to recover for the damages proximately resulting from such conduct, includes the right to recover for an aggravation of that existing injury or damage.

During trial, Dr. Bruns stated that there was no way to precisely quantify the percentage of distress caused by Busse's actions. Based on this testimony, the parties make diametric arguments. Nichols argues that the court should have instructed the jury that if they were unable to apportion the amount of distress caused by Busse's conduct, Busse should be liable for all the emotional distress suffered by Nichols. Conversely, Busse argues that irrespective of the instruction, Nichols failed to adequately prove the amount of the damage she suffered because of Busse's actions. We first address the propriety of the instruction.

Nichols argues that instruction No. 15 runs contrary to our holding in *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969), in which we upheld an instruction giving the defendant the burden of apportioning between the pain and suffering caused by the plaintiff's preexisting emphysema, and the pain and suffering caused by the defendant's negligence. The instruction provided that if the jury could not apportion the damages, then the plaintiff could recover for all pain and suffering proven. See, also, NJI2d Civ. 4.09 (providing that in certain cases, the following language should be added to an instruction resembling the first paragraph of instruction No. 15 above: "If you cannot separate damages caused by the preexisting (condition) from those caused by the (occurrence,

accident, collision, et cetera), then the defendant is liable for all of those damages").

Although we note that the present case certainly does not present a classic "preexisting injury," we need not address the applicability of the *McCall* apportionment instruction to emotional distress cases, for Nichols has failed to establish that the court erred in refusing her proposed instruction.

> "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."

Jensen v. Archbishop Bergan Mercy Hosp., 236 Neb. 1, 6, 459 N.W.2d 178, 182 (1990) (quoting *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990)).

In determining not to include an apportionment clause in instruction No. 15, the court stated: "I find there is applicable evidence here, gentlemen, that the jury could determine the extent of any aggravation." Both parties objected to the instruction. Nichols argued that if the burden of apportionment was not placed on Busse, and if the jury could not apportion the damages, then she could not recover. However, as is evidenced by the verdict, and bearing out the court's inclination, the jury was able to apportion damages. Thus, Nichols suffered no prejudice by the court's refusal to give her proposed instruction.

Having disposed of Nichols' argument relating to the propriety of the damages instruction, we turn to Busse's final contention on cross-appeal. Busse argues that because Nichols did not prove the amount of damages caused by Busse with exactitude, she has failed to meet her burden of proof. His argument is without merit.

As noted previously, a jury verdict will not be set aside unless clearly wrong; the verdict is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989); *Bell v. Williams*

Care Center, 226 Neb. 1, 409 N.W.2d 294 (1987).

The record contains sufficient evidence to support the jury's finding that Busse's actions caused a quantifiable portion of Nichols' emotional distress. Although Dr. Bruns stated that it would be "speculation" to place a percentage on the amount of distress caused by Busse's actions, he used the word in the lay sense, intimating a lack of specificity. Nichols introduced a variety of evidence which, though not providing mathematical certainty, indicated that Busse's actions exacerbated Nichols' distress and were the primary cause of the posttraumatic stress syndrome. The trial court acknowledged the sufficiency of Nichols' showing, commenting that there was sufficient evidence for the jury to determine the extent to which Nichols' grief was aggravated. We find no error in the court's determination.

With regard to the amount of damages sustained, Nichols was simply required to offer sufficient proof of damages so that the jury could reach its award without awarding an uncertain, speculative recovery. Cf., *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988); *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 411 N.W.2d 331 (1987); *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). The amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation. As we noted in *Schaefer v. McCreary*, 216 Neb. 739, 742, 345 N.W.2d 821, 824 (1984):

> There is no formula for computing damages in a [personal injury] case such as this, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the jury the right to determine the amount of recovery in cases such as this, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.

Accord *Woitalewicz, supra*.

Nichols provided adequate proof of damages to sustain her burden. She provided lists of the prescriptions she had taken, along with receipts for other medical expenses. She also presented evidence regarding the costs of her sessions with Dr. Bruns, which, when combined with her other medical costs, constituted over one-third of the eventual verdict amount.

Nichols also presented evidence regarding her future medical expenses. We cannot say that Nichols presented so little proof of damages that the jury's verdict should be disturbed.

We thus dispose of Busse's arguments on cross-appeal, rejecting his arguments that Nichols failed to establish a cause of action for intentional infliction of emotional distress. There was no error in the district court's refusal to grant Busse's motions for directed verdict and for judgment notwithstanding the verdict.

III. NICHOLS' APPEAL

1. Mistrial

We turn to Nichols' appeal. Nichols first argues that the district court erred by not granting her motion for mistrial because there was prejudicial misconduct by Busse's counsel in (1) referring to the wrongful death settlement amount when questioning a witness; (2) failing to disclose Weisenberg's acquaintance with Busse; (3) making unsupported, prejudicial remarks during opening statements; and (4) asking questions about the criminal charges against Busse.

A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991); *Reicheneker v. Seward*, 203 Neb. 68, 277 N.W.2d 539 (1979).

Nichols first argues that her motion for mistrial should have been granted because Busse's counsel, while questioning a witness, mentioned that the wrongful death settlement had been for $100,000. That fact had not been adduced as evidence during trial. The trial court, despite finding that counsel's conduct was intentional and improper, denied the request for mistrial.

While we agree with the court that counsel's conduct was improper and should be condemned, we do not find the overruling of the motion for mistrial to be an abuse of discretion. A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived. See, *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978); *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). Nichols

did not move for mistrial in a timely fashion.

After Busse's counsel interjected the settlement amount during questioning, Nichols' counsel objected, had the jury excused, and had the question stricken. However, Nichols' counsel did not move for a mistrial at that time. Following counsels' discussions with the court, one witness was cross-examined, redirected, and recrossed, Nichols was cross-examined and questioned on redirect, Busse was questioned on direct examination, and Nichols rested her case. The following morning Nichols moved for mistrial. The motion was denied.

Nichols argues that prior to the conclusion of the proceedings that evening she had no opportunity to consult with counsel, and thus, her first reasonable opportunity to request the mistrial was the next morning. We disagree. Although Nichols' counsel states that his request to consult with his client was not granted, we find no evidence of such a request, or its denial, in the discussion following the improper question. Additionally, counsel's comments to the district court indicated that he had decided to forgo any motion for mistrial, not that his decision was subject to speaking with his client. Finally, any attempt to hold the decision in abeyance was foreclosed when Nichols rested her case.

Nor are we convinced that the occurrence was so egregiously prejudicial that it demands this court grant a new trial sua sponte. See *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N.W. 462 (1898). We have previously noted that one cannot ordinarily predicate error on the trial court's failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the court admonishes the jury not to consider such material. *State v. Morrison, ante* p. 469, 500 N.W.2d 547 (1993); *Groves, supra*. In the case at bar, the court struck the question from the record, as requested by Nichols. The court also admonished the jury, as requested by Nichols, that the recovery was by the personal representative of Shawna's estate, not by Nichols. The court adequately complied with the requests of counsel and cautioned the jury not to consider the improper statement. Based on the precautionary measures taken by the court and the lack of

timeliness of Nichols' request, we cannot say that the court abused its discretion in denying the motion for mistrial. Nichols' arguments to the contrary are without merit.

Nichols next argues that a variety of other actions by Busse's counsel prevented her from receiving a fair trial. She first alleges that Busse's counsel failed to disclose Busse's relationship with juror Weisenberg. The record does not establish that Weisenberg was, in fact, acquainted with Busse, much less that Busse's counsel knew of any such acquaintance. This argument is meritless.

Nichols also contends that Busse's counsel made unsupported, prejudicial remarks during opening statements. However, Nichols made no objection to any of the remarks until after the verdict had been rendered. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992). See, *In re Interest of S.B.E. et al.*, 240 Neb. 748, 484 N.W.2d 97 (1992); *Breiner, supra*. Nichols waived her objections to the alleged misconduct; she may not assert them now.

Nichols' final allegation of misconduct relates to questions regarding the criminal proceedings against Busse which arose out of his actions at the time of the accident. Three such questions were asked by Busse's counsel. Nichols objected to each, and the court sustained each objection.

Nichols argues that the questions were improper and prejudicial and denied her a fair trial because they implied that Busse had been adequately "punished" for his actions. We cannot agree. The court sustained each of Nichols' objections before any answers were elicited. Nichols did not request that opposing counsel be admonished regarding the questions; neither did she request a mistrial. Furthermore, the court instructed the jury that any criminal action against Busse was irrelevant and should not be considered in its deliberations. Nichols has not shown that the questions prejudiced her or denied her a fair trial.

2. Juror Misconduct

Nichols' next set of arguments combine to allege that the trial court erred in denying her motion for new trial based on juror

misconduct. Nichols contends that four instances of juror misconduct demand a new trial: (1) juror Weisenberg's failure to reveal her acquaintanceship with Busse; (2) Weisenberg's statements to other jurors that as an insurance worker, she had witnessed inflated insurance claims; (3) Weisenberg's recounting of a similar accident to the other jurors; and (4) the discussion of the $100,000 settlement figure by some jurors.

"The district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion." *First Nat. Bank v. Daggett*, 242 Neb. 734, 743, 497 N.W.2d 358, 365 (1993). See, also, *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988). Furthermore, the trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. *Kohrt v. Hammond*, 160 Neb. 347, 70 N.W.2d 102 (1955).

In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). Additionally, the movant must show that the alleged misconduct resulted in a prejudicial verdict. *Id.*

Nichols first alleges that juror Weisenberg improperly failed to disclose her acquaintanceship with Busse. This argument is not supported by the evidence and is without merit. During voir dire, the judge asked the prospective jurors, "Do any of you have a *close personal or business relationship* with Mr. Busse?" (Emphasis supplied.) Weisenberg did not respond to the question. During the remainder of voir dire, neither party asked a more indepth question concerning relationships between the parties and the jurors.

Nichols argues that because Weisenberg's husband played on the same softball team as Busse, and because Weisenberg may have attended several of the team's games and a team party, she should have disclosed an acquaintanceship with Busse. We do not agree. The record does not indicate that Weisenberg failed to respond truthfully to any questions put to her by the judge or the attorneys. The court specifically found that any

relationship between Busse and Weisenberg was not sufficiently close to prejudice Nichols' right to a fair trial. The court's determination was not an abuse of discretion.

The remainder of Nichols' allegations of juror misconduct are based on affidavits from several of the jurors. With her motion for new trial, Nichols presented an affidavit which stated that during deliberations, juror Weisenberg had recounted an experience in which an insured had presented an inflated claim to the insurance company for which Weisenberg worked. In another affidavit, Weisenberg stated that she had told other jurors about an auto accident in which her cousin had been killed. The affidavit also stated (although it is unclear whether this information was conveyed to other jurors) that Weisenberg's relatives had not sued and had fully recovered from their loss. Busse also presented several juror affidavits, attempting to rebut the allegations of juror misconduct. We must first determine whether these affidavits were properly admitted as evidence.

The use of juror affidavits to inquire into the validity of a verdict is controlled by Neb. Rev. Stat. § 27-606(2) (Reissue 1989), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

(Emphasis supplied.)

In our various applications of § 27-606(2), we have discussed the import of the statute. We have noted:

> [Section 27-606(2)] permits use of a juror's affidavit to

> establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. However, it is just as clear that [§ 27-606(2)] prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, *or discussions during deliberations*, which enter into the verdict.

(Emphasis supplied.) *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 456-57, 412 N.W.2d 56, 78 (1987). Furthermore, we have held that if a jury considers extraneous information, that information may be deemed prejudicial without proof of actual prejudice, provided that the information relates to an issue submitted to the jury and there is a reasonable possibility that the information affected the verdict to a litigant's detriment. *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

Our inquiry then, is whether a juror's statements during deliberations, based on personal knowledge gained through life experiences, constitute "extraneous" information pursuant to § 27-606(2). This is a question of first impression in Nebraska. But cf. *Cook v. Patterson*, 129 Neb. 16, 260 N.W. 696 (1935) (addressing a similar issue prior to adoption of § 27-606). However, because § 27-606(2) is modeled after Fed. R. Evid. 606(b), which has been adopted by several states, this question has received attention in other jurisdictions. Nonetheless, our research has revealed that despite basing their rulings on virtually identical statutory language, our judicial brethren have taken a variety of analytical paths on their way to like results. See, e.g., *Hard v. Burlington Northern R. Co.*, 870 F.2d 1454 (9th Cir. 1989); *Marr v. Shores*, 495 A.2d 1202 (Me. 1985); *Baker v. Wal-Mart Stores, Inc.*, 727 S.W.2d 53 (Tex. App. 1987). But cf. *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976), *cert. denied* 429 U.S. 1110, 97 S. Ct. 1146, 51 L. Ed. 2d 563 (1977) (intimating that a different result may obtain in a criminal prosecution).

Based on our review of the pertinent case law, we feel that the proper approach is to prohibit the use of juror affidavits which seek to impeach verdicts due to a juror's intradeliberational statements based on his or her personal knowledge, when that

knowledge is not directly related to the litigation at issue. We are aware that in *Cook, supra*, when faced with a similar situation, this court held that the affidavits were admissible. In *Cook*, a jury member had previously suffered a head injury similar to the injury which gave rise to the plaintiff's negligence action. During deliberations, the juror related the events of his injury, based his approval of the verdict on his past experiences, and influenced the other jurors in arriving at their verdict.

On appeal, we set aside the verdict and remanded the cause for a new trial. In so doing, we stated: " 'Jurors may not state to fellow jurors, while considering their verdict, facts relative to issues in the case within their own personal knowledge, but not of the evidence introduced. They should make the same known during the trial, and, if desired, testify as witnesses.' " 129 Neb. at 18, 260 N.W. at 698 (quoting *Ewing v. Hoffine*, 55 Neb. 131, 75 N.W. 537 (1898)).

Our opinion in *Cook*, despite addressing a situation much like that presented by the case at bar, is distinguishable. *Cook* was decided before the advent of § 27-606(2), and, while we have always looked with disfavor on the use of jury affidavits to impeach jury verdicts, the use of such affidavits has been restricted to a greater degree since the enactment of § 27-606(2). Compare *Cook, supra*, and *Selders v. Armentrout*, 192 Neb. 291, 220 N.W.2d 222 (1974), with *Rahmig, supra*.

We agree with decisions from other jurisdictions which have held that a juror's intradeliberational statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute "extraneous" information within the meaning of the language of § 27-606(2). See, *Brooks v. Zahn*, 170 Ariz. 545, 826 P.2d 1171 (Ariz. App. 1991); *State v. Anderson*, 748 S.W.2d 201 (Tenn. Crim. App. 1985), *overruled on other grounds, State v. Shelton*, 851 S.W.2d 134 (Tenn. 1993); *Fillinger v. Fuller*, 746 S.W.2d 506 (Tex. App. 1988). Cf. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978) (allowing affidavits indicating that a juror had made statements regarding the *defendant's* past criminal record). These decisions provide a variety of persuasive rationales to support the aforementioned rule. Some hold that such information, although not adduced at the trial, is better deemed "internal"

information—because the information does not come to the jury's attention via a source outside their membership, such as a book, a dictionary, or the media. See, *Marr, supra*; *Baker, supra*. One commentator has noted that such information, because it occurs during jury discussions, is properly classified as part of the method, thought process, or motive behind the verdict, factors we have held to be unimpeachable by jury affidavits. See 8 John H. Wigmore, Evidence in Trials at Common Law § 2354(1)(b) (McNaughton rev. 1961). See, also, *Marr, supra*; *Rahmig, supra*. Other courts have noted that the jury is expected to call on their personal experiences and common sense, and unless their knowledge is directly related to the litigation at issue, those experiences cannot be attacked as "extraneous" prejudicial information. See *Hard, supra*. See, also, *Brooks, supra*; *State v. Anderson, supra*. Cf. *Steinmark, supra*. Finally, the rationale illustrated by *Brooks, supra*, seems quite apropos in the case before us.

In *Brooks*, following an adverse verdict, the plaintiffs moved for a new trial, based on juror misconduct. The plaintiffs argued that the statements of one juror, a former nurse, relating to the medical testimony at trial constituted "extraneous prejudicial information." 170 Ariz. at 548, 826 P.2d at 1174. In concluding that the juror's statements were not extraneous information, the Court of Appeals of Arizona stated:

> [Plaintiffs'] argument . . . confuses the functions of voir dire and Rule 606(b) [a rule identical to § 27-606(2)]. [Plaintiffs] now contend that, because [the juror] is a retired nurse, she could not draw upon her medical knowledge during deliberations. During voir dire, [plaintiffs] could have questioned [the juror] about her nursing and personal experience and the impact of that experience upon her view of the issues involved in the litigation . . . . *The proper time for a party to raise the issue of the potential impact of a juror's specialized knowledge is during voir dire, not after the party accepts the juror with full knowledge that she does or may possess specialized knowledge.*

(Emphasis supplied.) 170 Ariz. at 552, 826 P.2d at 1178. Accord, *United States v. Duzac*, 622 F.2d 911 (5th Cir. 1980),

cert. denied 449 U.S. 1012, 101 S. Ct. 570, 66 L. Ed. 2d 471.

We find the foregoing statement especially persuasive as applied to the case at bar. During voir dire, juror Weisenberg stated that her cousin had died in a car accident. Nichols' counsel then asked her, "Was [sic] there any complicated facts or anything unusual about the recovery of the family by reason of his death?" Weisenberg responded, "No." Nichols' counsel asked her no more questions about the incident. Later in voir dire, Weisenberg stated that she worked for an insurance company and that she handled some claims. After she informed Nichols' counsel that her employment position would not tend to prejudice her judgment, Weisenberg was asked no more questions regarding her employment. Nichols' counsel could have challenged Weisenberg for cause, but chose not to. Nichols should not be heard to complain about Weisenberg's use of her personal, specialized knowledge during deliberations. See *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 516, 428 N.W.2d 152, 160 (1988) (stating, "The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry").

Based on the rationales enunciated in the above-listed cases and the application of the facts of this case, we hold that juror Weisenberg's statements regarding her experiences with inflated insurance claims and her cousin's accident were not "extraneous" information within the meaning of § 27-606(2). Thus, the affidavits used to support these allegations were not admissible to impeach the jury's verdict. Without such evidentiary support, Nichols did not meet her burden of establishing juror misconduct. See *Auer, supra*. The trial court did not abuse its discretion in denying Nichols' motion for new trial based on these two allegations of juror misconduct.

We thus turn to Nichols' final allegation of juror misconduct, that several jurors considered the $100,000 wrongful death settlement, in contravention of the court's admonitions and instructions. Nichols again supports her allegation with a juror affidavit. Busse also presented several juror affidavits which stated that the settlement amount had not been discussed. We must again analyze the admissibility of

the affidavits.

As noted before, § 27-606(2) prohibits the use of juror affidavits to impeach a verdict, "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention." Applying this provision, we have previously noted that "extraneous" means " 'existing or originating outside or beyond : external in origin : coming from the outside . . . brought in, introduced, or added from an external source or point of origin.' " *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 455, 412 N.W.2d 56, 77 (1987) (quoting Webster's Third New International Dictionary, Unabridged 807 (1981)).

In spite of our prior applications of the term "extraneous" as employed in § 27-606(2), neither the statutory language nor our past decisions make clear whether that term encompasses information that has been excluded from jury consideration by a motion to strike. We thus must construe the language of the section.

Statutory language is to be given its plain and ordinary meaning. *State ex rel. Grams v. Beach, ante* p. 126, 498 N.W.2d 83 (1993); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). In addition, we will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Sorensen, supra*; *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984). Finally, to construe the statute properly, we will look to the purpose behind the statute and will give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). See, also, *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).

As our decisions indicate, we have been reluctant to allow jurors to impeach their verdicts unless the situation clearly falls within the terms of the evidentiary statute. See, e.g., *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991); *Rahmig, supra*; *Lambertus v. Buckley*, 206 Neb. 440, 293 N.W.2d 110 (1980). In the situation presented by the case at bar, we hold that the settlement amount cannot properly be characterized as "extraneous" information within the terms of

§ 27-606(2).

The settlement figure, although not part of the evidence, came to the attention of the jury in the presence of the judge and both attorneys. Section 27-606(2) was obviously not designed to deal with this situation. Section 27-606(2) enables the parties to introduce evidence that improper information came to the attention of the jury. However, the section does not permit further use of the juror testimony, e.g., the jurors may not relate the effect of such information on their verdict. See *Loving, supra.*

In the case at bar, juror affidavits were unnecessary to disclose the extraneous nature of the settlement information and the improper manner in which it was brought to the jury's attention. Both counsel and the court were immediately aware of the impropriety. Nichols' counsel properly objected and moved to strike; the court properly sustained both requests. As previously discussed, a motion for mistrial was not timely made. However, the problem had been recognized and dealt with.

If the jurors were allowed to testify that the settlement amount was discussed during deliberations, it would run afoul of the policy of limiting the potential for juror harassment. In every case where the losing party had been granted a motion to strike, that party would be inclined to seek out the jurors and question them regarding their deliberations. This is exactly the type of action § 27-606(2) seeks to limit. See *Rahmig, supra* (quoting *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), and noting that the rationale behind the strictures on the use of juror affidavits is to prevent juror harassment and to free the jury to engage in frank discussions). The present case indicates the very real potential for juror harassment; between them, Nichols and Busse presented a total of seven affidavits from four members of the jury.

Because the settlement amount came to the attention of the jury during trial, any discussion of the settlement during deliberations was just that—part of the jury's discussions. Thus, the affidavits related to conduct not within the ambit of § 27-606(2). See *Rahmig, supra.* Nor were the affidavits admissible to show that the jury failed to follow the court's

instructions. See, *Rahmig, supra*; *Lambertus, supra*; *Iman v. Inkster*, 90 Neb. 704, 134 N.W. 265 (1912) (holding that juror affidavits which alleged a failure to follow the court's instructions could not be used to impeach the jury's verdict).

We are aware of our previous statement that § 27-606(2) "permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial." *Rahmig*, 226 Neb. at 456, 412 N.W.2d at 78. Accord *Loving, supra*. However, both *Loving* and *Rahmig* dealt with information much different from that involved in the case presently before us. In *Loving*, the bailiff erroneously gave the jury copies of several documents which had not been entered into evidence. We deemed the information "extraneous." In *Rahmig*, we upheld the exclusion of affidavits alleging that the jury had discussed the tax consequences of their award. Neither case involved information which arose in the presence of the parties and the court. We thus clarify the above-quoted language as not encompassing the situation presented by the case at bar.

The affidavit alleging that the jury considered the settlement amount was not admissible to impeach the verdict. Nichols' allegation of jury misconduct was not supported by competent evidence, and therefore, the court did not abuse its discretion or prejudice her by denying her motion for a new trial. See *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). We thus dispose of Nichols' arguments based on jury misconduct.

3. Jury Instructions

Nichols also attacks the instructions given the jury. We have already addressed one such argument, relating to the burden of proof on damages. We now address her second instruction-related argument, that the court erred by refusing to give an instruction to indicate (1) that Nichols had received no money from Busse, (2) that this action was Nichols' only opportunity to recover, and (3) that the jury should ignore any statements implying that Busse might be required to pay twice for the damages requested.

It is not error for a trial court to refuse a requested

instruction if the substance of the proposed instruction is contained in those instructions actually given. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *Denesia v. St. Elizabeth Comm. Health Ctr.*, 235 Neb. 151, 454 N.W.2d 294 (1990). Furthermore, as we have previously discussed, Nichols bears a threefold burden of establishing the impropriety of refusing her requested instruction. She must show (1) that she was prejudiced by the court's refusal, (2) that her proposed instruction correctly stated the law, and (3) that her tendered instruction is applicable to the evidence in the case. *Brown, supra*; *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

Nichols has failed to show that she was prejudiced by the court's refusal to give the requested instruction. Following the mention of the settlement amount by Busse's counsel, the court admonished the jury: "The fact that there was another civil action brought, *not by the plaintiff* [*Nichols*], *but by the personal representative of the estate of Shawna Nichols* and that there was a recovery therefore is not something that should enter into your deliberations in this trial." (Emphasis supplied.) This point was reiterated in the court's instructions to the jury: "The fact that . . . another civil case arose out of the . . . collision that resulted in the death of Shawna Nichols is not a fact that should enter into your deliberations in this trial. . . . [A]ny recovery from another civil case is not connected with this case . . . ."

The court's instructions adequately covered the substance of Nichols' requested instruction. Moreover, the court's admonition further clarified the instruction actually given. Nichols was not prejudiced by the court's refusal to give her requested instruction.

4. Sufficiency of the Verdict

Nichols' final argument is that the jury's verdict was insufficient as a matter of law. Again, we disagree.

On appeal, the fact finder's determination of damages is given great deference. *Schuessler v. Benchmark Mktg. & Consulting, ante* p. 425, 500 N.W.2d 529 (1993). This court will not disturb a jury verdict as inadequate unless it is so clearly

against the weight and reasonableness of the evidence and so disproportionate to the injury proven that it appears to be the result of passion, prejudice, mistake, or disregard by the jury of the evidence or rules of law. *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987) (citing *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984)).

Based on the record, the jury's verdict of $6,200 does not appear to be so out of touch with the evidence and injury that it should be disturbed. As noted before, proving mental suffering is far from an exacting endeavor. Nichols introduced evidence that she had incurred medical expenses of over $2,000 at the time of trial. She introduced further evidence that she would incur future medical expenses of $2,600. The jury was left to place a monetary value on Nichols' emotional distress. We cannot say that the figure chosen by the jury is inadequate as a matter of law. We thus dispose of Nichols' final argument.

IV. CONCLUSION

We reject Busse's arguments that Nichols failed to adequately establish a cause of action for intentional infliction of emotional distress. The district court did not err by denying his motions for directed verdict and for judgment notwithstanding the verdict. We also hold that Nichols was not prejudiced by the district court's jury instructions. Furthermore, we affirm the court's denial of Nichols' motion for mistrial, the court's denial of Nichols' motion for new trial, and the jury's verdict.

AFFIRMED.

CAPORALE, J., dissenting.

Because the record establishes as a matter of law that the requisite elements of intentional or reckless conduct are lacking, I respectfully dissent.

It is well established in this state that before a plaintiff may recover for intentional infliction of emotional distress, he or she must establish, among other elements, that there was intentional or reckless conduct on the part of the defendant. See, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987); *Gall v. Great Western Sugar Co.*, 219

Neb. 354, 363 N.W.2d 373 (1985); *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983); *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981); *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975).

In reaching its decision, the majority relies upon Restatement (Second) of Torts § 46 (1965), but ignores the comment which clarifies that § 46

> applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

Id., § 46, comment *i.* at 77.

"Recklessness," as the Restatement defines the term,

> may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.

Id., § 500, comment *a.* at 587-88.

The majority paints the defendant Brian Busse's conduct as intentional by pointing to the fact that he intentionally called the plaintiff, Judy Nichols, on the telephone. But merely establishing that Busse made a telephone call does not establish that by so doing, he desired to inflict severe emotional distress. Quite the contrary, Busse's failure to inform Nichols about the facts of the accident can be read not as a way to hurt her, but, rather, as an attempt to shield her from injury. Busse's disingenuity may as easily be inferred to have been a symptom of the classic denial that often accompanies traumatic experiences as that he wanted to inflict injury. Or his conduct may simply have been the result of plain cowardice.

Whatever the situation may have been, the record falls far

short of proving that Busse "desired" to cause Nichols sorrow, suffering, and severe emotional distress above and beyond that which a person would be expected to experience due to the loss of a daughter. Nor can it be said that Busse was certain, or substantially certain, that severe emotional distress would result from his actions.

Perhaps recognizing the frailty of its treatment of the intentional conduct issue, the majority next directs us to facts it concludes indicate that Busse's actions meet the lower recklessness standard, contending that Busse's "dragging and abandoning [the decedent's] body, concealing his knowledge of the accident, and falsely accusing [the decedent] of stealing his pickup" were reckless. But Busse's act of dragging and deserting the decedent's body after the accident cannot be said to have been done with substantial certainty that as a result Nichols would suffer emotional distress "so severe that no reasonable person should be expected to endure it." The same holds true for Busse's failure to inform Nichols of the accident and of his false accusation of automobile theft.

The accident and subsequent events were indeed tragic, and Busse's conduct was reprehensible; but the tort system cannot compensate every wrong committed in our society. As noted in the first paragraph of this dissent, the record simply fails to establish that Busse acted with the intent or recklessness required to maintain an action for intentional infliction of emotional distress.

I would therefore reverse the judgment of the district court and remand the cause for dismissal.

HASTINGS, C.J., joins in this dissent.

ALLIANCE RAILROAD COMMUNITY CREDIT UNION, FORMERLY ALLIANCE RAILROAD EMPLOYEES CREDIT UNION, APPELLANT, V. COUNTY OF BOX BUTTE, NEBRASKA, APPELLEE.

503 N.W.2d 191

Filed July 23, 1993. No. S-91-252.

1. **Bankruptcy: Mortgages: Taxes: Statutes: Appeal and Error.** Whether a mortgagee who purchases property of a bankrupt may successfully challenge taxes levied or assessed during the bankruptcy is to be determined by statutory construction. Statutory construction is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Real Estate: Taxes: Liens.** The lien for taxes attaches automatically without any affirmative act by taxing officials after levies are complete. Taxes upon land, whenever levied, take precedence over all other liens.
3. **Real Estate: Taxes: Liability.** A tax, general or special, on real estate creates no personal liability or for the payment of which a judgment in personam could be obtained. The real property thus assessed is the only property that can be resorted to and taken in satisfaction of the taxes levied against the same.
4. **Bankruptcy: Property: Liens.** A stay of proceedings which is afforded by the laws of bankruptcy does not act as a ban, but merely as a suspension. A discharge in bankruptcy is personal to the bankrupt and has no effect upon a valid lien existing on his or her property.
5. **Bankruptcy: Property.** The automatic bankruptcy stay does not stay acts against property which is neither the debtor's nor the estate's.
6. **Actions: Parties: Proof.** The party asserting the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence.
7. **Bankruptcy: Mortgages: Real Estate: Taxes: Liens.** To permit mortgagees to purchase property on which they hold a lien from bankrupt mortgagors, thereby salvaging their interest, without subjecting them to the real estate tax liens would grant mortgagees a windfall that the federal Bankruptcy Code neither intended nor permits.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

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

M. Roger Schneekloth, Box Butte County Attorney, and Laurice M. Margheim for appellee.

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

HASTINGS, C.J.

