Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
09/16/2026 04:29 AM CDT

REPORTS OF CASES

DECIDED BETWEEN

MARCH 25, 1988 and JUNE 23, 1988

IN THE

Supreme Court of Nebraska

VOLUME CCXXVIII

TRINA SOLLARS

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1989

Copyright A. D. 1989

By Trina Sollars, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

WILLIAM C. HASTINGS, Chief Justice
LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice

TRINA SOLLARS ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Tecumseh
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Earl Witthoff	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	DeWayne Wolf	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Donald E. Rowlands II John P. Murphy	North Platte North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Jack H. Hendrix	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Edward E. Hannon	O'Neill
Sixteenth	Box Butte, Dawes, Grant, Morrill, Sheridan, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Gage and Jefferson	William B. Rist	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, Garden, and Kimball	John D. Knapp	Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Ronald D. Olberding	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	John C. Whitehead John M. Brower	Columbus Fullerton

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		Jeffrey L. Campbell	Papillion
		Albert Walsh	Papillion
Third	Lancaster	Neal H. Dusenberry	Lincoln
		James Foster	Lincoln
		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack Lindner	Lincoln
		Gale Pokorny	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		Lyn V. Ferer	Omaha
		Richard M. Jones	Omaha
		John McGrath	Omaha
		Thomas V. McQuade	Omaha
		Jane Prochaska	Omaha
		William F. Ryan	Omaha
		Stephen M. Swartz	Omaha
		Joseph Troia	Omaha
		Robert C. Vondrasek	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Ray L. Cellar	Geneva
		J. Patrick McArdle	Wilber
Eighth	Cedar, Dakota, Dixon, and Thurston	David W. Curtiss	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	James J. Duggan Stephen Finn Philip Riley	Norfolk Neligh Creighton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack R. Ott	Hastings Hastings
Eleventh	Hall and Howard	David A. Bush Richard E. Weaver	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd Kaufman Earl E. Morgan Kristine R. Cecava	Lexington North Platte Ogallala
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Alan L. Brodbeck August F. Schuman	O'Neill Ainsworth
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	G. Glenn Camerer James L. Macken	Gering Gering
Eighteenth	Gage and Jefferson	Steven B. Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas Dorwart C.G. Wallace III	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith Kovanda Robert E. Wheeler	Burwell Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gary F. Hatfield Gerald E. Rouse Lyle Winkle	Central City Columbus Columbus

ATTORNEYS

Admitted Since the Publication of Volume 227

JOSEPH FRANCIS BERTINETTI
BRIAN E. BUCKMEIER
ELIZABETH S. BURNES-SCHILLING
DAVID CLYDE COKER
MICHAEL L. CRUISE
RICK A. DAMKROGER
WESLEY S. DODGE
MICAELA O'CONNOR GILCHRIST
DOROTHY K. GOODMAN
CONSTANCE JOAN GRAHAM
RUSSELL W. HARFORD
DAVID H. HOESING
DAVID HARMON JOHNSON
LISA S. KESSNER
MARTHA MARTIN MCMINN
GRAYSON KIRK MEADE
JULIE E. MYERS
MEREDITH L. OAKES
RICHARD CARYL RITSCHER
MICHELE L. SCHERGER
DONALD CHARLES SIDAK
CHARLES LEROY SMITH
KEVIN DOUGLAS URBOM
JOHN CARL VANDERSLICE
BARBARA J. VITZTHUM
SHARON ENGLISH WATSON
MARY ELIZABETH WEBER
BRADLEY J. WHITE
GLEN D. WITTE

TABLE OF CASES REPORTED

AT&T; Hebard v. 15
AT&T Technologies; Allen v. 503
Abrahamson; Communications Workers of America v. 335
Albion Nat. Bank v. Farmers Co-op Assn. 258
Allen v. AT&T Technologies 503
Allgire; Guenther v. 425
American Charter Fed. S. & L. Assn. v. Zabel 721
American Medical International; Ford v. 226
American Stores Packing Co.; Behrens v. 18
Ames v. George Victor Corp. 675
Anderson; Welsh v. 79
Application of BIJK Enterprises, In re 804
Application of Koch Service, In re 631
Archbishop Bergan Mercy Hospital; Gilbert v. 148
Associated Wrecking v. Wiekhorst Bros. 764

BIJK Enterprises, In re Application of 804
BRG; Western Fertilizer v. 776
Bartee; Johnson v. 111
Behrens v. American Stores Packing Co. 18
Bierbower v. Hanson 716
Bishop v. Farm Bureau Life Ins. Co. 74
Blankemeyer; Federal Land Bank of Omaha v. 249
Blankenfeld; State v. 611
Blitzkie v. State 409
Board of Governors; Van Fossen v. 579
Board of Regents; Russell v. 518
Bodfield; State v. 205
Boysaw; State v. 316
Breeling v. Churchill 596
Brinkley v. Brinkley 595
Britt; State v. 201
Brown; O'Toole v. 321
Buche v. Buche 624
Building Systems, Inc. v. Medical Center, Ltd. 168
Buster; State v. 387

Carroll v. Moore 561
Cass, County of; McKinstry v. 733

Cech; Schuyler State Bank v. 588
Chief Indus. v. Hamilton Cty. Bd. of Equal. 275
Christen v. Christen 268
Chronicle Broadcasting Co.; Mandery v. 391
Churchill; Breeling v. 596
Clark; State v. 599
Clark v. Clark 440
Clay v. Clay 264
Commissioner of Labor; Groene v. 53
Communications Workers of America v. Abrahamson 335
Conservatorship of Estate of Martin, In re 103
Continental Western Ins. Co.; Mantz v. 447
Control Specialists v. State Farm Mut. Auto. Ins. Co. 642
County of Cass; McKinstry v. 733
Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr. 38

Dail; State v. 653
Davis; State v. 622
Derby; Sanchez v. 497
Devaney; Eliason v. 331
Diesel Power Equip. Co.; Kuehl v. 353
Dieter v. State 368

Edwin Bender & Sons v. Ericson Livestock Comm. Co. 157
Eliason v. Devaney 331
Engleman v. Nebraska Public Power Dist. 788
Ericson Livestock Comm. Co.; Edwin Bender & Sons v. 157
Estate of Martin, In re Conservatorship of 103

Farm Bureau Life Ins. Co.; Bishop v. 74
Farmers Co-op Assn.; Albion Nat. Bank v. 258
Federal Land Bank of Omaha v. Blankemeyer 249
Fees v. Rivett Lumber Co. 617
First Nat. Bank of York; Otto Farms v. 287
First State Bank v. Reed 349
Ford v. American Medical International 226
Frelo; State v. 122
Frieden Constr. Co.; Koch v. 328

George; State v. 774
George Victor Corp.; Ames v. 675
Gibson; State v. 455
Gilbert v. Archbishop Bergan Mercy Hospital 148
Gilbert v. Sioux City Foundry 379
Groene v. Commissioner of Labor 53
Growers Seed Assn.; NC + Hybrids v. 306
Grunwald Mechanical Contractors; Stodola v. 301

Guenther v. Allgire 425
Gunter; Rust v. 141

Hamilton Cty. Bd. of Equal.; Chief Indus. v. 275
Hamm v. Hamm 294
Hanson; Bierbower v. 716
Harding v. Harding 327
Haug; Rorick Partnership v. 364
Hebard v. AT&T 15
Heller's Carbonic; Poorker v. 729
Holman v. Papio Nat. Resources Dist. 94
Hook; State v. 138
Horne; Lincoln County Sheriff's Office v. 473
Hruby v. Kalina 713

Ihde v. Kempkes 433
In re Application of BIJK Enterprises 804
In re Application of Koch Service 631
In re Conservatorship of Estate of Martin 103
In re Interest of M.R., J.R., and N.R. 47

Janssen v. Trennepohl 6
Jensen; Larson v. 799
Johnson v. Bartee 111
Jordan; Kubista v. 244
Julch; Nuttelman v. 750

Kalina; Hruby v. 713
Katzman; State v. 851
Keim v. Keim 684
Kempkes; Ihde v. 433
Kimball v. Kimball 702
Kimbrough v. Kimbrough 358
Kleinberg; State v. 128
Knipple; State v. 264
Koch Service, In re Application of 631
Koch v. Frieden Constr. Co. 328
Koelling; Martinez v. 1
Kubista v. Jordan 244
Kuehl v. Diesel Power Equip. Co. 353
Kula v. Prososki 692

Ladehoff; State v. 812
Larson v. Jensen 799
Leibbrandt v. Lomax 552
Lincoln County Sheriff's Office v. Horne 473
Lincoln Electric Sys.; Lueder Constr. Co. v. 707
Lincoln Public Schools; Thomas v. 11

Line v. Line 700
Lomax; Leibbrandt v. 552
Lowry v. State Farm Mut. Auto. Ins. Co. 171
Lueder Constr. Co. v. Lincoln Electric Sys. 707

M.R., J.R., and N.R., In re Interest of 47
Mandery v. Chronicle Broadcasting Co. 391
Mantz v. Continental Western Ins. Co. 447
Martin, In re Conservatorship of Estate of 103
Martinez v. Koelling 1
McAllister v. McAllister 314
McCaslin v. Meysenburg 748
McCoy; State v. 178
McCurry; State v. 841
McKenna; State v. 29
McKinstry v. County of Cass 733
McPhail; State v. 117
Medical Center, Ltd.; Building Systems, Inc. v. 168
Meginnis Ford Co.; Schriner v. 85
Methe; State v. 468
Metropolitan Life Ins. Co. v. Reeves-Gustafson 233
Metzger; Micek v. 437
Meysenburg; McCaslin v. 748
Micek v. Metzger 437
Miller Farm-Home Oil Service; Panwitz v. 220
Monastero; State v. 818
Moore; Carroll v. 561
Moreno; State v. 210

NC + Hybrids v. Growers Seed Assn. 306
Nash; State v. 69
Nebraska Public Power Dist.; Engleman v. 788
Nuttelman v. Julch 750

Oliva; State v. 185
O'Toole v. Brown 321
Otto Farms v. First Nat. Bank of York 287

Panwitz v. Miller Farm-Home Oil Service 220
Papio Nat. Resources Dist.; Holman v. 94
Pappas; State v. 861
Peterson; Tank v. 491
Petitte; State v. 144
Poorker v. Heller's Carbonic 729
Prime Meat Processors; Rodriquez v. 55
Propst; State v. 722
Prososki; Kula v. 692

Radcliffe; State v. 868
Reed; First State Bank v. 349
Reed; State v. 645
Reeves-Gustafson; Metropolitan Life Ins. Co. v. 233
Region IV Ofc. of Developmental Dis.; Roggasch v. 636
Richard; State v. 872
Rincker; State v. 522
Rivett Lumber Co.; Fees v. 617
Rodgers v. Sparks 191
Rodriquez v. Prime Meat Processors 55
Roggasch v. Region IV Ofc. of Developmental Dis. 636
Roman L. Hruska U.S. Meat Animal Res. Ctr.; Currier v. 38
Rorick Partnership v. Haug 364
Rowe; State v. 663
Russell v. Board of Regents 518
Rust v. Gunter 141

Sanchez v. Derby 497
Schaefer; Worley v. 484
Schmidt v. Schmidt 758
Schriner v. Meginnis Ford Co. 85
Schuyler State Bank v. Cech 588
Sioux City Foundry; Gilbert v. 379
Sparks; Rodgers v. 191
Spire, State ex rel. v. Stodola 107
State; Blitzkie v. 409
State; Dieter v. 368
State ex rel. Spire v. Stodola 107
State Farm Mut. Auto. Ins. Co.; Control Specialists v. 642
State Farm Mut. Auto. Ins. Co.; Lowry v. 171
State v. Blankenfeld 611
State v. Bodfield 205
State v. Boysaw 316
State v. Britt 201
State v. Buster 387
State v. Clark 599
State v. Dail 653
State v. Davis 622
State v. Frelo 122
State v. George 774
State v. Gibson 455
State v. Hook 138
State v. Katzman 851
State v. Kleinberg 128
State v. Knipple 264
State v. Ladehoff 812
State v. McCoy 178

State v. McCurry 841
State v. McKenna 29
State v. McPhail 117
State v. Methe 468
State v. Monastero 818
State v. Moreno 210
State v. Nash 69
State v. Oliva 185
State v. Pappas 861
State v. Petitte 144
State v. Propst 722
State v. Radcliffe 868
State v. Reed 645
State v. Richard 872
State v. Rincker 522
State v. Rowe 663
State v. Stone 389
State v. Tracy 610
State v. Wiley 608
State v. Zellner 272
State v. Zemunski and Whiteley 536
Stevens v. Stevens 84
Stodola; State ex rel. Spire v. 107
Stodola v. Grunwald Mechanical Contractors 301
Stone; State v. 389

Tank v. Peterson 491
Thomas v. Lincoln Public Schools 11
Tracy; State v. 610
Trennepohl; Janssen v. 6

Van Fossen v. Board of Governors 579

Welsh v. Anderson 79
Western Fertilizer v. BRG 776
Whiteley, Zemunski and; State v. 536
Wiekhorst Bros.; Associated Wrecking v. 764
Wiley; State v. 608
Worley v. Schaefer 484

Zabel; American Charter Fed. S. & L. Assn. v. 721
Zavitka v. Zavitka 267
Zellner; State v. 272
Zemunski and Whiteley; State v. 536

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 85-915: **County of Richardson v. Usher.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-193: **Bergerac v. Bergerac.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-419: **Bank of Leigh v. Stuthman.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-455: **State ex rel. North v. Way.** Appeal dismissed. See Rule 7A(2).

No. 86-456: **State ex rel. Fry v. Addleman.** Appeal dismissed. See Rule 7A(2).

No. 86-792: **Shade v. Kirk.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-845: **III Lounge, Inc. v. Gaines.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-877: **State ex rel. Spire v. Box Office, Inc.** Appeal dismissed. See Rule 7A(2).

No. 86-899: **Ward v. Ferguson.** Motion of appellee Satterfield for costs and attorney fees overruled. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-964: **Tate v. AT&T Technologies.** Stipulation allowed; appeal dismissed.

No. 86-1039: **Shelter Mutual Ins. Co. v. Potter.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-068: **Brase v. Goodwill Industries, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-107: **N & K Investment Co. v. T.D.S., Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-159: **NC + Hybrids v. Booker.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-299: **Willers v. Nebraska Sand & Gravel, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-311: **Wherry v. Feldhaus.** Stipulation allowed; appeal dismissed.

No. 87-349: **Baker v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-680: **III Lounge, Inc. v. Gaines.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-691: **State v. Glathar.** Affirmed. See Rule 7A(1).

No. 87-776: **State v. Al Sultan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-778: **State v. Haynes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-779: **Lewis v. Lewis.** Motion of appellee for summary dismissal sustained; see Rule 7B(1). Appellee's request for attorney fees denied.

No. 87-832: **In re Estate of Robinson.** Stipulation allowed; appeal dismissed.

No. 87-836: **Rowe v. American Central Transport, Inc.** Joint motion allowed; judgment vacated and cause remanded to Public Service Commission for further proceedings.

No. 87-865: **State v. Gravenstein.** Affirmed. See Rule 7A(1).

No. 87-879: **Credit Bureau Services v. Kock.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-892: **John Hancock Mutual Life Ins. Co. v. Bielenberg.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-909: **State v. Stoner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-912: **Long v. Howland.** Stipulation allowed; appeal dismissed.

No. 87-914: **State v. Hefflinger.** Affirmed. See Rule 7A(1).

No. 87-922: **Crain v. Nebraska Liquor Control Commission.** By order of the court, joint stipulation allowed; judgment of district court for Lancaster County vacated and cause remanded for further proceedings.

No. 87-924: **State v. Engelhard.** Affirmed. See Rule 7A(1).

No. 87-929: **Roth v. County of Custer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-934: **State v. Wright.** Affirmed. See Rule 7A(1).

No. 87-937: **American Charter Federal Savings and Loan v. Shane.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 87-942: **State v. Labat.** Affirmed. See Rule 7A(1).

No. 87-946: **Federal Land Bank of Omaha v. Gohl.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-948: **Federal Land Bank of Omaha v. Brosius Cattle Co.** Amended motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-986: **State v. Krauel.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-994: **Wesco, Inc. v. Murino, Inc.** Stipulation allowed; appeal dismissed at cost of appellants.

No. 87-997: **State v. Baker.** Affirmed. See Rule 7A(1).

No. 87-1020: **State v. Maeder.** Affirmed. See Rule 7A(1).

No. 87-1024: **State v. Sporcic.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1026: **State v. Blankenship.** Motion of appellant for order to proceed in forma pauperis and for order requiring State to pay costs of copying briefs overruled; motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-1028: **Federal Land Bank of Omaha v. Red Willow Ranch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1030: **Federal Land Bank of Omaha v. Blankemeyer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-1037: **State v. Kyes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1039: **State v. Fernandez.** Affirmed. See Rule 7A(1).

Nos. 87-1041, 87-1042: **State v. Hodyc.** Affirmed. See Rule 7A(1).

No. 87-1052: **State v. Laughlin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1057: **State v. Lange.** Appeal dismissed. See Rule 7A(2).

No. 87-1061: **Metropolitan Life Ins. Co. v. Loftis.** Stipulation allowed; appeal dismissed.

No. 87-1062: **Shaul v. City of Hastings.** Stipulation allowed; appeal dismissed.

No. 87-1072: **State v. Harrison.** Affirmed. See Rule 7A(1).

No. 87-1077: **Wherry v. McNamara.** Stipulation allowed; appeal dismissed.

No. 87-1080: **Stewart v. Jackson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1083: **State v. Moore.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-1089: **Brosh v. McFarland.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1091: **Wittmaack v. County Board of Equalization.** Appeal dismissed. See Rule 7A(2).