The Alliance Railroad Community Credit Union (Credit Union) appeals the district court's dismissal of its petition which sought the refund of certain real estate taxes paid to the County of Box Butte, Nebraska (County). The requested relief was based on either Neb. Rev. Stat. § 77-1734.01 (Reissue 1990) or Neb. Rev. Stat. § 77-1735 (Reissue 1990). The Credit Union claims that the County is prohibited from assessing or levying general property taxes during any time after the owner of the property has filed a petition in bankruptcy during the effectiveness of the automatic stay provisions of the Bankruptcy Code and that any taxes assessed and levied in contravention of this stay are invalid and void.

It was stipulated and agreed by the parties in the district court that the matter be submitted to the court upon the pleadings, stipulations, and exhibits marked and received in evidence at the pretrial conference held on December 24, 1990. The only evidence in addition to the pleadings consisted of two exhibits showing the levy and payment of taxes for the years 1987 and 1988.

The underlying facts of this case are found for the most part in the allegations of the petition and the admissions in the County's answer. The Credit Union filed its petition in the district court for Box Butte County on April 13, 1990.

The Credit Union had loaned funds to James Gary Ward and Sandra S. Ward, on a date not appearing in the record, secured by a mortgage on the following-described real estate: "Lot 4, Block 10, Lakefield Addition to the City of Alliance, Box Butte County, Nebraska, according to the recorded plat thereof."

On July 21, 1987, the Wards had filed a petition for relief under chapter 13 of the U.S. Bankruptcy Code. The petition filed in this case alleged that as a result of the filing of the petition in bankruptcy, a stay of certain acts and proceedings against the debtors became effective as of the date of filing pursuant to 11 U.S.C. § 362(a) (1988) of the Bankruptcy Code. The Credit Union alleges that such a stay applies to the assessment, levy, and collection of taxes, and imposition of liens therefor, by governmental subdivisions. That allegation is specifically denied by the County. This forms the basic issue in

this appeal.

The facts alleged by the Credit Union and admitted by the County in its answer are that the County levied upon the Ward property certain real estate taxes for 1987 and 1988 as part of the regular tax collection activities of the County; that the Wards conveyed the real estate to the Credit Union on January 19, 1988, and on September 15, the U.S. Bankruptcy Court entered an order confirming the Wards' amended plan; that no notice of assessment, change, or any other action was sent to the Credit Union or to the Wards except the notice in December 1987 for the 1988 assessment generated by the county assessor for Box Butte County; and no relief from the stay was requested or granted to the County to allow actions to assess, levy, or perfect liens for payment of the 1987 and 1988 taxes on the Ward property.

The Credit Union further alleges, and it is admitted by the County, that it paid the 1987 and 1988 real estate taxes assessed on the Ward property, together with interest in the amount of $3,471.50, then made a claim for a refund to the county treasurer by means of letters dated December 20, 1989, and January 11, 1990. The county commissioners of Box Butte County denied the Credit Union's claim at their meeting held February 6, 1990.

The Credit Union also claims that 11 U.S.C. § 362(a) of the Bankruptcy Code applies to the assessment, levy, and collection of taxes, and imposition of liens therefor, by governmental subdivisions, and therefore, because the taxes levied and assessed in the face of a bankruptcy stay were illegal and void, it was entitled to a refund of taxes, interest, and advertising paid on the Ward property for 1987 and 1988, under the premise that the tax either had been imposed by mistake, as provided by § 77-1734.01, or was altogether void and invalid, as provided by § 77-1735. These allegations were denied by the County. The Credit Union accordingly prayed for judgment against the County in the amount of $3,471.50, plus interest from December 20, 1989, and costs of the action.

On February 19, 1991, the court dismissed the Credit Union's petition at its own cost, finding that

> 11 USC Section 362 operates as an injunction prohibiting

the creation of a lien under Section 77-203 R.R.S., 1943 while bankruptcy proceedings are pending, but it does not stay proceedings for the assessment and levy of real estate taxes; that the stay no longer applies after the property is conveyed to the Plaintiff by the bankrupt; and that the liens created by statute became effective when the stay was lifted.

The Credit Union claims that the district court erred (1) in holding that the stay of Bankruptcy Code 11 U.S.C. § 362(a) did not apply to the levy and assessment of real estate taxes by the County, (2) in finding that the stay prohibited only the creation of a lien pursuant to Neb. Rev. Stat. § 77-203 (Reissue 1990), and (3) in finding that the 1987 real estate taxes levied on the Ward real estate and the 1988 real estate taxes assessed during the pendency of the Ward bankruptcy were effective and became liens when the stay was lifted by conveyances to the Credit Union. The substance of the three claimed errors is that the trial court erred in refusing to recognize that 11 U.S.C. § 362(a) automatically stayed and therefore rendered void and invalid the assessment of taxes during those 2 years.

Whether a mortgagee who purchases property of a bankrupt may successfully challenge taxes levied or assessed during the bankruptcy is to be determined by statutory construction. Statutory construction is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court. *First Nat. Bank v. Heiden*, 241 Neb. 893, 491 N.W.2d 699 (1992). See, also, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Sorenson v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).

The procedure for the levy and collection of taxes in Nebraska may be found in the statutes. On or before January 1 of each year, the county assessor or county clerk shall make up a list, ledger, or computer file of the taxable lands and lots in the county. Neb. Rev. Stat. § 77-1303 (Reissue 1990). The county assessor or county clerk shall complete his or her revision of the assessment rolls and file with the county clerk on or before April 1 of each year a certificate indicating that such revision is complete. The county clerk shall cause to be published in a

paper of general circulation in the county a notice of the filing of the assessment roll. Neb. Rev. Stat. § 77-1315 (Reissue 1990). The county board of equalization shall fairly and impartially equalize the valuation of individual parcels of real estate so that all property is assessed uniformly and proportionately. Neb. Rev. Stat. § 77-1504 (Reissue 1990). The county board of equalization shall each year, on or before September 15, levy the necessary taxes for the current year. Neb. Rev. Stat. § 77-1601 (Reissue 1990). All tangible property not expressly exempt therefrom shall be subject to taxation and shall be valued at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1990). All general real property taxes levied for any county shall be due and payable on December 31 next following the date of levy, and commencing on that date shall be a first lien on the real estate taxed until paid or extinguished as provided by law. § 77-203.

This court has held that the lien for taxes attaches automatically without any affirmative act by taxing officials after levies are complete. Taxes upon land, *whenever* levied, take precedence over all other liens. *Eddy v. Kimerer*, 61 Neb. 498, 85 N.W. 540 (1901).

An automatic stay applicable to "(4) any act to create, perfect, or enforce any lien against property of the estate" is provided for in 11 U.S.C. § 362(a).

The purpose of the automatic stay is to protect the assets of the debtor from its creditors. *Rogers v. Rogers*, 671 P.2d 160 (Utah 1983); *In re Flagg*, 17 B.R. 677 (Bankr. E.D. Pa. 1982) (quoting legislative history to 11 U.S.C. § 362).

In *Barnett v. Lewis*, 170 Cal. App. 3d 1079, 1088, 217 Cal. Rptr. 80, 85 (1985), a California court offered the following observations on the purpose of 11 U.S.C. § 362(a):

> "It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." (*Foulke v. Lavelle* (1982) 308 Pa. Super. 131, 454 A.2d 56, 59.)

Another purpose of the automatic stay of proceedings

against a debtor who has filed a petition pursuant to the Bankruptcy Code is to prevent dissipation of the bankrupt's assets and to avoid the multiplicity of claims in different forums against the estate. *GMAC v. Yates Motor Co.*, 159 Ga. App. 215, 283 S.E.2d 74 (1981).

The Credit Union claims that this case is controlled by *Matter of Ballentine Bros., Inc.*, 86 B.R. 198 (Bankr. D. Neb. 1988). In that case, Equitable Life Assurance Society of the United States, Farmers Home Administration, and Adams Bank & Trust Company recorded mortgages against the property of the debtor, Ballentine Bros., Inc. Thereafter, on February 2, 1983, debtor filed its petition for chapter 11 relief. In September of each subsequent year, Keith County, Nebraska, commissioners assessed and levied taxes on this property. At no time during this period did Keith County seek relief from the automatic stay or file a claim in the bankruptcy proceedings.

In August 1985, Firmin Q. Feltz purchased from Keith County four county treasurer's certificates of tax sale without actual knowledge of the bankruptcy filing. In purchasing the tax sale certificates, Feltz paid the taxes owing on the property for 1981, 1982, 1983, and the first half of 1984. As holder of the tax certificates and to protect his interest in the real estate, Feltz continued to pay the real estate taxes through 1985. In July 1986, Feltz sought relief from the stay so that he could foreclose on his tax sale certificates. The bankruptcy court denied relief.

Equitable filed a proceeding in that court to establish the priority of the various claimants asserting liens. Equitable and Adams contended that the automatic stay provided by 11 U.S.C. § 362(a)(4) prevented Keith County from perfecting a tax lien postpetition. Feltz contended that Nebraska law provided that the perfection of a real estate tax lien is a function of time and thus no "act" occurs and, further, that Nebraska law provided that regardless of the perfection date of a real estate tax lien, it takes first priority over all other liens.

The bankruptcy court agreed that all prepetition tax liens held a first priority. However, it held adversely to Feltz as to assessments made and liens created postpetition. It cited to *In re New England Carpet Co., Inc.*, 26 B.R. 934 (Bankr. D. Vt.

1983), in which a creditor asserted, postpetition, a tax lien, claiming priority over other security holders.

> The relevant Vermont statute, similar to Nebraska's, authorized the tax lien to relate back in time so as to have "priority in law over any other lien having priority in time." *Id.* at 939. The court found that the "creditor's underlying interest must be created *prior* to the petition, and that the interest need only be perfected after the petition date, so as to be excepted from the automatic stay." *Id.* (emphasis added). *See also In Re Carlisle Court, Inc.*, 36 B.R. 209 (Bankr.D.C.1983) (holding that "post-petition real estate taxes assessed after commencement of the case . . . are not entitled to lien status based on the broad application of the automatic stay under 11 U.S.C. § 362(a)(4)"). *Id.* at 219.

Matter of Ballentine Bros., Inc., 86 B.R. at 201.

The *Matter of Ballentine Bros., Inc.* court went on to say:

> Therefore, Keith County's post-petition assessment and levy of real estate taxes on debtor's property are stayed unless the County succeeds in its second argument that tax collecting duties are essential to the public welfare and safety and that these duties are exempt from the stay pursuant to Section 362(b)(4), p. 2-3, *supra*. [That section provides, in substance, that the filing of a petition does not operate as a stay under certain conditions "of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."]
>
> Section 362(b)(4) is "intended to be given a narrow construction . . . and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.". [Citations omitted.] From this legislative passage has been generated what courts call the "pecuniary purpose" test. [Citation omitted.] "State and local governmental units cannot, by an exercise of their police or regulatory powers, subvert the relief afforded by the federal bankruptcy laws. When they seek to do so for a pecuniary purpose, they are automatically stayed, notwithstanding

> the exception found at 11 U.S.C. § 362(b)(4)." [Citation omitted.]
>
> . . . Keith County's assessment and levying of real estate taxes are purely pecuniary acts and intended to enable it to obtain funds. Although the funds will be used for various public purposes, the initial and primary purpose of assessment and levy is the collection of money, in this case, from debtor's estate. If the County were successful in claiming the Section 362(b)(4) exception, the County gains an economic advantage over the claimants "in relation to the debtor's estate." *Id.*
>
> . . . .
>
> . . . The County's claim will not be eliminated, but rather it will be assigned a priority in relation to the other claims.
>
> . . . .
>
> Moreover, attributing a narrow interpretation to Section 362(b)(4) is reasonable in context with other sections of the Bankruptcy Code addressing tax claims. For example, Section 503 designates "any tax incurred by the estate," after the commencement of the case, as an administrative expense. Administrative expenses receive first priority in payment after prepetition secured claims. 11 U.S.C. § 507(a)(1) (1987). The Code's inclusion of "taxes" as an administrative expense in Section 503 and the specific reference to "property taxes" assessed prior to the commencement of the case in Section 507(a)(7)(B) would be superfluous if the County could acquire a tax lien post petition despite the automatic stay.
>
> . . . .
>
> In conclusion, the 1981 and 1982 tax liens are properly perfected, and Nebraska law affords them first priority over all other claimants. Section 362(a) stays the 1983 through 1987 assessments, levies and liens as well as the 1988 assessment.

86 B.R. at 202-03.

The Credit Union claims the taxes assessed and levied by the County either are void and invalid or were collected by reason of mistake. *Matter of Ballentine Bros., Inc.* supports neither

conclusion. *Matter of Ballentine Bros., Inc.* said that "assessments, levies and liens" for taxes made and created during the bankruptcy proceedings were stayed and unenforceable during that period of time. 86 B.R. at 203. It held that "the County's claim will not be eliminated, but rather it will be assigned a priority in relation to the other claims." *Id.* at 202.

In re D. Papagni Fruit Co., 132 B.R. 42 (Bankr. E.D. Cal. 1991), is mildly critical of *Matter of Ballentine Bros., Inc.* In that case, an adversary proceeding in which the holder of a deed of trust executed prepetition disputed the validity of a lien of the County of Fresno as to taxes assessed and levied postpetition, and also sought to recover taxes withheld and paid in satisfaction of those liens upon sale postfiling of the property by plaintiff to a third party, relief was denied. The court said:

> Collection of *in rem* taxes can only be forced by actual sale of the property impressed with the lien. Thus the tax is not properly recoverable as an administrative claim. If it were made recoverable by some act of the bankruptcy court, such action would improperly transform *in rem* liability into personal liability, a result which apparently did not bother some courts [See, e.g., *Matter of Ballentine Bros., Inc.*, 86 B.R. 198 (Bkrtcy.D.Neb.1988) . . . .]

132 B.R. at 44.

Under Nebraska law

> a tax, general or special, on real estate creates no personal liability or for the payment of which a judgment *in personam* could be obtained. The real property thus assessed is the only property that can be resorted to and taken in satisfaction of the taxes levied against the same.

City of Beatrice v. Wright, 72 Neb. 689, 696, 101 N.W. 1039, 1042 (1904). This is in accord with the general rule. See *Merv E. Hilpipre Auction Co. v. Solon St. Bank*, 343 N.W.2d 452 (Iowa 1984).

In re D. Papagni Fruit Co. goes on to say:

> The devastating impact which can be suffered by a local government entities [sic] during the extended period of time that the automatic stay can remain in effect is borne out by the result in *Parr Meadows, supra*, where the

court's ruling benefitted only mortgage holders who were able to avoid four years of property tax liability while the bankruptcy case was pending with a loss to the county of more than $1.5 million in tax revenue.

. . . .

Further, it is obvious that the automatic stay does not bar all post-petition charges on real property, as over-secured creditors are permitted by § 506(b) to add post-petition interest to their secured claims as well as other charges authorized by a creditor's security agreement, including post-petition attorney fees [citation omitted]. . . .

Like other secured creditors, the taxing agency here is doing no more than imposing the ongoing charges it was authorized to impose prior to the bankruptcy filing. There is no sound reason why secured creditors should be allowed to accrue added post-petition charges against estate property and thus diminish the equity available to creditors generally, while a taxing agency, which is compelled to provide ongoing public services to the subject property, cannot.

. . . .

Wholly apart from the approach of the Fourth Circuit in relying upon § 546(b) to find an exception under § 362(b)(3) to the automatic stay, it is legitimate to inquire if Congress truly intended to include the *in rem* imposition of real property taxes, which form the principal source of revenue for the ongoing operations of most local governmental entities, within the meaning of "lien" as used in § 362(a). The reality is, as unequivocally demonstrated by all the cases involving this issue, that taxing agencies have regularly and historically, throughout the country, asserted that post-petition annually-assessed real property taxes constitute a charge against the property and that debtors, creditors and trustees (with the obvious exception of the parties involved in the cited cases) have concurred in and assented to that practice. Debtors-in-possession regularly pay such taxes (when able) and secured creditors complain loudly (and often

> pay the taxes themselves) when a default in tax payments occurs. It accordingly seems most incongruous to argue that Congress and those who assisted in the drafting of § 362(a)(4) were unaware of this reality at the time of its enactment or intended to introduce such widespread withdrawal of local government funding by adoption of the section.

132 B.R. at 45-47.

The case *In re Bellman Farms, Inc.*, 86 B.R. 1016 (Bankr. D.S.D. 1988), is somewhat helpful in resolving the issue in the case at bar because of the similarity of the taxing statutes of Nebraska and South Dakota. In *In re Bellman Farms, Inc.*, a chapter 11 bankruptcy petition was filed on December 1, 1981, and was dismissed on February 29, 1984. The debtor filed a second chapter 11 petition on March 13, which was converted to a chapter 12 bankruptcy and which was ongoing. The dispute in the chapter 12 proceedings involved a disagreement between the debtor and the Federal Land Bank of Omaha (FLB-O), which had a secured claim on the real estate of the debtor, as to the plan proposed by the debtor, which would reduce the amount owed by the debtor to FLB-O to the extent of the real estate taxes for the years 1981 through 1987. FLB-O objected to that treatment of its secured claim, insisting that all taxes accrued postpetition, either the one filed in 1981 or the present proceedings originally filed in 1984, and should be treated as an administrative claim.

FLB-O claimed that all taxes were assessed and levied during times when an automatic stay was in effect. Although determining that "the amount of taxes *due and owing* for 1984, 1985, 1986, and 1987 [years during the presently existing proceedings] is not deducted from the fair market value of the real property" (emphasis supplied) because "[t]he county does not have a secured claim for this amount because of the automatic stay," 86 B.R. at 1021, the bankruptcy court disagreed as to the taxes for 1981, 1982, and 1983, holding that the amount of those taxes would reduce the secured claim of FLB-O to that extent. The court stated:

> On February 29, 1984, the first Bellman Farms, Inc., Chapter 11 case was dismissed. The automatic stay of

> Section 362 was instantly lifted upon dismissal of the case. [Citations omitted.] At the time the case was dismissed, nothing prevented the lien of S.D.C.L. § 10-19-1 from attaching to the Bellman Farms, Inc., real property, and no affirmative acts were needed to perfect this lien against the FLB-O. The lien arises and is perfected by operation of law, but for the automatic stay, and, thus, Faulk County immediately, upon dismissal of the bankruptcy case, had a prior, perfected lien on the real property in question for unpaid real estate taxes from 1981, 1982, and 1983.

86 B.R. at 1020.

The language of *In re Bellman Farms, Inc.* supports the rule that a stay of proceedings which is afforded by the laws of bankruptcy does not act as a ban, but merely as a suspension. A discharge in bankruptcy is personal to the bankrupt and has no effect upon a valid lien existing on his or her property. *Omaha U. S. Employees' Federal Credit Union v. Brunson*, 147 Neb. 439, 23 N.W.2d 717 (1946). Furthermore, the automatic stay does not stay acts against property which is neither the debtor's nor the estate's. *Striegel v. Dakota Hills, Inc.*, 365 N.W.2d 491 (N.D. 1985); *In re Sparkman*, 9 B.R. 359 (Bankr. E.D. Pa. 1981); 11 U.S.C. § 362(a).

Despite the broad prohibitions enumerated in 11 U.S.C. § 362(a), a bankruptcy filing under chapter 11 "does not operate as a stay . . . of the issuance to the debtor by a governmental unit of a notice of tax deficiency." 11 U.S.C. § 362(b)(9) (formerly (b)(8)); *H & H Beverage Distrib. v. Dept. of Revenue of Pa.*, 850 F.2d 165 (3d Cir. 1988). Therefore, although a governmental unit may not collect taxes or create a lien during the period of the stay, it may notify the debtor of a tax deficiency. *Id.* See, *Stackpoole v Treasury Dep't*, 194 Mich. App. 112, 486 N.W.2d 322 (1992); *O'Neill v. Washington Tp.*, 188 N.J. Super. 565, 457 A.2d 1255 (1983).

The federal bankruptcy courts have rendered decisions, a bar to versus a suspension of liens, components of which we find analogous to this situation.

In *In re Martin*, 106 B.R. 334 (Bankr. D. Me. 1989), the municipality (the city of Portland, Maine) had not taken the necessary steps to ensure the continuing perfection and

enforcement of its real estate tax liens. The court, however, delivered its holding with the following preface:

> At the outset, the court finds that postpetition tax assessment by a municipality does not violate the automatic stay, provided for in § 362(a) of the Bankruptcy Code. *See Md. Nat. Bank v. Mayor & City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983).
>
> Tax liability of the bankruptcy estate is predicated on the necessity of protection by the state or municipality. *See Swarts v. Hammer*, 194 U.S. 441, 24 S.Ct. 695, 48 L.Ed. 1060 (1904). Because the property still receives municipal services such as protection from vandalism and maintenance of streets and roads during the administration of the estate, assessment of real estate taxes is not stayed under section 362 of the Bankruptcy Code. *See In re Klefstad*, 95 B.R. 622, 625 n.5 (Bankr.W.D.Wis.1988). To find otherwise would place too heavy a burden on each municipality, while permitting the debtor to enjoy the benefits of municipal services tax-free.

106 B.R. at 336.

The Credit Union alleged the invalidity of the levy and assessment for and the corresponding absence of a lien for taxes for the particular years. There are cases seemingly supporting its position. See, *Southern County Mut. Ins. Co. v. Powell*, 736 S.W.2d 745 (Tex. App. 1987); *United Northwest Fed'l Credit Union v. Arens*, 233 Kan. 514, 664 P.2d 811 (1983); *Brown v. National City Bank*, 8 Ohio Misc. 2d 40, 457 N.E.2d 957 (1983); *Matter of Thacker*, 24 B.R. 835 (Bankr. S.D. Ohio 1982); *In re McWhorter*, 37 B.R. 742 (Bankr. D.S.C. 1984); *Matter of Guterl Special Steel Corp.*, 111 B.R. 107 (Bankr. W.D. Pa. 1990). The Credit Union states that *Matter of Guterl Special Steel Corp.*, like *Matter of Ballentine Bros., Inc.*, held tax assessments were in violation of the bankruptcy stay and were "null and void." This simply was not the holding of *Matter of Ballentine Bros., Inc.* In any event, we reject the logic of those cases and adhere to the teachings of the earlier cases cited in this opinion.

Proof of the allegation that the assessment and levy of the

taxes in question were null and void is essential to the Credit Union's recovery. The party asserting the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991). The Credit Union has failed to meet its burden.

Once the Credit Union purchased the Lakefield Addition property from the Wards, that property was removed from the Ward bankruptcy estate, with the statutorily created liens becoming effective and perfected with that removal.

The Bankruptcy Code clearly provides in 11 U.S.C. § 362(c) that the stay continues until such property is no longer property of the estate, through such activities as sale, abandonment, or exemption, or if the bankruptcy case is closed or dismissed.

To permit mortgagees to purchase property on which they hold a lien from bankrupt mortgagors, thereby salvaging their interest, without subjecting them to the real estate tax liens would grant mortgagees a windfall that the federal Bankruptcy Code neither intended nor permits. Any other interpretation of the statute would create absurd results which we choose not to adopt.

The Credit Union's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

McCOOK NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. ARDEN E. MYERS AND EDITH MYERS, HUSBAND AND WIFE, ET AL., APPELLANTS AND CROSS-APPELLEES, AND MAXINE E. MYERS, APPELLEE AND CROSS-APPELLEE.

503 N.W.2d 200

Filed July 23, 1993. No. S-91-316.

1. **Mortgages: Real Estate: Foreclosure: Equity.** A proceeding to foreclose a real estate mortgage is an equitable action.
2. **Mortgages.** A mortgage may be enforceable despite certain inaccuracies in its description of the debt it secures.

3. **Pleadings: Appeal and Error.** A trial court may conform the pleadings to the facts proved when the amendment does not change substantially the claim or defense. The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice resulted.
4. _____: _____. Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.
5. **Bankruptcy: Debtors and Creditors: Liability.** A discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability and bars its enforcement against him. The debt still exists, however, and can be collected from any other entity that might be liable.
6. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
7. **Mortgages: Foreclosure: Receivers: Appeal and Error.** Whether a receiver should be appointed in conjunction with a mortgage foreclosure action is a matter within the discretion of the trial court. On appeal, that decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
8. _____: _____: _____: _____. In the appointment of a receiver, especially in a mortgage foreclosure case, very much must be left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely and to the injury of the party complaining, an appellate court will not interfere.
9. **Judgments: Liens: Child Support: Alimony.** The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future.
10. **Statutes: Liens: Mortgages: Alimony.** Under the statutes of Nebraska, alimony judgments are liens, and as such, if they precede a mortgage and are of record, they have priority over the mortgage for both past and future installments.
11. **Foreclosure: Liens.** A junior lienholder can foreclose a senior lien only with the senior lienholder's consent.
12. **Foreclosure: Liens: Parties.** A senior lienholder may be made a party to a foreclosure action to determine the priority and amount of his or her lien.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed as modified.

Daylene A. Bennett, of Burger, Bennett & Green, P.C., for appellants.

Susan C. Williams, of Murphy, Pederson & Waite, and Stanley C. Goodwin for appellee McCook National Bank.

George E. Clough, of Clough Law Office, for appellee Maxine E. Myers.

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

WHITE, J.

Arden Myers; his wife, Edith Myers; and Adair Myers (the Myerses), along with the Myers Brothers partnership (the Partnership), appeal the judgment of the district court foreclosing two real estate mortgages signed by the Myerses and held by appellee McCook National Bank (the Bank). The foreclosure was allowed in order to pay two of the Partnership's notes which were in default. The Bank cross-appeals, arguing that the court erred by (1) refusing to grant its request for a receiver and (2) failing to value and foreclose an alimony lien held by Adair Myers' former wife, appellee Maxine E. Myers. We affirm as modified.

At the time of trial, the Myerses owned the mortgaged land, which was located in Red Willow and Hitchcock Counties, as tenants in common. A portion of the land was subject to Maxine's alimony lien, which was created by an August 16, 1979, divorce decree and provided alimony until her death or remarriage.

On the date the mortgages were executed, the Partnership owed the Bank $1,235,000 pursuant to two promissory notes. In August 1984, at the request of the Bank, the Myerses executed the two mortgages on the subject land. However, in their description of the debt secured, the mortgages indicated that the two notes were signed *by the Myerses in their individual capacity*. In August and December 1985, the Partnership executed two more promissory notes to the Bank, renewing the obligations under the previous notes. The Partnership defaulted on the renewal notes in 1986.

In May 1987, the Partnership filed for relief under chapter 12 of the Bankruptcy Code. Ultimately, the bankruptcy court confirmed the Partnership's debtor's plan, but not before two versions had been submitted. Summarized, the following relevant facts occurred during the bankruptcy: The Partnership's initial plan recited an overall indebtedness to the

Bank of $1,237,931.73. The plan then segmented the debt, listing the appraised values of the various assets which secured the debt and proposing to pay the Bank the amount of its secured claim in accordance with those appraised values. Although the payment periods and interest rates vary as to each secured amount, the plan divided the debt as follows: $163,400 for the debt secured by the Partnership's equipment; $60,160 for the debt secured by the Partnership's cattle; $33,428 for the debt secured by a government payment due the Partnership; $6,400 for the debt secured by the Partnership's wheat crop; and $447,647 for the debt secured by the real estate, the value of which real estate was reached by subtracting a specified amount for Maxine's alimony lien. The total proposed repayment under the plan was $711,035.

Following submission of the plan, the Bank objected to it. After reviewing a statement of facts submitted by the Partnership, the bankruptcy court ruled that the real estate was not subject to the bankruptcy proceeding. The Partnership then submitted two more versions of the debtor's plan, the second of which was confirmed by the bankruptcy court. Under its amended versions, the plan no longer included the real estate as security for any debt and listed only the Partnership's chattels as security. The plan proposed to pay only that portion of the debt secured by the Partnership's chattels, an amount which would result in a return of approximately $300,000 to the Bank. At the time of the trial in the present action, the Partnership was in full compliance with that plan.

In September 1989, the Bank filed the present suit, seeking foreclosure of the mortgages. The Bank's petition stated that "the [Myerses] executed and delivered to [the Bank] two promissory notes in the amount of $1,235,000.00" that were subsequently renewed by notes signed "Myers Brothers by Adair Myers." The petition then noted that the Myerses had executed two mortgages on land they owned "to secure the payment of the indebtedness now evidenced by [the aforementioned] notes." Although the petition included copies of the renewed notes and the mortgages, which still described the debt as being personal to the Myerses, the prayer for relief made no mention of reformation. The Bank also requested

appointment of a receiver.

In their amended answer, the Myerses denied their individual indebtedness to the Bank. The defendants also raised several affirmative defenses, including that (1) the Partnership's debt had been discharged in bankruptcy and (2) the Bank was collaterally estopped, through the bankruptcy decision, from claiming that the Myerses were indebted on the notes. At trial, after the parties had rested, the Bank requested that its petition be conformed to the proof. The district court sustained the motion.

In its order, the district court first held that the mortgages were made with the intent to secure the Partnership's notes. Additional rulings by the court included that (1) the applicable statute of limitations was foreclosure; (2) there was no res judicata; (3) estoppel had not been pled; (4) although the Partnership's debt was discharged, the mortgage was not; and (5) no receiver should be appointed.

With regard to Maxine's lien, the court held that it was a superior lien to the Bank's on the Red Willow County real estate and that the lien secured $35,621 in past alimony. The court also held that the amount of Maxine's future lien was not determinable and that thus foreclosure of the lien could not be made without her consent. However, the court ruled that the property could be sold subject to Maxine's lien.

The court then ruled that the Bank was entitled to a decree of foreclosure and sale. The court awarded the Bank a judgment of $1,419,405.52 and ordered the defendants' interest in the land foreclosed. The Partnership was given 20 days to pay the debt or the property would be sold, subject to Maxine's superior lien on the applicable portion of the land.

Summarized, the Myerses and the Partnership argue that the court erred by (1) determining that the Bank had properly pled its cause of action and permitting amendment of the pleadings at the end of the trial; (2) determining that reformation is not a separate cause of action and need not be specifically pled; (3) not holding that reformation was barred by the statute of limitations; (4) failing to determine that the Bank did not meet its burden of proof for reformation; (5) determining that despite discharge of the Partnership's debt in bankruptcy, the

mortgages remained a valid lien; (6) determining that the Bank did not meet its burden of proof for foreclosure; (7) determining that collateral estoppel was not pled; and (8) ordering that the mortgages be foreclosed if the Partnership did not pay the debt in 20 days.

On cross-appeal, the Bank alleges that the court erred by (1) not appointing a receiver and (2) not foreclosing Maxine's alimony lien and valuing it in the amount of past-due alimony payments.

A proceeding to foreclose a real estate mortgage is an equitable action. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989); *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988). When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Regency Homes Assn. v. Egermayer, ante* p. 286, 498 N.W.2d 783 (1993); *Eliker v. Chief Indus., ante* p. 275, 498 N.W.2d 564 (1993).

Bearing in mind the foregoing standard of review, we turn to the contentions of appellants, Myerses and the Partnership. Appellants' first four assignments of error all focus, directly or indirectly, on the sufficiency of the Bank's assertion of its cause of action. Distilled, these arguments assert that due to the erroneous description by the maker of promissory notes in the mortgages, the Bank was required to plead that mistake, prove it, and seek reformation of the mortgages—all within the appropriate limitations period. Appellants contend that the Bank has failed to do so and thus should not be entitled to foreclose the mortgages. We disagree.

We first address the validity of the mortgages. Although appellants do not explicitly state that the mortgages were unenforceable as executed, they focus on the need for reformation of the instruments. Implicit in their argument is the premise that to be enforceable, a mortgage cannot erroneously describe the debt it secures.

Although this question is one of first impression in Nebraska, it has been addressed elsewhere. A number of courts in other jurisdictions have enforced mortgages despite inaccuracies in the description of the underlying debt. In their analyses, these courts often focused on the existence of the debt itself, rather than its description in the mortgage. See, e.g., *Tropicana Shipping, S.A. v. Empresa Nacional "Elcano"*, 366 F.2d 729 (5th Cir. 1966); *In re Spears*, 39 B.R. 91 (Bankr. E.D. Tenn. 1984); *Rogers v. Evans*, 137 Cal. App. 538, 31 P.2d 233 (1934); *E. E. E., Inc. v. Hanson*, 318 N.W.2d 101 (N.D. 1982). Cf. *Matter of Charter Executive Center Ltd.*, 34 B.R. 131 (Bankr. M.D. Fla. 1983). Moreover, some mortgages have been held enforceable if, by extrinsic evidence or other parts of the instrument, the debt sought to be secured may be accurately identified. See, *E. E. E., Inc., supra*; *Rogers, supra*; *Thompson v. Cobb*, 95 Tex. 140, 65 S.W. 1090 (1902). See, also, *Tropicana Shipping, S.A., supra*. We too have emphasized the importance of the debt, noting that the promissory note is the primary contract or obligation, and the mortgage an incident thereto. *A-1 Finance Co., Inc. v. Nelson*, 165 Neb. 296, 85 N.W.2d 687 (1957).

Finding the preceding cases persuasive, we hold that despite certain inaccuracies in its description of the debt it secures, a mortgage may still be enforceable. Turning to the facts of this case, we further hold that notwithstanding the erroneous description in the Bank's mortgages, the instruments were enforceable.

In the space provided for describing the debt, the two mortgages stated that $1,235,000 would be payable according to two promissory notes of the Myerses, which were due on September 7, 1984, and August 22, 1985. As previously noted, no such notes had been signed by the Myerses. However, based on the other information contained in the debt description and the information adduced at trial, it is clear which debt the mortgages were intended to secure. The Partnership had previously signed two promissory notes to the Bank, which were due on September 7, 1984, and August 22, 1985, and created a combined debt of $1,235,000. Those notes were later renewed by the Partnership, and one of the renewed versions,

which was attached to the Bank's petition, stated that it was secured by the August 1984 mortgage. Furthermore, the parties could not have been misled into thinking that the mortgages actually secured personal debts of the Myerses—at the time of the mortgages, only Adair had a personal debt with the Bank, in the amount of approximately $49,000. Finally, Adair admitted that the Myerses had to "put up the real estate" to obtain more credit *for the Partnership*.

The trial court specifically found that the mortgages were intended to secure the Partnership's notes. We agree. Despite the mortgages' inaccurate description by the maker of the notes, there was ample evidence to indicate which debt the parties intended to be secured. As such, the mortgages were enforceable in their form as attached to the petition.

Although we hold that the erroneous description in these mortgages did not render them unenforceable, we leave for another day the question of how much error would be too much. We note, however, that situations may arise where the party who makes such an inaccurate description may be precluded from enforcing the instrument. See *Gurske v. Strate*, 165 Neb. 882, 87 N.W.2d 703 (1958) (implying that the equitable rights associated with reformation may be altered where a third-party purchaser without notice relies on the original instrument).

Having determined that the mortgages were enforceable, we easily dispose of the appellants' assignments of error which relate to reformation. Because the mortgages were enforceable, they did not need to be reformed. Reformation did not need to be pled, and the limitations period for reformation did not apply. Appellants' arguments otherwise are without merit.

Nor do we find merit in the arguments that the Bank failed to properly plead its cause of action and that the court erred by allowing the Bank to conform its pleadings to the proof. Specifically, appellants argue that the Bank "did not plead reformation and did not plead liability of the defendants Adair Myers, Arden Myers and Edith Myers on any cause of action other than personal execution of the two notes." Brief for appellants at 20. Having already disposed of appellants' argument regarding reformation, we turn to the second portion

of their argument.

Neb. Rev. Stat. § 25-852 (Reissue 1989) permits the court to conform the pleadings to the facts proved when "the amendment does not change substantially the claim or defense." The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice resulted. *Thomas v. Marvin E. Jewell & Co.*, 232 Neb. 261, 440 N.W.2d 437 (1989); *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982). "Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact." *Id.* at 609, 324 N.W.2d at 809-10. Accord *Thomas, supra*.

Although the Bank's petition erroneously alleged that the Myerses had executed the original notes, it correctly stated that the notes had been renewed by the Partnership. It also stated that the notes were secured by the mortgages which, as we have previously discussed, adequately described the debt. Finally, the petition included copies of both the mortgages and the renewed Partnership's notes. The petition sufficiently indicated that the Myerses' mortgages were being foreclosed because the mortgages were intended to secure the Partnership's debt. Amendment of the petition to correct the erroneous allegation did not change the issues; it only clarified the factual scenario leading up to the foreclosure. We cannot say that the Myerses suffered prejudice by the amendment of the pleadings. We thus dispose of appellants' arguments relating to the sufficiency of the Bank's pleadings.

Appellants next argue that the district court erred by determining that despite the Partnership's discharge in chapter 12 bankruptcy, the mortgages remained a valid lien. Appellants assert that (1) the Partnership debt had been restructured, had been discharged, and was being repaid pursuant to the debtor's plan, and therefore, the debt was extinguished; (2) a mortgage cannot exist without a debt; and (3) a mortgage cannot be foreclosed absent a default. They conclude that either the mortgage has been released or, if it remains, the Bank cannot foreclose because the Partnership is in compliance with the debtor's plan. We address these contentions in order.

There is simply no support for appellants' first contention, that the debt has been extinguished and that therefore the mortgage has been released. Under the Bankruptcy Code, 11 U.S.C. § 524 (1988) provides, in relevant part:

> (a) A discharge in a case under this title—
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination *of the personal liability of the debtor* with respect to any debt discharged under section . . . 1228 . . . of this title . . . .
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt *as a personal liability of the debtor* . . . .
>
> . . . .
>
> (e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor *does not affect the liability of any other entity on, or the property of any other entity for, such debt*.

(Emphasis supplied.)

Based on the emphasized language, it is clear that the Bank retains its lien against the real estate. Only the Partnership was involved in the bankruptcy; thus, only it received a discharge. Moreover, the real estate, which was owned by the Myerses, was not property of the debtor. The Myerses, who pledged land as security for the debt of the Partnership, received no discharge. The property remained pledged as security for the note; the underlying debt was not extinguished. See *In re Lembke*, 93 B.R. 701, 702 (Bankr. D.N.D. 1988) ("a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability which, by virtue of [§] 524(a)(2) bars its enforcement against him. The debt still exists, however, and can be collected from any other entity that might be liable"). See, also, *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990), *modified, Abel v. West*, 932 F.2d 898 (1991); *United States v. Stribling Flying Service*, 734 F.2d 221 (5th Cir. 1984); *In re Fasse*, 40 B.R. 198 (Bankr. D. Colo. 1984); *Arkansas Real Estate Comm'n v. Veteto*, 303 Ark. 475, 798 S.W.2d 52 (1990).

We also note that the court handling the Partnership's bankruptcy ruled similarly on this issue. In an order released prior to the confirmation of the Partnership's debtor's plan, the U.S. Bankruptcy Court for the District of Nebraska found, among other things:

> The individual owners of the real estate [the Myerses] are not in bankruptcy. Their assets and obligations securing partnership debt are not subject to this proceeding. . . . In this case, the Bank has a secured claim to the extent of the value of the non-real estate assets. It is unsecured on the balance. *However, this does not affect Bank's* [*sic*] *rights with regard to claims against individual partners or against the real estate.*

(Emphasis supplied.)

Nor is there any merit to appellants' argument that the Partnership's compliance with its debtor's plan cured the default on the notes. Pursuant to its amended debtor's plan submitted after the journal entry which included the above-quoted language, the Partnership's plan proposed to repay only that portion of the debt secured by the Partnership's chattel assets. Thus, the confirmation of that plan precluded only an action by the Bank to recover debt secured by those assets. The plan did not, however, propose to repay any amount of the debt secured by the Myers' real estate. Therefore, despite the Partnership's compliance with its debtor's plan, the Bank was free to pursue its claim against the real estate. The bankruptcy court came to the same conclusion in its journal entry. The portion of the debt secured by the real estate had not been restructured pursuant to the Partnership's debtor's plan and thus remained in default.

As previously noted, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The Myerses' real estate remains pledged as security for the debt via the mortgage and is not relieved of that encumbrance simply because the Partnership has complied with its debtor's plan. Cf., *In re Western Real Estate Fund, Inc., supra*; *Stribling Flying Service, supra*.

Appellants argue that the Bank has failed to meet its burden

of proof because it has not shown a default. See *West Town Homeowners Assn. v. Schneider*, 231 Neb. 100, 435 N.W.2d 645 (1989). As our discussion has indicated, we disagree. The breach of terms of the promissory notes secured by the land was not cured under the Partnership's debtor's plan; contrary to appellants' arguments, there has been a default. The district court did not err by ruling that despite the Partnership's discharge, the mortgages could be foreclosed.

Appellants next argue that the district court erred in determining that collateral estoppel was not pled and therefore was not applicable. We agree on one point—allegations of collateral estoppel were included in appellants' second amended answer. However, we do not agree that collateral estoppel is applicable.

In their second amended answer, appellants asserted that the Bank was collaterally estopped from claiming that the Myerses are individually liable on the promissory notes because during the bankruptcy, the Bank "knowingly and deliberately maintained the position that the debt was incurred solely by [the Partnership] and that all benefits inured to [the Partnership] alone." The pleading further alleged that the Bank is collaterally estopped on the issue because it agreed to the debtor's plan and the restructuring of the Partnership's debt. In their brief, appellants argue that collateral estoppel applies because in its pleadings the Bank "continuously maintained the position that the promissory notes involved were individually signed by the [Myerses] and that the debt was that of the [Myerses] as individuals." Brief for appellants at 30. Each argument is incorrect.

We have previously delineated four conditions that must exist for the doctrine of collateral estoppel to apply:

> (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

(Emphasis omitted.) *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 154, 481 N.W.2d 165, 169 (1992).

When viewed with these conditions in mind, it becomes apparent that collateral estoppel does not apply to the case at bar. First, the Bank's statements in the pleadings of this action cannot work as a bar; there has not been the requisite prior action. Furthermore, as we have already discussed and as was determined by the bankruptcy court, the liability of the Myerses as individuals was not adjudicated in the bankruptcy proceeding. As such, the first requirement of collateral estoppel—prior adjudication of an identical issue—has not been met. The doctrine is thus inapplicable to this case.

The district court reached a similar finding in its order when referring to res judicata. Although collateral estoppel properly denotes the conclusive effect of a judgment with regard to specific issues, *Petska v. Olson Gravel, Inc., ante* p. 568, 500 N.W.2d 828 (1993), the court did not err in refusing to apply the doctrine. Appellants' argument to the contrary is without merit.

We thus turn to appellants' final argument, that the district court erred by ordering the Partnership to pay the debt within 20 days or the mortgages would be foreclosed. To an extent, we agree with appellants; the district court should not have "directed and ordered" the Partnership to pay the Bank. Such an order clearly violates the discharge that the Partnership received in bankruptcy. However, it seems equally clear that the court's statement was not made with the intention of violating the discharge order.

As our previous discussion has indicated, the Bank adequately pled and proved a cause of action for foreclosure. The district court so held. In its order, the court apparently was giving the defendants an opportunity to redeem by paying the judgment amount. Such action was permissible; only the wording of the order was improper.

The district court did not err by foreclosing the mortgages and ordering the sale of the property if the Bank was not paid the amount due it. We affirm the district court's decision on all issues raised by appellants, except that we modify the court's order by removing that portion which ordered the Partnership to pay the debt due the Bank. The order should simply state that if the Bank is not paid the amounts due it within 20 days, the

mortgages will be foreclosed and the property sold.

We now turn to the Bank's cross-appeal. The Bank contends that the court erred by (1) not appointing a receiver and (2) not foreclosing Maxine's alimony lien and valuing it in the amount of past-due alimony payments.

Under Neb. Rev. Stat. § 25-1081(2) (Reissue 1989), "[a] receiver *may* be appointed by . . . the district court . . . in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt." (Emphasis supplied.) The district court found that the mortgaged property was probably insufficient to pay the debt. However, the court reasoned that there had been no evidence shown as to the rights of the Partnership in a lease, the expected income from the property, the total rights and duties of the Partnership under the bankruptcy debtor's plan, the separation of income between the property subject to Maxine's superior lien, and other facts necessary for the designation of the receiver's duties. The court thus denied the Bank's request for appointment of a receiver.

Whether a receiver should be appointed in conjunction with a mortgage foreclosure action is a matter within the discretion of the trial court. On appeal, that decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989). See *O'Neill Production Credit Assn. v. Putnam Ranches, Inc.*, 198 Neb. 145, 251 N.W.2d 884 (1977).

In its brief, the Bank notes that the Partnership's debt exceeded the appraised value of the real estate, a point recognized by the district court. The Bank then cites us to a number of cases in which a debt was similarly undersecured and this court affirmed the granting of a receiver. Concluding, the Bank argues that the district court erred by failing to appoint the requested receiver. We do not agree.

Contrary to the Bank's argument, the key factor in our past affirmance of receiver appointments was not that the debt was undersecured; rather, it was the fact that the district court had determined that a receiver was appropriate. The hallmark of

these opinions was our deference to the district court, deference clearly mandated by the language of § 25-1081(2). This theme has been continually reflected in our decisions:

> In the appointment of a receiver, especially in a foreclosure case, very much must be left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely and to the injury of the party complaining, this court will not interfere.

Jacobs v. Gibson, 9 Neb. 380, 382, 2 N.W. 893 (1879). See, also, *Federal Land Bank of Omaha, supra*; *O'Neill Production Credit Assn., supra*; *Lackey v. Yekel*, 113 Neb. 382, 203 N.W. 542 (1925).

Based on the record before us, we again defer to the district court. We cannot say that the court's decision to deny the appointment of a receiver was an abuse of discretion. In spite of the undersecured debt, the record contains no evidence as to those matters which gave the court concern. Without such evidence, we are unable to conclude that the court's decision was unwise or that the Bank was injured. We will not disturb the court's ruling on the request.

We conclude by addressing the Bank's argument that Maxine's alimony lien should have been valued based on past-due amounts and foreclosed. In its decree, the district court ruled that Maxine's alimony lien was a superior lien on the Red Willow County real estate for both past and future alimony payments. The court valued the lien at $35,621 as of September 1, 1990, reflecting the amount in arrears at that time. However, the court further ruled that based on the evidence presented, the future value of the lien was indeterminable. The court thus held that Maxine's lien could not be foreclosed without her consent, but permitted the property to be sold subject to the lien.

The Bank first contends that Maxine bore the burden of proving the amount of her lien. Based on that premise, it argues that the evidence is insufficient to support the court's valuation of past-due alimony, and because Maxine did not present sufficient evidence to enable the amount of her future lien to be valued, she has lost the future lien.

To determine the merit of these arguments, we must first

determine the relative priorities of the parties' liens. Maxine's lien arose from a divorce decree which was entered August 16, 1979, in the district court for Red Willow County. Apparently, the judgment was never transcribed to Hitchcock County. The Bank's Red Willow County mortgage was recorded August 30, 1984. It is undisputed that Maxine has priority to all alimony that was in arrears as of that date.

With regard to the priority of Maxine's lien for the period following the execution of the mortgage, we have addressed similar questions on numerous occasions. In *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 385-86, 215 N.W.2d 629, 632 (1974), we stated: "The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future." See, also, *McCord v. McCord*, 128 Neb. 230, 258 N.W. 474 (1935); *Lynch v. Rohan*, 116 Neb. 820, 219 N.W. 239 (1928). Moreover, we have also stated:

> "[U]nder the statutes of this state, a judgment in favor of the wife for [a set alimony allowance per] month for her maintenance for an indefinite period is a lien upon the real estate of the husband for all amounts due and to become due under such decree, and will have priority over the lien of a judgment subsequently rendered against the husband."

McCord, 128 Neb. at 237, 258 N.W. at 477 (quoting *Lynch, supra*, and applying the preceding rule to a mortgagee who sought priority over the holder of an alimony lien). Cf. *Action Realty Co., Inc., supra* (holding that child-support liens have priority over subsequent encumbrances for all installments due or to become due).

Based on the foregoing language, it would seem that our inquiry is over and that Maxine has priority. However, each of the above-cited decisions applied statutory law that has since been repealed and replaced. (*Action Realty Co, Inc.* cites statutory provisions from both before and after the statutory changes. Although it is somewhat unclear which law the opinion relied upon, it is immaterial to our decision.) We thus must determine whether the new law requires a new rule.

Although *Action Realty Co., Inc.*, *McCord*, and *Lynch* relied on slightly different versions of the applicable statutes, the relevant statutory language stayed approximately the same and provided:

> "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments." . . . "Judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

(Emphasis omitted.) *Action Realty Co., Inc.*, 191 Neb. at 387, 215 N.W.2d at 632 (quoting Neb. Rev. Stat. §§ 42-319 and 42-323 (Reissue 1943)). Accord, *McCord, supra* (applying like language from Comp. Stat. §§ 42-319 and 42-323 (1929)); *Lynch, supra* (applying like language from Comp. Stat. §§ 1534 and 1538 (1922)).

In 1972, the Legislature repealed Neb. Rev. Stat. §§ 42-301 to 42-340 (Reissue 1943) and enacted substitute legislation. See 1972 Neb. Laws, L.B. 820. The pertinent statutory provisions provide: "Orders and judgments for temporary or permanent support or alimony shall be filed with the clerk *and have the force and effect of judgments when entered* . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 42-369(4) (Cum. Supp. 1992). "*All judgments and orders for payment of money shall be liens, as in other actions*, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments." (Emphasis supplied). Neb. Rev. Stat. § 42-371(1) (Cum. Supp. 1992).

Nothing in the present statutes indicates that the rule from our previous decisions on this issue should change. As the emphasized language indicates, the present statutes maintain the theme of their precursors: Alimony judgments continue to be liens. As such, if they precede a mortgage and are of record, they have priority over that mortgage. *Naudain v. Fullenwider*,

72 Neb. 221, 100 N.W. 296 (1904); Neb. Rev. Stat. § 25-1504 (Reissue 1989). See, also, *Omaha Loan & Bldg. Assn. v. Turk*, 146 Neb. 859, 21 N.W.2d 865 (1946); Neb. Rev. Stat. § 76-238.01 (Reissue 1990).

Pursuant to the Red Willow County divorce decree, Maxine's lien attached to the Red Willow County land on August 16, 1979. See § 25-1504. Her lien thus preceded, and has priority over, the mortgage—both as to past and future installments. See, *McCord v. McCord*, 128 Neb. 230, 258 N.W. 474 (1935); *Lynch v. Rohan*, 116 Neb. 820, 219 N.W. 239 (1928). Were we to hold that only *arrears* have priority, it would go against the clear intent of the statutes. Unlike the majority of judgments, alimony and support awards are necessarily forward-looking. Such is the case here. Maxine received a judgment entitling her to monthly alimony until she dies or remarries. That judgment is a statutorily declared lien on the property within the county, for all amounts due or to become due. See, §§ 42-369 and 42-371; *McCord, supra*. Cf. *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974).

We realize that when reaching our decision in *Lynch*, we relied, in part, on the portion of the then-existing statutes which stated that alimony was a lien "upon the property of the husband" as a basis for our determination that the lien maintained priority with regard to future alimony debts. Although that language was not made part of the present statutory scheme, we do not believe it changes the result. Sections 42-369 and 42-371 combine to provide that orders and judgments for alimony and support shall be liens. It is irrelevant that the statutes no longer single out one gender as the bearer of such a burden.

Having determined that Maxine's lien has priority over the mortgages, we must address the Bank's contention that she failed to meet her burden of proof. The Bank, as a junior lienholder, could foreclose Maxine's lien only with her consent. See, *Osage Oil & Refining Co. v. Mulber Oil Co.*, 43 F.2d 306 (10th Cir. 1930) (applying Oklahoma law); *Military Academy v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956). See, also, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.14

(2d ed. 1985). Cf. *Missouri, Kansas & Texas Trust Co. v. Richardson*, 57 Neb. 617, 78 N.W. 273 (1899). While we have held that a senior lienholder may be made a party to a foreclosure action to determine the priority and amount of his or her lien, see *id.*, those factors have been established here. The record contains adequate evidence to support the district court's $35,621 valuation of the alimony arrearage. Furthermore, the record also contains a copy of Maxine's divorce decree, which sets out the alimony payments due her until her death or remarriage. The record also indicates that Maxine is, in fact, alive and unmarried. Contrary to the Bank's contentions, Maxine does not lose her lien because she did not reduce its amount to present value.

We note that had it wished first priority at the time it sought the mortgages, the Bank could have requested that Maxine release her lien. See § 42-371(1) (Reissue 1984). Had she refused to grant a release, the Bank might have sought relief from the district court, perhaps posting bond to ensure payment of the judgment. See § 42-371(4) (Reissue 1984). However, because the Bank failed to conduct a title search before acquiring the mortgages, it took neither of the aforementioned precautions. It should not be heard to complain now. The Bank's arguments regarding Maxine's lien are without merit.

We affirm the rulings of the district court which foreclosed the Bank's mortgages on the Myerses' land, subject to Maxine Myers' alimony lien. We also modify the court's decree to the extent it is inconsistent with the discharge given the Partnership. The decree is affirmed in all other respects.

AFFIRMED AS MODIFIED.

LANPHIER, J., participating on briefs.

JACK HUMPHREY, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION, APPELLEE.

503 N.W.2d 211

Filed July 23, 1993. No. S-91-466.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Actions: Civil Rights.** A 42 U.S.C. § 1983 (1988) action is foreclosed where the governing statute provides an exclusive remedy for violation of its terms.
4. **Judgments: Verdicts.** On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the movant is deemed to have admitted as true all the 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 deducible from the relevant evidence.
5. **Directed Verdict.** In order to sustain a motion for directed verdict or judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
6. **Fair Employment Practices: Discrimination: Proof.** Although the ultimate burden of persuasion by a preponderance of the evidence in an age discrimination action under Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988) at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action. Should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
7. **Federal Acts: Fair Employment Practices: Discrimination: Proof.** To establish a prima facie case under 29 U.S.C. § 621 et seq. (1988), an age discrimination plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the position, and (4) the person who received the position was outside of the protected group.
8. **Rules of Evidence: Hearsay.** The language of Neb. Rev. Stat. § 27-803(7) (Reissue 1989), permitting the admission into evidence of "records, reports, statements or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law," does

not apply to investigative reports prepared by, or orders and determinations of probable cause issued by, the Nebraska Equal Opportunity Commission.

9. **Fair Employment Practices: Discrimination: Jury Instructions.** In an age discrimination case brought under the provisions of Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988), the jury is not to be instructed on the elements which constitute a submissible case.
10. **Jury Instructions: Appeal and Error.** The failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
11. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.

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

William J. Erickson for appellant.

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

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

CAPORALE, J.

I. INTRODUCTION

Upon being denied permanent employment by the defendant-appellee, Nebraska Public Power District (the district), the plaintiff-appellant, Jack Humphrey, brought suit alleging age discrimination in violation of the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988) (the state act), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1988) (the federal act), as well as denial of due process in contravention of 42 U.S.C. § 1983 (1988). The trial court directed a verdict in favor of the district on the § 1983 cause, the jury returned a verdict in favor of the district on the discrimination causes under the state and federal acts, and a judgment was entered accordingly. Humphrey contends in this court that the trial court erred in (1) sustaining the district's

motion for a directed verdict on his § 1983 cause, (2) failing to grant his motions for directed verdict and judgment notwithstanding the verdict on his state and federal act causes, (3) excluding from evidence certain findings and conclusions of the Nebraska Equal Opportunity Commission (the commission), and (4) giving a particular jury instruction. We affirm.

II. BACKGROUND

Humphrey, who was born August 22, 1935, was employed by the district as a temporary heating, ventilation, and air conditioning (HVAC) technician from July 8, 1985, to June 25, 1988. On or about September 8, 1987, Humphrey applied for the position of permanent HVAC technician III. However, 35-year-old David Einspahr was hired for that position as of February 1, 1988. Humphrey again applied for a permanent HVAC technician III position on June 9, 1988, but lost out to Christopher Kluthe, then 19 years old, who was hired as of July 1, 1988. Upon learning of Kluthe's promotion, Humphrey, on approximately June 28, quit his temporary employment with the district.

On September 26, 1988, Humphrey filed a complaint with the commission. In a determination filed on July 14, 1989, the commission found reasonable cause to believe that the district had discriminated against Humphrey because of his age, and this suit followed.

III. ANALYSIS

With that brief background in mind, we move on to a consideration of each of Humphrey's assignments of error.

1. Directed Verdict on § 1983 Cause

First, we address the challenge to the trial court's ruling directing a verdict in favor of the district on Humphrey's action under § 1983.

We begin by recalling that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. See, *Nichols v. Busse, ante* p. 811, 503 N.W.2d 173 (1993); *Sell v. Mary Lanning*

Memorial Hosp., ante p. 266, 498 N.W.2d 522 (1993). However, in reviewing the action of a trial court, we must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. See, *Sell, supra*; *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984).

The federal act makes it unlawful "for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." § 623(a). In most respects, the state act closely parallels the federal act. See *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988).

Section 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1366 (4th Cir. 1989), *cert. denied* 493 U.S. 850, 110 S. Ct. 147, 107 L. Ed. 2d 106, declares: "Section 1983 does not in itself create any substantive rights. Rather, it provides a statutory basis to receive a remedy for the deprivation of a right 'secured by the Constitution and laws' of the United States by a person acting under color of state law."

A § 1983 action is foreclosed "where the 'governing statute provides an exclusive remedy for violations of its terms.' " *Pennhurst State School v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), quoting *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (Powell, J., dissenting). Thus, we must decide whether the federal act forecloses a private action brought under § 1983 to enforce rights specifically addressed and protected by the federal act.

A number of federal courts have concluded that the federal act is the exclusive remedy for age discrimination in federal employment. See, e.g., *Ray v. Nimmo*, 704 F.2d 1480 (11th Cir.

1983); *Paterson v. Weinberger*, 644 F.2d 521 (5th Cir. 1981); *Giles v. Equal Employment Opportunity Com'n*, 520 F. Supp. 1198 (E.D. Mo. 1981); *Christie v. Marston*, 451 F. Supp. 1142 (N.D. Ill. 1978). See, also, *Dodson v. U.S. Army Finance and Accounting Center*, 636 F. Supp. 894 (S.D. Ind. 1986). Moreover, this principle of preclusion extends to state and local governmental employees, for "the [federal act] and its amendments provide a comprehensive statutory remedy that may not be bypassed through the means of an action under 42 U.S.C. § 1983." *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 469 (1st Cir. 1990). Accord, *Britt v. The Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 2929, 124 L. Ed. 2d 679 (1993); *Zombro, supra*; *Ring v. Crisp County Hosp. Authority*, 652 F. Supp. 477 (M.D. Ga. 1987); *Morgan v. Humboldt County School Dist.*, 623 F. Supp. 440 (D. Nev. 1985); *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982).

For example, in *Zombro*, the plaintiff, a member of the city police department, alleged that he was unlawfully transferred from one department to another because of his age. The plaintiff brought an age discrimination action under § 1983 (1982), 42 U.S.C. § 1985 (1982), and the 14th Amendment to the U.S. Constitution. The plaintiff did not seek remedy under the federal act.

In reaching the conclusion that the federal act provides the exclusive remedy for claims of age discrimination, the *Zombro* court wrote:

> It is implausible that Congress would have intended to preserve the private cause of action under § 1983 for age discrimination when that cause of action would severely undermine, if not debilitate, the enforcement mechanism created by Congress under the [federal act]. Congress, we believe, did not intend to permit plaintiffs to bypass the comprehensive statutory scheme clearly embodied in the language and legislative history of the [federal act] merely because they are employed by an agency operating under color of state law.

Zombro, 868 F.2d at 1369. We agree and, thus, conclude that the federal act provides the exclusive judicial remedy for claims

of age discrimination.

But this does not end our inquiry, for Humphrey attempts to circumvent the aforementioned preemption principle by claiming that his § 1983 claim does not sound in age discrimination, but, rather, seeks to remedy the deprivation of a property interest. Indeed, if Humphrey has alleged facts which indicate that the district violated some federally secured right other than those already protected by the federal act, a separate § 1983 action could lie. See *Morgan, supra.*

However, the property interest claims upon which Humphrey relies are found in a provision of the district's employee handbook promising to afford equal opportunity to district employees regardless of age. Moreover, Humphrey points to the district's policy of compliance with a presidential executive order requiring federal contractors to take affirmative action to eliminate age discrimination. The essence of both of these contentions is the district's policy of not discriminating on the basis of age. Thus, Humphrey's § 1983 claim mirrors his age discrimination claim under the federal act, i.e., that he was denied the positions because of his age. Because Humphrey's § 1983 claim is grounded solely in age discrimination, it is precluded by the federal act. Accordingly, the trial court was correct in directing a verdict in favor of the district on Humphrey's § 1983 claim.