No. 87-1097: **State v. Traxler.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1098: **State v. Howe.** Affirmed. See Rule 7A(1).

No. 87-1101: **Cunningham v. KRCB.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-1102: **First National Bank in Mitchell v. Elliott Ranch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1104: **State v. Frazier.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-1106: **State v. Osborne.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1107: **State v. Bernhardt.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-1110: **In re Estate of Dorman.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 87-1114: **State v. McArthur.** By order of the court, judgment and sentences vacated; case remanded to district court for further proceedings.

No. 87-1115: **Badami v. Nebraska Tractor & Equipment.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-1118: **In re Interest of Walker.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-1120: **State v. Ruberti.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1121: **State v. Mucha.** Affirmed. See Rule 7A(1).

No. 87-1123: **Tyler v. Alvarez.** Appeal dismissed. See Rule 7A(2).

No. 87-1124: **Toyota Motor Distributors, Inc. v. Nebraska Motor Vehicle Industry Licensing Board.** By order of the court, judgment vacated and cause remanded to district court for further proceedings.

No. 87-1127: **Five Points Bank v. Folsom.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-1129: **In re Interest of Tyler.** Appeal dismissed. See Rule 7A(2).

No. 87-1131: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 87-1135: **State v. Pohlman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1142: **State ex rel. Tyler v. Bartee.** Affirmed. See

Rule 7A(1).

No. 87-1146: **Hutcheson v. Deco Engineering Products, Inc.** Stipulation allowed; appeal dismissed.

No. 87-1148: **State v. Harvey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-001: **Tyler v. Buckley.** Affirmed. See Rule 7A(1).

No. 88-010: **Martin v. Hahn's Fencing and AID Insurance.** Stipulation allowed; appeal dismissed.

No. 88-013: **State ex rel. Tyler v. Spire.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-014: **Federal Land Bank of Omaha v. Brosius Cattle Co.** Amended motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-021: **State v. Larsen.** Affirmed. See Rule 7A(1).

No. 88-023: **State ex rel. Tyler v. Gunter.** Affirmed. See Rule 7A(1).

No. 88-024: **Blankenship v. Gray.** By order of the court, appeal dismissed; see Rule 7A.

No. 88-025: **State ex rel. Campbell v. Gunter.** Affirmed. See Rule 7A(1).

No. 88-026: **State ex rel. Tyler v. Clarke.** By order of the court, appeal dismissed; see Rule 7A.

No. 88-029: **Metropolitan Utilities Dist. v. Moschetti.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-032: **State v. Lightfoot.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-035: **State v. Nation.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-039: **Terrill v. Terrill.** Stipulation allowed; appeal dismissed without prejudice at cost of appellant.

No. 88-041: **State v. Bell.** By order of the court, cause remanded to district court for further proceedings.

No. 88-051: **Hollrah v. Hollrah.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each

party to pay own costs.

No. 88-056: **In re Interest of Skibstead.** Prehearing Conference report reviewed; appeal dismissed. See Rule 7A(2).

No. 88-060: **State v. Coon.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-062: **Forms Associates v. Thousand Adventures.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-066: **State v. Blankenship.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-070: **State v. Apo.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-080: **State v. Love.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-082: **Wilson v. Wilson.** Stipulation allowed; appeal dismissed.

No. 88-085: **State v. Pollard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-098: **Nicholson v. Lancaster County.** Stipulation allowed; appeal dismissed.

No. 88-101: **Magilton v. Magilton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-103: **State v. Cemper.** Affirmed. See rule 7A(1).

No. 88-113: **City of Lincoln v. Allison.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-114: **Baker v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-118: **State v. Hughes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-128: **County of Santa Clara v. Vanderkuur.** Appeal dismissed. See Rule 7A(2).

No. 88-134: **State v. Contreras.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 88-135: **Hoile v. Bankers Life Company of Des Moines.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-136: **Hanneman v. Hanneman.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 88-141: **First National Bank of Omaha v. Goeser.** Affirmed. See Rule 7A(1).

No. 88-142: **Tyler v. Hubbard.** Appeal dismissed. See Rule 7A(2).

No. 88-143: **Field v. Omaha Steakshops, Inc.** Stipulation allowed; appeal dismissed.

No. 88-144: **State v. Fuller.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-152: **Becker v. Northeast Cartage, Inc.** Motions of appellant and appellee to dismiss appeal sustained; appeal dismissed.

No. 88-154: **McCracken v. American Big Top, Inc.** Stipulation allowed; appeal dismissed.

No. 88-158: **Van v. Wytossek.** Stipulation allowed; appeal dismissed.

No. 88-164: **State v. Leslie.** Stipulation allowed; appeal dismissed without prejudice.

No. 88-165: **State v. Scott.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-166: **State v. Kelley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-170: **Munoz v. Munoz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-176: **In re Adoption of Roti.** Stipulation allowed; appeal dismissed.

No. 88-180: **State v. Hicks.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-182: **State v. Prue.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-201: **State v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-211: **State v. Woodrich.** Affirmed. See Rule 7A(1).

No. 88-212: **State v. McCarthy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-213: **State v. McCarthy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-244: **Hatton v. Derr.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-267: **Klawitter v. Mahaska Bottling Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-274: **Dimitroff v. Dimitroff.** Stipulation allowed; appeal dismissed with prejudice.

No. 88-277: **Barton v. Barton.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-282: **Simon v. Keystone Storage, Inc.** Stipulation allowed; appeal dismissed.

No. 88-292: **Staman v. Yaeger & Yaeger.** Appeal dismissed. See Rule 7A(2).

No. 88-293: **State v. Zimmerman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-306: **Bustos v. Bestenlehner.** Motions of appellant and appellee to dismiss appeal sustained; appeal dismissed.

No. 88-317: **State ex rel. Grams v. Village of Staplehurst.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 88-318: **Huston v. Huston.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-335: **State v. Adams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-337: **State v. Matis.** Stipulation allowed; appeal dismissed.

No. 88-349: **Langel v. Southgate Apartments Assoc.** Stipulation allowed; appeal dismissed with prejudice.

No. 88-364: **State v. Herron.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-368: **Department of Health v. Manor Care, Inc.** Motion of appellee for summary dismissal sustained; see Rule 7B(1)..

No. 88-401: **State v. Scott.** Stipulation allowed; appeal dismissed.

IN MEMORIAM

ROBERT VAN PELT

CHIEF JUSTICE WILLIAM C. HASTINGS.

Today, May 2, 1988, marks the opening of the May session of hearings. We have 10 cases for argument. Coincidentally, it is being celebrated in Lincoln as Law Day. On a sadder note, it is also the morning on which memorial services are being held for Senior U.S. District Judge Robert Van Pelt, who died last week.

The court concluded that with the number of cases scheduled and with lawyers from all over the state being involved, it would not be practical to cancel this session. Additionally, we felt that Judge Van Pelt, if he were to know, would be embarrassed and perhaps perturbed that we were impeding the progress of justice. Therefore, only I will excuse myself around 10 o'clock in order to attend the memorial services and represent this court in showing the high esteem in which all of us held Judge Van Pelt.

Robert Van Pelt was a common man, but an uncommonly good judge. I called him a jurist without peer. I based that on many ingredients: his legal knowledge and ability; his concern for others; his awareness of social problems; his judicial temperament; his dry wit; his courtesy and friendliness; and, I suppose, as much as anything, his kindness. He was a great friend of all of us and a great supporter of our court. I remember especially the effort he made last September, when it was somewhat difficult for him to get around, that, nevertheless, he attended the ceremony and reception on the occasion of my being sworn in as Chief Justice. He did me great honor.

We will all miss him, and share with his family in the sadness of his passing. But he lived a long, useful, and great life.

It is ordered that these remarks be spread upon the permanent records of this court and that a copy of them be forwarded to the family of Judge Van Pelt.

IN MEMORIAM

ROBERT C. BROWER

And now, on this 5th day of May 1988, at the hour of 9 a.m., the Supreme Court of the State of Nebraska is hereby convened in special Term of Court for the purpose of receiving resolutions in memory of Robert C. Brower, a former Justice of this court, who departed this life on the 25th day of November 1987.

CHIEF JUSTICE WILLIAM C. HASTINGS.

On behalf of the court, I would like to publicly thank Mr. Vance E. Leininger, Columbus, for his service as chairman of the committee selected to present such resolutions, as well as Mr. Philip T. Morgan, Fullerton; Mr. Edward Asche, Schuyler; Mr. John A. Wagoner, Grand Island; and the Honorable Joseph D. Martin, Grand Island, who have served as members of that committee. Those who will offer resolutions will be presented to the court as introduced by Mr. Leininger.

MR. VANCE E. LEININGER.

MAY IT PLEASE THE COURT, HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES, MEMBERS OF THE FAMILY OF JUDGE BROWER, COLLEAGUES, AND FRIENDS:

I deeply appreciate the honor and privilege of acting as chairman of the committee in charge of this memorial service. I attach particular significance to this occasion because of the geographical fact that I was privileged to grow up in Fullerton, the same community which Judge Brower called home, and for a part of that time, our family residences were less than a city block apart. I also recall with gratitude numerous courtesies extended to me by Judge Brower at the time immediately after my admission to the Bar, when I was trying to figure out where and how to coordinate the practice of law with the necessity of providing for a family of four, including two young children.

Fortunately, I was provided with a committee of four

eminent members of the Nebraska Bar, all of whom will contribute remarks this morning. I extend my sincere thanks to them for their willing cooperation. I am also indebted to Judge McCown, a retired Associate Justice of this court, and to Judge Boslaugh, with both of whom Judge Brower served as a member of this court, and from whom we will hear later.

I feel constrained to claim the prerogatives of a chairman, and I make some comments of my own at this time because I feel that my own long acquaintance with the Brower family gives me an insight into his true worth as a person, a lawyer, and a jurist, which I should share with everyone.

Robert C. Brower, or Bob, as we knew him in Fullerton, was born into a family which has exhibited a unique tradition exemplifying service of the utmost importance and value to their fellow men. His father, Martin I. Brower, was truly a pioneer in Nebraska. He had been admitted to practice law in Illinois and moved with his family to Fullerton about 1880, where he practiced law for about 10 years before becoming the county judge of Nance County, a judicial post which he held until 1896. Four years later, Judge Martin Brower saw the need for an additional financial institution in Fullerton and organized the Fullerton National Bank in 1900, which is still serving the needs of that community, and which only recently moved from its original location to new quarters.

Bob was born in 1896, the year his father left the judgeship, and received his basic education in the Fullerton public schools, graduating from high school in 1914. After attending the University of Nebraska, he completed his formal training in the law at the University of Michigan in 1919. His record as a law student must have been noteworthy, because upon graduation he took a position with a prominent law firm in Kalispell, Montana, where he practiced until 1922. One of the senior partners in that firm was a director of the Great Northern Railroad, and much of the firm's practice involved the legal problems of the railroads, which were then of great importance to the development of that part of the country.

However, more important to his family than his professional experience in Kalispell is the fact that while there he met his beloved wife of many years, Lenore. They were subsequently

blessed with three children, Honorable John M. Brower, a District Judge of the 21st Judicial District (which includes Bob's native Fullerton and Nance County); Thomas D. Brower, a distinguished member of this Bar practicing in Scottsbluff; and their daughter Helen Porter, residing in Lincoln, all of whom are present with us today, together with some of their children, several of whom have also followed the family tradition and are members of our profession.

Bob's return to Fullerton from Kalispell was typical of his entire career. He was called by a need for his services. His father passed away in 1920, as a result of which his older brother, Julian, needed his counsel and help in managing the bank and other family interests. In addition, the late J.H. Kemp, a highly regarded lawyer in Fullerton, needed help in his office.

Beginning in 1922, as a member of the firm of Kemp & Brower, Bob's practice shortly became engrossed with the typical problems of a small Nebraska county seat town which had expanded with the boom years of the 1920s, had taken on too much bonded indebtedness, and then suffered the fate of the 1930s, when the Great Depression applied the force of its tourniquet to the lifeblood of the local agricultural economy. As city attorney during the "hard times," as Bob called them, in the 1930s, he continuously had to keep his finger on the pulse of the local economy in order to protect the interests of the city in properties which were delinquent in the payment of general taxes and special assessments levied for improvements to those properties. Foreclosure proceedings were necessary, but property values had all but evaporated, and it was not until his son John joined him in the practice in about 1950 that it became worthwhile to attempt to resell properties that had been abandoned by their owners because of unpaid tax liens.

Similar concerns beset the local private financial institutions, but it is noteworthy that Bob's representation of the holders of mortgages during those disheartening years did not cost him the respect and good will of the general community, which he justly earned by his exhibition of common sense and fair treatment. In fact, he developed a wide acquaintance and following throughout the area, and in later years could relate many amusing stories and anecdotes about the so-called hard times

and the many sheriff's and referee's sales resulting from them.

The paperwork involved, however, was burdensome, and it was not unusual to see his office light on until well past the hour of darkness. I still have a vivid memory of seeing him walk from his office across the street to the local cafe for a late cup of coffee or a bite to eat after the end of his extended workday—usually about the time the rest of the people still visible on the street were leaving the local movie theater for their homes.

The affairs of the city were not the only ones that Bob was privileged to worry about in those days. He served 9 years on the local board of education during the 1930s, part of them as its president, when merely keeping the schoolhouse doors open was an accomplishment in many of our Nebraska towns. Also, during World War II, he took his turn at the office of county attorney of Nance County, a post hard to fill during those years.

Other community service, nonlegal in character, also claimed his attention during this part of his career. He was a charter member of the Fullerton Lion's Club and, in fact, the only surviving charter member of that organization at the time of his death.

Later, after his son John returned to take on some of the burdens of the office, Bob served two terms as a Senator in the State Legislature during the 1950s. While in the Legislature, he experienced a serious illness, but it only slowed him down temporarily.

I do not want to leave you with the impression that Bob's early career as a practicing lawyer in Fullerton was all dark and gloomy, because it also had its lighter moments. I distinctly recall that it was well known in the community that he and Mr. Kemp were not of the same political persuasion and that during one heated presidential campaign different clients would attest to seeing, first, a portrait of the Democratic candidate, and then, on another day, a portrait of the Republican candidate for that office prominently displayed in their waiting room. Eventually, close observation of their front door revealed that the identity of the candidate whose portrait was on display that day depended on which of the partners was first to appear on the scene.

Finally, Bob's career of service ended as an Associate Justice on the bench of this court. He was appointed by Governor Morrison to succeed the Honorable Adolph Wenke, and served here from 1961 to 1967, when his retirement was mandatory because of his age. Others will attest in greater detail to the invaluable nature of his contributions to the deliberations of this court.

Bob retired to Arizona with his wife, Lenore, who preceded him in death in 1982. He died November 25, 1987, here in Lincoln, at the age of 91. Interment followed in Fullerton, where he was born.

Robert C. Brower occupied a unique position in a unique family. He represented the second generation in three successive generations of members of the Nebraska judiciary. He represented the second generation in four successive generations of members of the Nebraska Bar. His was a lifetime of service—service to his family, to his native city and surrounding community, to his county and school district, and finally to his state generally, both as a Senator involved in the making of laws, and as a Judge of its highest court involved in their application—but always he was a servant of the law. Few are the men about whom this much can be said.

MR. PHILIP T. MORGAN.

MR. CHIEF JUSTICE, JUSTICES, MEMBERS OF THE COMMITTEE, AND FRIENDS AND FAMILY OF JUDGE BROWER:

I first became acquainted with Judge Brower in October of 1954 when I began practicing in Fullerton, Nebraska. We were competitors during the remainder of the time that Judge Brower practiced there.

Judge Brower always treated me with a great deal of courtesy, and this probably is one of the primary memories I have of him. Judge Brower was a man who believed in passing through life with humor and good feeling, and I always felt that the phrase "joie de vivre" fit him exactly.

Judge Brower enjoyed life to the fullest. He loved his family, good music, good books, and good fellowship, and he and I spent many happy times regaling each other with stories of

times past. I am sure that up there now, he is regaling someone with these same stories, and I only regret that they cannot be taped and sent to us. As an attorney, Judge Brower was extremely thorough, and he always had his client's best interest at heart.

We were not involved in many contested matters, but when we were, he was able always to leave the natural combativeness of the trial lawyer behind him in the courtroom and to be courteous and polite outside the courtroom.

I think that it is safe to say that the state, our town, and the Bar Association have lost a citizen of whom they were and can be justly proud.

MR. EDWARD ASCHE.

CHIEF JUSTICE HASTINGS AND ASSOCIATE JUDGES, MEMBERS OF THE BAR, AND MEMBERS OF THE FAMILY OF ROBERT C. BROWER:

Robert C. Brower and I first became acquainted in the early 1950s, at a time when we were both practicing in the Sixth Judicial District in Nebraska. Judge Brower at that time was practicing in Fullerton. I was located at Schuyler, and we were on the extreme ends of the district. Because of the distance between us, our contact, both professionally and socially, was somewhat limited.

There was, however, one case in which we both participated as adversaries which was of special interest to me at the time, and it now has a special spot in my memory. In 1951, during the spring thaw, an ice jam was formed in the Platte River southeast of Schuyler, which had the effect of blocking up the water on the Platte River for some distance upstream. The pent-up water finally broke out on the Butler County side of the river, flooding to the south, first in the Duck Creek Valley, thence into Skull Creek, with the water finally settling back into its original channel downstream. The river carried flowing ice and water in this new channel for days, and the result was a large part of the area adjacent to the river that became surrounded by water, and considerable damage was rendered. In fact, damage was extreme even in the pasturelands, where sod was ripped up for great distances. I remember during the

course of the trial, one of the oldtimers said that whenever you hear the water in this area there is only one thing left to do, and that is to get on your fastest horse and head for the high hills. Judge Brower had a client who had a quarter section of land in this area and who, in order to protect himself from recurring floods, had built a dike across almost the entire area of the Duck Creek Valley as protection against these waters. The result of the dike was that when these floodwaters came into this small channel, the dike had the tendency of diverting waters back to the north against the residence of our client and rendered considerable damage not only to the residence, but also to the lands in question surrounding the farmstead.