2. Denial of Directed Verdict and Judgment Notwithstanding the Verdict on State and Federal Act Causes

Next, we address Humphrey's assertion that the trial court erred in failing to enter a verdict in his favor on his causes under the state and federal acts and in failing to grant him a judgment notwithstanding the jury's verdict.

> "On a motion for judgment [non obstante veredicto, or notwithstanding the verdict], the movant is deemed to have admitted as true all the 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 deducible from the relevant evidence."

Pugh v. Great Plains Ins. Co., 239 Neb. 171, 172, 474 N.W.2d 677, 679 (1991). In order to sustain a motion for directed verdict or judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991).

The state act protects individuals who are "at least forty years of age but less than seventy years of age." § 48-1003. Section 48-1004(a) of the state act provides that it is unlawful for an employer "[t]o refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction."

While federal protection is now provided to all individuals who are at least 40 years of age, § 631, we, as a general rule, in other respects conform our reading of the state act to the reading of the federal act. *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988).

In cases arising under the state act, we have held that

> although the ultimate burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action. Should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Allen, 228 Neb. at 506, 423 N.W.2d at 427-28. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). (As recently clarified in *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, ____ S. Ct. ____, 125 L. Ed. 2d 407 (1993), *McDonnell Douglas Corp.* allocates the burden of production and the order for the presentation of the evidence; the ultimate burden of persuasion, however, rests on the plaintiff.)

To establish a prima facie case, an age discrimination

plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the position, and (4) the person who received the position was outside of the protected group. See, *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723 (8th Cir. 1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 635, 121 L. Ed. 2d 566; *Stein v. National City Bank*, 942 F.2d 1062 (6th Cir. 1991); *Allen, supra*. The ultimate issue is whether age was a determining factor in the employer's decision. *U.S.E.E.O.C. v. Century Broadcasting Corp.*, 957 F.2d 1446 (7th Cir. 1992). See *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986), *cert. denied* 479 U.S. 885, 107 S. Ct. 278, 93 L. Ed. 2d 254.

(a) First Permanent Position

With regard to the first position Humphrey was denied, three of the four elements of a prima facie case are clearly satisfied because the 52-year-old Humphrey came within the protected group; he was subjected to an adverse employment action by being denied the permanent position; and the position went to Einspahr, who was 35 years of age at the time he was hired and thus was not a member of the protected group. Consequently, the issue on which we focus is whether Humphrey was in fact qualified for the permanent position. Moreover, even if Humphrey established a prima facie case, he is required to then prove that the district's legitimate reason for not hiring him (i.e., that Einspahr was better qualified) was pretextual.

The record demonstrates that Humphrey possessed some of the skills necessary for the position, for he had received training in vibration analysis, basic refrigeration, and asbestos. Moreover, Humphrey was described as being "exceptional" at tubing. In his response on a job posting form, Humphrey stated that he realized he needed training in some areas and was willing to take more training and schooling. On the other hand, aside from on-the-job training, Einspahr had received no training for the position.

Furthermore, some evidence exists to show that Humphrey was a more productive employee than Einspahr. Admitted at trial were two volumes of job orders and a job order summary, showing that in the years 1986 and 1987, Humphrey completed

a higher percentage of job orders assigned than did Einspahr. Humphrey did not receive any criticism or negative verbal evaluations during his temporary employment and was described as being "punctual," whereas Einspahr was reprimanded about occasional tardiness.

Humphrey's shortcoming appears to have been his inability to use the computer system, which was used to determine the location, quantity, and item number of spare parts. The job description for the position specified that the ability to operate computer terminals to obtain information was "necessary to perform [the] job in a satisfactory manner." An electrical maintenance supervisor stated that computer literacy was "pretty essential" because "[e]verything is on the computer." Humphrey admitted that the computer was difficult for him and that he had problems using it, choosing instead to rely upon computer printouts. Einspahr, on the other hand, was able to use the computer system.

Finally, district officials were of the view that Einspahr possessed characteristics of leadership that Humphrey lacked. When Humphrey and Einspahr were sent out on jobs together, the HVAC foreman observed that

> normally [Einspahr] was the one that kind of took control. [He] was more aggressive just by nature than [Humphrey] and so therefore, I could see that once they left the office, although they were tech III type of individuals, that [Einspahr] was going to be the one that was kind of going to run the show.

Einspahr also displayed a zest for learning that Humphrey did not. Einspahr was described by a district hiring official as "more aggressive in his eagerness to want to learn" than Humphrey. For example, an HVAC foreman had given a book on electric theory to both Einspahr and Humphrey. When later asked if he had the book, Humphrey stated that he was not sure where he had placed it. Einspahr, however, asked questions about the reading and appeared to the foreman to have increased his knowledge in electricity, whereas Humphrey had not. The foreman also found that Humphrey had difficulty retaining information.

Although district officials admittedly found the decision to

hire Einspahr instead of Humphrey to be "a close call," they concluded that Einspahr "was doing a little better job."

(b) Second Permanent Position

Addressing the second position Humphrey was denied, we again discover that three of the four elements of the prima facie case are clearly established, since Humphrey was a member of the protected group; he was subjected to an adverse employment action; and Kluthe, who was 19 years old at the time he was hired for the permanent position, was outside of the protected group.

Kluthe received an associate's degree in air conditioning technology from a community college in December 1988. In Humphrey's own words, Kluthe's "technical training was very good." Although Kluthe was described by a coworker as "cocky," it was conceded that he "was a step ahead of probably most everybody in the shop."

An electrical maintenance supervisor for the district testified that the HVAC foreman stated that Humphrey, because of his age, would not be there in a couple of years and thus should not be hired. The supervisor told the foreman that they could not consider Humphrey's age.

Although the decision between Humphrey and Einspahr was a close one, there was little question when it came to Kluthe versus Humphrey. Kluthe "impressed" and "amazed" the supervisor because "he was coming in within a month making recommendations for changes to the entire system because he found things wrong." The HVAC foreman testified that it was "very evident" that Kluthe was the better HVAC technician.

As the aforementioned discussion illustrates, it is in dispute whether Humphrey established that he was qualified for the position, a necessary element of an age discrimination prima facie case. Even assuming that Humphrey established a prima facie case, the evidence presented an issue as to whether the district articulated legitimate, nondiscriminatory reasons for its decisions or whether those reasons were merely pretextual. The evidence was not such that reasonable minds could draw but one conclusion: that age was a determining factor in the district's decisions to hire Einspahr and Kluthe rather than

Humphrey. Because it is the prerogative of the jury, as the trier of fact, to resolve conflicts in the evidence and to determine the weight and credibility to be given to testimony of witnesses, *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992), and *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989), the evidence clearly presented a submissible issue for the jury. The trial court thus properly denied Humphrey's motion for directed verdict and request for judgment notwithstanding the verdict.

3. ADMISSIBILITY OF COMMISSION FINDINGS AND CONCLUSIONS

Humphrey also claims that the trial court erred in excluding from the evidence the commission's investigative reports and a portion of its determination. Although the trial court received in evidence portions of the determination containing the commission's findings, it excluded investigative reports of onsite interviews with district officials and the commission's determination that reasonable cause existed to believe that the district discriminated against Humphrey on the basis of age.

Neb. Rev. Stat. § 27-803 (Reissue 1989) provides, in relevant part:

> Subject to the provisions of section 27-403 [permitting the exclusion of certain relevant and probative evidence], the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (7) Upon reasonable notice to the opposing party prior to trial, records, reports, statements or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness.

We have held admissible under that provision a record of the revocation of a motorist's license, *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990), and records showing fingerprints, *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977). Unlike the material Humphrey here seeks to introduce, the records admitted in the foregoing cases reflected, in one instance, a

firsthand factual observation, and in the other, a mere depiction of physical characteristics. In contrast, Humphrey seeks to introduce not facts required to be observed and recorded pursuant to law, as contemplated by § 27-803(7), but investigative data, opinions, and conclusions drawn therefrom.

We recognize that under Fed. R. Evid. 803(8)(C), a number of federal courts have held that the admissibility of material such as Humphrey sought to introduce is entrusted to the discretion of the trial court. E.g., *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990), *cert. denied* ____ U.S. ____, 111 S. Ct. 2263, 114 L. Ed. 2d 715 (1991); *Tulloss v. Near North Montessori School*, 776 F.2d 150 (7th Cir. 1985); *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir. 1984), *cert. denied* 469 U.S. 1041, 105 S. Ct. 525, 83 L. Ed. 2d 413; *Nulf v. International Paper Co.*, 656 F.2d 553 (10th Cir. 1981); *Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir. 1977). But it must be remembered that the federal rule permits, in civil actions, the introduction of "factual findings resulting from an investigation made pursuant to authority granted by law . . . ." Our § 27-803(7) does not so permit, and for good reason, for the merit of such investigations is largely in the mind of the reader. Compare *Plummer v. Western Intern. Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981) ("[a]n [agency] determination, prepared by professional investigators on behalf of an impartial agency, has been held to be a highly probative evaluation of an individual's discrimination complaint"), with *Johnson*, 734 F.2d at 1309 ("[agency] determinations are not homogeneous products; they vary greatly in quality and factual detail").

Thus, the trial court should have excluded all of the material generated by the commission. However, its error in this regard inured to Humphrey's benefit and thus provides him with no basis for appellate relief.

4. Jury Instruction

Humphrey claims that the trial court erred in a particular instruction to the jury. Therein, the trial court advised the jury that Humphrey had the burden in the first instance to prove that he was qualified for the positions for which he had applied

and that he had been passed over by virtue of his age, and that if Humphrey had met that initial burden, it became the district's burden to prove that it had a legitimate, nondiscriminatory reason for hiring Einspahr and Kluthe rather than Humphrey.

The questioned portion of the instruction then told the jury:

> If you have determined that [Humphrey] has met his initial burden of proof [as set forth previously], and that the [district] has met its burden of proof [as set forth previously], then [Humphrey] must prove by the greater weight of the evidence that:
>
> . . . The reason or reasons articulated by the [district] for not employing [Humphrey] as a permanent HVAC technician during 1988 are pretextual in nature, *and* that the stated reason or reasons for the [district's] actions were not the only reason or reasons, and that the age of [Humphrey] made a difference in the [district's] employment decision.

(Emphasis supplied.)

We first observe that much of the instruction should not have been given at all. That an age discrimination plaintiff must first establish that he or she was qualified for the position for which he or she was rejected and that he or she was disadvantaged by virtue of age are matters for the trial court to consider in determining whether a plaintiff has established a prima facie case. If the plaintiff has done so and the defendant has articulated a legitimate, nondiscriminatory reason for its action, then a submissible case has been made and the jury need only be instructed that it is the plaintiff's burden to prove that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. See *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, ____ S. Ct. ____, 125 L. Ed. 2d 407 (1993) (employer's production of evidence of nondiscriminatory reason, whether ultimately persuasive or not, satisfies employer's burden of production and rebuts presumption raised by employee's prima facie case).

The matter is akin to that presented in *State v. McCurry*, 228 Neb. 841, 424 N.W.2d 364 (1988). We therein declared that because whether *Miranda* warnings had been properly administered and whether the criminal defendant had waived

those rights were questions of law, it was inappropriate to instruct the jury to disregard the defendant's custodial statement to law enforcement officers unless it found the foregoing two conditions to have been met.

That having been clarified, we return to Humphrey's claim that the emphasized conjunctive word "and" in the questioned portion of the instruction at issue should have been the disjunctive word "or." He argues that this mistake placed a "double burden" on him.

He concedes, however, that he failed to object to the instruction at trial and admits that he did not raise this issue in his motion for new trial. We have ruled that the "[f]ailure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error." *Paro v. Farm & Ranch Fertilizer, ante* p. 390, 395, 499 N.W.2d 535, 540 (1993). Accordingly, we consider only whether the alleged mistake constituted plain error indicative of a probable miscarriage of justice.

> Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.

Katskee v. Nevada Bob's Golf of Neb., 238 Neb. 654, 661, 472 N.W.2d 372, 379 (1991).

In his attempt to demonstrate that the claimed defect amounts to plain error, Humphrey calls our attention to *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984), a case involving an automobile-motorcycle collision. The court therein remanded the cause for a new trial because the trial court failed to provide the jury with an instruction on the definition of "proximate cause." That is not the situation here: the trial court did not fail to instruct on an issue essential to the resolution of the case; it described the same requirement twice.

The second segment of the questioned portion of the instruction, that the stated reason or reasons for the district's

actions were not the only reason or reasons, merely restates the first segment of that portion of the instruction, i.e., that the reason or reasons articulated by the district for not employing Humphrey were pretextual in nature. "Pretext" has been defined as an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." Black's Law Dictionary 1187 (6th ed. 1990). Indeed, the jury, after beginning its deliberations, requested an instruction from the trial court on the definition of "pretextual." The parties stipulated to provide the jury with a photocopy of the definition of "pretext" found in Webster's Ninth New Collegiate Dictionary 932 (1985): "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Thus, if the jury found that the reasons were pretextual, it can necessarily be said that those were not the only reason or reasons. While the trial court gave the jury more information than necessary by advising them as to what constitutes a prima facie case, we cannot under the circumstances say it committed plain error.

IV. JUDGMENT

The record failing to sustain any of Humphrey's assignments of error, we affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARLON BRAY, APPELLANT.

503 N.W.2d 221

Filed July 23, 1993. No. S-92-756.

1. **Motions to Suppress.** The duty rests on the defendant, after his motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made.
2. **Trial: Evidence: Appeal and Error.** On appeal, the defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.

3. **Appeal and Error.** Absent plain error, an appellate court will not address an issue not assigned and discussed in the party's brief.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

WHITE, J.

Marlon Bray appeals from a jury verdict convicting him of possession of marijuana with intent to deliver and resulting in a sentence of 2 years' imprisonment. Bray asserts that the warrant underlying the search of his residence was invalid and that the district court should have granted his motion to suppress the evidence seized pursuant to the warrant. We affirm.

On December 18, 1991, an Alliance police officer applied for a telephonic warrant to search Bray's apartment. The application was granted and the warrant issued. An affidavit sufficient to support issuance of the warrant accompanied the application. The record also indicates that at the time of the warrant's issuance, all procedural requirements relating to the issuing of a telephonic warrant had been complied with.

Upon searching Bray's apartment, the police discovered and seized drug paraphernalia and marijuana. Bray was charged with possession of marijuana with intent to deliver.

Prior to trial, Bray moved the court to suppress all evidence seized pursuant to the warrant. At the hearing on the motion, Bray challenged the validity of the warrant, arguing that it did not comply with Nebraska's telephonic warrant statutes, Neb. Rev. Stat. §§ 29-814.03 to 29-816 (Reissue 1989). He concluded that all evidence resulting from the invalid warrant should be suppressed. The district court overruled the motion.

At trial, evidence regarding the search was introduced through both testimony and exhibits. After the jury found Bray

guilty of possession of marijuana with intent to deliver, he was sentenced to not less than 2 years' imprisonment. The case comes before us pursuant to our granting of Bray's motion to bypass the Nebraska Court of Appeals.

Bray's sole assignment of error challenges the "[u]se at trial by the prosecution of evidence seized pursuant to an invalid search warrant in violation of the Defendant's statutory and constitutional rights."

Before turning to Bray's argument, we address a threshold issue raised by the State. The State argues that despite his motion to suppress, Bray failed to preserve the issue of the propriety of the court's ruling thereon because he did not adequately object to the introduction of the seized evidence at trial.

When the State began questioning the first witness regarding the evidence found during the search, Bray's counsel stated: "I would ask that a continuing objection be noted objecting to any *testimony* regarding what was found in the apartment." (Emphasis supplied.) The objection, which was based on Bray's motion to suppress, was overruled. Later, the State offered the actual evidence seized during the search, which included over 400 grams of marijuana, a marijuana pipe, and the remains of several marijuana cigarettes. Bray again objected; however, this time counsel based the objection on foundation and relevancy, stating: "There's been no showing what those exhibits are." The objection was again overruled.

The State argues that because Bray did not object to the seized evidence based on the alleged invalidity of the warrant, he has waived that claim of error on appeal.

We have consistently held that the duty rests on the defendant, after his motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made. *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993); *State v. Partee*, 240 Neb. 473, 482 N.W.2d 272 (1992). Moreover, on appeal, the defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact. *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991). Finally, absent

plain error, this court will not address an issue not assigned and discussed in the party's brief. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

Applying the preceding rules to the case at bar, we must agree with the State. Bray has not adequately preserved his challenge to the evidence supporting his conviction. While Bray's objection to *testimony* relating to the search was adequate to preserve the issue, neither his assignment of error nor his argument even addresses the overruling of that objection. We cannot say that any impropriety in the court's interpretation of the meaning of the statutory language and its application to this case are so plainly evident from the record that it rises to the level of plain error. See *Sayer v. Bowley, ante* p. 801, 503 N.W.2d 166 (1993). Thus, we do not address the court's ruling on the testimony on our own motion. See Neb. Ct. R. of Prac. 9D(1)d.

As for his objection to the evidence *seized*, Bray does question the propriety of the court's ruling in his brief. However, objections based on foundation and relevancy do not preserve for appeal the "invalid warrant" challenge that he now asserts. See *Jensen, supra*. Thus, we do not even reach the merits of Bray's attack on the validity of the search warrant. By failing to challenge the seized evidence on that ground at trial, he has also failed to preserve such a challenge for appeal.

Based on the lack of adequate challenges to the evidence used to convict him, we find the record contains ample evidence to support Bray's conviction for possession of marijuana with intent to deliver. The judgment of the district court is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF A.M. STEPHENSON, DECEASED. MICHAEL N. MULLIGAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HELEN STEPHENSON, DECEASED, APPELLANT, V. M.L. STEPHENSON ET AL., COPERSONAL REPRESENTATIVES OF THE ESTATE OF A.M. STEPHENSON, DECEASED, APPELLEES.

503 N.W.2d 540

Filed July 30, 1993. Nos. S-90-919, S-90-920.

1. **Decedents' Estates: Pleadings: Executors and Administrators.** As a result of Neb. Rev. Stat. §§ 30-2315 and 30-2317 (Reissue 1989), a surviving spouse elects to take a share in the augmented estate when a petition for the elective share is filed in the county court that has probate jurisdiction and is served on the estate's personal representative, if any.
2. **Decedents' Estates: Abatement, Survival, and Revival: Executors and Administrators.** When a surviving spouse has petitioned for an elective share of a decedent's estate, the right to pursue an elective share is no longer a surviving spouse's potential personal right subject to abatement, but has become a right vested in the surviving spouse. Therefore, if a surviving spouse dies after filing a petition for an elective share pursuant to Neb. Rev. Stat. §§ 30-2315 and 30-2317 (Reissue 1989), the proceeding to enforce the spouse's election as a vested right may be revived by the personal representative of the estate of the spouse who has made the election but who has died before distribution of property pursuant to the elective share.
3. **Decedents' Estates: Claims: Abatement, Survival, and Revival.** Under Neb. Rev. Stat. §§ 30-2324 and 30-2325 (Reissue 1989), a right to allowances for homestead, exempt property, and unpaid spousal support survives the claimant's death to the extent of unpaid support.
4. **Antenuptial Agreements.** An antenuptial agreement is statutorily authorized by Neb. Rev. Stat. § 30-2316 (Reissue 1989) of the Nebraska Probate Code.
5. **Antenuptial Agreements: Statutes: Time.** An antenuptial agreement is governed by the statute in effect at the date of a deceased spouse's death.
6. **Antenuptial Agreements.** As a contract, an antenuptial agreement is governed by the same principles that are applicable to other contracts, but is subject to the particular statutory requirement that an antenuptial agreement must be based on fair disclosure.
7. **Antenuptial Agreements: Proof.** A party asserting the invalidity of an antenuptial agreement has the burden of proving invalidity.
8. **Antenuptial Agreements: Words and Phrases.** As used in Neb. Rev. Stat. § 30-2316 (Reissue 1989) concerning an antenuptial agreement, "fair disclosure" means that before signing an antenuptial agreement, each party must disclose to the other the facts that exist at the time of the agreement and which, in the absence of the antenuptial agreement, affect or determine the prospective intestate share of a surviving spouse in the disclosing party's estate or which otherwise affect or determine distribution of property at the disclosing party's death.

9. **Antenuptial Agreements.** Neb. Rev. Stat. § 30-2316 (Reissue 1989) imposes a statutory duty that the parties to an antenuptial agreement make fair disclosure before signing the antenuptial agreement.
10. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
11. _____: _____. As a general principle of proof, one alleging fraud must prove fraud.
12. **Decedents' Estates: Courts: Jurisdiction: Equity.** In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction.
13. **Actions: Contracts: Rescission: Equity.** An action to rescind a written instrument is an equity action.
14. **Fraud: Proof: Circumstantial Evidence.** Fraud may be proved by circumstantial evidence.
15. **Equity: Fraud: Proof: Evidence.** In an equity case, fraud must be proven by clear and convincing evidence.
16. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, THOMAS J. GIST, Judge. Judgment of District Court affirmed, and cause remanded with direction.

Richard L. Halbert and Michael R. Dunn, of Halbert & Dunn, and Daniel Duffy, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

M.J. Bruckner and Paul J. Peter, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., and William F. Davis for appellees.

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

SHANAHAN, J.

Helen Stephenson, the widow of A.M. Stephenson, filed her petition in the county court for Otoe County, requesting

allowances for homestead, exempt property, and spousal support and further requesting that the court, pursuant to Neb. Rev. Stat. § 30-2317 (Reissue 1989), set over to Helen her elective share in the augmented estate of A.M. Stephenson, deceased.

The personal representatives of the A.M. Stephenson estate objected to Helen's requested allowances and an elective share because Helen and A.M. Stephenson had signed an antenuptial agreement which barred Helen's sharing in the A.M. Stephenson estate and waived all claims against the estate. In response to the objection, Helen replied that the antenuptial agreement was "a result of fraud and overreaching."

The county court found that the evidence was "clear and convincing" that the antenuptial agreement was the "result of fraud in the inducement on the part of A.M. Stephenson" because "A.M. Stephenson intentionally withheld from Helen Stephenson information concerning the nature and extent of his assets." Therefore, the court entered judgment for Helen Stephenson and invalidated the antenuptial agreement, thereby entitling Helen to an elective share equal to one-half of the augmented estate of A.M. Stephenson, deceased. The county court also granted Helen Stephenson allowances for spousal support, homestead, and exempt property. Later, the county court ordered that the estate pay fees and costs for the lawyers who represented the personal representatives on their objections.

The county court's judgments were appealed to the district court, which, finding that the evidence was not "clear and convincing" on the issue of A.M. Stephenson's fraud, reversed the county court's judgment on the antenuptial agreement and remanded the cause to the county court with direction "to incorporate the provisions of the antenuptial agreement in the estate proceeding, giving it full force and effect," that is, the antenuptial agreement barred Helen Stephenson's claims against, and an elective share of, the estate of A.M. Stephenson, deceased. However, the district court affirmed the county court's judgment for fees and costs.

Helen Stephenson appealed from both judgments of the district court, but died pending her appeals consolidated for

disposition by this court. Helen Stephenson's appeals have been revived in the name of Michael N. Mulligan, personal representative of the estate of Helen Stephenson, deceased. See Neb. Rev. Stat. § 25-1401 et seq. (Reissue 1989) (revivor of action).

REVIVOR

The personal representatives of the A.M. Stephenson estate contend that since Helen has died during pendency of these appeals, her claims for allowances and an elective share as a surviving spouse have abated; therefore, revivor is unavailable.

Neb. Rev. Stat. § 30-2315 (Reissue 1989) of the Nebraska Probate Code states: "The right of election of the surviving spouse may be exercised only during his or her lifetime by him or her." According to § 30-2317: "The surviving spouse may elect to take his or her elective share in the augmented estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share . . . ."

Neb. Rev. Stat. § 30-2324 (Reissue 1989) of the Nebraska Probate Code authorizes an allowance for support of a surviving spouse during administration of an estate. Further, § 30-2324 provides in part: "The death of any person entitled to family allowance, other than the surviving spouse, terminates his [or her] right to allowances not yet paid." Also, in part Neb. Rev. Stat. § 30-2325 (Reissue 1989) provides:

> The homestead allowance, the exempt property, and the family allowance as finally determined by the personal representative or by the court, shall vest in the surviving spouse as of the date of decedent's death, as a vested indefeasible right of property, shall survive as an asset of the surviving spouse's estate if unpaid on the date of death of such surviving spouse, and shall not terminate upon the death or remarriage of the surviving spouse.

The appellee personal representatives point to *In re Estate of Samson*, 142 Neb. 556, 7 N.W.2d 60 (1942), and *Jacobson v. Nemesio*, 204 Neb. 180, 281 N.W.2d 552 (1979), as support for their position that Helen Stephenson's claims for allowance and an elective share are abated by her death. In *In re Estate of Samson*, which was decided before the current Nebraska

Probate Code became effective on January 1, 1977, see Neb. Rev. Stat. § 30-2901 (Reissue 1989), this court held that a widow's claim for spousal allowance for her deceased husband's estate was based on a personal right that abated when the widow died during pendency of the widow's appeal from an adverse judgment on her claim for the allowance. In *Jacobson*, this court, considering whether a surviving spouse's claim for support survived the claimant's death, stated that allowances for homestead, exempt property, and spousal support

> are all provided by statute and are personal in nature. We have found no statute, nor are we cited to any statutory provision, declaring that these rights, personal in nature, survive the death of the surviving spouse. It is fundamental that when a party to a pending suit dies and the right is personal in nature, the right dies with the person. The personal representatives of a deceased party to a suit cannot prosecute or defend a suit after his death unless the cause of action on which the suit was brought is one that survives by law.

204 Neb. at 183, 281 N.W.2d at 554. However, we note the existence of §§ 30-2324 and 30-2325 in the Nebraska Probate Code as previously mentioned.

The plain language of §§ 30-2315 and 30-2317, when read conjunctively, states that a surviving spouse elects to take a share in the augmented estate when a petition for the elective share is filed in the county court that has probate jurisdiction and is served on the estate's personal representative, if any. When a surviving spouse has petitioned for an elective share, the right to pursue an elective share is no longer a surviving spouse's potential personal right subject to abatement, but has become a right vested in the surviving spouse. Therefore, if a surviving spouse dies after filing a petition for an elective share pursuant to §§ 30-2315 and 30-2317, the proceeding to enforce the spouse's election as a vested right may be revived by the personal representative of the estate of the spouse who has made the election but who has died before distribution of property pursuant to the elective share.

Helen Stephenson timely elected to take her share of the augmented estate of A.M. Stephenson, deceased; hence, her

election survives her death and may be pursued by the personal representative of her estate. Also, the clear language of §§ 30-2324 and 30-2325 directs that a right to allowances for homestead, exempt property, and unpaid spousal support survives the claimant's death to the extent of unpaid support. Therefore, Helen Stephenson's right to pursue her elective share in the augmented estate of A.M. Stephenson, deceased, and her right to allowances were not terminated by the death of Helen Stephenson, but survived her death as an asset of her estate. Consequently, the present appeals are properly revived by the personal representative of the estate of Helen Stephenson, deceased.

ANTENUPTIAL AGREEMENTS

Generally.

In Nebraska, an antenuptial agreement is statutorily authorized by the Nebraska Probate Code, specifically, Neb. Rev. Stat. § 30-2316 (Reissue 1989), which states:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. . . .

"An antenuptial agreement is a contract entered into between a man and a woman in contemplation, and in consideration, of their future marriage whereby the property rights and economic interests of either the prospective wife or husband, or both, are determined and set forth . . . ." *Gross v. Gross*, 11 Ohio St. 3d 99, 102, 464 N.E.2d 500, 504 (1984). Accord, *Russell v. Walz*, 458 N.E.2d 1172 (Ind. App. 1984); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 494 P.2d 208 (1972). Regarding antenuptial agreements, this court stated in *In re Estate of Enyart*, 100 Neb. 337, 343, 160 N.W. 120, 122 (1916):

> Such instruments frequently tend to peace and happiness by settling questions concerning rights of property which, especially in the case of marriage of people in later life having children of a former marriage, often furnish

> grounds of irritation and friction which may defeat the very purpose of the union.

Accord *Wulf v. Wulf*, 129 Neb. 158, 261 N.W. 159 (1935). In *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986), this court held that an antenuptial agreement which was entered into before January 1, 1977, the effective date of § 30-2316, is governed by the statute in effect at the date of a deceased spouse's death. See § 30-2901 (effective date of the Nebraska Probate Code is January 1, 1977).

Antenuptial Agreements as Contracts.

As a contract, an antenuptial agreement is governed by the same principles that are applicable to other contracts, but is subject to the particular statutory requirement that an antenuptial agreement must be based on fair disclosure. See *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963) (an antenuptial agreement, unrecognized at common law, must comply with the formalities prescribed by the statute authorizing antenuptial agreements; hence, compliance with statutory formalities is essential to the existence of an antenuptial agreement). See, also, *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162 (1990) (antenuptial agreements are enforceable as any other contract and are examined under the same criteria applicable to other types of contracts); *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985) (general contract law governs antenuptial agreements); *McHugh v. McHugh*, 181 Conn. 482, 436 A.2d 8 (1980) (antenuptial agreement is a type of contract and must comply with ordinary principles of contract law).

Burden of Proof re: Invalidity.

A party asserting the invalidity of an antenuptial agreement has the burden of proving invalidity. See *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986). See, also, *Gant v. Gant, supra* (burden of demonstrating invalidity of antenuptial agreement is on the party asserting the agreement's invalidity); *In re Estate of Lopata*, 641 P.2d 952 (Colo. 1982) (a party contesting the validity of an antenuptial agreement has burden of proving invalidity); *In re Estate of Kester*, 486 Pa. 349, 405 A.2d 1244 (1979) (burden of proof is on one seeking to

invalidate an antenuptial agreement). Thus, the rule concerning the burden of proof to invalidate an antenuptial agreement favors the validity of antenuptial agreements and is, therefore, consistent with the notion that antenuptial agreements are useful instruments which can be helpful in ordering the financial affairs of spouses, particularly spouses who seek to protect the financial well-being of a child or children born of a prior marriage.

In *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 488, 149 N.W.2d 344, 352 (1967), this court stated:

> Ordinarily the burden of proof as to the invalidity of an antenuptial contract is on the party alleging it; but if the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband to prove the validity of the contract.

Consequently, we now expressly disapprove and reject the statement in *Strickland v. Omaha Nat. Bank, supra*: "[I]f the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband to prove the validity of the contract."

"FAIR DISCLOSURE"

In accordance with § 30-2316 regarding an antenuptial agreement, "after fair disclosure" one may sign a written contract or agreement waiving the right to an elective share of a prospective spouse's estate and the right to allowances for homestead, exempt property, and spousal support.

In *In re Estate of Hill*, 214 Neb. 702, 706-07, 335 N.W.2d 750, 753 (1983), this court characterized "fair disclosure" used in § 30-2316:

> "Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income. The mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement. Where the agreement was freely executed, the fact that one party did not disclose in detail to the other party the nature, extent,

> and value of his or her property will not alone invalidate the agreement or raise a presumption of fraudulent concealment. [Citations omitted.] Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage."

(Quoting *In re Estate of Lopata, supra.*) Accord *In re Estate of Peterson, supra.*

Notwithstanding the phrase "fair disclosure" in § 30-2316, this court has held that the basic issue for invalidation of an antenuptial agreement "is fraud or overreaching and not the absence of disclosure." *Moss v. Stueven*, 200 Neb. 215, 217, 263 N.W.2d 98, 100 (1978). Accord, *Grassman v. Jensen*, 183 Neb. 147, 158 N.W.2d 673 (1968) (fraud in the inducement is sufficient ground for avoidance of antenuptial agreement); *Strickland v. Omaha Nat. Bank, supra* (basic issue is fraud or overreaching, not the absence of disclosure).

Therefore, as used in § 30-2316 concerning an antenuptial agreement, "fair disclosure" means that before signing an antenuptial agreement, each party must disclose to the other the facts that exist at the time of the agreement and which, in the absence of the antenuptial agreement, affect or determine the prospective intestate share of a surviving spouse in the disclosing party's estate or which otherwise affect or determine distribution of property at the disclosing party's death. Thus, § 30-2316 imposes a statutory duty that the parties to an antenuptial agreement make fair disclosure before signing the antenuptial agreement. Cf. *Strickland v. Omaha Nat. Bank, supra* (parties to an antenuptial agreement have a relationship of mutual trust and confidence).

FRAUD BY CONCEALMENT

Fraud by Concealment.

"[W]here one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation." *State*

ex rel. NSBA v. Douglas, 227 Neb. 1, 25, 416 N.W.2d 515, 530 (1987).

Accordingly, to prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment. See, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

> *Conceal* means "To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).

Christopher v. Evans, 219 Neb. 51, 55, 361 N.W.2d 193, 196 (1985). Accord, *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991); *Kracl v. Loseke, supra*.

Burden of Proof re: Fraud.

As a general principle of proof, one alleging fraud must prove fraud. See *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

HELEN STEPHENSON'S CLAIM

To avoid the consequence of her antenuptial agreement with A.M. Stephenson, Helen Stephenson asserts that the agreement resulted from A.M. Stephenson's fraudulent concealment which induced her to sign the agreement. Therefore, Helen Stephenson requested, in essence, that the county court rescind the antenuptial agreement, setting aside the agreement as a bar to Helen's taking an elective share of, and receiving allowances

from, the estate of A.M. Stephenson, deceased.

County Court Jurisdiction.

Concerning a county court's jurisdiction, Neb. Rev. Stat. § 30-2211(b) (Reissue 1989) states: "The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it."

In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction. See, *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988); *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985); *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

"An action to rescind a written instrument is an equity action." *Kracl v. Loseke*, 236 Neb. at 292, 461 N.W.2d at 69. Accord, *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); *Christopher v. Evans, supra.*

Because rescission of the Stephenson antenuptial agreement was an equitable remedy, the county court, exercising equity power within the court's probate jurisdiction, applied equity principles in determining whether the agreement was fraudulent and, therefore, subject to rescission in the sense that the antenuptial agreement would be set aside as a bar to Helen Stephenson's share of the estate of A.M. Stephenson, deceased.

Proof of Fraud.

"Fraud may be proved by circumstantial evidence." *Kracl v. Loseke*, 236 Neb. at 296, 461 N.W.2d at 72. Accord, *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

"In an equity case, fraud must be proven by clear and convincing evidence." *Kracl v. Loseke*, 236 Neb. at 296, 461 N.W.2d at 72.

"[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984). Accord, *In re Interest of C.K., L.K., and G.K.*, 240

Neb. 700, 484 N.W.2d 68 (1992); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

STANDARD OF REVIEW

According to Neb. Rev. Stat. § 25-2733 (Reissue 1989), which is applicable to appeals under the Nebraska Probate Code, see Neb. Rev. Stat. §§ 30-2217 and 30-1601 (Reissue 1989), the district court's standard of review for a judgment within a county court's probate jurisdiction is an examination "for error appearing on the record made in the county court . . . ."

"In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. See, Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992) . . . ." *In re Estate of Watkins, ante* p. 583, 587, 501 N.W.2d 292, 295 (1993). However, as noted, there is an equity question involved in the probate proceedings for the estate of A.M. Stephenson, deceased, namely, whether the antenuptial agreement is a product of fraud by A.M. Stephenson's concealment so that the antenuptial agreement may be set aside as a bar to Helen Stephenson's share of the estate of A.M. Stephenson, deceased, and allowances from the estate.

> In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Chambers-Dobson, Inc. v. Squier, 238 Neb. 748, 750, 472 N.W.2d 391, 395 (1991). Accord, *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986).

Therefore, both the district court and this court, as appellate courts reviewing an equity question determined in probate

proceedings before a county court, must conduct a de novo review of the record and reach factual conclusions independent of those reached by the county court.

BACKGROUND

Before the Agreement.

In 1956, Helen Stephenson, then Helen Mulligan, became acquainted with A.M. Stephenson and started working as a clerk in a Nebraska City hotel owned by him. Helen and her children moved to Columbus, Nebraska, in 1960, where she remained until 1968, when she returned to Nebraska City and renewed her acquaintance with A.M. Stephenson, whose wife had died a year earlier.

Meeting for the Antenuptial Agreement.

On the morning of February 27, 1969, A.M. Stephenson telephoned Helen and said "get your bag packed" because he and she were going to "catch a plane to Las Vegas and be married." Stephenson was 65 years of age, and Helen was 58. However, before departing for the airport, A.M. Stephenson and Helen met at the office of Otto H. Wellensiek, A.M. Stephenson's longtime lawyer. Helen was nervous, and therefore, Wellensiek read a "prenuptial agreement" for Helen, who had no lawyer and had not seen the agreement before her appearance at Wellensiek's office. The agreement contained no information concerning A.M. Stephenson's property. No financial statement for A.M. Stephenson or list of his property was given to Helen. Although Helen believed that A.M. Stephenson had substantial property interest, she lacked knowledge concerning his specific assets.

Wellensiek was A.M. Stephenson's lawyer in various business and personal transactions and had handled the legal work for A.M. Stephenson's purchases and sales of property. Also, as A.M. Stephenson's lawyer who had prepared the antenuptial agreement, Wellensiek recognized the importance of a disclosure of property in conjunction with an antenuptial agreement and, as A.M. Stephenson's lawyer, undertook "every effort to make a full disclosure" to Helen. In making this disclosure, Wellensiek mentioned several items of property owned by A.M. Stephenson, including a liquor store in

Nebraska City, the Grand Hotel Company, the Stephenson Hotel and Stephenson Motel in Falls City, Nebraska, as well as a hotel and motel in Mexico, Missouri. Wellensiek further mentioned that A.M. Stephenson had substantial funds in the form of cash and certificates of deposit and said that A.M. Stephenson's assets were valued in "excess of a million dollars." A.M. Stephenson "concurred" with Wellensiek's description of the Stephenson property.

The Antenuptial Agreement and Marriage.

After Wellensiek's property description, Helen signed the antenuptial agreement before a notary public in Wellensiek's office. The agreement stated, among other things, that

> upon the death of either [A.M. Stephenson or Helen], the survivor will not have, and will not assert any claim, interest, estate, or title under the laws of any State, because of such survivorship in or to the property, real, person, or mixed, of which said deceased party may die seized or possessed . . . and such survivor hereby relinquishes to the heirs, devisees, administrators, executors, and assigns of such deceased party, any and all of his or her claim, distributive share, interest, estate, or title that he or she would be entitled to as the surviving husband or wife respectively . . . .

After signing the antenuptial agreement, A.M. Stephenson and Helen flew to Las Vegas, where they married on March 1, 1969.

Estate of A.M. Stephenson, Deceased.

A.M. Stephenson died testate on January 29, 1987. Under his will filed with the county court on February 13, 1987, and later admitted to probate, A.M. Stephenson acknowledged that he left two sons and a daughter surviving him and, after devising a trust estate of $35,000 for the benefit of Helen Stephenson, devised a life estate to Helen concerning the family residence, made several bequests to his children and grandchildren, devised the "Stephenson Toddy Shop," a liquor store, to his grandsons, bequeathed to his children and grandchildren all his capital shares in the Grand Hotel Company, and devised the residue of his estate to his son and

grandsons.

The inventory filed in the A.M. Stephenson estate reflected assets valued at $1.1 million, that is, the following assets and values: real estate—$154,400; securities—$274,154; notes and cash—$176,800; insurance—$2,800; property owned jointly with a person other than Helen Stephenson—$165,000; miscellaneous personal property—$63,574; and gifts within 3 years before A.M. Stephenson's death—$276,000.

At the trial concerning Helen's petition for an elective share and allowances and the personal representatives' objection based on the antenuptial agreement, Helen Stephenson, when asked whether A.M. Stephenson or his lawyer, Wellensiek, had told her about all of A.M. Stephenson's property, replied: "I just don't remember because all I wanted to do was get that paper signed and get out and get my bag packed." Further, on cross-examination of Helen Stephenson, questions were asked and answered as follows:

> Q- Isn't it true, Mrs. Stephenson, that at the time you signed the agreement, you didn't care whether [A.M. Stephenson] had any other property because all you wanted was to be taken care of?
>
> A- That's right.
>
> Q- You had kind of a rough life up until that point in time —
>
> A- I did.
>
> Q- Your first husband was not able to support you very well?
>
> A- That's right.
>
> Q- And all you were really interested in was in being taken care of?
>
> A- That's right.
>
> Q- And that is — And that came down to having a home and some security?
>
> A- That's right.
>
> . . . .
>
> Q- And isn't it true, Mrs. Stephenson, that you don't know what it was that Mr. Stephenson had, that he did not disclose at the time that you entered into the [antenuptial agreement], because you were not interested, isn't that

true?

A- Yes, it's true.

. . . .

Q- So you weren't interested in what he had that he may not have disclosed at the time of the execution of the prenuptial agreement back in 1969, isn't that true?

A- I didn't go into it —

Q- But the fact of the matter is, that at the time of the execution of that agreement you were not interested because what you wanted was a husband and security?

A- That's right.

The county court found that the evidence clearly and convincingly established A.M. Stephenson's fraud in concealing information concerning his assets when he and Helen signed their antenuptial agreement. Therefore, the county court found that A.M. Stephenson's fraud by concealment invalidated the antenuptial agreement and determined that Helen Stephenson, in the absence of the antenuptial agreement which was invalidated, was entitled to a $412,516 share of the estate of A.M. Stephenson, deceased. The court also awarded Helen allowances for homestead, exempt property, and spousal support for 1 year. Attorney fees were awarded to the personal representatives' lawyers.

In appeals to the district court, the county court's judgment for the attorney fees was affirmed, but the district court concluded that evidence of A.M. Stephenson's fraud was not "clear and convincing" and, consequently, reversed the county court's judgment concerning invalidation of the antenuptial agreement and remanded the cause to the county court with the direction previously mentioned.

ASSIGNMENTS OF ERROR

Helen Stephenson, through the personal representative of the estate of Helen Stephenson, deceased, contends that (1) the evidence prevents the district court's judgment reversing the county court's judgment for Helen Stephenson and remanding the cause to the county court; (2) the county court erred in its determination concerning the value of a liquor store, the Stephenson Toddy Shop, as an asset of the estate of A.M.

Stephenson, deceased; and (3) the county court abused its discretion in awarding attorney fees for the personal representatives' lawyers.

DE NOVO REVIEW

Because this is an equity case involving alleged fraud by concealment, we have conducted our de novo review of the record as required in an appeal from a judgment in an equity action. See *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991).

Even if we assume for the time being that A.M. Stephenson intentionally withheld material information necessary for a fair disclosure under § 30-2316, a de novo review brings our focus to Helen Stephenson's testimony, which may be summarized as follows: Before and at the time of signing the antenuptial agreement, Helen Stephenson's primary reason for signing the agreement was her prospective marriage to A.M. Stephenson and her "being taken care of" with a husband, home, and security. Therefore, according to Helen Stephenson, she was not interested in A.M. Stephenson's property, his financial condition, or his assets as information inducing her to sign the antenuptial agreement. In that posture, the evidence is neither clear nor convincing that Helen Stephenson relied on any information about A.M. Stephenson's financial condition or assets as an inducement to the antenuptial agreement. In our view, all the evidence points to the fact that Helen Stephenson would have signed, and actually did sign, the antenuptial agreement regardless of any disclosure or absence of a disclosure by A.M. Stephenson concerning facts and information which potentially and eventually affected Helen Stephenson's elective share in A.M. Stephenson's estate in the absence of an antenuptial agreement. However, we neither state nor imply that Helen Stephenson had a duty to inquire about A.M. Stephenson's property. A.M. Stephenson had the duty to make a fair disclosure in reference to the antenuptial agreement. Nonetheless, because Helen Stephenson failed to establish her detrimental reliance on the disclosure, she failed to prove her claim based on A.M. Stephenson's fraud by concealment and, therefore, was not entitled to equitable relief

in the form of a rescission, that is, invalidation of the antenuptial agreement. See *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

Thus, as a result of our factual findings independent of those made by the county court as the trial court for the Stephenson case, we conclude that Helen Stephenson failed to meet her burden of proof, by clear and convincing evidence, that A.M. Stephenson concealed material information required to be disclosed for a valid antenuptial agreement and that such concealment induced Helen Stephenson to sign the antenuptial agreement. Therefore, our finding coincides with the fundamental finding by the district court; hence, we affirm the district court's judgment reversing the county court's judgment concerning the antenuptial agreement and remanding this cause to the county court with direction that the antenuptial agreement, as a matter of law, bars Helen Stephenson's elective share in the estate of A.M. Stephenson, deceased, and bars allowances to Helen Stephenson for homestead, exempt property, and spousal support.

Since we have determined that the antenuptial agreement has not been invalidated and, therefore, that Helen Stephenson is not entitled to an elective share of the estate of A.M. Stephenson, deceased, or allowances from the estate, we need not consider Helen Stephenson's assignments of error concerning the valuation of the Stephenson Toddy Shop and the attorney fee awarded to the personal representatives' lawyers.

CONCLUSION

After our de novo review, we affirm the district court's judgments. Accordingly, as the result of the district court's judgment concerning the antenuptial agreement, this cause is remanded to the county court for further proceedings with the direction that the antenuptial agreement bars Helen Stephenson's elective share of the estate of A.M. Stephenson, deceased, and, further, bars allowances to Helen Stephenson from the estate of A.M. Stephenson, deceased.

AFFIRMED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JEFF BOPPRE, APPELLANT.

503 N.W.2d 526

Filed July 30, 1993. No. S-92-519.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial made under Neb. Rev. Stat. § 29-2101 (Reissue 1989) because of (1) irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the State, or any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial; (2) misconduct of the jury or the prosecuting attorney, or of the witnesses for the State; or (3) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed on appeal.
2. **Due Process: Prosecuting Attorneys: Evidence.** Irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment.
3. **Prosecuting Attorneys: Pretrial Procedure.** There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.
4. **Motions for New Trial: Evidence.** The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.
5. _____: _____. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
6. _____: _____. Evidence tendered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
7. **Rules of Evidence: Witnesses: Impeachment: Prior Statements.** Although Neb. Rev. Stat. § 27-607 (Reissue 1989) provides that the "credibility of a witness may be attacked by any party, including the party calling" her or him, a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
8. **Rules of Evidence: Hearsay: Proof.** In order for a statement to qualify as an excited utterance, there must have been a startling event, the statement must have related to the event, and the statement must have been made while under the stress of the event; the key requirement is spontaneity, a showing that the statement was made without time for conscious reflection.
9. **Rules of Evidence: Verdicts: Juries.** Neb. Rev. Stat. § 27-606(2) (Reissue 1989) prohibits inquiry into a jury's votes.

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

Lawrence G. Whelan for appellant.

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

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

CAPORALE, J.

I. STATEMENT OF CASE

In *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990) (*Boppre I*), we affirmed the judgments adjudicating the convict appellant herein, Jeff Boppre, guilty of two counts of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), two counts of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1989), and two counts of using a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). The convict thereafter filed a motion for new trial, which the district court overruled. In this appeal from that ruling, the convict asserts, in summary, that the district court erred by failing to (1) find prosecutorial misconduct, (2) find the existence of newly discovered evidence, and (3) receive evidence concerning the early vote of the jury. We affirm.

II. SCOPE OF REVIEW

The convict asserts he is entitled to a new trial under Neb. Rev. Stat. § 29-2101 (Reissue 1989), which provides, so far as is relevant to the allegations in his motion:

> A new trial, after a verdict of conviction, may be granted, on the application of the [convict], for any of the following reasons affecting materially his substantial rights: (1) Irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the state, or any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial; (2) misconduct of the jury or the prosecuting attorney, or of the witnesses for the state . . . (5) newly discovered evidence material for the [convict] which he could not with reasonable diligence have discovered and produced at the trial. . . .

We have held that a motion for new trial on the basis of newly

discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed on appeal. *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). We now hold that the same standard of review applies to the other grounds asserted in the motion for new trial filed herein.

III. FACTS

The facts as adduced at the convict's trial are contained in *Boppre I* and are not repeated herein, except as otherwise specifically indicated. Except as so indicated, the facts hereinafter set forth were developed at the hearing on the convict's motion for new trial and relate to the summarized assignments of error which the convict has discussed in his brief. The convict has also made arguments based on material which the district court excluded from the evidence but which rulings the convict has not assigned as error. Inasmuch as Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) provides that, save for plain error we might choose to review, consideration of a case will be limited to the errors assigned, we do not concern ourselves with those arguments. See, *Baker's Supermarkets v. Feldman, ante* p. 684, 502 N.W.2d 428 (1993); *State v. Martin, ante* p. 368, 500 N.W.2d 512 (1993); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992).

1. Prosecutor's Conduct

The claim of prosecutorial misconduct embodied in the first summarized assignment of error centers on the trial testimony of Alan Niemann and on the failure of the prosecution to have revealed the existence of Melissa Moreno, who once claimed to have been present while the murders were committed.

(a) Niemann Testimony

After being contacted by a fellow inmate on Niemann's behalf, a group of private investigators hired by the convict's family met with Niemann at the Omaha Correctional Center. As a result, Niemann both signed an affidavit and made a sworn oral statement which was reported by a member of a firm of reporters.

In the affidavit Niemann recites, in part:

> The testimony I gave [at trial] was not a true and accurate depiction of my knowledge of the incidents . . . . The product of my testimony was a direct result of the use of threats, intimidation, and coercion I was subjected to by the present Scottsbluff [sic] County Attorney, Brian Silverman. Mr. Silverman stated that if I did not testify the way that he wanted me to I would be charged with two counts of murder. Furthermore, Mr. Silverman gave me several typed pages detailing the information he wanted me to testify to. Mr. Silverman told me to "read and memorize these pages and get it right."

The affidavit further declares that Niemann obtained the specific details in his testimony regarding the murders from typed information Brian Silverman told him to testify to; from Silverman's "coaching" of testimony on not less than eight occasions; from information his attorney told him about statements his former roommate, Kenard Wasmer, was making; and from newspaper articles.

According to the affidavit, the true facts, which directly contradict his trial testimony, are the following:

> I was never in the house rented by Richard Valdez.
>
> I never saw Jeff Boppre shoot Richard Valdez or Sharon Condon.
>
> I never saw Richard Valdez laying on the floor or move while on the floor after being shot.
>
> I never saw Jeff Boppre break out a light bulb in the Valdez house.
>
> I never removed any items from the Valdez house.
>
> I have never been in possession or have any knowledge of scales Richard Valdez owned or had at his residence.
>
> I never saw Jeff Boppre throw away a gun either going to or coming back from Phoeniz [sic], Arizona.
>
> The camera used at trial was my camera that I had owned a long time prior to the murders.
>
> Jeff at no time stated to me, "You should have heard that bitch beg for her life."

These clear and concise affidavit declarations stand in stark contrast to Niemann's oral statement, which is almost entirely

devoid of questioning regarding coerced and coached testimony or the specific denials of his trial testimony. For the most part, Niemann is unable in his statement to clearly recall or state what he actually did or saw on the night of the murders. He believes that the convict made three or four trips to the residence of Richard Valdez for the purpose of purchasing cocaine, the last two trips being made after midnight, when one of their acquaintances went home for the evening. After the convict, Wasmer, and Niemann finished using the cocaine, which was probably around 1 a.m., the convict left to go home to bed. Sometime later, possibly after 15 to 45 minutes, the convict returned, asking whether Niemann and Wasmer wanted to go to Phoenix. The three had previously discussed going there, but had no definite plan to do so. Shortly after the convict returned, the three left for Arizona without packing anything for the trip. Niemann denied that he or the convict brought an army coat full of items stolen from Valdez into the trailer. Niemann also denied that he and the convict walked to a cliff west of Gallup, New Mexico, and threw a gun away, saying, rather, "We walked down to the cliff and took a leak."

The State produced three affidavits in rebuttal of Niemann's recantation of his trial testimony. The first was from James Snyder, an investigator with the Nebraska State Patrol. Snyder interviewed Niemann on two different occasions after the convict's investigators had done so, and on both occasions Niemann told Snyder that his sworn testimony at trial was the truth. Niemann also stated that he recanted his trial testimony to the convict's investigators so that they would quit bothering him.

Before considering the second affidavit, which was made by Robert Kinsey, a detective lieutenant of the Scottsbluff Police Department, we point out that the trial record demonstrates that when Kinsey first met with Niemann at the Scottsbluff office of the State Patrol, Niemann claimed that the convict had left Niemann's home at 1 o'clock on the morning of the murders to go to the convict's own house in order to change clothes and stop at the bank to get cash. The convict returned a short time later, and they left for Phoenix at that time. Niemann also told Kinsey that the convict and Wasmer were wearing the

same clothes at the time of the convict's arrest as when they left for Phoenix. Niemann also said that the convict traded the gun, which later proved to be the murder weapon, to Valdez for cocaine about a week before the murders. At that point in the interview, Kinsey gave Niemann the *Miranda* warnings even though Niemann was not then under arrest, according to Kinsey's new trial affidavit. Niemann then elected to have an attorney present; the interview was terminated, and Niemann was allowed to leave the State Patrol office. Later that evening, Niemann was arrested at his home when a search and arrest warrant was executed. Niemann was then interviewed a couple of days later in the presence of his attorney, Charles Fitzke. According to the trial record, after his arrest and until trial, Niemann was not allowed to speak to Wasmer about the case.

The third affidavit is that of Fitzke, the then public defender for Scotts Bluff County. By the time he was appointed to represent Niemann, Niemann was being held in the Scotts Bluff County jail and had been charged with Class II felony robbery. The two discussed the circumstances of Niemann's involvement. After those discussions, Fitzke informed the prosecution that Niemann was willing to cooperate and testify truthfully regarding his involvement if the State would reduce his charges to a Class III felony. To Fitzke's knowledge, the prosecution had no information as to what Niemann would say or would be able to testify to until he was first interviewed in Fitzke's presence. Niemann's statement at that time was consistent with the one he had previously given to Fitzke, and at no time did the prosecuting attorney, his deputies, or the investigator coerce or intimidate Niemann or supply him with any information.

(b) Moreno's Existence

Three and a half days after the murders, Melissa Moreno, then a high school junior, claimed to two of her classmates that she had been present at the murders.

According to these classmates, Moreno appeared to be "really scared and sad," and turned around looking the other way prior to talking with them. Moreno said she had been with the victim Sharon Condon the day of the murders and had gone

to the Valdez residence that evening at around 7 p.m. Numerous persons visited the Valdez residence. Later, between 11 p.m. and midnight, Moreno and Condon, who were then apparently alone in the house, heard noises and people talking outside the house. When they heard noises at the back door sounding as though someone was breaking in, Condon told Moreno to go hide. Moreno went into the bedroom and hid under the bed.

Moreno continued that she heard Condon's footsteps as she entered the doorway of the bedroom, three different male voices, and footsteps entering the house by the back door. Initially, one of the men walked toward the bedroom while the other two walked around in other parts of the house. Moreno heard some men talking, but she did not know what they were saying. She then heard Condon's scream and gunshots.

Moreno knew the convict and his voice and claimed that she "knew it wasn't his voice" and that "he didn't do it." Three gunshots were fired initially, and after the other two intruders' footsteps approached the bedroom, three or four additional shots were fired. The shots seemed to be directed into the bedroom; Moreno did not hear Condon say or do anything after screaming at the first shots. Moreno heard one of the three running away and then a light or light bulb breaking. At that point, she heard what she believed to be a fourth party coming in the back door, followed by two or three additional gunshots. Moreno believed it had been Valdez entering the house and being shot by one of the three intruders. Following that shooting, the intruders "were running through the house . . . . They were picking up things and they were running. [Moreno] heard them run out the door, and she heard a car door slam and then the car take off."

Moreno claimed to have waited under the bed for about 10 minutes to be certain everyone was out of the house. When she got out from under the bed, she was unable to see much in the darkness. She ran toward the kitchen and heard glass crackling under her. Looking down, she saw a body in the kitchen area. She ran out of the Valdez house through the back door to a nearby house.

Moreno then broke off her story, as other students were entering the classroom and class was called to order. At other

times, Moreno told a teacher and guidance counselor that she had knowledge of the murders, and she told the entire classroom that she was at the murder scene under the bed, without elaborating the details.

The two classmates Moreno initially talked with told a third student of Moreno's version of what she witnessed at the murder scene. When this third student told her mother what she had heard, the mother notified law enforcement officials. As a result, the third student was interviewed by an officer and gave a signed statement.

Moreno was questioned by a deputy sheriff approximately a week after her conversation with her classmates. Although she admitted that she had said she was in the Valdez residence, she denied telling anyone that she was under the bed when the shooting occurred. She explained that she was upset and confused, and "it was just something she made up out of frustration and anger and she apologized for making the statement." She knew only what she had heard from the media and others. Moreno also told police that she was very close to the victims and that she was like their little sister. She had been at the Valdez house many times, occasionally staying overnight, and had been present several times when Valdez prepared marijuana and cocaine for sale, use, and distribution. She did not know the convict well but had been present a couple of times when he purchased cocaine and marijuana. Moreno had seen the convict and Valdez argue and shout at each other while negotiating drug deals, and Condon had told her Valdez did not like or trust the convict.

On the evening of the murders, Moreno, Condon, and Valdez had gotten food and gone cruising in Condon's automobile. After cruising for awhile, Condon and Valdez dropped Moreno off at a party in Scottsbluff.

In her initial statement to police, Moreno said she had left the party twice, walking to nearby locations to see other friends and relatives, leaving at 3 or 4 o'clock Monday morning. In a later affidavit, Moreno recited that after being left off at the party at 9 p.m., she did not recall leaving the house where the party was held.

The convict's trial counsel, Leonard Tabor, testified that at

the relevant time defense counsel in the area were not permitted to obtain copies of police reports but could review the file, take notes, and dictate from the material. They were, however, provided copies of all laboratory reports. Tabor was never denied an opportunity to examine police reports in the county attorney's office, and none of those involved in the police investigation ever refused to show him evidence or cooperate with his requests to see evidence. Tabor dictated from some of the reports in the case and took handwritten notes on those he deemed less important.

Tabor did not recall Moreno's name surfacing at any point and is certain that neither she nor anyone else was ever identified as a potential eyewitness to the murders via any discovery he was allowed. He first learned of Moreno's claimed presence at the murders long after trial through the convict's private investigators.

2. OTHER EVIDENCE CLAIMED TO BE NEWLY DISCOVERED

The claim asserted in connection with the second summarized assignment of error, that there exists material newly discovered evidence which the convict could not with reasonable diligence have discovered and adduced at trial, involves, in addition to the matters discussed in connection with the prosecutor's conduct, the testimony of the convict's sister-in-law, Lori Boppre, the wife of the convict's brother, Danny; the offer of proof of a handwriting expert; and the theory of a "criminalist."

(a) Sister-in-Law's Testimony

The sister-in-law claims that her testimony at trial was not fully truthful, as her husband had physically abused her on several occasions and had threatened her life and that of their son.

She asserts that her husband told her what to say to the convict's defense attorney and how to testify at trial. According to the sister-in-law, her husband told her "not to mention that he was there when the murders were talked about. He told [her] to only mention, that he was there to smoke weed with Kenard and Alan, and that anything pertaining to the murders [she] was not supposed to mention."

After the murders, Wasmer and Niemann no longer frequented her home. Even after her husband was imprisoned, she did not come forward to correct her inaccurate testimony because she remained in fear of him and his family. In fact, she did not reveal the inaccuracy of her testimony until she had been contacted three or four times by the convict's investigators, deciding to do so only after consulting with her therapist.

The sister-in-law now claims that shortly before the murders, she heard her husband, Wasmer, Niemann, and one Ruff discuss murdering someone whom she later learned to be Valdez. One of them said that they "should do the person that they got this terrible weed from." After that time, she, on at least 10 occasions, heard the four discussing and planning a murder on virtually a daily basis. The convict was never a party to the discussions.

According to her testimony at the hearing on the new trial motion, "We were out at Danny's parents' house, and they were all in the garage, and they came out, and Danny told me later on that Ricky Zogg offered him $10,000 to kill Richard Valdez, and [Wasmer] and [Niemann] were present." However, later during her direct examination, the following exchange occurred:

> Q. Did you hear your husband say, that he wanted to kill Valdez and steal his money, and his dope?
>
> A. No. Because of the fact, that he never mentioned who they were talking about.
>
> Q. Well, did you hear him say, that he wanted to kill somebody and steal their money and dope?
>
> A. Yes.