The case was tried before Judge Kokjer, who among his many fine attributes had the patience of Job. The counsel on the other side of our case was E.A. Coufal of David City and, of course, he was assisting Judge Brower. About 14 days of trial time was consumed in the trial of that case, which extended over about 6 weeks' time. At the conclusion, Judge Kokjer rendered a written opinion consisting of five pages of special findings. That did not end the case. There was a motion for new trial, which was rather extended, together with motions to again open up the case and submit new evidence, and also there were contempt proceedings for failure to conform to the decree. The case was finally brought to a close 4 years later, in 1956. There were no appeals taken from any of the orders entered by the court.

E.A. Coufal and Judge Brower were two very capable trial lawyers, and in that contest I was intent merely on keeping up my learning process with respect to floodwaters in a water case. These two gentlemen furnished their client with a classic defense, and during that time I formulated my opinion of Judge Brower's attitude with respect to opposing counsel, and it is from that position that I now speak.

Through the period that this matter was under trial, I found Judge Brower personable, friendly, and respectful of the opposition, even though they did not measure up to his own experience, talent, and knowledge of law. His courtroom demeanor was above average. He was, at the same time, defensive of his own client, whom I regarded as one in need of

great help. After rereading the pleadings in the case and recalling the contributions by the several witnesses and the attorneys involved, coupled with the patience of Judge Kokjer, it is my opinion that it represented a well-tried water case, if that is at all possible.

In 1961, Judge Brower was appointed by Governor Morrison to the Supreme Court, and he continued there until his retirement in 1967, at the age of 71 years. We being members of the same judicial district, his career in this court was of interest to me, and I was always anxious to read the advance sheets to see if Judge Brower participated in any way. I had the good fortune to appear twice before him when he was a member of this court. At the time I was named as one of the members of this committee, we in our office conducted a survey of the number of opinions that Judge Brower participated in during his stay on this court. We found that he wrote opinions in 154 cases, which included 7 dissenting opinions. No tabulation was made of per curiam opinions, but the number of opinions must of necessity have had a momentous effect on the case law that now exists in the State of Nebraska.

I have one more thought in connection with the contributions of this one man toward the Bar Association and the judicial system, and that is that of his three children, two are very active practitioners in the state: his son Thomas, who is practicing in Scottsbluff, and his son John, who is now a district judge of our present 21st Judicial District.

I greatly appreciated the invitation by the Chief Justice to be a member of this committee. It has also been a great pleasure for me to be here to speak to you about the attributes of this man and to call your attention again to the many contributions that have been made by this family, and especially by the deceased, Judge Brower.

MR. JOHN A. WAGONER.

MAY IT PLEASE THE COURT, MEMBERS OF THE BROWER FAMILY, MEMBERS OF THE BAR, AND THIS COMMITTEE:

I appreciate the opportunity of speaking in behalf of Judge Brower. I first became acquainted with Judge Brower in the

middle 1950s. I did some work for an insurance company, and I was assigned an investigation in the Fullerton area. Judge Brower represented the claimant. Those were adverse circumstances to become acquainted with a man of the ability of Judge Brower, but we settled the claim and there were not any lawsuits. I think that spoke well for Judge Brower. I felt that I was beaten before I started, so I paid the claimant off.

My next meeting with Judge Brower was at Fullerton. I remember it concerned some property, and I had to go to the assessor's office to find out some valuations. I made many trips over to the courthouse in Fullerton on this particular transaction. We got it resolved eventually without any litigation. All through my contact with Judge Brower during both of these instances, although I was considerably younger and more inexperienced than he was, he treated me with unfailing courtesy. I thought that was one of the nice things of my acquaintance with Judge Brower, that he was so courteous and helpful, and he was adamant on behalf of his client. He took care of his clients first, and then he was a courteous lawyer in an adversarial capacity.

I spoke to Judge Brower when he was a member of the Nebraska Legislature. In those days they did not have offices; they had two benches at the rear, and you spoke to the Senator sitting down in the bench. I am not a constituent of his district, but I did ask him for some information. He gave it to me willingly, helpfully, and again I was deeply impressed by his conduct to his fellow men. He was truly a fine gentleman.

I feel the State of Nebraska gained from the experience and the integrity which was ingrained into Judge Brower's life. And the spirit of Judge Brower exemplifies his capacity as a jurist of this honorable court. I feel that he was a typical Nebraskan.

HONORABLE JOSEPH D. MARTIN.

MAY IT PLEASE THE COURT, AND THE FAMILY AND FRIENDS OF JUDGE BROWER:

Years ago when I was young and naive, I met Bob Brower in the legislative chambers. We were both freshmen and served together for two terms. Little about that time sticks in my memory except for two occasions.

Once, Bob nominated me for chairman of the Judiciary Committee. There were two of us nominated. There were seven of us on the committee and we voted twice, each time the vote was 3 to 3. Finally, Bob asked for a recess, came to me, and said, "Aren't you voting for yourself?" I said, "No, I didn't think it was proper," and he said something to the effect that the Lord helps those who help themselves and if I planned to move on, I had better help myself first. We went back, and the next vote was 4 to 3, and with his help we got through that session of the Legislature. It is kind of like the story about the fellow who fell down the well. You can throw him a rope, but if it is not fastened to anything, it will not help him. Bob Brower was the rope—the anchored rope for me—when I was in the Legislature.

On another occasion we had a bill concerning taxes. Bob was opposed to the increase which might result to the ordinary property owner because we were giving the railroads, or whoever it was, a break. He said to me, "Joe, I have an idea that I'm going to deed all my property to the inmates at the Beatrice Home and the Hastings Asylum and then I'm going to advise them not to pay these real estate taxes. They'll have to appoint guardians ad litem and by the time this thing gets through the court system, these other people will realize how silly this bill is." Of course he did not, and whether the bill passed or not, I do not remember, but these two minor incidents, to me at least, conveyed the feeling that he was sympathetic to those of us inexperienced in life and also to the ordinary citizens he represented.

What I am trying to say is that though I had few dealings with Bob after our stint in the Legislature, and even after I became older, albeit still naive, whenever his name was mentioned or we met, I felt comfortable knowing that here was one person who had compassion and humility. And I felt comfortable always knowing he was out there, and if need be I could talk to him and he would understand. And, of course, by now I know all things pass with time, but if I can peg a remembrance on a good person, I have been graced, and I feel fortunate in having known Judge Brower.

ASSOCIATE JUSTICE HALE MCCOWN, RETIRED.

MAY IT PLEASE THE COURT:

It is a privilege for me to join with other members of the bench and bar at this memorial session to honor the memory of Judge Robert C. Brower.

When I first joined the Nebraska Supreme Court in January of 1965, my chair at that end of the bench was next to Bob Brower's. For the first 2 years of my time on the bench and the last 2 years of his service, we sat side by side—not only on the bench, but in the conference room as well, where many of the unheard arguments of this court proceed. He was always willing to share his knowledge and experience, which was wide-ranging and intensive, and help a new judge get started and adjusted to the customs and procedures of this court. His kindness, warmth, and great sense of humor were acknowledged by all his colleagues. Because of all these things, he was always a very special friend.

I am sure that others have already given you the biographical history of Judge Brower, and I shall therefore say only that he came to the bench following a long and distinguished career as a lawyer in public service. He liked to refer to himself as an "old country lawyer." If so, he was one of the very best of that wonderful breed. He was always a fine judge, dedicated to his work and to his family, and interested in and well informed about an amazing variety of the major and minor issues involving public and governmental affairs, past, present, and projected.

It would be difficult to characterize Judge Brower as fitting into any certain classification within any sort of narrow limits. He was a quiet, warm, and friendly man, who was never afraid to express his considered views on legal and public issues when it was appropriate. He had a marvelous sense of humor, which was often directed at himself.

I always felt that Judge Brower reflected the true spirit of the old frontier—a rugged and loyal spirit of independence and a real devotion to the rights of the individual and to life and liberty for all. He was a man of integrity, who stood for, and fought for, the principles he believed in. He had an uncanny ability to find the just result in practical terms for individual

cases. That ability came from his devotion to the cause of evenhanded justice, grounded in dedication to the principles of the common law and individual liberty. There were those who did not know him well who regarded him as austere, but his kindness, warmth, and honesty were a source of universal admiration among those who knew him well.

Judge Brower was dedicated to his duty as a judge, and he performed that duty with pride and with consummate skill. His stature is unassailable, and his career and his contributions to the cause of justice in this state command our admiration and respect.

I am sure that Judge Robert Van Pelt, who left us only a few days ago, would forgive me for using a couplet which he used at a memorial service for a former judge of this court several years ago.

"Death this year has taken men
Whose kind we shall not see again."

His friends and colleagues join in paying respect to the memory of Robert Brower, a great man as well as a fine judge. It was a pleasure to have known him.

ASSOCIATE JUSTICE LESLIE BOSLAUGH.

On March 3, 1961, approximately 60 days after I became a member of this court, Judge Adolph Wenke passed away suddenly and unexpectedly. On March 13, Robert Brower was appointed to succeed Judge Wenke.

I want to digress for a moment and mention that Bob was not the first member of the Brower family with whom I was acquainted. When I attended high school in Hastings, Nebraska, his sister was teaching civics and government. She was an interesting person and a splendid teacher. Several years later I had the pleasure of meeting his niece who was then a student attending Hastings College.

It was my honor to serve with Judge Brower during the 6 years he was a judge of this court. He was a remarkable man and brought a wealth of experience to the court. He had distinguished himself not only in the practice of law, but in the fields of banking and agriculture. He had served several terms in the Legislature, and he was familiar with the many aspects of

state government.

Although Judge Brower was some 20 years my senior, he was in many ways one of the youngest men on the bench.

If I were to select one quality that I believe was dominant in Judge Brower, I would say it was his sense of fairness. He had an instinct for what was right and just. He never hesitated to do what he felt had to be done.

He was a warm friend, a good companion. We enjoyed his company. We shall miss him very much.

HONORABLE JOHN M. BROWER.

MAY IT PLEASE THE COURT:

I deeply appreciate the privilege of appearing before this court in honor of my father, former Justice Robert C. Brower. I know that both my sister, Helen, and my brother, Tom, join me in thanking you, not to mention the grandchildren and many friends that my father had.

Father was the son of a lawyer, a son of a judge, Martin I. Brower. Martin moved from Illinois in 1881 with his father to settle in Nance County. Nance County had been the Pawnee Indian Reservation and most of the land in that county was not homesteaded as was most of the land in Nebraska. The land was sold at auction at a public sale in Lone Tree, which is now known as Central City, and most of this land was purchased by absentee landowners from the east. The land was rented out to sharecroppers and immigrant farmers, tenants who were sent from the East to farm this land. Some of those holdings remained in Eastern hands until the 1960s.

Father mentioned, on a number of occasions, how the development of Nance County had been impeded by the lack of capital and income, with profits being sent east to the investors and little put back into the land. This economic phenomenon, I believe, had a great deal to do with his views of social matters and politics. His parents were very much involved in the social issues of the day and maintained a home which many guests frequented. These were people covering the Chautauqua circuit or engaged in political movements of the day, such as women's suffrage and prohibition. Duty, social commitment, and ethics were an integral part of that home environment.

Father started his practice in 1919 in Montana, where he met our mother. After the death of his father, he returned to Nebraska to practice with Mr. James H. Kemp in 1922. He was devoted to his community and Nance County. He suffered through the Depression of the 1930s like many others. During those hard times, he and his partner had resolved not to represent foreign mortgagees. The bread and butter then was the foreclosure business, and to refuse to represent those many insurance companies in foreclosure actions, I assure you, did not enhance the firm's income. Fees were often a basket of eggs, a load of firewood, live chickens, or possibly a half a hog or sack of potatoes. I do not think that he ever kept track of time with a client. If the case took more time than he initially anticipated, so be it—the needed time was provided.

When I returned to Fullerton in 1951, times were not very flush, and I know that concerned my father. But when it was suggested that a new billing method be instituted based on time charges, he said, "The client shouldn't pay to educate you. You should be prepared to handle their case and tell them what the action is likely to cost when you start." He felt that the profession imposed upon him a duty to his client and had set for himself the highest ethical standards. He also felt, and so instructed others, that if you have reason to question the ethics of a particular matter, you should not be involved in it. Your duty is to your client within the limits imposed upon you as a member of the court, and if you were worried about your ethical position, you were not in the position to give your client his full due.

He was a great pacer. He would walk to the bank, or to the post office, or to the courthouse. The length of that walk was in direct proportion to the complexity of the problem he was trying to resolve. Many townspeople would pass him on his trip and make some greeting without response. They knew my father. He was doing his research. Quite frequently, after going halfway down the block, he would turn and shout back some recognition, it having registered on him that someone had talked to him. He took his work seriously; he read a lot and studied each issue of the case; and he was always well prepared. He was a plodder. He enjoyed the search and had a keen sense

of humor; yet, I believe that his greatest asset was that he had an impulse, the sudden inclination without conscious thought, to know what was right and wrong. He knew the power that pulled the string of that impulse. It was hidden in him. It was life, and it was the man himself.

In his conception of fellow man he was never swayed by the tools, the wealth, or the power that attached to man. He knew and believed those things, when disjunct from the cause that sets them in motion and puts them to rest, had no more value than the stenographer's notebook, the writer's pen, or the carpenter's hammer without the owner.

In later years my brother, Tom, assisted my father with his business matters, and I know that he noticed how many and how varied were the causes in which father had taken an interest. He made contributions to many, many of the causes in our society, and in reflecting upon those things, my brother commented that he had concluded that father was a totally unselfish man. He was constantly in the middle of controversy and took controversial positions on all issues, but he himself was never controversial. He served his fellow man, his community, and the state faithfully, and will be remembered because of that. One can ask for nothing more.

CHIEF JUSTICE HASTINGS.

At this time I would like to acknowledge the presence of Paul W. White, former Chief Justice of this court, who served with Judge Brower. Judge White, it is a pleasure to have you here, and also to acknowledge the presence of Attorney General Robert M. Spire and his Chief Deputy, Eugene Crump.

I served on the district bench for about 2 years at the time that Judge Brower served on this court. I remember him with affection as a kind, dignified, and thoroughly competent judge, and I am glad to hear everyone agreed that that is true, because one of the first cases I tried, *Banks v. State*, a school land lease case, was reversed by a vote of 4 to 3 by this court. Judge Brower wrote the dissenting opinion. He said, "I would affirm the judgment of the trial court insofar as it purports to place the title to the improvements in the lessees. That was all the trial court did. That is all we were asked to do by either party."

MR. VANCE E. LEININGER.
MAY IT PLEASE THE COURT:

I respectfully move that these proceedings be spread at large upon the records of this court.

CHIEF JUSTICE HASTINGS.

That motion will be granted.

Thank you so much, and to the family, we thank you for being here and for participating, and for all of you, the committee, and those of you in attendance. We are adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BRENDA MARTINEZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARTIN A. MARTINEZ, DECEASED, APPELLANT, V. OREL KOELLING, APPELLEE.

421 N.W.2d 1

Filed March 25, 1988. No. 86-271.

1. **Partnerships: Liability: Torts.** The partnership or every member of the partnership is vicariously liable for the torts committed by one of the partners acting in the scope of the business.
2. **Partnerships: Liability: Tort-feasors.** Since partners are liable as joint tort-feasors, the party aggrieved may sue the firm or sue one or more of its members, and may even single out one whose only connection to the tortious conduct is via membership in the firm.
3. **Pleadings.** The withdrawal of a pleading by the court's permission has the effect of removing it from any and all consideration, and the issues are then left in the same status as though the withdrawn pleading had never been filed.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

Patrick A. Brock of Cunningham, Blackburn, VonSeggern, Livingston and Francis, for appellant.

Jeffrey H. Jacobsen of Jacobsen, Orr, Nelson & Wright, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

WHITE, J.

This is an appeal from the district court's grant of summary judgment against the plaintiff, Brenda Martinez, personal representative of the estate of Martin A. Martinez. On December 8, 1983, Martinez filed a wrongful death action

against Orel Koelling on behalf of her late husband. The petition alleged that on November 13, 1982, Martin Martinez was fatally injured in an accident on defendant's farm. The defendant is alleged to be the owner of the premises and the employer of the deceased. Liability is premised on the negligence of Orel Koelling, either individually, or vicariously through one of his agents, or both.

The defendant's answer admitted that part of the plaintiff's petition which alleged the defendant to be the employer of the deceased and the owner of the premises. In the very next paragraph, however, the defendant alleged that Martin Martinez was employed by a partnership known as Koelling Farm and Ranch Partnership, of which the defendant is a partner.

On November 30, 1984, over 2 years after the accident, the plaintiff amended her petition, this time naming the partnership as the sole defendant. The partnership filed a demurrer to the amended petition for the reason that any action against the partnership was barred by the statute of limitations. See Neb. Rev. Stat. § 30-810 (Reissue 1985). Thereafter, the plaintiff filed a motion to strike the demurrer and, in the alternative, moved for leave to withdraw the amended petition and proceed on the original petition.

In ruling on the plaintiff's motions, the district court judge found that there had been no undue prejudice as to the partnership and granted the plaintiff's motion for leave to withdraw her amended petition. In the same hearing the district court denied the plaintiff's motion to strike and found the partnership's demurrer as to the plaintiff's amended petition to be moot.