The sister-in-law claims that on one occasion her husband said that he "didn't have any money, he didn't have anything to sell, he was tired of being broke, and wanted some money and drugs."

She heard the four discuss trying to find a way to involve the convict, because they knew he planned a trip to Arizona sometime soon and because they had fired the convict's gun when her husband had borrowed it.

Her husband had known Niemann since the two were

classmates in the seventh or eighth grade, and came to know Wasmer when he moved to the Scottsbluff area in August 1988. She claims that Wasmer and Niemann wanted to meet with the convict but that he was always working, so they were not introduced to him until sometime in September. However, at trial the convict testified that he had encountered Niemann and Wasmer in early August through his brother and that he began to obtain cocaine for them in late August.

The sister-in-law's affidavit outlines the events immediately surrounding the murders as follows:

> During the week prior to the Valdez/Condon murders, Jeff Boppre mentioned the fact that he was planning a trip to Arizona. Once Danny Boppre, Alan Niemann and Kenard Wasmer heard the news that Jeff Boppre would be going to Arizona, they started talking more about killing someone and now mentioned the fact that they would be going to Arizona.
>
> On the evening of Sunday, September 18, 1988, Alan Niemann, Kenard Wasmer, Kevin Cushing, Chris Ruff and a friend of Chris Ruff's were at our residence . . . . During that time, Danny and I began arguing over the fact that I was tired of listening to them talk about killing someone. At 7:00 P.M. all of the men departed including Danny Boppre. At 9:00 P.M. Danny Boppre returned to our residence. A short time later, I observed Danny pacing the floor, repeatedly looking out the window and he appeared overly anxious and nervous. I asked Danny who he was looking for. Danny replied that he was waiting for Wasmer. Between 12:30 and 12:45 A.M. Kenard Wasmer arrived at our residence. I let Wasmer in the door and asked him where Niemann was. Wasmer told me that it was none of my business. Because Wasmer and Niemann were always together, I again asked Wasmer where Niemann was. This time, Wasmer state[d], "he's taking care of business." Wasmer appeared visibly upset. As soon as Wasmer entered our home, Danny lead [sic] him into the back bedroom where they proceeded to talk in private for fifteen to twenty minutes. Within a short time, Wasmer departed. After Wasmer was gone, Danny stated

to me that he may have to leave in a while and go to Wasmer and Niemann's trailer.

The sister-in-law claims that after the murders, her husband had a never-ending supply of marijuana and money. On one occasion she saw $3,000 in his possession.

(b) Handwriting Offer

The convict offered the testimony of a handwriting expert who had examined the videotapes and photographs of the crime scene depicting the writing on the floor and doorjamb near Valdez' body and handwriting exemplars of Niemann, Zogg, Valdez, Wasmer, and the convict.

After the district court sustained the State's objection to this testimony on the grounds that the evidence was not newly discovered, the convict offered to prove that in this witness' view, the evidence available is insufficient to render a positive opinion as to the authorship of the writings. The expert would opine that the writings are inconsistent with writing samples of Valdez and the other individuals, with the exception of Zogg. He found, "There were identifiable habits in the writing on the floor and/or the wall that also can be seen in the writing of Mr. Zogg, although I am not saying Mr. Zogg wrote it."

(c) Criminalist's Theory

One claiming to be knowledgeable about firearms and crime scene evidence characterized himself as a criminalist, which he defined as "one who works with the forensic sciences whether it be firearms, a questioned document, chemistry, whatever area . . . of expertise." He reviewed the evidence and prepared an affidavit summarizing his findings. From viewing the videotapes of the crime scene, he concluded that the rear door of the house was kicked open, pulling the screws out of the section of a hasp attached to the doorjamb. This affiant claims that on a longer videotape not shown to the jury, a law enforcement officer can be heard to say, "That door was kicked in." (This longer videotape is not included in the record forwarded on appeal, but the convict asserts it had been admitted as evidence.) The affiant is of the view that such is inconsistent with Niemann's trial testimony that the convict knocked on the door at the Valdez residence, spoke with an

occupant through the door, and was then admitted into the house. Based upon the bloodstains, Valdez' blood ran from the body or an extremity rather than splattering. Because there was no splattering or blood trail and there was no soiling of the knees or legs of Valdez' pants, nor were his feet dirty or bloody, it is, in the affiant's view, improbable that Valdez moved himself from where he was shot. However, based upon Valdez' shirt being pulled up in back, there being broken glass under the body, and a tube of grease under or near the body's left hip, which grease was apparently used in the writings found on the floor near the body, it appears to the affiant that Valdez' body was moved a short distance.

The affiant also was of the opinion that there should have been latent fingerprints in the writings in blood on the doorjamb and in grease on the floor.

3. Jury Vote

Apparently claiming the jury's vote at various stages of its deliberations somehow bears on the quality of the verdict, the convict, after the district court sustained the State's objection thereto, offered to prove that the first vote taken by the jury was 9 to 3 for acquittal and the second 6 to 6.

IV. ANALYSIS

With that factual background, we turn to the legal analysis of the issues presented by the convict's summarized assignments of error.

1. Prosecutor's Conduct

The convict's first summarized assignment of error, challenging the prosecutor's conduct, relates to "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). At issue are not statutory rights to discovery, but, rather, one's "right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court laid down the principle

that irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment.

In *United States v. Agurs*, the U.S. Supreme Court clarified the *Brady* rule as follows:

> The rule . . . arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.
>
> In the first situation, typified by *Mooney v. Holohan*, 294 U. S. 103, [55 S. Ct. 340, 79 L. Ed. 791 (1935)] the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . .
>
> The second situation, illustrated by the *Brady* case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material." A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.
>
> . . . .
>
> The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made. . . .

. . . .

In many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all. The third situation in which the *Brady* rule arguably applies, typified by this case, therefore embraces the case in which only a general request for "*Brady* material" has been made.

We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.

. . . .

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would

be to allow complete discovery of his files as a matter of routine practice.

. . . [T]his Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U. S. 786, 795[, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972)]. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Cf. *Giglio v. United States*, 405 U. S. 150, 154[, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)]. . . .

. . . .

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

This statement of the standard of materiality describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language.

427 U.S. at 103-13.

(a) Niemann's Testimony

The first aspect of the convict's claim that the prosecutor engaged in misconduct rests on the claim that the prosecutor knowingly used at trial Niemann's perjured testimony.

The critical flaw in the argument is the premise that Niemann's trial testimony has been shown to be false. Such is simply not the case. The recitation of the record in part III(1)(a) of this opinion does establish that Niemann is a self-confessed liar, but there is no demonstration that he was truthful when he recanted his trial testimony to the convict's investigators rather than when he testified at trial and when he talked with the State's investigators.

Moreover, in considering claims of perjured testimony later recanted in connection with a motion for new trial, we have written:

> "Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result." . . . "[E]vidence tendered in support of a motion for new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict."

State v. Pittman, 210 Neb. 117, 120-21, 313 N.W.2d 252, 256 (1981). See, also, *Fugate v. State*, 169 Neb. 434, 99 N.W.2d 874 (1959).

Even if Niemann had at trial denied any involvement by the convict, the testimony of Wasmer and Zogg and the other trial evidence make a different result improbable. The statements Wasmer attributed to the convict are damning: " 'Let's just go blow [Valdez] away' "; " '[T]here couldn't be any witnesses' "; " '[Y]ou should have seen it. . . . You should have seen that bitch plead for her life' "; " ' "That wasn't good but it wasn't bad either for taking two people's lives" ' "; and in reference to how he felt about the killings, " ' "I like it, I want to do it again." ' " *Boppre I*, 234 Neb. at 926-28, 453 N.W.2d at 414-15.

(b) Moreno's Existence

The second aspect of the convict's claim that the prosecutor

engaged in misconduct arises from the prosecutor's claimed failure to reveal Moreno's existence.

We begin our analysis of this phase of the matter by noting that the convict's pretrial discovery requests were lengthy and detailed, seeking, inter alia:

> Names and addresses of all witnesses having knowledge of the offense who the State intends to call as witnesses, or, on whose evidence the charge is based.
>
> . . . .
>
> The [convict] further requests the court enter an Order requiring the prosecution in this case to make timely disclosure to counsel for the [convict] of the existence of any evidence known to the prosecution for [sic] which could be discovered by the prosecution, that tends to negate the guilt of the accused, mitigate the degree of his offense, reduce the punishment, or as otherwise material to the above. The [convict] further requests the court enter an Order requiring the prosecution to disclose any threats, promises, or representations made to any witness, which may affect the witness's testimony.

The trial court's order on those two sections of the convict's discovery requests reads:

> [T]he State is not required to furnish defense with any and all prior statements, whether written or not, made by all witnesses the State may call at trial . . . .
>
> . . . .
>
> . . . [T]he State shall provide to the [convict] information concerning threats, promises or representations made to any witness which may affect issues of credibility and evidence which tends to negate the guilt of the accused, mitigate the degree of the offers [sic] or reduce the punishment.

The first quoted section of the request is addressed to witnesses upon whose evidence the charges are based or who might be called by the State as witnesses. Neither Moreno nor the two classmates to whom Moreno first made her claim of presence at the murder scene are potential State's witnesses or the sources of evidence to support the charges. As a result, this is not a case involving exculpatory evidence which was the

subject of a specific request, as in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The second quoted portion of the convict's discovery request and the portion of the order related thereto fit the third type of case described in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), that is, that which requests all *Brady* material or anything exculpatory. The *Agurs* standard for determining materiality which rises to a constitutional error in such a situation is that any omission must be evaluated, in the context of the entire record, to determine if the omitted evidence creates a reasonable doubt that did not otherwise exist.

In making that evaluation, it is first to be noted that the convict has failed to show what Moreno would say if she were called to testify at a new trial. In the context of postconviction relief cases, we have said that to sustain a claim of ineffective assistance of counsel based on the failure to interview witnesses, the record must establish the testimony of the witnesses counsel failed to interview. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989). It would seem appropriate that no less a showing be required to evaluate whether a new trial should be granted. However, the convict's position is that in this instance what Moreno would testify to does not make any difference, for if she were to say she had been present and that the voice of the killer was not that of the convict, the convict would have made his point. If, on the other hand, she were to testify that she had not been present, the convict would be able to impeach her by her prior inconsistent statements and thereby again make his point.

What this approach overlooks, however, is that although Neb. Rev. Stat. § 27-607 (Reissue 1989) provides that the "credibility of a witness may be attacked by any party, including the party calling" her or him, a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982).

The only extrinsic evidence of Moreno's claim that she was present at the murder scene, the statements she made to her

classmates, is hearsay and thus not admissible as substantive evidence. As the district court observed, the statements are not exempted from the hearsay rule as constituting excited utterances. As recently noted, in order for a statement to qualify as an excited utterance, there must have been a startling event, the statement must have related to the event, and the statement must have been made while under the stress of the event; the key requirement is spontaneity, a showing that the statement was made without time for conscious reflection. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). Moreno did not make the claim that she had been present at the scene until 3 1/2 days after the murders. We recognize that the time interval between the startling event and the statements is not in and of itself dispositive of the spontaneity issue, *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983); how long the interval may be must be determined by the facts unique to each particular case, *State v. Jacob, supra*. While in *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), we found 2 days not to have been too long an interval for the statement a 4-year-old made to police concerning injuries inflicted upon her stepbrother, 3 1/2 days is too long in this case. Not only were Moreno's statements made in a social rather than an investigative setting, she was not a 4-year-old child.

Moreno's statements to her classmates were made after extensive time for conscious reflection; thus, the requisite spontaneity is lacking. In so ruling, we do not overlook the fact that she was described as being scared when she made the claim of being present at the murder scene, but given the time interval, it cannot reliably be said that the perceived fright resulted from the event. It is as likely to have been part of the drama created in the making of the statements.

In any event, the statements once made by Moreno, upon which the convict places so much reliance, were, when all is said and done, not only recanted but were made by one who claimed to have been hiding under a bed, in the dark, and who was in fear for her own life. She never claimed to have seen anything relevant to the killing. Thus, while she claimed the voice she heard did not belong to the convict, she never was in a position to claim that the convict was not present at the scene or that he

was not the one who shot the victims. Given those circumstances and the trial evidence outlined in *Boppre I*, it cannot be said that Moreno's testimony is material in the *Agurs* sense, for no matter what she might say at a new trial, it would not create a reasonable doubt as to the convict's guilt which did not otherwise exist.

2. OTHER EVIDENCE CLAIMED TO BE NEWLY DISCOVERED

In addition to the topics discussed in connection with the prosecutor's conduct, the matters involved in the second summarized assignment of error, the claim that there exists other newly discovered evidence warranting a new trial, are as identified in part III(2) hereof.

We recall as an initial matter that the newly discovered evidence offered in support of a new trial must be so potent that by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), *disapproved on other grounds, State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). The evidence must actually be newly discovered and may not be something which could have been discovered and produced at trial with reasonable diligence. See *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

(a) Sister-in-Law's Testimony

Since the coercion which the sister-in-law now claims was not revealed until long after trial, her present testimony, that the convict was not a part of the planning discussions she overheard, may be characterized as newly discovered. However, her new testimony does no more than add to the convict's claim at trial that many people may have had a motive to kill Valdez and that there may have been a conspiracy to accomplish that. Thus, the new testimony would merely be cumulative. Since the sister-in-law cannot say that the convict was not involved, only that she did not see him around when she heard discussions concerning the killing, it cannot be said that her testimony would probably have resulted in a different verdict.

(b) Handwriting Offer

Given that at trial the convict attempted but failed to develop handwriting evidence, it cannot be said that what he offered to prove in that regard at the hearing on his new trial motion was newly discovered.

(c) Criminalist's Theories

Nor are the criminalist's theories newly discovered evidence. He merely sought to evaluate bits and pieces of the trial evidence favorably to the convict.

3. JURY VOTE

Although the convict calls attention to our observation in *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981), that where a verdict is of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt, he cites no authority for his proposition that evidence of a jury's initial votes is admissible in seeking a new trial.

The matter is controlled by Neb. Rev. Stat. § 27-606(2) (Reissue 1989):

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In applying that rule, we have held that although a juror may testify that extraneous material was improperly brought to the jury's attention, a juror may not testify as to the effect the material had on the deliberation process. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). See, *Loving v. Baker's*

Supermarkets, 238 Neb. 727, 472 N.W.2d 695 (1991); *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990); *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988); *State v. Roberts*, 227 Neb. 489, 418 N.W.2d 246 (1988).

In applying the federal counterpart to § 27-606(2), Fed. R. Evid. 606(b), the U.S. Court of Appeals for the Seventh Circuit has noted that the rule is designed to protect the jury's deliberation process, including its votes. *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985), *cert. denied* 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) (civil case). Accord *Wiedemann v. Galiano*, 722 F.2d 335 (7th Cir. 1983). See, also, *United States v. Marques*, 600 F.2d 742 (9th Cir. 1979), *cert. denied sub nom., Belcher v. United States*, 444 U.S. 858, 100 S. Ct. 119, 62 L. Ed. 2d 77; *United States v. Gerardi*, 586 F.2d 896 (1st Cir. 1978).

The U.S. Court of Appeals for the Tenth Circuit, in a case very much analogous to the case now before us, wrote:

> We agree with respondent that the district court erred in considering evidence from two jurors who indicated that they would have voted differently had they been given an entrapment instruction. We hold that such evidence is not permitted in a federal habeas proceeding. Fed.R.Evid. 606(b) prohibits juror testimony "to the effect of anything upon that . . . juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith," *id.*, with certain exceptions not here applicable. We have strictly construed Rule 606(b) to prohibit a juror from testifying to the effect of anything upon that juror's mind not within the specified exceptions to the rule. . . . Although Capps attempts to distinguish the instant situation by asserting that the testimony does not attack the verdict or the jurors' deliberations or mental processes, we think the situation is indistinguishable from *Voigt*. By playing a "what if" game with jurors who voted to find him guilty, Capps actually is probing their mental processes in their deliberations and using the results in an attempt to secure a new trial. This he cannot do under Rule 606(b).

Capps v. Sullivan, 921 F.2d 260, 262-63 (10th Cir. 1990).

It would be anomalous indeed to hold that a juror could not explain the effect of extraneous material on his or her deliberations but permit a juror to reveal how he or she voted at a given point in those deliberations.

V. JUDGMENT

Inasmuch as the record fails to sustain any of the convict's summarized assignments of error, we affirm the district court's judgment.

AFFIRMED.

WHITE, J., concurs.

JAMES DAVIS, M.D., APPELLEE, V. GREGG WRIGHT, M.D., M. ED., DIRECTOR OF THE DEPARTMENT OF HEALTH, AND THE DEPARTMENT OF HEALTH, APPELLANTS.

503 N.W.2d 814

Filed August 6, 1993. No. S-91-289.

1. **Administrative Law: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992).
2. _____: _____. An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992).
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law in connection with which an appellate court has an obligation to reach an independent conclusion, irrespective of the determination made by the court below.
4. **Disciplinary Proceedings: Physicians and Surgeons: Proof.** The allegations made in disciplinary proceedings involving physicians must be proved by clear and convincing evidence.
5. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual

findings for those of the district court where competent evidence supports those findings.

6. **Licenses and Permits: Health Care Providers.** A violation of the practice standards of the medical profession does not define unprofessional conduct for the purposes of Neb. Rev. Stat. § 71-147(10) (Reissue 1990).
7. **Administrative Law: Appeal and Error.** Neb. Rev. Stat. § 84-917(6)(b) (Cum. Supp. 1992) authorizes the district court to affirm, reverse, or modify the decision of an administrative agency or to remand the case for further proceedings.

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

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellants.

William M. Lamson, Jr., and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

HASTINGS, C.J.

This is an appeal from the judgment of the district court, which on review under Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) reversed the order of Gregg Wright, director of the Nebraska Department of Health (Director), revoking the license of the petitioner, James Davis, to practice medicine and surgery in the State of Nebraska and revoking his controlled substance registration. The Director and the Department of Health (Department) appealed, alleging as error substantially (1) that the district court erred in finding that the State had failed to prove by clear and convincing evidence that Davis had engaged in a sexual relationship with a patient during the physician-patient relationship and that Davis had fraudulently prescribed controlled substances for a patient, and (2) that the court erred in imposing a disposition against Davis instead of remanding the case to the Director for the appropriate disposition.

Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. § 84-917(5)(a). The district court may affirm, reverse,

or modify the decision of the agency or remand the case for further proceedings. § 84-917(6)(b).

> (1) An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals.
>
> . . . .
>
> (3) . . . [T]he appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.

Neb. Rev. Stat. § 84-918 (Cum. Supp. 1992).

This was a disciplinary action brought by Robert M. Spire as Attorney General of the State of Nebraska under the provisions of Neb. Rev. Stat. § 71-147 et seq. (Reissue 1990) against Davis, a physician licensed to practice medicine in the State of Nebraska.

The amended petition, filed on May 31, 1989, before the Director, alleges that Davis practiced psychiatry in Omaha and that in 1978, a 33-year-old female (patient I) placed herself under the medical control of Davis. In about April or May 1982, according to the pleading, Davis asked patient I if she would have a sexual relationship with him. Patient I eventually consented, and thereafter Davis and the patient engaged in sexual activity "on almost every regularly scheduled appointment he had with her until January of 1984." This activity, it is alleged, constituted unprofessional conduct on the part of a practicing physician within the meaning of § 71-147(10); grossly immoral or dishonorable conduct evidencing the lack of fitness to practice medicine and surgery within the state, in violation of § 71-147(2); and practices beyond the authorized scope of medicine and surgery, in violation of § 71-147(5)(b).

Additionally, it is alleged that in February 1980, a 26-year-old female (patient II) placed herself under the medical care and control of Davis, relying upon his professional advice and treatment of her depression and pain as a result of the patient's Crohn's disease. On or about January 7, 1985, as a result of a

complaint that Davis was overprescribing drugs for this patient, which resulted in a conference with an investigator from the bureau of examiners in the Department, Davis agreed that he was prescribing too much medication and would monitor the exact number of drugs patient II was taking daily. Notwithstanding that promise, it is alleged, a male live-in friend of patient II's accompanied the patient to an appointment with Davis, and after the friend complained of back pain, Davis prescribed Percodan and Darvocet for the friend without benefit of a physical examination. The amended petition continues, alleging that although the male friend moved to Philadelphia in September 1985, which Davis knew, and Davis had no further contact with him, Davis nevertheless continued to prescribe these medicines, giving the prescriptions to patient II until July 1987, although no records disclosed that a physician-patient relationship existed between Davis and the friend.

The amended petition goes on to allege that on or about June 26, 1986, Davis wrote four prescriptions for a female friend of patient II's, prescribing Darvocet, Percodan, Valium, and Placidyl, although the friend had never seen Davis as a patient, and that Davis knew that the medications he prescribed in the friend's name would be used by patient II.

The aforementioned acts regarding prescriptions constituted, according to the allegations of the State, the practice of medicine beyond the authorized scope, in violation of § 71-147(5)(b); unprofessional conduct on the part of Davis within the meaning of § 71-147(10); and grossly immoral or dishonorable conduct evidencing the lack of fitness to practice medicine and surgery within the state, in violation of § 71-147(2).

A hearing was conducted on the complaint before a hearing examiner appointed by the Director as well as before the Director himself, who was present during the entire time that the hearing progressed. The hearing was held in conformity with § 71-155, which provided in part that "[t]he proceeding [for the revocation or suspension of a license or certificate] shall be summary in its nature and triable as an equity action." The hearing commenced on September 11, 1989, and concluded on

the morning of September 15. Either in person or by deposition, 19 witnesses testified, and the transcript of the testimony consists of over 700 pages plus 2 volumes of exhibits and pleadings, all of which this court has examined. The findings, conclusions, and order of the Director stated that Davis did in fact maintain a sexual relationship with a patient during her treatment; that he did in fact issue narcotic drugs in the names of two friends of a patient's, knowing that they were for the use of the patient; and that such conduct violated the statutory prohibitions in all respects, and the Director ordered the license of Davis revoked and the registration of Davis for the prescribing of controlled substances revoked.

The petition for review was filed in the district court on July 6, 1990. That court found that the record failed to prove, either by clear and convincing evidence or by the greater weight of the evidence, that Davis had a sexual relationship with patient I. The court found that Davis did perform a physical examination on the male friend of patient II's and that his prescribing of drugs for that person was an acceptable action within the scope of his medical practice, but that Davis continued the prescriptions for an unreasonable period of time without a followup examination. The court also found that he wrote prescriptions for the female friend of patient II's based solely on her complaints of pain, which was a minimally acceptable action within the proper scope of his medical practice, and that although he failed to keep adequate records of the prescriptions written for these two friends of patient II's, the record failed to establish, either by clear and convincing evidence or by the greater weight of the evidence, that Davis had committed fraud with reference to his prescription practice.

The district court reversed the order of the Director revoking the license of Davis to practice medicine and modified the order of the Director revoking the controlled substance registration of Davis and instead temporarily suspended that registration for a period of 3 months, after which time the registration was ordered automatically reinstated.

Section 71-147 provided in part as follows:

> A license or certificate to practice a profession may be . . . revoked, or suspended or have other disciplinary

> measures taken against it in accordance with section 71-155 when the applicant, licensee, or certificate holder is guilty of any of the following acts or offenses: . . . (2) grossly immoral or dishonorable conduct evidencing unfitness or lack of proficiency sufficient to meet the standards required for practice of the profession in this state . . . (5) practice of the profession (a) fraudulently, (b) beyond its authorized scope . . . (10) unprofessional conduct, which term includes all acts specified in section 71-148 and such other acts as may be defined in rules and regulations adopted and promulgated by the board of examiners in the profession of the applicant, licensee, or certificate holder with the approval of the department . . . .

Although not raised as a specific assignment of error, there is a disagreement between the parties as to the burden of proof necessary to establish guilt in conduct necessary to support disciplinary action. Because this is an essential element in any disciplinary proceeding, we must in the first instance make this determination.

The appellants maintain that the Department's policy has always been to utilize a preponderance of the evidence standard, in accordance with the Department's interpretation of § 71-155. Statutory interpretation is a question of law in connection with which an appellate court has an obligation to reach an independent conclusion, irrespective of the determination made by the court below. *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993).

The appellants' position is that since the proceeding has been statutorily defined as having civil and equitable characteristics, a mere preponderance of the evidence is all that is required.

We disagree.

This court defined the standard as applied to attorneys in disciplinary proceedings in *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 519, 406 N.W.2d 644, 651 (1987):

> For the sake of uniformity and clarity, the rule as to the burden of proof in disciplinary proceedings shall hereafter be by clear and convincing evidence, which 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. Clear and convincing evidence means more than a preponderance but less than evidence beyond a reasonable doubt. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

See *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988).

While that case alone does not bind the court to application of the same standard to physicians, common sense dictates that the law treat the complainant's burden in the arena of the two professions' disciplinary proceedings similarly. Nevertheless, we examine the dispositions and analyses by other states in these matters.

Wisconsin applies the clear and convincing evidence standard for attorneys, which is of course within the exclusive jurisdiction of the Wisconsin Supreme Court, while the legislature provides a mere preponderance of the evidence standard for physicians. In *Gandhi v. Medical Examining Board*, 168 Wis. 2d 299, 483 N.W.2d 295 (Wis. App. 1992), the Court of Appeals of Wisconsin held that application of the preponderance of the evidence standard to physicians did not violate due process or equal protection. The legislature, the court reasoned, using a separation of powers analysis, does not have to rationalize the differing burden of proof, since the legislature did not create the dual standards. See, also, *Boswell v. Bd. of Veterinary Medicine*, 477 N.W.2d 366 (Iowa 1991); *Eaves v. Board of Medical Examiners*, 467 N.W.2d 234 (Iowa 1991); *In re Polk License Revocation*, 90 N.J. 550, 449 A.2d 7 (1982).

The Supreme Court of Wyoming has recently held, in *Devous v. Bd. of Medical Examiners*, 845 P.2d 408 (Wyo. 1993), that a disciplinary proceeding before a licensing board is an adversary proceeding in which the burden is upon the complainant to present its case and state with precision its charges against the licensee and to establish the charges by clear and convincing evidence. The court cited to a previous Wyoming case, *Fallon v. Wyoming State Board of Medical*

Exam., 441 P.2d 322, 326 (Wyo. 1968), in which the court had stated that " 'fraud will not be imputed to any party when the facts and circumstances out of which it is supposed to arise are consistent with honesty and purity of intention.' "

The Mississippi Supreme Court has held that in disciplinary proceedings before the state board of psychological examiners, charges must be proved by clear and convincing evidence. *St. Bd. of Psychological Ex. v. Hosford*, 508 So. 2d 1049 (Miss. 1987). See, *Hogan v. Mississippi Bd. of Nursing*, 457 So. 2d 931 (Miss. 1984); *Levi v. Mississippi State Bar*, 436 So. 2d 781 (Miss. 1983).

Recently, the California Court of Appeal, in *Silva v. Superior Court (Heerhartz)*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993), held that the clear and convincing evidence standard, rather than the preponderance of the evidence standard, applies at hearings on applications for interim orders suspending or imposing restrictions on licenses of medical care professionals. The court reasoned as follows:

> In *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856, 185 Cal.Rptr. 601, the court held the "clear and convincing proof to a reasonable certainty" standard of proof applies at Board administrative proceedings to revoke or suspend a medical license. The *Ettinger* court explained that the higher "clear and convincing" standard has been applied in disciplinary proceedings against other professional licensees, such as real estate brokers and attorneys. Although attorney discipline proceedings have a "nature all their own, neither civil nor criminal," nevertheless the purpose of attorney discipline proceedings and doctor license suspension proceedings is identical. "Since it is apparent that the underlying purpose of disciplining both attorneys and physicians is protection of the public, it would be anomalous to require a higher degree of proof in disciplinary hearings involving attorneys or real estate agents than in hearings involving physicians." (*Id.* at pp. 855-856, 185 Cal.Rptr. 601.)
>
> . . . "It is the totality of professional employment opportunity involving vested interest rights which requires

the higher standard." ([*Id.*] at p. 857, 185 Cal.Rptr. 601.) *Silva*, 14 Cal. App. 4th at 569-70, 17 Cal. Rptr. 2d at 580.

The disciplinary proceedings of physicians and attorneys serve the same purpose: protection of the public interest. We see no justification for differentiating between the two professions in this regard and hold that the allegations made in disciplinary proceedings in either case must be proved by clear and convincing evidence.

A review of the record discloses a nearly hopeless conflict in the evidence. Patient I insists that she had an ongoing sexual relationship with Davis on almost every office visit from March 1983 until January 1984. Other professionals who later treated patient I testified that this was what she had told them. Davis categorically denies this claim, and his testimony is corroborated by the testimony of Elizabeth Yager, a practicing psychiatrist who completed a 3-year residency and a 1-year fellowship at the Nebraska Psychiatric Institute during the years 1981 to 1984. During much of the time she was at the institute, she worked with Davis, and she gave as her opinion that during the years 1983 and 1984, when the sexual relationship supposedly was ongoing, she participated with Davis in the conferences with patient I approximately 50 percent of the time and that knowing that other students would sit in on other sessions, she could not imagine Davis' being alone with patient I on more than 30 percent of the visits. It was her testimony that no improper contact by Davis could have occurred.

As to patient I's mental and emotional problems, Davis diagnosed her as having asthma along with an anxiety disorder, a depressive disorder, and a hysterical personality. He described a woman having a hysterical personality as being seductive, flirtatious, coquettish, and sexually promiscuous as a general rule; having relatively poor judgment; usually not having much of a conscience; and tending to be prone to suicidal thinking. He determined that the steroids she was taking for her asthma attacks were giving her a terrible mood and that she would become paranoid and would usually break contact with reality. He said that hysteria causes people to fabricate. The steroids which she was taking, according to Davis, caused her to gain a

"ton of weight," going from 110 pounds up to 180 pounds. According to Davis, hysterical people tend to fall in love with their therapists, and he knew she was in love with him because she told him. She also told him that she was upset because he married his present wife.