On October 23, 1985, the defendant, Orel Koelling, filed a motion for summary judgment, asserting that he was not the employer of the deceased. The motion further alleged that the amended petition, by naming a new defendant, effectively dismissed the action against Orel Koelling. The district court overruled this motion.

On January 13, 1986, the defendant filed an amended answer, this time asserting that the plaintiff's action is barred by the statute of limitations, again asserting that the amended

petition effectively dismissed the defendant from the action. Thereafter, the plaintiff moved to strike paragraph 1 of the defendant's amended answer, which asserts the statute of limitations, and paragraph 4, which alleges that the deceased was employed by the partnership. The plaintiff moved in the alternative for leave to add the partnership as an additional party defendant.

The district court overruled the plaintiff's motion to strike and denied her leave to add the partnership as an additional party. The court then allowed defendant to renew his motion for summary judgment. The court ruled that the plaintiff was aware that the decedent was an employee of the partnership since January 9, 1984, the time of the defendant's original answer. The court theorized that because of this employment relationship, the cause of action was primarily against the partnership. Since the cause of action had run against the partnership before the amended petition, the court granted the defendant's motion for summary judgment.

The plaintiff, in her first assignment of error, asserts that the district court erred in granting the defendant's motion for summary judgment.

The district court apparently concluded that because the decedent was an employee of the partnership and the death occurred in the course of the partnership business, the plaintiff could not bring an action against one of the partners without first obtaining a judgment against the partnership. In *Horn's Crane Service v. Prior*, 182 Neb. 94, 95, 152 N.W.2d 421, 423 (1967), this court held that "[i]n an action seeking a personal judgment against the individual members of a partnership . . . the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership . . . ." Later, in *Security State Bank v. McCoy*, 219 Neb. 132, 133, 361 N.W.2d 514, 515 (1985), interpreting Neb. Rev. Stat. § 25-316 (Reissue 1985), we said that judgment must be had against the partnership "as a condition precedent to bringing of an action against individual partners." In both of these actions the plaintiff sought judgment against individual partners on alleged partnership contractual liability. In *Prior, supra* at 96-97, 152 N.W.2d at

423, we offered several policy reasons for the rule in these cases:

> One of the most obvious is that credit having been extended to the partnership or firm, the members ought to have a right to insist that the partnership property be exhausted first. And to permit a firm creditor to by-pass the partnership property and exhaust the assets of an individual member leaving the partnership property extant, would be an obvious injustice, permit the other partners to profit at his expense, and place him in an adverse position with relation to his copartners.

The Uniform Partnership Act, Neb. Rev. Stat. §§ 67-301 to 67-343 (Reissue 1986), also lends credence to the rule because, pursuant to § 67-315(b), a partnership's liability under a contract is joint only, and not joint and several. In the case of tort liability, however, partners are jointly and severally liable for torts committed by a partner within the scope of the business. §§ 67-313 and 67-315(a). Thus, while the rule may be well-suited where the alleged liability is contractual, it is not necessarily appropriate or even applicable where the alleged liability is in tort.

With respect to partnership liability in tort, § 67-313 provides as follows:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Under § 67-315, "[a]ll partners are liable . . . [j]ointly and severally for everything chargeable to the partnership under [§] 67-313 . . . ." From these sections of the Uniform Partnership Act, it has been recognized that the partnership or every member of the partnership is vicariously liable for the torts committed by one of the partners acting in the scope of the business. Such liability arises not from the personal wrong of the individual member against which liability is asserted, but from the principle of mutual agency from which all partnership law necessarily derives. For a compilation of the cases see 59A

Am. Jur. 2d *Partnership* § 647 at 559 n.1 (1987). In this regard the court in *Truscott v. Peterson*, 78 N.D. 498, 514-15, 50 N.W.2d 245, 255 (1951), said:

> "Since partners are liable as joint tort-feasors, the party aggrieved has his election to sue the firm or to sue one or more of its members, and may even single out for suit a partner who personally was in no wise involved in the commission of the tort. This liability for the tort of a copartner is also binding in equity on the individual assets of such partner in like manner as if the individual liability had arisen from an express contract apart from the contractual relation arising from the partnership. . . ."

(Citation omitted.) See, also, A. Bromberg, Crane and Bromberg on Partnership § 64 (1968). Under these principles, we hold that Orel Koelling is a proper party defendant and may be sued individually for his own tortious conduct and for tortious conduct committed by one or more of his partners.

The issue still remains, however, whether the defendant, Orel Koelling, was properly before the court in his individual capacity. On appeal the defendant again asserts that the plaintiff, by amending her petition, abandoned the action against Orel Koelling individually and that the amended petition against the partnership was barred by the statute of limitations. The defendant, however, ignores the effect of the district court's decision granting leave to the plaintiff to withdraw her amended petition and proceed on the original. The withdrawal of a pleading by the court's permission has the effect of removing it from any and all consideration, and the issues are then left in the same status as though the withdrawn pleading had never been filed. *Guebard v. Jabaay*, 117 Ill. App. 3d 1, 452 N.E.2d 751 (1983); *Mathis v. Clary*, 142 Ind. App. 154, 231 N.E.2d 157 (1967); *Bongardt v. Frink*, 265 N.C. 130, 143 S.E.2d 286 (1965). The defendant did not allege any abuse of discretion in the court's decision to reinstate the original petition, nor can it be said, under the circumstances of this case, that any such abuse was exercised. The defendant was therefore at all times before the court in his individual capacity. Any error in the proceedings there may have been as a result of the amended petition did not affect a substantial right of the

defendant and was therefore properly disregarded. See Neb. Rev. Stat. § 25-853 (Reissue 1985).

Since the defendant was at all times before the court and is amenable to suit in his individual capacity, the district court's grant of summary judgment in favor of the defendant was in error.

In her second assignment, the plaintiff seeks a reversal of the district court's decision overruling plaintiff's motion to strike and denying leave to add the partnership as an additional party. We find no abuse of discretion in the court's decision to deny leave to add an additional party. At the time of the motion the statute of limitations as to the partnership entity had already passed. The plaintiff's motion to strike paragraph 1 of the defendant's amended answer should, however, have been sustained. The action against Orel Koelling in his individual capacity is not barred by the statute of limitations. As to paragraph 4, the motion was properly overruled.

Based on the foregoing, it is unnecessary to review the plaintiff's remaining assignments of error. The decision of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MATHIAS G. JANSSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF LILA MAE JANSSEN, DECEASED, APPELLANT, V. MICHAEL TRENNEPOHL, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND RAY D. RETZLAFF, THIRD-PARTY DEFENDANT, APPELLEES.

421 N.W.2d 4

Filed March 25, 1988. No. 86-324.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings,

depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

3. _____. The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled.
4. _____. Upon motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
5. **Motor Vehicles: Liability.** Where a person is injured by the racing of two or more other parties on a public highway, all engaged in the race are liable, although only one of the vehicles came in contact with the injured person or the vehicle in which he was riding.

Appeal from the District Court for Sheridan County. PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Gary J. Nedved and Anne E. Winner of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., and James F. Wefso of Hollstein & Wefso, for appellant.

Kenneth W. Payne, for appellee Trennepohl.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

CLARK, D.J.

Plaintiff, Mathias G. Janssen, personal representative of the estate of Lila Mae Janssen, brought a wrongful death action alleging that the defendant, Michael Trennepohl, and Ray Retzlaff were racing their cars when the Retzlaff car collided with a car driven by Lila Mae Janssen, causing her death. Defendant denied the allegations of plaintiff's petition and alleged that the sole and proximate cause of the accident was the negligence of Retzlaff. The district court for Sheridan County granted defendant's motion for summary judgment and dismissed plaintiff's petition. Plaintiff appeals.

The only issue on appeal is whether the district court erred in granting summary judgment. In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may

be drawn from the evidence. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

On September 7, 1984, Lila Mae Janssen was killed when the car driven by Retzlaff struck her car on U.S. Highway 20 approximately 3 miles west of Gordon, Nebraska. As a result of the accident, Retzlaff pled guilty to a criminal charge of motor vehicle homicide.

At about 10:15 p.m. on September 7, 1984, Retzlaff, with Donald Molitor as a passenger, left Gordon and drove west on Highway 20. Highway 20 is a two-lane highway which, according to Retzlaff, is straight for approximately 2 1/2 miles out to the "corner" or curve where the accident occurred. Retzlaff recalled passing three vehicles, the first being the car driven by defendant, whom he knew. Retzlaff denied making any gestures or giving any indication to defendant that he wanted to race, but recalled that as he pulled out to pass defendant he could hear defendant "step on the car a little bit." Retzlaff states he then passed two other cars at the same time and as he approached a curve in the highway saw the taillights of the Janssen car. Retzlaff tried to avoid the car but lost control and hit the rear of the Janssen car. Retzlaff estimated that approximately 45 to 60 seconds had elapsed between passing the last two cars and impact.

Molitor generally substantiated Retzlaff's testimony, but estimated the time between passing the last two vehicles and the accident was "[t]hirty seconds to a minute, maybe, if even that." Molitor also testified that defendant had at times talked of having raced with Retzlaff and others on prior occasions.

Defendant recalled that as he left Gordon he noticed that Retzlaff was behind him and that he was going approximately 50 miles per hour when Retzlaff passed him. Defendant stated that he subsequently saw Retzlaff pass three cars all at once and that he himself passed those same three cars all at once also. Shortly thereafter, he saw Retzlaff's brake lights come on and applied his brakes. Defendant next observed dust and smoke, and his car passed through the accident scene. Defendant denies racing with Retzlaff.

Robert Beguin, a passenger in defendant's car, stated that when Retzlaff passed defendant's car, Retzlaff continued on to

pass other cars, and before Retzlaff pulled back into the right-hand lane, defendant also pulled out and passed the same cars that Retzlaff had just passed. Beguin estimated defendant's speed at approximately 70 to 75 miles per hour when defendant passed the cars. Beguin denied that defendant and Retzlaff were ever driving down the highway side by side at any time other than when Retzlaff originally passed defendant and denied that defendant and Retzlaff were racing. Beguin further testified that it was common knowledge around school that defendant would race his car at times.

Joyce Reed testified that two cars passed her on the highway as she was going about 45 to 50 miles per hour. She did not know how fast the two cars were traveling, but they were "going very fast" and passed her in quick succession. She stated that defendant's car, which she recognized, passed her first, then the other car, which she later found to be the Retzlaff car, came up beside defendant's car so they were side by side. She noticed that the cars continued side by side down the highway until they disappeared in that formation as they traveled over a "knoll" in the highway. Reed estimated that she observed the cars traveling side by side for 30 seconds to 1 minute. In her opinion the cars were racing because they remained side by side for such a long time and because they were going at such a high rate of speed. Reed testified that about 30 seconds after the two cars' taillights disappeared over the "knoll" she saw "lights swirling" and "dust in the air," indicating that something had happened. Reed then arrived on the accident scene.

Curtiss Smith and his passenger son, James Smith, filed identical affidavits in which they stated that at about 10:30 p.m. on September 7, 1984, they were driving west on Highway 20 when they were passed by two cars which were about three car lengths apart and which were traveling at a high rate of speed.

Gurney Pittenger, a Nebraska State Patrol officer, testified as an expert in auto accident reconstruction. Pittenger testified that in his opinion, at the time Retzlaff's car lost control, about 300 feet from the accident scene, it was traveling 111.45 miles per hour. Pittenger's opinion as to why Retzlaff's car lost control was essentially that because of his speed Retzlaff overdrove his headlights and did not see the curve coming up.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987). The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Schrodt v. Sullivan Transfer & Storage Co.*, 222 Neb. 347, 383 N.W.2d 767 (1986). Upon motion for summary judgment the court examines the evidence, not to decide any issues of fact, but to discover if any real issue of fact exists. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973).

Racing is defined in Neb. Rev. Stat. § 39-602(73) (Reissue 1984) as follows: "Racing shall mean the use of one or more vehicles in an attempt to outgain, outdistance, or prevent another vehicle from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long-distance driving routes."

Neb. Rev. Stat. § 39-668 (Reissue 1984) bans racing on highways:

> No person shall drive any vehicle on any highway in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, and no person shall in any manner participate in any such race, competition, contest, test, or exhibition.

As stated in 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 799 (1980):

> Racing between two motorists on a public highway constitutes negligence which will render them liable for injuries proximately resulting to others therefrom. Both motorists may be held liable under the rule that where two or more tortfeasors by concurrent acts of negligence which, although disconnected, yet, in combination, inflict

injury, all are liable.

This rule was enunciated by the Nebraska Supreme Court as early as 1921. "Where a person is injured by the racing of two or more other parties on a public highway, all engaged in the race are liable, although only one of the vehicles came in contact with the injured person or the vehicle in which he is riding." *Thomas v. Rasmussen*, 106 Neb. 442, 444-45, 184 N.W. 104, 105 (1921). See, also, *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956). Further, it appears to be the law in all jurisdictions which have directly addressed this issue. See Annot., 13 A.L.R.3d 431 (1967).

A review of the evidence in this case reveals a genuine issue of material facts. The testimony regarding excessive speed, the manner in which other cars were passed, the side-by-side driving of the two cars, that defendant and Retzlaff had raced before, and that defendant had previously raced his car with others presented evidence which, if believed by the finder of facts, could justify an inference that defendant and Retzlaff were engaged in a race and that such a race was the proximate or a proximately contributing cause of the accident.

Accordingly, the judgment is reversed and the cause remanded for trial.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JACQUELEN A. THOMAS, APPELLANT, V. LINCOLN PUBLIC SCHOOLS AND BOARD OF EDUCATION OF LINCOLN PUBLIC SCHOOLS, APPELLEES.

421 N.W.2d 8

Filed March 25, 1988. No. 86-407.

1. **Appeal and Error.** Ordinarily, the Nebraska Supreme Court will dispose of a case on appeal on the theory on which it was presented in the lower court.
2. **Administrative Law: Appeal and Error.** Where a board or officer decides no question of adjudicative fact and no statute requires the board or officer to act in a judicial manner, such board's or officer's orders are not reviewable by error proceedings.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions to dismiss.

Beverly Evans Grenier of Steven D. Burns, P.C., for appellant.

Edwin C. Perry of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees.

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

GRANT, J.

Jacquelen A. Thomas, plaintiff-appellant, filed her "Amended Petition-In-Error" in the district court for Lancaster County on January 15, 1986. In that petition in error, plaintiff alleged that she was employed as a secretary to the superintendent of schools and to the board of education for the Lincoln Public Schools from 1967 to August 31, 1985; that on August 2, 1985, petitioner was given oral notice that her employment was to be terminated on September 1, 1985; that petitioner was first employed by written contracts, which terminated on August 31, 1969; and that contracts were extended yearly thereafter by "intent cards," the last of which had been accepted by her in May of 1985.

Petitioner in error further alleged in her amended petition that she was a classified employee under contract and, as such, governed by the terms and conditions of the "Personnel Policies and Regulations of the Lincoln Public Schools." Petitioner further alleged that "[a] grievance hearing was held before a grievance committee of the Board of Education" and that a decision was rendered by the full board adopting the recommendation of the committee to deny petitioner's grievance.

Petitioner further alleged that the decision of the respondents was in error and attached "[t]he decision of the Board of Education" and incorporated that decision in the amended petition by reference. The hearing before the board was reflected in nearly 40 pages of testimony.

Respondents, in the district court, filed an "Answer to

petitioner's Amended Petition-in-Error" denying most of the allegations of the petition.

In the district court, the district judge ordered "that the denial of the petitioner's grievance by the Board of Education . . . is affirmed."

In short, the pleadings presented a petition in error to the district court. Plaintiff so pled her case, and the case followed the normal progression of that procedure. We have followed the rule that "[o]rdinarily . . . we will dispose of a case on appeal on the theory on which it was presented in the lower court." *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 438, 345 N.W.2d 300, 305 (1984). We treat this case, then, on appeal, as a petition in error filed in the district court.

Neb. Rev. Stat. § 25-1901 (Reissue 1985) sets out the basis for proceedings by way of a petition in error and provides: "A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." Neb. Rev. Stat. § 25-1903 (Reissue 1985) provides: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error . . . ."

Neb. Rev. Stat. § 25-1902 (Reissue 1985) defines a "final order" thus: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment . . . is a final order which may be vacated, modified or reversed, as provided in this chapter."

Examination of the record before us leads to the conclusion that at no time, in this case, was the Lincoln Board of Education or the Lincoln Public Schools acting in a judicial capacity, nor could respondents, or either of them, enter an order which "in effect determines the action and prevents a judgment . . . ." It is true that a school board exercises certain "judicial functions" in connection with certificated employees under Neb. Rev. Stat. § 79-12,109 (Reissue 1987). Certificated employees, however, are defined in Neb. Rev. Stat. § 79-12,107 (Reissue 1987) as teachers or administrators. Petitioner does not allege she is a member of that class.

Further, petitioner does not allege, nor can we find, any

statutory authority permitting a school board to act as a tribunal exercising judicial functions with regard to its employees other than teachers and administrators. Nor can we determine that any order of a school board in connection with its regular employees, other than teachers and administrators, could be such an action as would prevent a judgment, as referred to in the definition of a final order in § 25-1902.

In a somewhat analogous case, we held in *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 308, 148 N.W.2d 301, 303-04 (1967), "In the present case the superintendent decided no dispute of adjudicative fact, and no statute required him to act in a judicial manner. Such orders are not reviewable by error proceedings, which are limited to orders made in the exercise of judicial functions." Where a board or officer decides no question of adjudicative fact and no statute requires the board or officer to act in a judicial manner, such board's or officer's orders are not reviewable by error proceedings.

In this case, the board of education was acting as an employer and was refusing to renew the employment contract of an employee. It was not exercising a judicial function. No statutory provision permits the board to exercise a judicial function in the case before us, and no board action could prevent the filing of an appropriate suit by the petitioner in error.