Dr. Yager generally agreed with the diagnosis Davis made of patient I. According to Yager, the patient was agitated and anxious, suffering from a borderline personality disorder which caused her to be overly reactive to things. The patient showed a tendency to polarize—either she loved people or she hated them. She was a very dependent person and exhibited a strong, possessive love to the point of jealousy toward Davis. Yager went on to say that with patient I, there is a combination of a woman who is psychotic with an unstable personality who has an infatuation with her doctor, and he is taken away from her, so her anger, her frustration, and her belief from all those years of psychosis come out. According to Yager, the patient probably believed to a great extent that the relationship which she claimed happened actually did happen. Robert Osborne, a physician and psychiatrist called by the State as a witness, said that he agreed with Davis as to what a hysterical personality is. He said such a woman reacts more spontaneously and impulsively to stimuli, has significant problems in relating to people and regarding men, and tends to be flirtatious and coquettish. At the same time, Osborne said, such personalities have difficulty with dependency and overdependency and "have a tendency to ascribe, at times, relationships that don't exist. I mean, they may over-interpret a word, a statement, a look, as meaning more than it does . . . ." The district court, after conducting a de novo review on the record as required by § 84-917(5)(a) and (6)(b), concluded that

> [patient I's] lack of credibility with regard to sex during office visits undermines the credibility of all her accusations concerning sexual activity with the Petitioner [Davis]. Respondents [State] have failed to prove, either by clear and convincing evidence or by the greater weight of the evidence, that the Petitioner had a sexual relationship with [patient I] while she was his patient or at any other time.

Appeals from the district court are required by § 84-918 to be taken in the manner provided by law for appeals in civil cases, and the "judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record." We are unable to find that this particular language has ever been judicially interpreted. However, appeals from boards of adjustment as provided for by Neb. Rev. Stat. § 19-912 (Reissue 1991) are somewhat analogous. That section provides that an appeal from a decision of a board of adjustment may be taken to the district court, which may conduct a hearing with or without the taking of additional evidence and "may reverse or affirm, wholly or partly, or may modify the decision brought up for review. . . . Any appeal from such judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law." This court had occasion to interpret the meaning of § 19-912 in *Stratbucker Children's Trust v. Zoning Bd. of Appeals, ante* p. 68, 497 N.W.2d 671 (1993). Citing *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), we said:

> "[A] district court may disturb a decision of such a board [of adjustment] only if . . . the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
>
> ". . . .
>
> ". . . [A]n appellate court reviews the decision of the district court and . . . irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of the board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court."

Stratbucker Children's Trust, ante at 71, 497 N.W.2d at 674. We adopt that reasoning as applicable to the present appeal and declare that under § 84-918, an appellate court, in reviewing a

judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. Adopting that standard, we affirm the judgment of the district court regarding the alleged sexual misconduct of Davis.

We turn next to the issue relating to the prescribing by Davis of drugs for the two friends of patient II's. In this regard, the district court found that Davis wrote prescriptions for controlled substances for the male friend of patient II's based on a physical examination and complaints of pain, which was an acceptable action within the proper scope of his medical practice, notwithstanding the allegation by the State that it was in violation of § 71-147(5)(b). However, the court found that Davis continued to write those prescriptions for an unreasonable period of time without followup physical examination and continued to do so after the friend moved out of the State of Nebraska and that in doing so, Davis unreasonably relied upon patient II to fill those prescriptions and send them on to her friend.

The court found that Davis also wrote prescriptions for controlled substances for the female friend of patient II's based solely on her complaints of pain, which was a minimally acceptable action within the proper scope of his medical practice. The court also determined that Davis failed to keep adequate records of the prescriptions written for the two friends of patient II's, but that Davis was not aware that the patient was intercepting or keeping those drugs for her own use, and that Davis did not participate in any fraudulent scheme to prescribe drugs for either of the friends in order to supply patient II with more drugs than were medically indicated or permitted under Nebraska law. The court concluded that the State failed to prove either by clear and convincing evidence or by the greater weight of the evidence that Davis committed fraud with respect to his prescription practice.

However, in its order, the district court did not completely absolve Davis of all responsibility nor invalidate all sanctions. Its order reads in part as follows:

Paragraph 3 of said decision is modified in its entirety to

> provide as follows: The controlled substance registration of Dr. James Allen Davis, Jr., M.D., is temporarily suspended for a period of three months from the date of this Order. After such period of suspension, said registration shall be automatically reinstated. The Director of Health shall devise procedures to be followed by Dr. Davis with respect to prescriptions and record-keeping designed to ensure that Dr. Davis complies with legal and professional requirements for prescribing and monitoring usage of controlled substances. If the Director is not at any time satisfied with Dr. Davis' compliance with the procedures devised hereunder, the Director may order up to, but not exceeding, an additional six months suspension of Dr. Davis' controlled license [sic] registration as necessary to ensure compliance.

The standard of review which we must employ is as previously stated; i.e., where competent evidence supports the district court's factual findings, this court will not substitute its factual findings for those of the district court.

Nevertheless, at the outset we note our recent holding in *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993). Curry was charged with prescribing controlled substances for nonmedical reasons in violation of § 71-147(10),

> which reads: "unprofessional conduct, which term includes all acts specified in section 71-148 and such other acts as may be defined in rules and regulations adopted and promulgated by the board of examiners in the profession of the . . . licensee . . . with the approval" of the health department.
>
> Neb. Rev. Stat. § 71-148 (Reissue 1990) reads: "For the purpose of section 71-147, unprofessional conduct shall include any of the following acts," trailed by 15 defining clauses, none of which deal with the prescribing of drugs. . . .
>
> The State acknowledges that neither § 71-148 nor the rules and regulations concerning the practice of medicine "specifically state that prescribing controlled substances for other than medical purposes; continuing to prescribe a controlled substance after the patient is taking more of the

> controlled substance than instructed and sharing the controlled substances with others; and prescribing controlled substances to counter the effects of the first controlled substance prescribed is unprofessional conduct." . . . However, in reliance upon the presence of the word "includes" in the statute, the State claims that § 71-147(10) is a broad, inclusive law which embraces Curry's conduct as unprofessional conduct because it violated the practice standards of the medical profession.

Curry, 242 Neb. at 700-01, 496 N.W.2d at 517.

In the instant case, there was testimony by a physician, Osborne, that the activities of Davis in overprescribing medications violated the practice standards of the medical profession. However, in *Curry*, this court discussed rules of statutory construction and concluded that "a violation of the practice standards of the medical profession does not define unprofessional conduct for the purposes of § 71-147(10)." 242 Neb. at 703, 496 N.W.2d at 518.

Finally, there was competent evidence to support the factual findings of the district court, and we find no errors in the record of the court's reversal of the order of the Director revoking Davis' license to practice medicine or in the record of the modification by the court of the order of the Director revoking Davis' controlled substance registration.

The appellants argue that it was error for the district court to impose its own penalty by suspending the controlled substance registration of Davis for 3 months rather than remanding the case to the Director for the appropriate disposition. As previously stated, § 84-917(6)(b) authorizes the district court to affirm, reverse, or *modify* the decision of the agency or to remand the case for further proceedings.

We find no error in the judgment of the district court, and it is affirmed.

AFFIRMED.

DESIGN DATA CORPORTION, APPELLEE, V. MARYLAND CASUALTY COMPANY, AN INSURANCE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, CONSOLIDATED FREIGHTWAYS, INC., THIRD-PARTY DEFENDANT, APPELLEE.

503 N.W.2d 552

Filed August 6, 1993. No. S-91-579.

1. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
3. **Uniform Commercial Code: Contracts: Sales.** The Uniform Commercial Code applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the Uniform Commercial Code do not apply. The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning.
5. **Insurance: Contracts.** While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
7. **Insurance: Contracts: Estoppel.** Estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present.
8. **Insurance: Contracts: Estoppel: Case Disapproved.** To the extent that it may suggest that coverage on an insurance policy may be extended by estoppel without a showing of detrimental reliance, *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983), is disapproved.

9. **Insurance: Breach of Contract: Claims: Proof.** When a breach of an insurance contract is alleged, the plaintiff has the burden of bringing his or her claim within the limitations of the policy.
10. **Appeal and Error.** Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for further proceedings.

Stephen L. Ahl and Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Lavern R. Holdeman, of Nelson Morris Holdeman & Titus, for appellee Design Data Corp.

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

HASTINGS, C.J.

This action was brought by the insured, Design Data Corporation, upon the denial of a claim made on a commercial insurance policy issued by defendant and third-party plaintiff Maryland Casualty Company. Design Data sought the recovery of damages to a computer plotter shipped by third-party defendant Consolidated Freightways, Inc., from the insured to a customer, HHB Drafting, Inc.

Summary judgment was entered in favor of Design Data and against Maryland Casualty, as later will be set out. There is no issue remaining to be decided between Maryland Casualty as third-party plaintiff and Consolidated as third-party defendant.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. *In re Estate of Wells, ante* p. 152, 497 N.W.2d 683 (1993); *Viking Broadcasting Corp. v. Snell Publishing Co., ante* p. 92,

497 N.W.2d 383 (1993).

In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Professional Firefighters of Omaha v. City of Omaha, ante* p. 166, 498 N.W.2d 325 (1993); *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993).

Design Data operates a computer services company in Lincoln, Nebraska. Design Data purchased from Maryland Casualty a policy of commercial insurance for its operations which was in effect at the time of the loss at issue here. In relevant part, the policy provides:

> **Property Insured**
>
> . . . .
>
> We'll cover equipment you own, rent, or for which you are legally responsible. We'll consider all of these to be yours in this agreement.
>
> . . . .
>
> **Where Insurance Applies**
>
> We'll cover losses that occur at the locations shown in the Declarations, or while in transit in the United States of America excluding Hawaii and Alaska.
>
> **Causes of Loss Insured**
>
> . . . .
>
> We'll cover losses that occur at the locations shown in the Declarations, up to the limit of coverage that applies. Losses that occur while property is in transit are covered up to the transit limit. If no transit limit is shown, these losses won't be covered.

The schedule of covered premises in the "Declarations" shows the address of the location as 1033 O Street, Lincoln, NE 68508. The limits of insurance in the "Declarations" disclose: "G. Property in Transit $_____."

In November 1988, Design Data sold a "Hewlett Packard 7586B Roll-Feed 8-Pen Drafting Plotter," as part of a structural steel design computer system, to HHB. Design Data arranged for shipment to the purchaser in Pevely, Missouri, via Consolidated. In a deposition, Design Data's vice president of

sales, Ed Bruening, stated that the plotter was in good condition when tendered to Consolidated and that the carton it was packaged in showed no evidence of damage or perforation. However, HHB employee Harold Glamann, who received the shipment, testified by deposition that when the plotter arrived, he noticed that there had been some damage to the cardboard container. Glamann stated: "The wheels of the plotter were actually protruding through a hole in the container. When the driver drug [sic] it off or dropped it to the ground, that may or may not have created more damage. It dropped rougher than I would like to see computer equipment handled." When Glamann was asked if there was any other noticeable damage to the carton, he replied that it appeared that "something had either fallen on it or something heavy put on it that it was caved in." Upon opening the carton and examining the plotter, Glamann noticed that it had been "cracked and chipped in a couple of different places" and that the paper tray was bent or not positioned properly.

Howard Becker, president of HHB, stated in a deposition that at the time he learned of the damage to the plotter upon his return to his plant, a Design Data representative was present. Becker testified that the individual from Design Data hooked up the plotter and "tried to get it to work," but that it just made a loud noise and was not operable. The plotter had been tendered to Consolidated pursuant to a tariff provision which set the "released value" for the computer equipment at $5 per pound. As a result of the damage, Design Data filed a claim with Consolidated, which issued a draft to Design Data on March 29, 1989, for $1,700, the tariff limit as specified. The reverse side of the draft, which was accepted and endorsed by Design Data, contained the following language:

> Endorsement and negotiation of this draft constitutes a release of *all claims*, known or unknown, including judgments thereon, the undersigned has or may have against the payor, and *any other person* on account of any injury, loss or damage, arising out of, or in connection with, the occurrence referred to on the explanatory voucher slip attached hereto.

(Emphasis supplied.)

In a letter to Design Data dated February 21, 1989, Maryland Casualty acknowledged the receipt of a loss notice regarding the damaged plotter and stated:

> It is our position that Design Data Inc. no longer owned the equipment purchased and accepted by HHB Drafting Inc. Therefore, your Electronic Data Processing form would not cover any equipment since you did not own[,] rent or have legal responsibility for same. We must respectfully deny coverage on this claim.

In its amended answer, Maryland Casualty alleged that Design Data had delivered the computer to the purchaser, which had accepted the goods; that the property was damaged while in transit; and that the property was covered by a transit limit calculated at the released value rate of $5 per pound. It was additionally alleged that there had been a settlement of all claims which arose from the damage in that a check for $1,700 was issued to Design Data from Consolidated. Maryland Casualty generally denied all other allegations of Design Data's petition. Design Data moved to strike portions of the amended answer dealing with the transit limit, asserting that Maryland Casualty was estopped from raising new and different allegations in defense of denial of coverage. In a journal entry dated October 24, 1990, the district court sustained Design Data's motion to strike and granted Design Data's motion for summary judgment, as previously indicated. The court later entered judgment for the amount of damage which it found due. The parties had stipulated that the remaining value of the damaged plotter after crediting the payment of $1,700 made by Consolidated was $10,112.88. It was in this amount that the court entered judgment for Design Data, plus attorney fees of $6,961.80.

Maryland Casualty first contends that the district court erred in finding that Design Data had an insurable interest in the plotter at the time the damage was discovered. The initial question to be resolved is whether the Nebraska Uniform Commercial Code is applicable to the transaction at issue. Design Data argues that the transaction was not governed by the provisions of the Uniform Commercial Code because it was primarily for the performance of services and not for the sale of

goods.

The president of HHB, Becker, testified that from his discussions with Design Data, he was under the impression that he was purchasing a complete system for the price of $73,495, which included the hardware and software that worked together, a license to use the software, a 3-day training seminar in Lincoln, and installation of the software and hardware at his office. Becker stated that he would not have purchased the hardware from Design Data apart from the system, because although he could have purchased the same hardware locally, a condition of the sale was the purchase of the hardware and software as a bundled unit, and the software was the most important part of the system. Both hardware and software would be considered "goods."

In *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 307-08, 363 N.W.2d 155, 160 (1985), this court discussed the applicability of the Uniform Commercial Code when a contract calls for both the sale of goods and the rendition of services, noting:

> The question of whether this is a contract for the sale of goods depends upon an examination of the entire contract. The cases are uniform in holding that the U.C.C. applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the U.C.C. do not apply.
>
> The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.

While Becker stated that he would not have purchased the hardware apart from the system as a whole, it is evident from his testimony that the hardware and software, sold as a bundled unit, were the essential elements of the sale, and not the

installation or other peripheral items, such as the 3 days of training, which were included in the purchase price. Becker also testified that "[w]e had made arrangements for Design Data's representative to be here [at HHB's plant] on a Sunday to install this so that we could productively start using it on a Monday." It would seem apparent that installation required no more than a relatively short time to hook up the $73,495 system and test it. Thus, the sale of goods was the predominant factor in the transaction, with labor incidentally involved, and the provisions of the Uniform Commercial Code therefore apply.

Maryland Casualty contends that under Neb. U.C.C. § 2-509 (Reissue 1992), the risk of loss had passed to the buyer upon the buyer's acceptance of the plotter and that Design Data had no insurable interest at the time the damage was discovered. In pertinent part, § 2-509 provides:

> (1) Where the contract requires or authorizes the seller to ship the goods by carrier . . .
>
> (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

Maryland Casualty concedes that the risk of loss can be shifted back to the seller if the buyer effectively revokes acceptance, but contends that the key criterion is whether the buyer's acceptance was reasonably induced by the difficulty of discovery of nonconformity before acceptance. Neb. U.C.C. § 2-608 (Reissue 1992) provides:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a

> reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Neb. U.C.C. § 2-510 (Reissue 1992) deals with the effect of a breach on the risk of loss, stating in pertinent part:

> (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.
>
> (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

In addition to the above, Neb. U.C.C. § 2-501 (Reissue 1992) provides in part:

> (2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

Maryland Casualty argues that HHB's rejection was untimely and, thus, an ineffective transfer of the risk of loss, since the buyer's onsite manager had reason to suspect that the plotter had been damaged when the shipment arrived. Although HHB employee Glamann noticed that the container was damaged when the shipment arrived, he testified that at the time he signed the delivery receipt, the plotter was still in the box and he did not know that there was any physical damage to the plotter. After he discovered the damage he reported it to his supervisor, Becker, when Becker returned to the office.

Becker testified that he had been in Lincoln for a training session with Design Data and learned of the damage to the plotter upon his return to the office on Sunday. As we have

previously stated, Becker said that he had made arrangements for a Design Data representative to be at HHB's plant on Sunday to install the equipment so that it could be used on Monday. Becker and the Design Data representative learned of the damage to the plotter at approximately the same time. Becker stated that the Design Data representative was to return to Lincoln on Monday morning and report the damage to his supervisor and would send another plotter to HHB as soon as possible. Becker further testified that he was to pay the balance due on the equipment after it was installed in his office, but that he withheld payment that day because the system was not working.

While HHB had reason to suspect that the plotter was damaged, the nature of the damage was not known until the carton was opened and inspection was made. It was reasonable under the circumstances for Becker to allow the Design Data representative who was present to install the plotter to ascertain the extent of the damage. The revocation of acceptance was timely, and thus, the risk of loss remained with the seller, Design Data. Under the terms of its policy, Maryland Casualty was to provide coverage for equipment which Design Data owned, rented, or for which it was legally responsible. Design Data had an insurable interest in the plotter at the time the damage was discovered, and therefore Maryland Casualty's first assignment of error is without merit.

Maryland Casualty next asserts that the district court erred in finding that Maryland Casualty's liability was not limited to the transit limit in effect at the time that the plotter was damaged and in finding that Design Data had not waived all claims against Maryland Casualty when it executed a release of claims in exchange for settlement with Consolidated.

In regard to the claimed error regarding the transit limit, relying on *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987), and *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983), Design Data asserts the rule that in order for an insurer to claim a particular reason for denying liability, it must do so prior to the filing of litigation; i.e., after having given a reason for denial of coverage, it cannot later, when suit is filed, rely on a separate

and different reason. Here, Design Data contends that the only information it possessed concerning the declination of the claim was contained in a letter from a Maryland Casualty representative which relied upon the purported passing of title or ownership of the equipment to HHB.

Boren and *Chisholm* are examples of what has sometimes been called "mending one's hold" once litigation begins. This rule, found in Nebraska case law, was based originally on *Railway Co. v. McCarthy*, 96 U.S. 258, 24 L. Ed. 693 (1877). That case involved a claim for damage to cattle shipped by rail from Parkersburg, West Virginia, which failed to reach Baltimore on a Monday because the shipper, it was first claimed, could not obtain the necessary cars. After suit was filed, the defendant claimed that Parkersburg's "Sunday Laws" prevented such activities as shipping cattle on Sunday. The Supreme Court rejected the defense on the ground that the defendant was "mending its hold."

> We have already shown that the defendant proved upon the trial that it was impossible to forward the cattle on Sunday, for want of cars. And it is fairly to be presumed that no other reason was given for the refusal at that time. It does not appear that any thing was then said as to the illegality of such a shipment on the Sabbath. This point was an after-thought, suggested by the pressure and exigencies of the case.

96 U.S. at 267. Insurance or extension of coverage was not involved in this case.

Out of that beginning has grown the concept of coverage by estoppel at least tangentially referred to in *Chisholm*. In *Chisholm*, Justice Caporale, who was joined in his concurring opinion by Justices Boslaugh and McCown, pointed out:

> My misgiving arises from the confusion which appears to surround the restated rule that once an insurer gives a reason for its conduct and decision, it cannot, after litigation has begun, change its ground and its conduct upon another and different consideration. The cases cited by the majority certainly establish that the rule exists and has been applied in insurance cases. Indeed, the rule has been applied in certain noninsurance cases as, for

> example, situations in which no objective evidence of some later asserted reason existed. [Citations omitted.]
>
> I respectfully suggest, however, that such a rule makes no sense in the absence of showing detrimental reliance upon the prior statements or conduct. The rule, after all, is one of estoppel. Estoppel ordinarily requires as one of its elements proof that the party asserting the doctrine has been prejudiced by good faith reliance upon the statements or conduct of the other party. [Citations omitted.] I would make clear that, as an element of the rule, good faith detrimental reliance upon an insurer's prior statements or conduct must be shown.

213 Neb. at 309, 329 N.W.2d at 107.

Both parties seem to misconstrue the policy provisions as to losses occurring "in transit." The relevant policy language bears repeating here: "[L]osses that occur while property is in transit are covered up to the transit limit. If no transit limit is shown, these losses won't be covered." The substance of Maryland Casualty's argument has to be that the "transit limit" in the policy refers to the "released value rate" contained in the tariff. This position makes no sense. The application of "transit limit" must be found within the policy. The plain reading of the policy discloses that the amount of transit limit has been left blank in the policy. No transit limit is shown in the policy, and therefore under the terms of the policy, "these losses won't be covered."

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992). The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*,

233 Neb. 248, 444 N.W.2d 676 (1989); *Central Waste Sys. v. Granite State Ins. Co.*, 231 Neb. 640, 437 N.W.2d 496 (1989).

The parties in this case simply did not contract for any transit coverage, nor was any premium paid for this coverage. In limiting the expansion of coverage by waiver and estoppel, the Michigan Court of Appeals, in *Lee v Evergreen Regency Coop*, 151 Mich. App. 281, 285-86, 390 N.W.2d 183, 185-86 (1986), stated in part:

> [A]s noted in 1 ALR3d 1139, 1144; "[T]he courts of most jurisdictions agree that [waiver and estoppel] are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. The theory underlying this rule seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium, and the principle has been announced in scores of cases involving almost every conceivable type of policy or coverage provision thereof."

As pointed out in *ABCD... Vision v. Fireman's Fund Ins. Companies*, 304 Or. 301, 306-07, 744 P.2d 998, 1001-02 (1987), by the Oregon Supreme Court:

> The Court of Appeals misapplied this court's decision in *Ward* [*v. Queen City Ins. Co.*, 69 Or. 347, 128 P. 1067 (1914),] because, in doing so, it ignored the distinction between the applicability of estoppel to conditions of forfeiture and its applicability to exclusions relating to the scope of coverage.
>
> . . . .
>
> . . . When an insurer's assertion of policy defenses is challenged by claiming that policy exclusions have been lost through estoppel, the correct procedure is to determine first whether the provisions upon which the insurer relies are conditions of forfeiture that are subject to estoppel or, instead, are matters relating to the scope of coverage. Estoppel cannot be invoked to expand insurance coverage or the scope of an insurance contract. . . .
>
> When there is forfeiture of coverage being effected, there is insurance coverage for the loss in the first place,

> but acts of the insured nullify the coverage, such as the filing of a false statement of loss in *Ward*. Here, there never was coverage under provision (a) of the policy for "mechanical or electrical breakdown or failure" of the insured property. Under provision (a) these perils were outside the scope of the coverage. Further, under provision (g) there never was coverage for "[l]oss, damage * * * resulting from repairing, adjusting, servicing or maintenance operation" of the insured. Nothing in the estoppel doctrine of *Ward* prevents the insurer from adding these additional defenses against coverage of this loss.

Estoppel may not be used to expand the scope of coverage of a policy to include coverage not provided for in the contract or excluded by the contract. *Shannon v. Shannon*, 150 Wis. 2d 434, 442 N.W.2d 25 (1989).

In *State Farm Mut. Auto. v. Hartford Acc. & Ind.*, 646 S.W.2d 379, 381 (Mo. App. 1983), the court stated, " 'The point urged by appellant is one of coverage, and the law is firmly established that extension of coverage beyond the plain wording of the contract cannot result from waiver.' "

"The trial court was correct in its refusal to expand the coverage in excess of the stated limits of an unambiguous insurance contract. The doctrine of estoppel may not be used to enlarge the coverage of an insurance policy." *Shannon v. Great American Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979).

While the rule as to "mending one's hold" *may* be alive and well as to conditions of forfeiture, generally it has no application to matters relating to coverage, and estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present. In *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987), apparently the insurance company had furnished a defense to the insured all the way through judgment without a reservation of rights. It was not until the insurance company answered interrogatories in garnishment that it claimed that the people whom it had

defended as insureds were not insureds as defined in the policy. This case is not applicable to the present situation.

As to *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983), to the extent that it may suggest that coverage on an insurance policy may be extended by estoppel without a showing of detrimental reliance, it is disapproved.

It should now be apparent that Design Data's problem is that it never had "in transit" coverage; it has only vaguely alleged, but failed to establish, that its loss came within the terms of the Maryland Casualty policy. When a breach of an insurance contract is alleged, the plaintiff has the burden of bringing his or her claim within the limitations of the policy. *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991).

The problem now shifts to Maryland Casualty. Although it does not claim error in the obvious finding by the trial court that coverage was present, it did in its amended answer generally deny "each and every other allegation of Plaintiff's Petition," placing in issue Design Data's claim that its loss was within the coverage of the policy. In the case *In re Interest of D.M.B.*, 240 Neb. 349, 351, 481 N.W.2d 905, 908-09 (1992), we said:

> Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. . . . *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990).

We determine that the trial court, in implicitly finding that this particular loss was within the coverage of the insurance policy, committed plain error and that Design Data is not entitled to summary judgment. However, Maryland Casualty filed no corresponding motion for summary judgment, so it is necessary that we remand the cause to the district court for further proceedings. See *Baker's Supermarkets v. Feldman*, *ante* p. 684, 502 N.W.2d 428 (1993). Because we reverse the

judgment, it is unnecessary for us to consider Maryland Casualty's final assignment of error.

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. CLARENCE J. WILLIAMS, APPELLANT.

503 N.W.2d 561

Filed August 6, 1993. No. S-91-837.

1. **Assault: Intent.** The intent required by Neb. Rev. Stat. §§ 28-308(1), 28-309(1), and 28-310(1) (Reissue 1989) relates to the assault, not to the injury which results.
2. **Lesser-Included Offenses: Case Overruled.** To the extent that *State v. Grant*, 242 Neb. 364, 495 N.W.2d 253 (1993); *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992); *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991); and *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), rely upon and apply the cognate-evidence approach, they are overruled.
3. **Lesser-Included Offenses.** The rule announced in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), that to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser, is readopted.
4. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
5. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute, "intentionally" means willfully or purposely, and not accidentally or involuntarily.
6. **Criminal Law: Words and Phrases.** While in a criminal statute the meaning of the word "knowingly" varies with the context, it commonly imports a perception of the facts requisite to make up the crime.

7. **Presumptions: Evidence: Juries.** The presumption of innocence demands that all factual elements of a government's case be submitted to the jury.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, STEPHEN A. DAVIS, Judge. Judgment of Court of Appeals reversed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

CAPORALE, J.

Pursuant to verdict, the district court adjudged the defendant-appellant, Clarence J. Williams, guilty of first degree assault, in violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1989). The Nebraska Court of Appeals reversed the conviction and remanded the cause for a new trial because of the district court's refusal of Williams' request that the jury be instructed on the elements of third degree assault, which he claims to be a lesser offense included within the crime of first degree assault. In the course of doing so, the Court of Appeals characterized first degree assault as a specific intent crime and second and third degree assaults as general intent crimes. Upon the petition of the plaintiff-appellee State, we granted further review and now reverse the judgment of the Court of Appeals.

While the victim, Tisha Caston, was babysitting at a girl friend's house, she was visited by her friends Shawnia Fleming and Toyce Wakefield. The two told Caston that when she finished working, they would meet her in front of a convenience store.

When Caston completed her babysitting duties, she proceeded to meet Fleming and Wakefield, who were in the parking lot of a bar across the street from the designated meetingplace. Wakefield was standing outside of a vehicle talking with Williams; Fleming was seated in the passenger side of the vehicle talking with Mark Smith, the owner of the

vehicle. Caston, who had not previously met Williams or Smith, approached her two friends and asked them if they were ready to go. They replied affirmatively, and Fleming thereupon left the vehicle and walked across the street to the convenience store. Wakefield and Caston began to leave shortly thereafter. However, Williams attempted to persuade Wakefield to "ride" and "party" with him and Smith. When Wakefield said no, Williams began coaxing Caston, who also said no. According to Caston, when she tried to walk away, Williams "started cussing [her] out" and struck her on her left temple with his fist. Although Williams denies having struck Caston at that time, security guards from the bar grabbed him and told him to leave.

Caston turned and ran across the street to a pay telephone to call her aunt for a ride. Being unable to reach her aunt, Caston telephoned 911. While she was on the telephone, Smith drove by with Williams, obscenities were exchanged, and, according to Williams, Caston threw a bottle at Smith's vehicle. In any event, while Smith remained in his vehicle, Williams got out and, despite Caston's repeated pleas of "no," struck her with a closed fist on the lower part of her left jaw.

Williams admits hitting Caston, claiming it to have been "just an impulsive reaction," but claims that he "didn't want to cause her no [sic] injury." Williams then jogged off and left with Smith in Smith's automobile.

Caston was taken by her mother to the hospital, where she remained for approximately 4 days. She had suffered two fractures to her lower jaw, injuries which the oral and maxillofacial surgeon who treated Caston found to be consistent with a blow to the jaw. The injuries required surgery and the insertion of metal plates, which resulted in the permanent scarring of Caston's chin.

We concern ourselves first with the nature of the intent required by the various assault statutes. The pertinent part of § 28-308(1) reads: "A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." The applicable passage of Neb. Rev. Stat. § 28-309(1) (Reissue 1989) proclaims: "A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to

another person with a dangerous instrument; (b) Recklessly causes serious bodily injury to another person with a dangerous instrument . . . ." And the relevant portion of Neb. Rev. Stat. § 28-310(1) (Reissue 1989) provides: "A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person . . . ."

Although we have not been cited to, nor do we find, any case in which we have directly considered the precise nature of the intent required by the first degree assault statute, cases exist in which we have addressed the issue with respect to the second degree assault statute. Most recently, in *State v. Ayres*, 236 Neb. 824, 828, 464 N.W.2d 316, 320 (1991), we wrote that the second degree assault statute "does not require that the weapon in question be used in a manner, or with the intent, to cause serious bodily injury or death." See, also, *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). We had earlier observed that "[a]ssault with a dangerous instrument, like simple assault, is a 'general intent' crime." *State v. Duis*, 207 Neb. 851, 854, 301 N.W.2d 587, 589 (1981). Although we did not define a "simple assault," it is clear from the context in which the phrase is used that we were distinguishing assaults which do not involve the use of a dangerous weapon from those assaults which do involve such use. Thus, *Duis* implies that all assaults are general intent crimes. That is to say, the intent relates to the act which produces the injury, not to the consequences which result from the assault.