The judgment is reversed and the cause remanded with directions to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

TOM W. HEBARD, APPELLANT, V. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, INC., APPELLEE.

421 N.W.2d 10

Filed March 25, 1988. No. 86-484.

1. **Demurrer: Pleadings.** Pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled.
2. _____: _____. A demurrer which challenges the sufficiency of the allegations is a general one.
3. **Demurrer: Pleadings: Appeal and Error.** In reviewing a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
4. **Employment Contracts.** An employee's "at-will" status can be modified by contractual terms that may be created by employee handbooks and oral representations.
5. _____. Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.
6. **Employment Contracts: Trial.** Whether specified conduct indicates a promise is a question of fact for a trier of fact.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

W. Russell Bowie of Ashford, Bowie & Higgins, P.C., for appellant.

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

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

WHITE, J.

This appeal arises from an order of the district court for Douglas County sustaining the appellee's demurrer and dismissing appellant's amended petition.

Appellant's amended petition alleges that he accepted employment with Northwestern Bell Telephone Company on or about May 15, 1960. On January 1, 1984, American Telephone and Telegraph Company, Inc. (AT&T), was forced to divest

itself of several of its companies, one of which was Northwestern Bell.

At the time of divestiture, appellant, Tom W. Hebard, held the position of telemarketing consultant. Appellant alleges that he was involuntarily transferred to AT&T after divestiture and held his same position for 2 weeks, after which time he was informed that the position no longer existed. He was then reclassified as an account executive. AT&T's policies, however, required that account executives become "certified" in accordance with procedures set forth in appellee's certification guide, a copy of which is attached to Hebard's amended petition. Hebard alleges that he fully complied with the certification process and submitted his required portfolio on or before the due date. After review, Hebard's portfolio was rejected by his superior, Marlin Rogers, and he was demoted to a communication servicing consultant, a position for which he had no training.

Appellant further alleges that following the rejection of his portfolio he was advised by his immediate supervisor not to appeal Rogers' decision (such right to appeal is provided for in the certification guide attached to the amended petition), because an appeal would result in termination prior to his eligible retirement date. Hebard retired under protest on July 24, 1985. A copy of his application for "involuntary retirement" is attached to his amended petition and incorporated by reference.

AT&T takes the position that Hebard's amended petition fails to state a cause of action. In reviewing this case, we are bound by the rule that pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled. *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987). Moreover, a demurrer which challenges the sufficiency of the allegations is a general one. *Id.* In our review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Id.* See, also, *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987).

In his amended petition Hebard alleges that an "oral contract of employment" existed between himself and AT&T. He states that "part of the oral contract . . . was that [he] would receive an annual salary plus sales incentives in the performance of his duties . . . ." He further alleges that his district sales manager, a superior, "assured" him "that if he complied with the certification procedures, there would be absolutely no reason [he] would not become certified and therefore eligible for incentive compensation."

Appellant alleged in the amended petition that he "fully complied with the certification process [and submitted] his completed portfolio" on or before the due date. His certification was denied, he alleges, due to an unfair performance appraisal, and he was subsequently denied the right to appeal that decision, due to threats of termination.

The gist of appellant's complaint, which is admittedly difficult to decipher, is an action for breach of an employment contract. Giving the amended petition a liberal construction, as we are required to do, we find that it is sufficient to state a cause of action.

This court has several times held that an employee's "at-will" status can be modified by contractual terms that may be created by employee handbooks and oral representations. *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. See, *Toussaint v Blue Cross*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Ritchie v Mich Con Gas Co*, 163 Mich. App. 358, 413 N.W.2d 796 (1987).

In the case at bar, we express no opinion as to whether the conduct of the appellee, in making certain representations to Hebard, indicates a promise which might constitute terms of an employment contract. Whether such conduct indicates a promise is a question of fact for a trier of fact. 75 Am. Jur. 2d *Trial* § 396 (1974). See, also, *Ritchie, supra* (whether there was an implied contract that employment would not be terminated except for just cause presented a question of fact for the jury, in

light of representations made by employer to employee).

Liberally construed, plaintiff's amended petition is sufficient to state a cause of action. Although it is unartfully drafted, in essence the amended petition alleges an oral contract of employment which established provisions for certification as an account executive, leading to a certain salary plus sales incentives. Hebard alleges that he "fully complied" with the certification process but was unfairly denied certification, which amounted to a breach of promise on the part of AT&T. Due to that breach, Hebard states, he was forced to retire "involuntarily" and suffered damages in the form of lost salary.

The district court's order sustaining defendant's demurrer to the amended petition was in error. We reverse and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RICHARD H. BEHRENS, APPELLANT AND CROSS-APPELLEE, V. AMERICAN STORES PACKING CO. ET AL., APPELLEES AND CROSS-APPELLANTS.

421 N.W.2d 12

Filed March 25, 1988. No. 87-069.

1. **Workers' Compensation: Court Rules.** Neb. Rev. Stat. § 48-163 (Cum. Supp. 1986) provides that the Workers' Compensation Court may adopt all reasonable rules necessary for carrying out the intent and purposes of Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984 & Cum. Supp. 1986).
2. **Workers' Compensation.** The Workers' Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act.
3. **Workers' Compensation: Appeal and Error.** In a review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
4. **Statutes: Time.** Where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the

amendment, it is binding upon a tribunal, and the date of the tribunal's judgment or award is the critical time, not the date of its hearing.

5. **Workers' Compensation: Words and Phrases.** Ordinarily, the term "reduction in the amount of such award" found in Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986) refers to the total amount of the award to the employee. However, the "amount of such award" includes the issue of total disability.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

T.J. Hallinan of Law Offices of Cobb & Hallinan, P.C., for appellant.

Kevin Colleran and David A. Barron of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, Richard H. Behrens, appeals a Workers' Compensation Court three-judge panel's order denying his application for medical travel expenses and an increase in physical therapy expenses. Defendants cross-appeal the order that continued plaintiff's right to vocational rehabilitation services and allowed an attorney fee. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff received serious injuries to his left knee in a February 15, 1979, accident. Upon rehearing, on April 30, 1984, plaintiff was awarded temporary total disability benefits of $155 per week, medical allowances to continue to receive future reasonable hospital and medical care, and a right to vocational rehabilitation training. However, his submitted plan for training as an environmental laboratory technician was rejected by the court because he was deficient in apparent required basic skills, particularly mathematics. As ordered, plaintiff recontacted the rehabilitation services. In August 1984, he resubmitted his plan for environmental laboratory technician training to defendants, which rejected the plan. Plaintiff kept in touch with his rehabilitation specialist counselor. He attended classes at Southeast Community

College, Lincoln, Nebraska, principally in remedial math, with the purpose of qualifying for the same laboratory technician training. During the 2-year period following the award, plaintiff had three serious surgical operations and three knee manipulations; no new training plan was submitted to the court. On September 5, 1985, defendants filed a motion, Neb. Rev. Stat. § 48-141 (Reissue 1984), to modify the April 30, 1984, award to find that plaintiff was no longer totally disabled and to deny plaintiff's right to vocational rehabilitation training, because he was violating the court's order by continuing to prepare for a training plan previously rejected by the court. After a one-judge hearing, defendants' application was denied by an order entered January 7, 1986.

Defendants appealed, asking for a rehearing before a three-judge panel. Plaintiff filed no response. However, as later discussed, the trial issues were apparently expanded to include plaintiff's claims for hospital, medical, travel, and physical therapy expenses. After a 2-day trial on May 22 and July 31, 1986, the panel's decision and order were entered January 12, 1987, finding that plaintiff remained temporarily totally disabled and entitled to vocational rehabilitation services subject to limiting instructions, and (1) ordering that defendants' appeal be denied, (2) disallowing plaintiff's travel expenses to Georgia, (3) both allowing and disallowing some of plaintiff's claimed therapy expenses, (4) allowing the $120 consultation fee of Jack Hughston, M.D., Columbus, Georgia, (5) reaffirming its prior rejection of plaintiff's plan for training as an environmental laboratory technician and ordering him to seek other plans for training, and (6) allowing plaintiff a $1,500 attorney fee, deposition costs, and court costs. Plaintiff appeals; defendants cross-appeal.

Plaintiff assigns these three errors: (1) The court erred in failing to find that he was entitled to be reimbursed for the travel expenses incurred in traveling to Georgia to consult with Dr. Hughston, upon the recommendation of his treating physician; (2) the court erred in failing to find that he is entitled to recover the charges incurred for physical therapy which did not exceed the regular charge made for such services in similar cases; and (3) the court erred in applying the 1975 Nebraska

Medical Association Relative Value Study to bar recovery of a portion of his physical therapy expenses.

Central to plaintiff's appeal are these statutes and authorities:

> The employer shall be liable for all reasonable medical, surgical, and hospital services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . subject to the approval of and regulation by the Nebraska Workers' Compensation Court, not to exceed the regular charge made for such service in similar cases. . . . If the employee shall select a physician located in a community not the home or place of work of the employee, and a physician is available in the local community or in a closer community, no travel expenses shall be required to be paid by the employer or his insurer. . . .
>
> . . . .
>
> The Nebraska Workers' Compensation Court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished . . . .

Neb. Rev. Stat. § 48-120 (Cum. Supp. 1986).

Neb. Rev. Stat. § 48-163 (Cum. Supp. 1986) provides that the Workers' Compensation Court may adopt all reasonable rules necessary for carrying out the intent and purposes of Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984 & Cum. Supp. 1986).

Prior to 1986, rule IV of the Workers' Compensation Court provided:

> The Nebraska Medical Association 1975 Relative Value Study when used in conjunction with a conversion factor of $19 per unit hereby is adopted as a fee schedule *to be used as a guide in setting maximum fees* for physician's services in Workmen's Compensation Cases. . . . In any event, the fees charged shall not exceed the usual and customary charges for such services in the community if the usual and customary charges are less than what the use of the conversion factor would be.

(Emphasis supplied.)

Effective November 18, 1986, and as filed with the Clerk of the Nebraska Supreme Court on January 6, 1987, the Workers' Compensation Court amended rule IV to provide:

> The Nebraska Medical Association 1975 Relative Value Study when used in conjunction with a conversion factor of $19 per unit hereby is adopted as a fee schedule to be used as a guide in setting maximum fees for medical services in Workers' Compensation cases *except for charges for physical therapy* . . . .

(Emphasis supplied.)

Briefly, the relative value study (RVS) chart assigns unit numbers to medical procedures and services, dependent on nature and difficulty; the court by rule from time to time assigned a dollar conversion factor, which in 1986 was $19 per unit claimed.

The Workers' Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act. *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

Although defendants were obligated to pay plaintiff's future medical expenses pursuant to the April 30, 1984, award, it is not clear from the record how plaintiff's claims for hospital, medical, physical therapy, and travel expenses became issues at the rehearing, since they were not issues at the prior modification hearing. There were no supporting formal pleadings. The findings later made by the court in its January 12, 1987, order, referring to its pretrial order, are helpful:

> [I]t is that Order [April 30, 1984], as it relates to vocational rehabilitation rights, which is the subject of this Application for Rehearing. The issues set forth in said pretrial Order are whether plaintiff violated the order of the Court entered April 30, 1984, relative to vocational rehabilitation rights and if so, whether plaintiff's entitlement to vocational rehabilitation rights should be terminated and *whether his compensation benefits should be reduced, suspended, or terminated.* The parties stipulated that the issues of whether or not the costs incurred in having an examination conducted by Dr. Jack Hughston of Georgia and the costs incurred incidental to

that examination are compensable, are before the Court. (Emphasis supplied.)

The compensation court is not bound by "any technical or formal rules of procedure," § 48-168 (Cum. Supp. 1986). It may adopt reasonable rules, § 48-163. Rule XXIV of the Workers' Compensation Court (rev. 1986), filed with the Clerk of this court, provides in part that the pretrial order shall supersede all other pleadings and shall set forth a statement of the issues to be determined. We assume that there was some record made of plaintiff's medical claims and that it was the understanding and intention of the court and the parties that the issues of medical, travel, hospital, and physical therapy expenses were included in the court's statement of issues in its pretrial order. In any event, there was no subject matter objection made by defendants either at trial or on appeal, and we do not consider the matter plain error.

TRAVEL EXPENSES

Plaintiff claims error in the denial of expenses of travel in October 1985 to Columbus, Georgia, for consultation with Dr. Hughston, a recognized authority on the extensor mechanism of the knee. Defendants argue that such travel is contrary to § 48-120. Dr. Hughston recommended a synovectomy procedure be first tried, and if not successful, then a patellectomy (removal of the kneecap).

Patrick Clare, M.D., Lincoln, Nebraska, had been Behrens' treating physician since February 1979. In 1985, Dr. Clare referred Behrens to Michael Walsh, M.D., director of sports medicine at the University of Nebraska Medical Center, Omaha, Nebraska, for examination. There is conflict in the evidence whether Behrens was referred to Dr. Hughston by either Dr. Clare or Dr. Walsh, or whether Behrens made his own decision for that consultation, and also whether the travel expense was a reasonable medical expense within § 48-120. Dr. Walsh suggested that it might be worth a trip to Georgia to see Dr. Hughston if the insurance carrier would pay the expenses. Dr. Clare testified that an examination by Dr. Hughston was not medically necessary, and that "I felt two years ago that he ought to have a patellectomy." The patellectomy surgery was later performed by Dr. Clare. The court allowed Dr. Hughston's

$120 consultation fee.

Behrens cites four cases supporting his claim that were decided prior to 1975, when the standard of review in the Supreme Court was de novo. That standard was changed in 1975, § 48-185 (Cum. Supp. 1986), and our review is now limited. In a review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Bender v. Norfolk Iron & Metal Co.*, 224 Neb. 706, 400 N.W.2d 859 (1987); § 48-185.

The travel expenses are fact questions; we cannot say that the trial court was clearly wrong in finding that the travel expenses were not a reasonable medical expense as provided in § 48-120.

PHYSICAL THERAPY CHARGES

Plaintiff's second and third assignments are discussed together.

A large part of the evidence relates to physical therapy services received by plaintiff, mostly at St. Elizabeth hospital, Lincoln, Nebraska, to relieve pain, to aid surgery recovery, and for other related physical conditions. There is great conflict in the evidence concerning the services actually performed, the description of services performed, the time period in performing the services, the reasonableness of the claims, and the relationship of the claims to the RVS chart. In view of our later reversal of the court's order on this physical therapy issue, this evidence is not further detailed.

Plaintiff argues that (1) the court's use of the RVS chart was contrary to the statutory mandate, § 48-120, that the employer is obligated to pay for all reasonable medical, surgical, and hospital services incurred by plaintiff; and (2) the RVS chart was improperly used by the court in its January 12, 1987, order in determining the reasonable medical expenses for physical therapy services, since the court's January 2, 1987, amendment to rule IV excepting physical therapy charges was binding on the court because it was a procedural change and not substantive, citing *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985), and *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

In *Smith*, Chief Justice Krivosha, concurring in the result, said at 665, 358 N.W.2d at 220:

> It is generally considered in the law that a *substantive right* is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. . . . A *procedural right*, on the other hand, is considered to simply be the method by which *an already existing right is exercised.*

(Emphasis supplied.)

In *Allen*, we said that where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it was binding upon a tribunal, and the date of the tribunal's judgment or award was the critical time, not the date of its hearing.

From an examination of rule IV and its purposes, we determine that the RVS chart was nothing more than a tool, guide, method, or aid for the court in evaluating all of the evidence in arriving at the reasonableness of the claimed medical expenses, an existing right. Rule IV originally and as amended was procedural only, not substantive. Rule IV as amended November 16, 1986, and filed with the Clerk of this court January 6, 1987, excepting charges for physical therapy, was binding on the panel upon adoption, and it was obligated to disregard the RVS chart at the time the court made and filed its order on January 12, 1987. It was error for the court to either consider or apply rule IV and the RVS chart when assessing the reasonableness of the physical therapy expenses. That part of the court's order allowing St. Elizabeth hospital's claim of $1,821.25 is set aside; the allowance of a $1,770.65 credit to defendants for payments made to St. Elizabeth hospital was proper. The record shows, and the trial court found, that there was great conflict in the record relating to the claims for physical therapy services, and there is a suggestion in the record that some of the therapy did not relate to plaintiff's compensable injury. Since we review for error only, and the reasonableness of these medical charges is a fact question to be determined by the trial court, we reverse and remand to the court for further proceedings in accord with this opinion to

determine plaintiff's medical claims, if any.

Defendants' cross-appeal assigns two errors: (1) The Workers' Compensation Court erred in holding that Behrens did not violate the court's earlier order regarding rehabilitation or fail to cooperate with rehabilitation efforts, thus waiving his right to further benefits; and (2) the Workers' Compensation Court erred in awarding Behrens an attorney fee of $1,500 and deposition costs of $259.25, when there was a reasonable controversy regarding Behrens' entitlement to compensation.

REHABILITATION RIGHTS

Defendants' first assignment deals with this part of the court's January 12, 1987, order:

> The Court finds that plaintiff remains totally disabled as a result of his leg injury and that although he may not have cooperated as fully and completely as he could have with the vocational rehabilitation people that such failure was due in part to his physical condition and his many surgeries and does not constitute failure to cooperate. The Court does find however that the Court's prior disapproval of a plan of rehabilitation proposed for plaintiff as an environmental lab technician should be affirmed, the evidence being that plaintiff's below average math scores and other evidence indicate that plaintiff would not be successful in completing the courses necessary for him to become such a technician. The Court further finds however that plaintiff is entitled to vocational training in another field. If the plaintiff and his rehabilitation counselor are unable to determine alternative rehabilitation training further evaluation and testing may be necessary. The Court further finds that after a suitable plan is agreed upon that plaintiff should diligently pursue said plan under the guidance of his rehabilitation counselor and if he fails to do so the defendants may file further proceedings in this Court to suspend plaintiff's temporary total disability benefits in whole or in part for such failure.

Briefly, as directed by the court, plaintiff did contact a counselor in May 1984, who later, in 1985 and 1986, suggested other goals for training. Plaintiff was not interested; he wanted

to be able to enter a program for training as an environmental laboratory technician. His counselor did not discourage him and, in fact, testified that in her opinion, after more educational training he would qualify. Plaintiff enrolled in Southeast Community College, Lincoln, Nebraska, taking remedial classes, mostly in mathematics. His attendance was not regular, which, he explained, was caused by surgeries and recovery time. He did improve in his math skills. The court's order rejecting this plan was supported in the evidence. Defendants contend that plaintiff's rights for vocational rehabilitation should be terminated because he continued over a 2-year period to pursue efforts to become a lab technician, directly contrary to the orders of the court.

As we view the record, "One of the primary purposes of the Nebraska Workers' Compensation Act shall be restoration of the injured employee to gainful employment," § 48-162.01(1) (Cum. Supp. 1986). Plaintiff was temporarily totally disabled and entitled to vocational rehabilitation services, § 48-162.01(3), as ordered by the court on April 30, 1984. Plaintiff did contact the rehabilitation services as ordered; however, he failed to submit a new training plan. Nevertheless, neither the statutes nor the court order provides a timetable procedure regimenting an employee to develop training plans while the employee is totally disabled and he otherwise qualifies for training and complies with the court's discretionary orders. By the court's January 12, 1987, order, plaintiff was directed to seek other vocational training, or evaluation and testing where necessary, and defendants were provided with recourse if plaintiff failed to comply with the court's new order. Again, this is a fact question to be decided by the trier of the facts. There was no error in the court's not terminating plaintiff's rights of vocational rehabilitation training.

ATTORNEY FEES AND COSTS

Defendants argue that the allowance of a $1,500 attorney fee should not have been allowed, since there was a reasonable controversy concerning plaintiff's continued right to vocational rehabilitation services. That was not the basis for plaintiff's claim for attorney fees; rather, his claim is found in § 48-125 (Cum. Supp. 1986):

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and *fails to obtain any reduction in the amount of such award*, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Supreme Court.

(Emphasis supplied.)

From a reading of the court's order, that was also its basis for the attorney fee allowance. Ordinarily, the term "reduction in the amount of such award" found in § 48-125 refers to the total amount of the award to the employee. *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). However, as shown in *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985), the "amount of such award" includes the issue of total disability, which was one of the issues originally proposed by defendants in their application for modification: "plaintiff is no longer totally disabled and . . . the court should set the residual permanent partial disability plaintiff sustained as a result of the accident and injury." That issue continued at the rehearing.

Whether or not a reasonable controversy exists is a fact question for the trier of fact. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). It is not necessary here to examine and apply the criteria for a reasonable controversy as set out in *Mendoza*, for the reason that it is very clear from all of the medical evidence that plaintiff continued to be totally disabled, that is, he was disabled to earn wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Rapp v. Hale*, 170 Neb. 620, 103 N.W.2d 851 (1960). There was no reasonable controversy on that issue. The trial court made no finding on whether or not there was a reasonable controversy; however, such is inherent in its order finding that plaintiff remained totally disabled. Defendants having failed to change or obtain a reduction in plaintiff's award of temporary

total disability, the allowance of a $1,500 attorney fee and $259.25 in deposition costs was reasonable and proper. Plaintiff should be allowed a $1,000 attorney fee for services in this court, taxed as costs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. PATRICIA McKENNA, APPELLANT.

421 N.W.2d 19

Filed March 25, 1988. No. 87-143.

1. **Speedy Trial.** The period of delay resulting from the absence or unavailability of a defendant in a criminal case is excludable from the statute requiring that any person informed against be brought to trial within 6 months. Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1985).
2. **Speedy Trial: Proof.** Under Neb. Rev. Stat. § 29-1207 (Reissue 1985), the State has the burden of proving the existence of an excludable period by a preponderance of the evidence.
3. _____: _____. In determining the absence or unavailability of a defendant under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1985), the State need only show defendant was *either* absent *or* unavailable.
4. **Speedy Trial: Records: Judicial Notice.** In determining "excludable periods" under Neb. Rev. Stat. § 29-1207 (Reissue 1985), the court may take judicial notice of the files and records of the court.
5. **Speedy Trial.** A defendant in a criminal case cannot take advantage of a delay in being brought to trial where she is responsible for the delay either by action or inaction.
6. **Attorney and Client: Notice.** The general rule is that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client.

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

Forrest F. Peetz of Peetz and Peetz, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

BRODKEY, J., Retired.

Patricia McKenna, defendant below, appeals to this court from the decision of the district court for Holt County denying defendant's motion for an absolute discharge on the basis that she was denied a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1985). Appellant makes one assignment of error in her brief on appeal, that being that the county court, and thereafter on appeal the district court, erred in failing to sustain her motion for an absolute discharge, and further erred in not finding that the defendant had been denied her right to a speedy trial.

The issues to be considered by this court are (1) whether the time period between appellant's failure to appear at trial and her subsequent appearance in court 10 months later is excludable as "delay resulting from the absence or unavailability of the defendant" under § 29-1207(4)(d); and (2) whether the action of the county court in taking judicial notice of the court file, which indicated the failure of the defendant to appear on a specified date and the subsequent issuance of a bench warrant, is sufficient to meet the State's burden to prove the existence of an excludable period under the aforesaid section. We affirm.

The statute involved herein, § 29-1207, provides in part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

The factual background of this case, as discernible from the record filed in this court on appeal, is that a complaint was filed in the county court for Holt County on September 11, 1985, charging Patricia McKenna with second offense driving while

under the influence of alcoholic liquor, a Class W misdemeanor. It appears that the defendant was not tried on that charge until November 17, 1986; thus, more than 6 months elapsed and the statute above cited would have been violated unless any of the excludable times stated therein apply. A citation in lieu of arrest was issued under the above complaint on September 11, 1985, and arraignment thereon was scheduled for September 25.

On three subsequent occasions McKenna's arraignment date was rescheduled, to wit: (1) It appears the court entered an order on September 18, 1985, rescheduling the arraignment from September 25 to October 7, with notice thereof being mailed to McKenna by regular mail. (2) Prior to the arraignment on October 7, McKenna notified the court via letter that she wanted to plead not guilty to the charge and asked permission of the court to do so by her letter, since her financial situation made it difficult for her to get to O'Neill from her residence in Lincoln. The court responded to this letter by filing, on October 8, 1985, a second order for hearing, rescheduling the arraignment to October 21, and again notice was mailed by regular mail to McKenna. (3) A third order for hearing was filed on October 21, 1985, rescheduling the arraignment to November 4. Notice of this change in date was again mailed to McKenna by ordinary mail.

On November 4 the matter proceeded to arraignment, and McKenna was present in court without an attorney. After determining that McKenna qualified for a court-appointed attorney, the court did appoint an attorney to represent her and scheduled the matter for trial to the court on November 25 at 3 p.m. On November 26 an order for hearing was entered, rescheduling the trial from November 25 to December 2, 1985, at 3 p.m. Notice of the order was sent to McKenna's court-appointed attorney via ordinary mail. The record is silent as to the reason for this rescheduling. However, on December 2, the date set by court for the trial, court was in session, but the appellant failed to appear for trial. On December 3, the following day, a bench warrant was issued for McKenna's failure to appear at trial on December 2, 1985. The record is silent as to whether service was attempted and, if so, the result

of such attempt. All of the foregoing dates were obviously within the 6-month period provided for by the statute above quoted.

It next appears from the record that on June 6, 1986, the bench warrant was reissued, but the warrant is silent as to whether service was attempted. However, the record reflects the fact that at the hearing in county court on appellant's motion for absolute discharge held on November 17, 1986, appellant's counsel mentioned during the argument, "She continued to reside at the same location. If they wanted to pick her up, they could have picked her up which, in fact, they eventually did." This statement would seem to indicate that the bench warrant issued on June 6, 1986, was indeed executed. The record reveals that McKenna appeared in Holt County Court on October 28, 1986, with her court-appointed attorney. At this hearing the court asked McKenna why she failed to appear at trial on December 2, 1985, and the following dialogue occurred:

> MISS MCKENNA: 'Cause I couldn't afford to get here, I had to travel from Lincoln.
>
> THE COURT: Did you contact the Court?
>
> MISS MCKENNA: No.
>
> THE COURT: Why not?
>
> MISS MCKENNA: I didn't.
>
> THE COURT: Were we just suppose to guess that you weren't going to be here?
>
> MISS MCKENNA: I just didn't — *I don't really have an excuse. I didn't contact the Court, and I should have.*

(Emphasis supplied.)

In view of the above colloquy it appears clear that the appellant not only knew of the trial date, December 2, 1985, but did not have an excuse for her inaction and did not contact the court as she should have. It thus appears that the delay was due to her own inaction.

Following the above inquiry, the court scheduled a hearing date on appellant's motion for absolute discharge for November 17, 1986, and on that date a formal hearing was held on the motion. Appellant contended that it was well past the 6-month period in which the State must bring the matter to trial and argued that the complaint must be dismissed unless the

State could meet its burden of proving that an excludable period existed under § 29-1207(4). At the hearing the State asked the court to take judicial notice of the court file, which indicated that appellant was scheduled for trial on December 2, 1985, but failed to appear for trial on that date, and that on December 3 a bench warrant was issued for the arrest of the appellant, and was reissued on June 6, 1986.

It should be noted that the court, in announcing its decision to overrule the motion for absolute discharge, stated: "[T]he absences within that past year are the result of the absence or unavailability of the defendant. And she first evidenced that absence or inability to appear or unavailability by her failing to appear for trial as ordered." At that hearing the parties stipulated the facts of the case, and the court found McKenna guilty of driving while intoxicated and sentenced her to probation for a period of 2 years.

McKenna appealed the decision of the court on the absolute discharge motion to the district court for Holt County, which court entered a memorandum decision on February 4, 1987, affirming the lower court's ruling. In its decision the district court noted: "[T]he record shows the Defendant did have notice of the continuance and did not appear because she could not afford travel to O'Neill . . . ." McKenna now appeals this ruling to this court and asks that the decision be reversed and remanded with directions to dismiss.

The first issue to be decided in this case is whether the time period between appellant's failure to appear at trial and her subsequent appearance in court is deemed excludable as "delay resulting from the absence or unavailability of the defendant" under § 29-1207(4)(d).

As previously indicated, § 29-1207 requires that "[e]very person indicted or informed against for any offense shall be brought to trial within six months," and further provides that "[s]uch six-month period shall commence to run from the date . . . the information is filed." That section also provides that certain periods "shall be excluded in computing the time for trial," and subsection (4)(d) sets forth one of the excludable periods, that being the "period of delay resulting from the absence or unavailability of the defendant." Since the

defendant's absence or unavailability may be excluded in computing the 6-month period, the State need only show that the defendant was *either* absent *or* unavailable for the time period in question. In the case at bar the appellant's failure to be present at trial and her subsequent failure to notify the court of her willingness to reschedule the trial appear to bring this time period under the exclusion of § 29-1207(4)(d).

The impact of the failure of a defendant to appear for trial and the subsequent tolling of the speedy trial statute are discussed in several Nebraska cases. Two of the cases most relied upon by appellant are *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982), and *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985). The factual situation in *Beck, supra*, is particularly important, as the appellant in the case at bar argues that *Beck* is dispositive and requires a positive resolution of her case.

The defendant in *Beck* was informed against on October 8, 1980. On November 6 the defendant was released on bail. On December 16 defendant failed to appear for arraignment, and, thereafter, a bench warrant was issued. On August 20, 1981, the defendant appeared in court after arrest pursuant to the bench warrant. Subsequently, defendant, through new counsel, moved to dismiss for failure to comply with the Nebraska speedy trial statute. Defendant argued that neither he nor his then-appointed counsel was notified to appear for arraignment or trial. Defendant's former counsel testified that he was notified to appear at a bond review hearing on November 11, 1980, but did not notify the defendant because he did not know how to reach him. This court noted that defendant's address appeared on the front of the bond filed on November 6, 1980. *No evidence of any notice to appear at arraignment was served on defendant or his then-appointed counsel.* The trial court found that " 'the defendant absented himself from the jurisdiction and was, in fact, unavailable for trial for a period of at least from December 16th, 1980, until August 20th, 1981, when he appeared . . .' " due to the execution of the bench warrant. *State v. Beck, supra* at 703, 325 N.W.2d at 150.

On appeal, this court cited Neb. Rev. Stat. § 29-901(3)(b) (Reissue 1979), which outlines the obligation of a defendant to

appear before the court "to answer the offense wherewith he may be charged, and to appear at such times thereafter as may be ordered by the proper court."

This court stated: "There can be no serious dispute that a defendant is required to appear at those dates and at those times when ordered and of which he is notified." 212 Neb. at 704, 325 N.W.2d at 150. The court noted in *Beck* that the record contained no evidence to show that the defendant and/or counsel were ever notified to appear. The court stated it can accord no weight to findings which have no support in the evidence and then reversed the cause on defendant's motion.

In *Bennett, supra*, following a mistrial on July 22, 1983, the defendant was scheduled for, and failed to appear at, a new trial on October 5, 1983. A warrant was issued, which resulted in defendant's arrest on April 8, 1984; thereafter, defendant's motion for dismissal on the ground that he was denied a speedy trial was overruled. Upon appeal to this court defendant's failure to appear at trial was scrutinized under § 29-1207(4)(d). Defendant's claim was that he was "available" at all times for trial, but was not notified of the trial scheduled for October 5. The record reflected that the defendant's trial attorney did indeed notify defendant of the impending trial date and subsequently urged him to surrender to the police following his failure to appear at trial.

The court specifically distinguished this case from the situation in *Beck* discussed above and affirmed the ruling of the lower court. The court stated:

> Rather than a situation such as presented in *Beck*, this case falls within the rule which states that one cannot take advantage of a delay in being brought to trial where he is responsible for the delay either by action or inaction. *State v. Craig, ante* p. 70, 361 N.W.2d 206 (1985).

State v. Bennett, 219 Neb. 601, 603, 365 N.W.2d 423, 425 (1985).

It appears from Nebraska case law that when a defendant is aware of the scheduled trial date and fails to appear on that date, the Nebraska speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court.

The appellant contends that this court should consider her as having been "available" for trial and argues that any defect in this proceeding is the sole result of the failure of the State to serve the bench warrant in a timely fashion. The applicable case law states, however, that either *action* or *inaction* is dispositive when a defendant "is responsible" for the delay. As previously indicated, in this case appellant failed to appear at the scheduled trial on December 2, 1985. This is clearly "inaction." In a subsequent hearing, appellant, for all reasonable purposes, admitted both knowledge of the scheduled date and a lack of excuse for failure to contact the court. This case appears, accordingly, to fall squarely within the patterns contemplated by both the express language of the statute and this court's treatment of the applicable sections in prior cases.

It should be noted that in both *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982), and *State v. Bennett, supra*, the defendants were eventually brought into court pursuant to warrants for their arrest. The period of time between Beck's failure to appear and the successful execution of the warrant was over 8 months. While the opinion in *Beck* does not note whether a second bench warrant was issued after the initial 6-month period, it would appear that the situation in that case is similar to the fact pattern here. That same pattern is repeated in *Bennett*, where the period of time between his failure to appear and his arrest was 6 months. In neither of these cases did the court construe any delay in executing the warrant as bearing on the issue of whether the State violated the defendant's right to a speedy trial. Rather, as may be inferred from *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), it would appear that the defendant had an affirmative duty to contact the court to reschedule the trial date.

The second issue arising in this case is whether the court's taking judicial notice of the court file, which indicated appellant's failure to appear for trial on a specified date and the subsequent issuance of a bench warrant, is sufficient to meet the State's burden to prove the existence of an "excludable" period under § 29-1207.

The general rule is clear. The State has the burden of proving that one or more of the excludable periods of time exist under

subsection (4)(d) of § 29-1207 if the defendant is not tried within 6 months of the commencement of a criminal action. *State v. Beck, supra; State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978). It is also the established rule that to overcome a defendant's motion for absolute discharge from an offense, the State must prove existence of an excludable period by a preponderance of the evidence. *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Beck, supra*.

As previously stated, in *Bennett, supra*, the defendant claimed he was not notified of his scheduled trial date and thus failed to appear for that reason. Bennett's attorney testified that she discussed the trial date with him, left a message confirming that date at his mother's home as defendant requested, and subsequently urged defendant to surrender to the police following the issuance of the bench warrant for defendant's failure to appear at trial. The court held that the trial attorney's testimony fulfilled the burden the State was required to meet in order to excuse the delay from October 5, 1983, to April 8, 1984, because of the absence or unavailability of the defendant.

In this case the record establishes clearly that the trial date had been set and the attorney for the appellant had been notified of that date. When questioned at trial the appellant admitted a failure to apprise the court of her inability to be present and also failed to present additional evidence on her own behalf. Also, in his argument to the Supreme Court on this appeal, the attorney for the appellant, upon questioning by the court, admitted that he had received the notice mailed to him by the court in setting the date of the trial. Even if it were to appear from the record that the appellant was not notified as to the trial date, either directly or by her attorney, we believe that the rule would still be the same in this situation, that she had knowledge of the trial date and failed to appear. In *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 144, 322 N.W.2d 369, 373 (1977), the general rule is stated to be as follows: "It is clear that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client. 7A C.J.S. *Attorney & Client* § 182 (1980)."