We last dealt with the matter in connection with the first degree assault statute in *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). Therein, the defendant claimed, among other things, that there was insufficient evidence to support a finding that he had intended to inflict serious bodily injury. In rejecting that claim, we first remarked it was well settled that " ' "independent evidence of specific intent is not required. . . ." ' " *Id.* at 623, 419 N.W.2d at 162. We then commented that the intent with which " ' "*an act* is committed . . . may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." ' " (Emphasis supplied.) *Id.* Thus, *Costanzo* implies that the requisite intent

relates to the prohibited act, i.e., the assault, and not to the result achieved, i.e., the injury. That is to say, first degree assault is a general intent, not a specific intent, crime.

We also rejected the claim that because the defendant in the earlier case of *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989), claimed not to have intended to cause the victim serious bodily injury, the evidence was insufficient to establish guilt. However, in the course of concluding that the circumstantial evidence did indeed prove guilt, we improvidently quoted from *State v. Ristau*, 201 Neb. 784, 272 N.W.2d 274 (1978), the statement that to " 'constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to injure, but no actual battery need occur.' " 233 Neb. at 520-21, 446 N.W.2d at 219. The quotation was improvident because whereas *Swigart* arose under the present § 28-308(1), *Ristau* was decided under the predecessor statute, Neb. Rev. Stat. § 28-413 (Reissue 1975), which read: "Whoever assaults another with intent to inflict a great bodily injury shall be punished upon conviction . . . ." The two statutes differ markedly, for while under § 28-413 it was the infliction of the injury which was prohibited, under § 28-308(1) the prohibited conduct consists of the act which "causes" injury in some degree.

In that last respect, the second and third degree assault statutes are the same as the first degree assault statute. We therefore now specifically hold, as we implied in *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), that all three offenses are general, and not specific, intent crimes; that is to say, the intent required by §§ 28-308(1), 28-309(1), and 28-310(1) relates to the assault, not to the injury which results.

Having clarified that matter, we turn our attention to the question of whether the district court erred by refusing to instruct on the elements of third degree assault as a lesser-included offense of first degree assault.

In *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), we abandoned the statutory-elements approach for determining what constitutes lesser-included offenses and adopted instead the cognate-evidence approach which we, quoting from *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988), explained in greater

detail in *State v. Grant*, 242 Neb. 364, 372, 495 N.W.2d 253, 258 (1993):

> "Under the cognate approach, a defendant may be convicted of a lesser offense that, under the strict statutory-elements approach, is not necessarily committed in the course of committing the greater offense. The lesser offense is related and, hence, 'cognate' in the sense that it has several elements in common with the greater offense but may have one or two elements not essential to the greater crime. . . .
>
> . . . [T]he cognate-evidence method, focuses on the evidence supporting the charge rather than on the statutory elements or the accusatory pleading."

Since deciding *Garza*, we have experienced firsthand the difficulties the cognate-evidence approach presents by permitting the consideration of elements the lesser crime may not share with the higher crime and have come to better understand the wisdom of the observations of the U.S. Supreme Court in *Schmuck v. United States*, 489 U.S. 705, 720-21, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989):

> [T]he elements tests is far more certain and predictable in its application . . . . Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.

Hence, we return to the statutory-elements approach and, therefore, overrule the following decisions to the extent that they rely upon and apply the cognate-evidence approach: *State v. Grant, supra*; *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992); *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991); *State v. Garza, supra*.

We readopt the rule announced in *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982): " 'To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . .' " Accord, *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). Otherwise stated, a lesser-included offense "is one which is fully embraced in the higher offense." *State v. Tamburano*, 201 Neb. 703, 705, 271 N.W.2d 472, 474 (1978).

Thus, in determining whether an offense is indeed a lesser-included one, a court initially does not look to the evidence in the particular case, but, rather, as the name of the statutory-elements rule implies, looks only to the elements of the criminal offense. *State v. Lovelace, supra*. However, once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *State v. Tamburano, supra*; *State v. McDonald*, 312 Minn. 320, 251 N.W.2d 705 (1977). Accord, *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980). Consequently, a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

Third degree assault differs from first degree assault with respect to the injury which results and may differ with regard to the mental state with which the assault is committed. A first degree assault arises when one acting "intentionally or knowingly" causes "serious bodily injury" to another. In contrast, third degree assault arises when one acting "[i]ntentionally, knowingly, or recklessly" causes mere "bodily injury" to another. Since both first degree and third degree assault may rest upon a finding that the accused acted intentionally or knowingly, third degree assault is to that extent necessarily included within first degree assault. Moreover, since

one cannot inflict serious bodily injury without inflicting bodily injury, third degree assault is fully encompassed within first degree assault. Thus, third degree assault is a lesser-included offense of the crime charged, first degree assault, and an instruction on third degree assault would be appropriate if the evidence in this case justifies its submission.

In this connection, we look first to the evidence relating to the mental state under which Williams acted. In the context of a criminal statute, "intentionally" means willfully or purposely, and not accidentally or involuntarily. *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991). While in a criminal statute the meaning of the word "knowingly" varies with the context, it commonly imports a perception of the facts requisite to make up the crime. *R. D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 178 N.W.2d 277 (1970).

The record discloses that Williams intentionally and knowingly approached and struck Caston despite her pleas that he not do so and that he then proceeded to quickly leave the scene without observing whether Caston was injured. Thus, irrespective of whether it can also be said that Williams acted recklessly, as the term is defined in Neb. Rev. Stat. § 28-109(19) (Reissue 1989), a matter we do not decide, so far as the requisite mental state is concerned, the evidence would support the existence of either first degree or third degree assault.

That brings us to the nature of the injury inflicted. "Serious bodily injury" occurs when there exists "a substantial risk of death, or . . . substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." § 28-109(20). "Bodily injury," on the other hand, exists when there is present "physical pain, illness, or any impairment of physical condition." § 28-109(4). Thus, there can be no serious bodily injury in the absence of a bodily injury. Caston suffered a broken jaw, requiring extensive hospitalization and resulting in permanent scarring. Consequently, for the purpose of determining whether to instruct on third degree assault as a lesser-included offense, the evidence provides no rational basis for finding that Williams' actions caused mere "bodily injury," and, for that purpose, does not produce a rational basis for a

verdict acquitting Williams of the offense charged and convicting him of the lesser offense. See *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

However, the presumption of innocence demands that all factual elements of the government's case be submitted to the jury. *United States v. Canales*, 744 F.2d 413 (5th Cir. 1984), *reh'g denied* 750 F.2d 69; *United States v. Manuszak*, 234 F.2d 421 (3d Cir. 1956); *People v. Figueroa*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986). Thus, the jury was free, had it so chosen, to determine that the injury was not serious and to thus acquit Williams.

The judgment of the Court of Appeals is reversed.

REVERSED.

BOSLAUGH, J., concurring in the judgment only.

I concur in only that part of the majority opinion which holds that the evidence in this case was such that there was no rational basis for the jury to convict the defendant of only the lesser offense. Thus, an instruction on a lesser-included offense was not required, and I concur in the judgment of the court for that reason.

STATE OF NEBRASKA, APPELLEE, V. SHANNON STOTT, APPELLANT.

503 N.W.2d 822

Filed August 6, 1993. No. S-92-915.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous.
2. _____: _____. In deciding whether a trial court's findings on a motion to suppress are clearly erroneous, a reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Standing: Words and Phrases.** "Standing" means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy.
4. **Constitutional Law: Search and Seizure: Standing.** The capacity to claim the protection of the Fourth Amendment depends upon whether the person who

claims the protection has a legitimate expectation of privacy in the invaded place.

5. **Search Warrants: Search and Seizure: Standing.** The principle of severability applies with respect to standing and permits a court to address specific locations which a defendant has standing to challenge and disregards those locations which a defendant does not, regardless of whether the locations appeared on one warrant or numerous warrants.
6. **Search and Seizure.** One has a reasonable or legitimate expectation of privacy in one's own body.
7. **Search and Seizure: Standing.** One lacks standing to object to the search of another.
8. **Search and Seizure.** The right to be free from unreasonable searches and seizures is a personal right which cannot be asserted vicariously.
9. **Constitutional Law: Search and Seizure: Motor Vehicles: Standing.** An occupant of an automobile has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his or her Fourth Amendment rights.
10. **Constitutional Law: Search and Seizure: Property.** While property ownership is a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of a court's inquiry.
11. **Search and Seizure: Property: Proof.** A defendant may demonstrate the infringement of his or her own legitimate expectation of privacy by showing that he or she owned the premises or that he or she occupied them and had dominion and control over them by leave of the owner.
12. **Search Warrants: Words and Phrases.** An anticipatory search warrant is one that is issued before the item to be seized has arrived at the place to be searched.
13. **Search Warrants: Probable Cause.** Search warrants are not invalid merely because they are anticipatory in nature; the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed.
14. **Search Warrants.** In order to be valid, a warrant must particularly describe the places to be searched and persons to be seized.
15. _____. Particularity in a search warrant is required in order that the executing officer can reasonably ascertain and identify the persons or places authorized to be searched and the things authorized to be seized.
16. _____. What amounts to sufficient particularity in a search warrant depends upon the facts and circumstances of each case.
17. **Constitutional Law: Criminal Law: Trial: Witnesses.** The 6th Amendment to the U.S. Constitution, applicable to the states via the 14th Amendment, mandates that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.
18. _____: _____: _____: _____. Compulsory process is guaranteed by Neb. Const. art. I, § 11, which requires that in all criminal prosecutions, the accused shall have the right to have process to compel the attendance of witnesses in his

behalf.

19. _____: _____: _____: _____. The right to compel witnesses is not absolute, but is limited to those witnesses who are material and favorable to the defense.
20. **Witnesses: Juries.** The determination of the credibility of a witness is a matter within the jury's province.
21. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court.
22. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
23. **Constitutional Law: Statutes: Proof.** The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.
24. **Trial: Witnesses: Prisoners: Depositions.** Under appropriate circumstances, depositions may be substituted for the live testimony of imprisoned witnesses.
25. **Criminal Law: Trial: Testimony.** The right to present relevant testimony may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.
26. **Constitutional Law: Criminal Law: Testimony.** The compulsory process clause guarantees a criminal defendant the right to offer material and favorable testimony.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Benjamin P. King, of Reed & King Law Office, for appellant.

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

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

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdict, the defendant-appellant, Shannon Stott, was adjudged guilty of attempting to distribute a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-201 (Reissue 1989), Neb Rev. Stat. § 28-405(c)(10) [Schedule I] (Cum. Supp. 1990), and Neb. Rev. Stat. § 28-416 (Cum. Supp. 1992); distributing the substance, in violation of § 28-416; and conspiring to deliver the substance, in violation of § 28-416 and Neb. Rev. Stat. § 28-202 (Reissue 1989). Stott asserts, in summary, that the district court erred in (1) failing to

suppress certain evidence which he claims was obtained pursuant to an illegal warrant and (2) failing to find Neb. Rev. Stat. § 25-1233 (Reissue 1989) violative of the Sixth Amendment to the federal Constitution in that it limits a criminal defendant's access to the testimony of certain prisoner witnesses. We affirm.

II. FACTS

On March 10, 1992, Nebraska State Patrol Investigator Scott L. Kendall received a telephone call from a confidential informant who told Kendall that he, the informant, had traveled to Denver with Stott, where they met one Russ, later determined to be Russell Robbins, and purchased one-fourth pound of marijuana before returning to Scottsbluff, Nebraska. The informant also advised Kendall that he had arranged to buy one-half ounce of marijuana from Stott at approximately 2:30 p.m. that same day.

After being fitted with a listening device and furnished money to make the purchase, the informant proceeded to Stott's residence. Upon Stott's later arrival, the informant went with Stott to the latter's bedroom, where the informant told Stott that he wanted one-half ounce of marijuana "for a gal's brothers." The informant then purchased one-half ounce of marijuana divided into two bags represented to each contain one-fourth ounce of marijuana.

During this March 10 transaction, the informant inquired about purchasing one-fourth pound of marijuana. Stott told the informant that Robbins would be arriving in Scottsbluff from Denver on either March 12 or March 14.

After learning that Robbins would in fact be arriving in Scottsbluff on the morning of March 12, the informant contacted Kendall. The informant was again fitted with a listening device and was given $500 for the purchase of the marijuana.

Robbins arrived at Stott's residence, where the informant was also present, on the evening of March 12. Stott, driving the informant's automobile and accompanied by the informant, then left for the residence of Stott's sister; Robbins followed in his pickup truck. At approximately 9 p.m., the two vehicles

were stopped on a Scottsbluff street by a State Patrol officer, at which time Stott remarked to the informant that " 'we've been narked off.' " Kendall saw Stott "reaching, bending down a little bit like he was hiding something" in the automobile. A search of the area in which Stott had apparently concealed an object produced a baggie of marijuana. A search of Stott incident to his arrest revealed $800 in cash, including five $100 bills matching those Kendall had given the informant.

Robbins' pickup was subsequently secured and searched, revealing approximately 7 pounds of marijuana, plastic bags, and a digital scale.

A search of Stott's residence uncovered a piece of paper with Robbins' address and telephone number secreted in a planter.

III. ANALYSIS

With those facts in mind, we turn our attention to Stott's summarized assignments of error.

1. NONSUPPRESSION OF EVIDENCE

In his first summarized assignment of error, Stott claims the district court erred in refusing to suppress evidence seized during the March 12 searches. Stott argues that the search warrant was fatally flawed in two respects. First, he claims that at the time the search warrant was issued, there was not probable cause to justify its issuance. Second, he alleges that the warrant was invalid for overbreadth.

We begin by once again recalling that in determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). In deciding whether a trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

(a) Standing

Initially, we must determine whether Stott has standing to challenge the validity of the search warrant.

" 'Standing' means that a person has a sufficient legally

protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy." *State v. Baltimore*, 242 Neb. 562, 568, 495 N.W.2d 921, 925 (1993). Specifically, with regard to search and seizure, it has been held that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), citing *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Accord, *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).

The warrant declared that probable cause existed to believe that marijuana and drug paraphernalia were concealed or kept in the following locations: the informant's automobile, Stott's residence, Stott's person, the "person of Russell, last name unknown," and the "vehicle of Russell believed to be a small pickup bearing Colorado license plates."

Stott contends that we cannot separate the locations to be searched for purposes of determining standing, attempting to paint the searches of all locations as one search because all five locations were cited on one search warrant. Stated another way, Stott claims that if he has standing to challenge one area to be searched, he possesses standing to challenge all areas to be searched because all five locations were listed on one warrant. He cites no authority for this theory, nor can we find any.

Indeed, the federal courts have adopted a principle of severability and have concluded that the general parts of a search warrant may be severed, thus permitting a court to suppress only those items not seized pursuant to the specific parts of the warrant. *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983), *cert. denied* 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 538 (1984); *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982), *cert. denied* 464 U.S. 814, 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983); *United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981). We now

conclude that the principle of severability applies with respect to standing and permits a court to address specific locations which a defendant has standing to challenge and disregard those locations which a defendant does not, regardless of whether they appeared on one warrant or numerous warrants.

Stott clearly has standing to contest the search of his person, since it is elementary that one has a reasonable or legitimate expectation of privacy in one's own body. See *State v. Johnson, ante* p. 758, 502 N.W.2d 477 (1993).

However, it is manifest that one lacks standing to object to the search of another. *State v. Bruno*, 293 Minn. 84, 196 N.W.2d 459 (1972). The right to be free from unreasonable searches and seizures is a personal right which cannot be asserted vicariously. *Rakas v. Illinois, supra*; *State v. Kenny*, 224 Neb. 638, 399 N.W.2d 821 (1987). Obviously, Stott did not have a legitimate expectation of privacy in Robbins' person. Thus, Stott cannot challenge the search of Robbins.

With regard to the search of the informant's automobile, we have held that "an occupant of an automobile has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his or her Fourth Amendment rights." *State v. Chavez*, 240 Neb. 538, 543, 483 N.W.2d 122, 125 (1992), citing *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990). Accord *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989). Because Stott was an occupant in the informant's automobile and thus had a legitimate expectation of privacy, he has standing to challenge the search of the automobile.

Stott was not, however, an occupant in Robbins' pickup truck, nor did he possess any ownership interest in that motor vehicle. It is therefore clear that Stott did not possess any legitimate expectation of privacy in Robbins' vehicle and has no standing to question its search.

That leaves the search of Stott's residence. At the time, Stott was residing with his mother and grandmother in Scottsbluff. The record does not disclose whether Stott owned the premises upon which he lived; however, "[w]hile property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . .

property rights are neither the beginning nor the end of [a] [c]ourt's inquiry." *United States v. Salvucci*, 448 U.S. 83, 91, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), citing *Rakas v. Illinois, supra*. A "defendant may demonstrate the infringement of his own legitimate expectation of privacy by showing that he owned the premises or that he occupied them and had dominion and control over them by leave of the owner." *U.S. v. Villegas*, 899 F.2d 1324, 1333 (2d Cir. 1990), *cert. denied* 498 U.S. 991, 111 S. Ct. 535, 112 L. Ed. 2d 545. Here, the record reveals that Stott occupied the invaded premises and exercised dominion and control over them. Thus, Stott possessed a legitimate expectation of privacy in his place of residence. See *People v. Koury*, 214 Cal. App. 3d 676, 262 Cal. Rptr. 870 (1989).

Accordingly, Stott lacked the requisite standing to challenge the validity of the search warrant with regard to Robbins' automobile and person. However, Stott has standing to challenge the warrant as to the informant's automobile, Stott's person, and Stott's residence.

(b) Probable Cause

The first of Stott's challenges to the searches attacks the validity of the search warrant by claiming that probable cause did not exist at the time the warrant was issued, but, rather, there was merely a belief that probable cause would exist in futuro.

The essence of Stott's argument is a challenge to the validity of an anticipatory search warrant. We recently defined such a warrant as " 'one that is issued before the item to be seized has arrived at the place to be searched.' " *State v. Morrison, ante* p. 469, 480, 500 N.W.2d 547, 556 (1993), quoting *U.S. v. Tagbering*, 985 F.2d 946 (8th Cir. 1993). We therein held that search warrants are not invalid merely because they are anticipatory in nature. Quoting *U.S. v. Garcia*, 882 F.2d 699 (2d Cir. 1989), *cert. denied, Grant v. United States*, 493 U.S. 943, 110 S. Ct. 348, 107 L. Ed. 2d 336, we declared that " ' "the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed." ' " *Morrison, ante* at 480, 500 N.W.2d at

556.

Kendall signed and filed an affidavit and application for issuance of a search warrant. The affidavit detailed surveillance of Stott and the evidence obtained from the informant and concluded:

> Affiant states that during the last . . . transaction, the [informant] asked . . . Stott when he would be getting some more marijuana as the [informant] had told . . . Stott he wanted a quarter pound and . . . Stott told the [informant] he better get his money ready as Russell will be in Scottsbluff either Thursday, March 12, 1992 or Saturday, March 14, 1992.
>
> Affiant states that the [informant] called [an investigator] of the Nebraska State Patrol on March 12, 1992 at about 9:00 and informed [the investigator] that he believed the individual, Russell, would be here from Colorado the afternoon of March 12, 1992. [The informant] also informed affiant that he believes the individual named Russell will be driving a small pickup with Colorado plates.
>
> Affiant states that upon issuance of this warrant, it will be necessary to wait to execute the warrant until the individual from Colorado arrives with the marijuana and therefore, as this could happen anytime between March 12, 1992 to March 14, 1992 and also because arrival could be in the daytime or nighttime, affiant requests that this search warrant be designated an anytime search warrant.

As the affidavit and factual record demonstrate, the search was not, as Stott contends, "just a hunt," but, rather, was a valid search based upon probable cause, i.e., " 'a reasonable suspicion founded on articulable facts.' " *State v. Farrell*, 242 Neb. 877, 884, 497 N.W.2d 17, 21 (1993). The district court was not clearly wrong in upholding the validity of the anticipatory search warrant.

(c) Overbreadth

Stott's second challenge claims that the warrant was flawed because it was overly broad. This argument is based in part on Stott's mistaken belief that probable cause did not exist.

The Fourth Amendment to the U.S. Constitution requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized.*" (Emphasis supplied.) Analogous is Neb. Const. art. I, § 7. Likewise, Neb. Rev. Stat. § 29-814.04 (Reissue 1989) provides, in relevant part, that "[i]f the magistrate or judge is satisfied that probable cause exists for the issuance of a search warrant . . . the magistrate or judge shall issue the warrant *which shall identify the person or place to be searched and the person or property to be seized.*" (Emphasis supplied.)

It is well established that in order to be valid, a warrant must particularly describe the places to be searched and persons to be seized. *State v. Johnson, ante* p. 758, 502 N.W.2d 477 (1993), citing *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988). " 'Particularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized. . . .' " *State v. Pecha*, 225 Neb. 673, 679, 407 N.W.2d 760, 764 (1987), quoting *People v Nieves*, 36 N.Y.2d 396, 330 N.E.2d 26, 369 N.Y.S.2d 50 (1975). What amounts to sufficient particularity depends upon the facts and circumstances of each case. *State v. Johnson, supra.*

Here, the warrant accurately listed Stott's legal name, described his residence by street address, and identified the informant's automobile by license plate number. Thus, sufficient particularity was given with respect to those persons or places Stott has standing to challenge as not to offend the federal and state Constitutions or § 29-814.04.

2. Access to Prisoner Witness

In his second summarized assignment of error, Stott complains that the district court erred in refusing to compel the production of Robbins to testify in person at trial.

In existence since this state's territorial days, § 25-1233 provides: "A person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition." The

record is unclear as to where Robbins was confined at the time of Stott's trial; however, important to our inquiry is that he was confined in a state correctional facility outside Scotts Bluff County.

No claim is made that § 25-1233 is constitutionally infirm because it makes the oral examination at trial of prisoner witnesses dependent upon county boundaries rather than the distance between the witness' location and the place of trial, and we therefore do not concern ourselves with this matter.

In connection with a motion to compel the State to produce Robbins to testify in court, Stott described Robbins' testimony as being "utterly essential" to his defense, for Robbins would testify that he, Stott, "had nothing to do with the drugs that were seized . . . ." Relying upon *Rains v. State*, 173 Neb. 586, 114 N.W.2d 399 (1962), *cert. denied* 371 U.S. 967, 83 S. Ct. 549, 9 L. Ed. 2d 538 (1963), the district court overruled Stott's motion but permitted him to depose Robbins; the deposition was later received into evidence at trial.

The 6th Amendment to the U.S. Constitution, applicable to the states via the 14th Amendment, *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Moreover, compulsory process is guaranteed by Nebraska's version of the right, Neb. Const. art. I, § 11, which similarly requires that "[i]n all criminal prosecutions the accused shall have the right . . . to have process to compel the attendance of witnesses in his behalf . . . ."

(a) Materiality

The right to compel witnesses is not absolute, but is limited to those witnesses who are material and favorable to the defense. Thus, Stott must demonstrate materiality, i.e., he must at least make some plausible showing of how the testimony of the witness would have been both material and favorable to his defense. See, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982); *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986). The constitutional right to compulsory

process requires process only for competent and material witnesses. *State v. Jones, supra*; *State v. Cain, supra*; *O'Rourke v. State*, 166 Neb. 866, 90 N.W.2d 820 (1958).

Robbins' deposition reveals that he admitted transporting the approximately 7 pounds of marijuana to Scottsbluff, but he claims that Stott was in the dark as to Robbins' transportation of the drug and that Stott was in no way involved in its purchase. Moreover, Robbins claims that he was not aware of any arrangement for Stott to sell marijuana. Such testimony, if believed, is clearly material to Stott's defense, for it goes to the heart of the offense—whether Stott intentionally violated the relevant statutes. We do not delve into the veracity and sincerity of Robbins' testimony, for the determination of the credibility of a witness is a matter within the jury's province. See *State v. Connely, ante* p. 319, 499 N.W.2d 65 (1993). Therefore, Robbins' testimony was both material and favorable to Stott's defense, and we thus proceed to the question of the constitutionality of § 25-1233.

(b) Adequacy of Deposition Testimony

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. Schmailzl, ante* p. 734, 502 N.W.2d 463 (1993), citing *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Connely, supra*; *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality. *State v. Schmailzl, supra*; *State v. Connely, supra*; *State v. Garza, supra*; *State v. Crowdell, supra*.

The scope of § 25-1233 was addressed in *Rains v. State, supra*. Therein, the defendant argued that the trial court erred in not permitting him to depose two of his accomplices, both of whom were confined in state penal institutions. In holding that the trial court did not abuse its discretion, the *Rains* court noted that

> [t]here is no showing as to what material evidence would

> be adduced by the witness . . . in behalf of the defendant relating to the defendant's defense if the motion to take his deposition was granted. In a situation of this kind, the question is whether or not the trial court abused its sound legal discretion in not permitting the defendant to take the depositions as set forth in his motion.

173 Neb. at 597-98, 114 N.W.2d at 405. See, also, *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955) (declining to rule on the constitutionality of § 25-1233).

The compulsory process clause

> was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. . . . [T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Washington v. Texas, 388 U.S. 14, 19-20, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Until 1967, the federal compulsory process clause had become, for all intents and purposes, a dead letter. See Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 73 (1974-75). New life was breathed into the provision in 1967 in *Washington v. Texas*, in which the U.S. Supreme Court struck down a state statute prohibiting persons charged or convicted as accomplices in the same crime from testifying for one another. The Court ruminated further:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19.

Some 15 years later, in *United States v. Valenzuela-Bernal*,

458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), the Supreme Court held that a criminal defendant was not denied his right to compulsory process when the federal government deported two of the defendant's witnesses after it was determined that they were illegal aliens. The Court focused on the fact that a defendant must make some plausible showing that the testimony would have been relevant, material, and favorable to the defendant's case before a Sixth Amendment violation can occur.

Neither the U.S. Supreme Court nor the lower federal courts have found occasion to resolve the precise issue with which we are faced, i.e., whether the deposition testimony of a prisoner witness satisfies the compulsory process clause. However, some state courts have addressed comparable concerns.

At least one court has taken the view that the compulsory process clause requires live testimony. In *Ross v. Com.*, 577 S.W.2d 6 (Ky. App. 1977), the trial court overruled the defendant's motion to secure the attendance of a prisoner witness at his trial. On appeal, the Kentucky Court of Appeals first noted that the essence of what the defendant sought was the common-law writ of habeas corpus ad testificandum. The court held that under the federal and state compulsory process clauses, because the Commonwealth of Kentucky had custody and control of the prisoner witness, the defendant was entitled to an order requiring the warden to produce the prisoner to testify as a witness at trial. Additionally, the court found the commonwealth's argument that the defendant could be compelled to depose the prisoner witness, rather than produce the witness for live testimony, to be without merit. Nevertheless, the appeals court concluded that the lower court did not abuse its discretion because the defendant's motion was filed too late to secure the prisoner witness' attendance at trial.

Other courts have permitted the use of depositions as an alternative to the use of live testimony. In *Hahn v. State*, 306 N.W.2d 764 (Iowa 1981), the defendant claimed that the trial court had violated the state compulsory process clause in denying his attempt to secure the presence of two prisoner witnesses at a postconviction hearing. The defendant deposed one of the witnesses following the trial court's refusal to order

the personal appearance of either prisoner witness. On appeal, the defendant specifically contended that the witness' answers to interrogatories were less effective than his live testimony would have been. The Supreme Court of Iowa concluded that an order for the personal appearance of the prisoner witness was not mandated by the Iowa Constitution. The court made no reference to the federal Constitution's Sixth Amendment in reaching its decision.

In *Magee v. State*, 43 Ala. App. 218, 187 So. 2d 274 (1966), the defendant sought to have some of his fellow convicts testify on his behalf. The Court of Appeals of Alabama, although ultimately basing its decision on the fact that the defendant failed to follow statutory procedure, noted that exceptions to the compulsory process clause exist, most notably an exception for convicts.

Finally, in *People v. Putman*, 129 Cal. 258, 61 P. 961 (1900), the defendant sought to have some 13 prisoners testify at his murder trial. The trial court granted the defendant's motion as to six of the prisoners and ordered that depositions be taken of the other seven. On appeal, the Supreme Court of California, citing *Willard v. Superior Court*, 82 Cal. 456, 22 P. 1120 (1890), determined that an order for the production of a prisoner witness does not issue as a matter of right, but, rather, only where the trial court determines that the witness is necessary. The state supreme court further held that depositions may be substituted for the live testimony of imprisoned witnesses. See *In re Bagwell*, 26 Cal. App. 2d 418, 79 P.2d 395 (1938) (relying upon statute similar to § 25-1233, court held that prisoner was not entitled to writ of habeas corpus ad testificandum in civil action the prisoner had filed). See, also, *State v. Dehler*, 257 Minn. 549, 102 N.W.2d 696 (1960) (holding that defendant is not deprived of right to compulsory process where depositions of defendant's out-of-state witnesses are available).

The issue in the present case distills down to the significance of live testimony vis-a-vis deposition testimony. The merit of in-court testimony has long been recognized by courts and commentators. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); 4 Jack B. Weinstein &

Margaret A. Berger, Weinstein's Evidence ¶ 800[01] (1992). The customary reason given favoring the use of live testimony is that it permits the jury to view the witnesses' demeanor. But see Note, *The Theoretical Foundation of the Hearsay Rules*, 93 Harv. L. Rev. 1786, 1798 n.50 (1980) (citing several studies, author concludes that the "asserted value of demeanor as an indicium of reliability . . . seems suspect").

Although we appreciate that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), we are also cognizant that the right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," *id.*, 410 U.S. at 295. Section 25-1233 represents an equitable compromise of legitimate interests—the right of a criminal defendant to present testimony in his own defense and the interest of the state in curtailing the exorbitant costs of criminal prosecutions.

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), make clear that the compulsory process clause guarantees a criminal defendant the right to offer material and favorable testimony. Stott was indeed permitted to offer the material and favorable testimony of Robbins by way of deposition. There is no requirement under the state or federal compulsory process clause for testimony to be live. What these provisions do require is that criminal defendants be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury. *Washington v. Texas, supra*.

We hold that a criminal defendant does not possess an absolute constitutional right to demand the personal attendance of a prisoner witness incarcerated outside the county of the venue of trial. Thus, under the circumstances of this case, Stott has not met his burden to clearly demonstrate that § 25-1233 violates the compulsory process clauses of the Constitutions of the United States and of this state.

IV. JUDGMENT

The record failing to sustain Stott's summarized assignments of error, we affirm the judgment of the district court.

AFFIRMED.

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