The sole remaining issue, then, is whether the court file in

and of itself presented facts sufficient to meet the State's burden by a "preponderance of the evidence." We are convinced that it did. The court file established both the pattern of hearing dates prior to the final date of trial and the appellant's failure to appear, as well as the colloquy set out above between the court and McKenna. Appellant did not question, at the hearing on the motion to discharge, the truth or veracity of any facts within the file. At the hearing, then, the preponderance of evidence presented to the court would appear to have been sufficient to meet the required showing. Appellant was absent due to her own inaction. Moreover, the record establishes that at no point after the scheduled trial did the appellant contact the court and offer to appear. Under this pattern of facts we believe that judicial notice of the court file clearly established by a preponderance of the evidence her failure to appear. From what we have stated above, we conclude that the judgment of the district court should be affirmed.

AFFIRMED.

LEON E. CURRIER, APPELLEE, V. ROMAN L. HRUSKA U.S. MEAT ANIMAL RESEARCH CENTER, APPELLANT.

421 N.W.2d 25

Filed March 25, 1988. No. 87-223.

1. **Workers' Compensation: Appeal and Error.** In our review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Health Care Providers.** In connection with the rendering of medical services to a disabled worker, the focus is on the nature of the services provided, not the status or devotion of the provider of the services.
3. _____: _____. A person rendering necessary medical services to a disabled worker on an "as-needed" basis need not render the services during each moment of compensated time but, rather, must be available to perform the needed services during the times when needed.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellant.

Elizabeth Stuht Borchers and D. Christopher Smith of Marks & Clare, for appellee.

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

GRANT, J.

This is an appeal from the Nebraska Workers' Compensation Court. Plaintiff, Leon E. Currier, who was receiving disability and medical benefits, petitioned the court for additional benefits for ongoing personal care services provided in his home by a specific person, a woman unrelated to him. After rehearing on September 17, 1986, the court affirmed the original award and found that the personal care services were compensable under Neb. Rev. Stat. § 48-120 (Cum. Supp. 1986) and *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). The court ordered that the plaintiff recover from defendant, starting December 8, 1984, the sum of $135 per week as an allowance for personal home care, to

> continue for as long as the plaintiff reasonably elects not to be a resident of a nursing care or extended care facility and for as long as the need for such home personal care persists. The payment of said weekly care allowance shall be in addition to the weekly benefits for temporary total disability. The Court finds that said allowance is reasonable when one considers that this provides the plaintiff with approximately 40 hours of care at minimum wage. The Court has considered the fact that Linda Jacobsen is also employed part time as a dietary assistant at the local hospital, working 27 to 32 hours a week.

The record shows the following. On March 5, 1982, Currier, then 61 years old, suffered an injury to his back arising out of and in the course of employment by the defendant, Roman L. Hruska U.S. Meat Animal Research Center, operated by the State of Nebraska, when he fell into a fertilizer spreader from the back of a truck. As a result of the accident, Currier suffered a spinal injury and subsequently underwent surgery for a spinal

fusion. In a Workers' Compensation Court proceeding, Currier was determined to be temporarily totally disabled. He was hospitalized in Omaha, Nebraska, and was transferred to Kearney County Community Hospital, where he stayed from August 1982 until December 1984. The defendant paid all hospital and medical expenses incurred by Currier in the accident. During his stay at the hospital, Currier was given permission to leave the hospital on occasion, and transported himself in a vehicle which had been adapted for him by the defendant.

In the spring of 1984, during his stay at the hospital, Currier and a dietary assistant whom he had met at the hospital orally agreed that she would "help him in a place to live and take care of him." Currier stated that he wanted to get some freedom and be on his own. In December 1984, Currier elected to leave the hospital, and the dietary assistant moved into his rental home to help in taking care of him. At the time of the rehearing, changes had been made in the home to accommodate Currier's disability. On March 15, 1985, Currier and the dietary assistant entered into a written employment contract, agreeing that the assistant was to be employed as a "domestic household service worker and personal nurse to perform such duties as are customarily performed by one holding such position in other similar arrangements." The contract provided that the assistant was to receive $800 per month in compensation for her services, in addition to room and board. At the time of the rehearing, she had not been compensated for any of her services.

Dr. Donald Prince, a physician who had treated Currier on a daily basis during his stay at Kearney County Community Hospital, testified in a posthearing deposition dated October 1, 1986. In his deposition, Dr. Prince testified that Currier had been required to stay in the hospital for rehabilitation purposes so that he could eventually live at home with a care person. Dr. Prince testified that at the time Currier left the hospital in December 1984, although Currier was able to walk with the use of canes, he needed assistance in the event of a fall. Although Dr. Prince had not prescribed any specific medical regimen after Currier's release from the hospital, he testified in his deposition that Currier needed assistance in everyday tasks

such as bathing, preparation of meals, and getting dressed; that he needed someone to relieve his pain during a muscle spasm; and that he needed someone to help him in the event of a fall. It was his opinion that Currier was totally disabled with no possibility of recovery and that Currier was unable to live by himself without assistance.

The nurse who had treated Currier during his stay at the hospital testified that at the time Currier left the hospital, he had complete immobility of the upper spine, could not bend or twist, could not lift or pull, had muscle spasms during the night, and needed medication and assistance to change the position of his legs; that although he was able to walk with canes, he had difficulty balancing; and that he needed help in getting dressed. Although the nurse could not estimate how many hours per day Currier required assistance, she testified that Currier needed assistance during specific times of the day with dressing, with preparation of meals, at bedtime, and for daily inspections of his body for sores and infections.

The dietary assistant testified that she spends approximately 75 to 85 hours per week caring for Currier. She makes his coffee in the morning, bathes or showers him, puts on his shoes and socks, helps him get dressed, makes his breakfast, does his housework and yardwork, takes him to the doctor, assists him when he loses his balance or falls, gives him medication, untangles his legs when he experiences muscle spasms, and helps him off the bathroom stool. In addition to these duties, she continues to work approximately 27 to 32 hours per week as a dietary assistant at the hospital. Currier described his muscle spasms as follows:

> A. Your legs cramp up, pull up, you get it in the hips and back. Get them crossed in the nights, can't get them uncrossed, legs crossed at night. You have to roll over. You get the spasms, you get them uncrossed, you are hollering for somebody to get there.
>
> Q. Do you holler for [the dietary assistant] —
>
> A. Yes.
>
> Q. — to assist you then? Are you able to tell me how many nights in the last couple of nights that you have had muscle spasms that have woken you up?

A. That wakes me up?

Q. Uh-huh.

A. Like I say, I could tell you the time that it don't ever — You may sleep for an hour, hour and a half; you might sleep for two hours; might sleep for 30 minutes. It all depends on your condition. Get a wrinkle in the bed sheet or something, you're going to have a spasm. You have to get up out of bed and have the bed straightened out for you.

The State assigns as error that the Workers' Compensation Court erred in "providing that housekeeping services and personal care services are compensable pursuant to Neb.Rev.Stat. §48-120 (Reissue) and *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978)."

We first note that § 48-120 provides that "the employer shall be liable for all reasonable medical, surgical, and hospital services" and that the Workers' Compensation Court "shall have the authority to determine the necessity, character, and sufficiency of any medical services." In our review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Hernandez v. Farmland Foods*, 227 Neb. 629, 418 N.W.2d 765 (1988); *Bender v. Norfolk Iron & Metal Co.*, 224 Neb. 706, 400 N.W.2d 859 (1987). The Workers' Compensation Act is to be broadly construed so that the purposes of the act are not "thwarted by technical refinements of interpretation." *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 656-57, 228 N.W.2d 303, 305 (1975); *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

In *Spiker*, this court held that, pursuant to § 48-120, a totally and permanently disabled workman who required nursing care as the result of an accident arising out of and in the course of employment can recover the cost of the nursing care, even though such care will not cure or lessen the disability. The evidence in *Spiker* showed that the employee required nursing care on a full-time basis. In order to reduce the costs of his care, the employee's wife cared for the employee at home. During the night, it was necessary for her to get up at least once to change

his bedding. The wife administered medication to him when he had a bladder spasm, inserted catheters, and generally took care of him on the evenings and weekends when the employed nurse was absent. The *Spiker* court held that, pursuant to § 48-120, a workman may recover, as medical benefits, the reasonable value of the nursing care furnished by his spouse while cared for at home, overruling this court's earlier decision in *Claus v. DeVere*, 120 Neb. 812, 235 N.W. 450 (1931). The injured employee in *Spiker* was also entitled to recover the reasonable expenses of the nurses and aides who assisted in caring for him at home. As set out in the concurrence of Brodkey, J. (joined by Boslaugh, McCown, and White, JJ.) in *Spiker*, three basic requirements must be met before compensation may be rendered for care to an injured employee by the spouse in the home: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse.

The *Spiker* holding was reaffirmed in *S & S LP Gas Co. v. Ramsey*, 201 Neb. 751, 272 N.W.2d 47 (1978), and applied in a different fact situation. Ramsey did not have a house to go to, and the necessary services were rendered by a nursing home. In *Ramsey*, the employee needed assistance in eating, bathing, dressing, going to the toilet, and getting in and out of bed, and needed nursing-type care on a 24-hour basis. The court approved the payment for such service.

Unlike the situation presented in *Spiker*, the care rendered to Currier is not provided by a spouse, but is provided by a woman unrelated to him. We are unable to understand the State's emphasis on the fact that nursing services are being furnished to Currier by an unrelated female person. The evidence shows that Currier is an injured person who needs assistance from some other person, and he does not have a spouse. As stated in the concurrence of Brodkey, J. (joined by Boslaugh, McCown, and White, JJ.) in *Spiker*, the focus is on the " 'nature of the service provided, not the status or devotion of the provider of the service . . . .' " 201 Neb. at 522, 270 N.W.2d at 310. In *S & S LP*

Gas Co. v. Ramsey, supra at 752, 272 N.W.2d at 47, this court stated that "[i]t is not essential that the assistance . . . be furnished by a doctor, nurse, or other medical person." The *Ramsey* court approved payments to an unrelated person.

Appellant asserts that neither the language in § 48-120 nor the court's holding in *Spiker* interprets " 'reasonable medical services' " to include "general housekeeping services or personal care services" as a compensable award. Brief for Appellant at 18. In its order, however, the Workers' Compensation Court determined that the services provided by the dietary assistant were *not* normal housekeeping services and that the personal care services provided by the assistant were medically necessary and compensable. The evidence herein supports that finding.

Appellant knew of Currier's disability. In a letter dated July 25, 1985, the appellant indicated that "[w]e do agree that we would be liable for providing medical services to Mr. Currier in his home if such were necessary." Although the letter indicated that the appellant did not believe that these services were necessary, the record reveals that the appellant did have notice of Currier's disability and need of assistance. Furthermore, as Currier was still determined to be totally disabled at the time he left the hospital, it is unreasonable for appellant to assume that further medical care outside of a hospital environment was unnecessary.

In regard to the second prong of the *Spiker* three-part test, appellant contends that the services provided by the assistant are normal household duties or personal care services and are thus not compensable. At page 13 of its brief, appellant states, "If this court were to find that the employer is liable for 'nursing services' which includes household services and personal care services then the issue would be solved and the *Spiker* holding would have to be extended to include such services." We find, however, that the Workers' Compensation Court could have found that many of the services provided by the assistant were compensable. We note that this court is in accord with other jurisdictions which deny compensation for ordinary household duties which are performed by a spouse. The basis for such holdings is that a spouse performs such

duties both for herself and for her husband as a part of the marital relationship. Such considerations are not present in this case.

The Michigan Court of Appeals stated:

> Thus, the fact that a spouse is able to perform household tasks during those times when not actually in attendance with the patient is irrelevant under the circumstances of this case. If the services were provided by someone other than plaintiff's wife, that person would, we assume, pursue his or her own interests within the limits of the job. Such person might read, knit, watch television, or nap during those times in which he or she is simply "on call". The fact that [the service provider] might use her "on call" time to perform household tasks does not alter the "nature of the service provided" or the "need" for the service.

Brown v Eller Advertising Co, 111 Mich. App. 538, 543, 314 N.W.2d 685, 688 (1981).

Ordinary, noncompensable housekeeping tasks include cleaning, preparation of meals, and washing and mending clothes. Compensable tasks include serving meals in bed, bathing and dressing, administering medication, and assisting with sanitary functions. *Sealey Mattress Co. v. Gause*, 466 So. 2d 399 (Fla. App. 1985); *Trejo v Mich Sugar Co*, 133 Mich. App. 753, 350 N.W.2d 314 (1984).

The testimony presented at the 1986 rehearing established that Currier is unable to live in his own home without assistance. Currier needs help in dressing, bathing, relief of pain during a muscle spasm, administering of medication, and in the event of a fall. The testimony fully supports the finding of the compensation court that the services provided by the dietary assistant are medically necessary and thus compensable, because those specific services are beyond the scope of ordinary household duties. Because of Currier's disability, it is necessary that some person be available, especially during the nighttime hours, to render medical services. We hold that a person rendering necessary medical services on an "as-needed" basis need not render the services during each moment of compensated time but, rather, must be available to perform the

needed services during the times when needed. Appellant's first assignment of error is without merit.

In the State's second assignment of error, the State claims that the court erred in the amount awarded to Currier for the services provided by the dietary assistant. Appellant asserts that the reasonable value of these services is not capable of ascertainment. Where there is sufficient, competent evidence to support the amount of an award in a workers' compensation case, that amount will not be set aside unless clearly wrong. See *Hernandez v. Farmland Foods*, 227 Neb. 629, 418 N.W.2d 765 (1988). The Workers' Compensation Court's determination that Currier should be compensated for the assistant's services at the rate of $135 per week is based on the minimum wage payable for a 40-hour week. The assistant testified that she spends 75 to 85 hours per week caring for Currier. Although the estimate provided by the assistant may include time spent for noncompensable services, the nature of her duties required that she be at Currier's disposal during specific times. As stated in *Bello v. Zavota Bros. Transp. Co., Inc.*, 504 A.2d 1015, 1018-19 (R.I. 1986),

> The fact that [a person] may not have been actively performing a strictly medical task at each and every moment of the day does not mean that she should not be compensated for her continuous attendance. This case is analogous to the situation in which a night nurse watches over a sleeping patient. The fact that the patient sleeps through the night does not support an argument that the nurse should not be paid for the night. He or she must be present and available to meet the patient's needs, not according to some preestablished timetable, but as the patient experiences them.

The fact that an attendant service provider may perform household tasks during "on-call" time does not alter either the need for or the nature of the services provided. *Standard Blasting & Coating v. Hayman*, 476 So. 2d 1385 (Fla. App. 1985). The administrator at Kearney County Community Hospital testified that alternative institutional care at the hospital for Currier was, at the time of the rehearing, $870 per month. This figure was based on the room rate only and did not

include charges for additional services.

It is apparent from the foregoing that the sum of $135 per week for the services provided by the assistant was reasonable and well within the range of the evidence. Appellant's second assignment of error is without merit. Appellee is awarded the sum of $1,500 for attorney services in this court.

The decision of the Workers' Compensation Court is affirmed.

AFFIRMED.

IN RE INTEREST OF M.R., J.R., AND N.R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.R., APPELLANT.
420 N.W.2d 924

Filed March 25, 1988. No. 87-552.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court; however, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Parental Rights: Juvenile Courts.** A juvenile court may, under proper procedures and when warranted, order a rehabilitative plan with reasonable provisions material to the plan's rehabilitative objective of correcting, eliminating, or ameliorating the condition or situation on the basis of which the juvenile court asserted jurisdiction.
3. _____: _____. Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship between the reason for asserting jurisdiction and the plan's rehabilitative objective.
4. **Parental Rights.** Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay.

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

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Janice Lipovsky, and Roger Lott, guardian ad litem, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

CAPORALE, J.

T.R., who was 24 years old at the time of trial, appeals from the judgment of the separate juvenile court of Lancaster County, terminating her parental rights in and to her daughter, M.R., born February 24, 1980, and her two sons, J.R., born April 7, 1981, and N.R., born April 29, 1983. W.R., the adoptive father of M.R. and husband of T.R. at the time of the births of J.R. and N.R., relinquished his parental rights to all of the children, which rights were then terminated by the court below. Since he has not appealed from that judgment, we are concerned only with the rights of the mother, who contends the court below erred in determining that the evidence clearly and convincingly established that (1) she had "substantially and continuously neglected" her children or refused to provide them with "necessary parental care and protection," (2) she had failed to reasonably comply with a plan of rehabilitation, and (3) it was in the children's best interests to terminate her parental rights. We affirm.

It is our obligation to try the factual questions de novo on the record, and we are thus required to reach a conclusion independent of the trial court; however, where the evidence is in conflict, we consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

T.R. and W.R. were married in 1980; an action to dissolve their union was filed in 1983, during which a battle over the custody of the children developed. Remarkably enough, however, when the marriage was dissolved, legal custody of the children was placed jointly in and with the two parents. Each parent was to have physical possession of the children during alternate 2-week periods. Predictably, the arrangement did not

work. According to the mother, who lived alone for a period after the dissolution, the father harassed and intimidated her whenever she had physical possession of the children. She claims to have lived in fear that he would harm both her and the children. There is evidence that the father is a violent individual who had assaulted the mother and threatened both her and her family over custody issues.

The mother, on her own, asked for help from the Department of Social Services because she could not control the children after they visited their father. The mother then moved in with a friend, and shortly thereafter, the father filed a complaint with the police, alleging that the mother and her friend were engaging in inappropriate sexual conduct. An investigation of the complaint revealed that the father had sexually molested his adopted daughter. In addition, the amended petition filed by the State alleged that the mother's friend had had sexual contact with M.R. and J.R. and that M.R. and J.R. had been locked in a closet.

After the children were placed in emergency foster care on or about December 17, 1984, an adjudication hearing was had, at which the juvenile court found the children to be subject to its jurisdiction under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984). That statute provides that the juvenile court shall have original and exclusive jurisdiction over

> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

The evidence on which that adjudication was made is not

contained in the bill of exceptions submitted to us, and we must thus conclude that the evidence supports the assertion of jurisdiction by the juvenile court. We therefore concern ourselves only with whether the evidence clearly and convincingly establishes the State's right to terminate the mother's parental rights within the context of the errors she has assigned to the termination phase of the proceeding, the only phase covered by the bill of exceptions.

According to the transcript, the court ordered a plan designed to reunite the mother with her children by requiring her to participate in counseling with an approved therapist, obtain parental training, visit her children on a regular basis, and establish a residence separate and apart from her friend.

The mother maintained consistent visitation with her children up until December 1985, when she became frustrated with the social services system and refused any more visitations, except for an unscheduled one at a holiday dinner. However, up to the time she ended her visitation, the mother interacted well with the children and was attentive and interested in their well-being. She also stopped the counseling she had been undergoing because she felt she did not interact well with the counselor to whom she had been reassigned. Moreover, the mother continually refused to establish a residence separate and apart from her friend.

Thus, on February 25, 1987, the State filed a petition seeking a termination of the mother's parental rights, pursuant to Neb. Rev. Stat. § 43-292 (Reissue 1984), which provides:

> The court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247,

reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

At the termination hearing a foster care provider testified that when M.R. became depressed and unhappy, she would run to her room, crawl under her blankets, and masturbate as she said she had been taught to do by her mother's live-in friend. There was also testimony that M.R. and J.R. talked about seeing sexual activities between her mother and the live-in friend and that J.R. had spoken of being locked in a room with no doorknob.

The mother asserted, however, that the children were not speaking of the friend with whom she lived, but adduced no evidence to corroborate her assertion. The mother testified she did not wish to establish an independent residence because she was afraid of the children's father, and, though still frightened, living with her friend made her feel safer. She admitted, however, that at one time she claimed she lived with her friend because she had been evicted from her apartment and had no money. At the time of the termination hearing, the mother was employed and earning $4 per hour.

There was testimony that M.R. had low self-esteem and scratched or dug at herself until sores developed; that J.R. is an extremely disruptive and aggressive child, prone to hitting, biting, and kicking adults and children alike; and that two foster care providers found the children so unmanageable as to ask that they be placed elsewhere. There was expert testimony that the children need a stable home environment, as demonstrated by the fact that when J.R. was given several hours of daily undivided attention, his behavior improved.

Whatever may be the merits of other aspects of the court's rehabilitative plan, and whatever may be the rights of adult lovers, no one has the right to corrupt innocent children, as the evidence clearly and convincingly establishes was done in this case as a consequence of the mother's living arrangements. The mother cannot provide her children with a stable home environment while she lives with this particular person. Moreover, the evidence establishes the mother had but one visit with her children since December 1985. No matter how

frustrating dealing with the social services bureaucracy may be, such frustration provides no basis for forsaking one's children.

There was expert testimony that the mother had a passive-aggressive personality which is characterized by the alleviating of stressful situations by avoidance behavior, such as by skipping appointments. That may explain why the mother did not see her children, but it neither helps the children nor shows that the mother has taken steps or will ever take steps to put herself in a position to take proper care of her children. Neither did the mother's fear of the children's father excuse her failure to remove herself from the home of one who has mistreated her children. The court did not require that the mother live alone, only that she not live with a person who was a demonstrated danger to her children.

As we observed in *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987), a juvenile court may, under proper procedures and when warranted, order a rehabilitative plan with reasonable provisions material to the plan's rehabilitative objective of correcting, eliminating, or ameliorating the condition or situation on the basis of which the juvenile court asserted jurisdiction.

> Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures. Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.

Id. at 268, 417 N.W.2d at 158.

The plan in question was material because it provided a

means to change the conditions under which the mother lived, conditions which had proved to be deleterious to the best interests of the children. The mother simply chose her friend over her children.

As we have said before, where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987); *In re Interest of P.J.M., R.E.M., and S.A.M.*, 226 Neb. 764, 415 N.W.2d 124 (1987). The condition which required the children's placement in emergency foster care continues to exist some 2 1/2 years later.

There being no merit to any of the mother's assigned errors, the judgment terminating her parental rights in and to M.R., J.R., and N.R. is affirmed.

AFFIRMED.

DR. JAMES P. GROENE, APPELLANT, V. COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

421 N.W.2d 31

Filed March 25, 1988. No. 87-580.

Appeal from the District Court for Colfax County: JOHN M. BROWER, Judge. Affirmed.

Dr. James P. Groene, pro se.

Laureen Van Norman and John F. Sheaff, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

PER CURIAM.

The petitioner, Dr. James P. Groene, has appealed from the order of the district court affirming the order of the Commissioner of Labor.

The principal issue in this case is whether the persons

working in the petitioner's chiropractic office are employees or independent contractors. The issue is one of fact to be determined in accordance with the requirements of Neb. Rev. Stat. § 48-604(5) (Cum. Supp. 1986). In order for petitioner to prevail, the evidence must show that the petitioner satisfied all three requirements of the statute. *Commissioner of Labor v. Lyric Co.*, 224 Neb. 190, 397 N.W.2d 32 (1986). To review a determination of fact, a bill of exceptions containing the evidence before the lower court must be filed in this court. *Johnson v. Johnson*, 224 Neb. 159, 396 N.W.2d 284 (1986), *modified* 224 Neb. 811, 401 N.W.2d 506 (1987).

A bill of exceptions has not been filed in this court, and the transcript fails to show that a bill of exceptions was ever filed in the district court. In the absence of a bill of exceptions, the judgment of the trial court will be affirmed if the pleadings support the judgment. *In re Estate of Kesting*, 220 Neb. 524, 371 N.W.2d 107 (1985).

In the petitioner's brief there is some reference to a possible constitutional question. In order for a constitutional question to be considered, Neb. Ct. R. of Prac. 16A (rev. 1986) requires that a notice of a constitutional question be filed with the brief. *Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn.*, 191 Neb. 1, 213 N.W.2d 443 (1973) (Boslaugh, J., concurring). The record fails to show compliance with this rule.

Since the pleadings support the judgment of the district court, it is affirmed.

AFFIRMED.

TINA C. RODRIQUEZ, APPELLANT AND CROSS-APPELLEE, V. PRIME MEAT PROCESSORS, ALSO KNOWN AS PRIME INTERNATIONAL CORPORATION, ALSO KNOWN AS VMI CORPORATION, ET AL., APPELLEES, AND FIREMAN'S FUND INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

421 N.W.2d 32

Filed March 25, 1988. No. 87-696.

1. **Workers' Compensation: Appeal and Error.** In reviewing workers' compensation cases the Nebraska Supreme Court is not free to weigh the facts anew; rather, it accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case.
2. _____: _____. The factual findings of the compensation court on rehearing will not be set aside on appeal to the Nebraska Supreme Court unless clearly wrong.
3. _____: _____. In testing the sufficiency of the evidence to support the findings of the compensation court on rehearing, every controverted fact must be resolved in favor of the successful party, who is to have the benefit of every inference that can be drawn therefrom.
4. _____: _____. A finding with regard to causation of an injury is one for determination by the compensation court as the fact finder.
5. **Workers' Compensation.** The language concerning the partial loss of use of multiple members contained in Neb. Rev. Stat. § 48-121(3) (Cum. Supp. 1986) applies only where the losses of use are the consequence of injuries sustained in a single compensable accident.
6. **Statutes: Legislature: Intent.** In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result.
7. **Workers' Compensation: Legislature: Intent.** The intention of the Legislature is to be determined from the compensation act as a whole, rather than from loose words or phrases in isolated parts.
8. **Workers' Compensation: Attorney Fees: Time.** Where there is no reasonable controversy regarding an employee's claim for workers' compensation, Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986) authorizes the award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments.
9. **Workers' Compensation: Appeal and Error.** Whether a reasonable controversy exists is a question of fact, and this court is bound by the findings of the compensation court on rehearing, to the extent such findings have support in the evidence.
10. **Workers' Compensation: Jurisdiction: Insurance.** The provisions of Neb. Rev. Stat. § 48-146 (Cum. Supp. 1986), requiring that policies insuring liability arising under the Nebraska Workers' Compensation Act provide that jurisdiction over the insured shall be jurisdiction over the insurer and that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against the insured, do not authorize the compensation court to ignore

the separate identities of the insured and insurer.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, and Mino St. Lucas of St. Lucas & Kenny, for appellant.

Melvin C. Hansen and Allen J. Potts of Hansen, Engles & Locher, P.C., for appellee Aetna/Cigna Insurance.

Ronald E. Frank of Sodoro, Daly & Sodoro, for appellee Fireman's Fund.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

CAPORALE, J.

Plaintiff, Tina C. Rodriquez, filed an action for workers' compensation benefits against her employer, appellee Prime Meat Processors, and its insurers, appellee and cross-appellant Fireman's Fund Insurance Company and appellee Aetna/Cigna Insurance Companies. Dissatisfied with the benefits awarded her, Rodriquez appeals, assigning three errors which combine to challenge the compensation court's factual finding that the disabilities of her upper extremities (arms) resulted from separate accidents, and its legal conclusion that the relevant portion of Neb. Rev. Stat. § 48-121(3) (Cum. Supp. 1986) applies only when a worker has sustained disabilities to two or more specified members of the body as the result of a single accident. In its cross-appeal Fireman's Fund asserts the compensation court erred in assessing against it a waiting time payment and attorney fee. We affirm as modified.

FACTS

Rodriquez was born on February 2, 1925, is divorced, is possessed of an eighth grade education, and has no skills suiting her for any employment other than manual labor. She was employed by Prime Meat Processors as a laborer in 1975 and continued that employment until February 2, 1985.

During that period of time, Rodriquez suffered two work-related accidents which are the subject of this litigation, the first

of which occurred on November 4, 1981, and the second on July 27, 1982. On November 4, 1981, Rodriquez fell and as a result suffered a disability to her right arm. The details of this accident are not in dispute and need not be recited here.

On July 27, 1982, Rodriquez suffered a second fall. In testimony at the initial hearing held on September 10, 1986, Rodriquez described this accident as follows:

> [Rodriquez]. . . . So I was carrying this box and I just put — you know, was going over there when I felt my foot slip and I let the box go. I just let the box go because I figured it wasn't worth it and I fell and when I fell, I put this hand down because this one was already sore and I didn't want to hurt this any more.
>
> Q. You braced yourself with [your] left hand because your right hand was already sore?
>
> [Rodriquez]. That's right. So then I just put this down and I was on my knees.
>
> Q. You fell to your knees bracing yourself with your left hand?
>
> [Rodriquez]. Yes. I kept this hand down so then I couldn't get up and there was two girls, two Mexican girls that came up to me and asked me what had happened. I said I really didn't know. It happened so fast I didn't know. So then they helped me get up. When I got up my hand was already this big.
>
> Q. Which hand?
>
> [Rodriquez]. My left hand. . . .
>
> . . . .
>
> Q. All right. Now let's go back to the second fall again. When you fell to the floor while you were moving the box in July of 1982 did you brace your fall with your right hand?
>
> [Rodriquez]. No.
>
> Q. Just your left hand?
>
> [Rodriquez]. I put this hand — this is the one.
>
> Q. You are indicating your left hand?
>
> [Rodriquez]. Yes. I knew that if I put this one down I was going to have more problems than what I already had.
>
> Q. So you claim that there was no additional injury to

the right hand in the fall of July 1982?

[Rodriquez]. I just put my hand down like this and I felt a little something and it pulled because I knew what was going to happen so I just braced myself here. That's why the fall was all here.

At appellee Aetna/Cigna's insistence Rodriquez consulted Dr. Bernard Kratochvil, an orthopedic surgeon. On February 15, 1985, Kratochvil wrote that "because of the disability to the upper extremities, [Rodriquez] is unable to return to her former work. Because of her age, experience, and education, she is not employable."

On January 17, 1986, Kratochvil wrote,

> It is my opinion that the patient has a 20 percent permanent partial impairment of the right upper extremity as a result of the injury in November of 1981 [and] that she has a 20 percent permanent partial impairment of the left upper extremity as a result of the July 1982 injury.

On May 7, 1986, Kratochvil wrote that Rodriquez "was last seen in our office on the 4th of April of 1986. It is my opinion that Tina Rodriguez [sic] remains unemployable. It is my opinion that as of April 4th, 1986, she has reached maximum medical benefit."

The rehearing of Rodriquez' case was held on February 11, 1987. Rodriquez' testimony at this proceeding essentially repeated that of the initial hearing, with the notable exception of her testimony regarding the facts of her second fall. On direct examination in the rehearing, Rodriquez engaged in the following colloquy with her attorney:

> [Rodriquez] . . . I was going over there when I slipped and I didn't realize what was really happening to me until I fell, and I let the box go and I put both of my hands down, but like I said, I babied this one (indicating) a little bit, and when I heard it crack, then I — well, I really wasn't worried about this hand (indicating) at all.
>
> Q Which hand?
>
> [Rodriquez] My right hand, because it was already injured and I didn't care because I thought I had broken my hand.

Q Which hand?

[Rodriquez] My left hand, you know, when I fell.

Q I'm not sure I understand your testimony now. You're saying that you fell and you injured both hands on the second fall?

[Rodriquez] Yes, both hands, right. I put both hands down.

Q There has been received in evidence a transcript of your testimony at the first trial of this case, and in that trial you said you only injured your left hand in the second fall. Now you've changed your mind. Why?

[Rodriquez] Why? Because at that time, I didn't remember. I was kind of confused. It's been so long and so much has gone on that I just didn't think about it. And then when I went back and found my own notes that I had written —

Q That's Exhibit No. 15.

[Rodriquez] Yes. — I realized what really had happened.

Rodriquez represented that she had written an account of the second accident on June 22, 1985, for a purpose or purposes unstated in the record; it is this account to which she refers as exhibit 15 in the above quotation. It is of note that Rodriquez also gave and signed a statement dated October 7, 1982, which also purports to be an account of her second accident. The October 7 statement was also admitted into evidence at the rehearing; it differs from Rodriquez' testimony at the rehearing and tends to corroborate her story as told at the initial hearing.

Kratochvil testified by deposition as follows, on direct examination conducted on Rodriquez' behalf:

Q. Now, let me ask you at this point if all of those operations that you have been [talking] about so far have been on the right hand and arm?

[Kratochvil]. That's correct.

Q. Doctor, do you have an opinion with reasonable medical certainty as to the cause of the injuries necessitating those treatments?

[Kratochvil]. Yes.

Q. What is your opinion?

[Kratochvil]. It was the result of an injury which occurred in November of 1981.

. . . .

Q. Can you tell me did you also treat the left hand and arm?

[Kratochvil]. Yes.

Q. Tell me about that, give me the history and bring that up to date.

[Kratochvil]. She sustained an injury to the left upper extremity in July of 1982.

On cross-examination conducted on behalf of Fireman's Fund, Kratochvil testified:

Q. Was it your understanding that on the second accident that occurred on July 27 of 1982 that she had injured her left upper extremity and either injured her right upper extremity or right hand, or at least aggravated a prior injury?

[Kratochvil]. I believe that's the way she described it.

On cross-examination conducted on behalf of Aetna/Cigna, Kratochvil testified:

[Kratochvil]. I started to take care of Tina Rodriquez after Dr. Klein became ill and wasn't able to practice, and I think possibly, I wasn't aware of the fact that this had anything to do with a work-related injury, or at least I didn't think it was that involved. As time went on and I treated her on several occasions and operated on her, I found out there were two separate injuries, and there were two separate extremities involved at the time of each injury. So I proceeded to try to get the facts. Now, I'm not sure whether I got them from the patient or from her attorney, but the point is I finally tried to summarize the whole affair and I came up with this information, that she had injured herself in November of 1981 and that involved the right hand and shoulder; a second injury occurred in July of 1982 which involved the left upper extremity. Then she had had surgery on six different occasions involving both upper extremities, both hands, both thumbs.

Q. And I believe you testified earlier that the treatment which you have provided and the condition which you

have described to the right hand I believe is a result of the injury of November, 1981?

[Kratochvil]. Yes.

Q. And to the left hand the result of the injury of July, 1982?

[Kratochvil]. Yes.

On recross-examination conducted on behalf of Fireman's Fund, Kratochvil testified as follows:

Q. Doctor, without regard to the extent of impairment to Tina Rodriquez' either left arm or [right] arm, I want to represent to you one of the problems that has arisen in this case is whether or not Tina Rodriquez suffered injuries, an injury to her right arm also when she fell in July of 1982, and apparently through some notes that you have gone through that are outside your chart, based upon your conversations with either Tina Rodriquez or her attorney or both, you have resolved at least in your mind that in 1981 she had an injury to the right arm and in July of '82 she had an injury to the left arm, is that correct?

[Kratochvil]. That's correct.

Q. But at the time you offered . . . the July 6, 1984 report, at that time you had interpreted the records as having something to do with an injury to her right upper extremity when she fell in July of 1982, is that correct?

[Kratochvil]. Yes.

Q. Today you are now correcting that in essence, is that basically what you are saying?

[Kratochvil]. Well, it has been very difficult to sort out the facts, and I'm not certain that the patient has them on the tip of her tongue. However, the way I understand it is that she had an injury to the right upper extremity in the November, 1981 accident, then she had another accident where she slipped and fell in July of '82 and this time she injured the left upper extremity. I don't have any information that would indicate that she also injured or aggravated the condition of her right upper extremity in July of 1982. I don't have any facts one way or the other.

Q. But your medical opinion today is that in 1981 she injured her right arm and in 1982 she injured her left arm?

[Kratochvil]. That's the way I understand it.

Q. That's your opinion within reasonable medical certainty today?

[Kratochvil]. Yes.

Following the rehearing, the compensation court awarded Rodriquez certain medical and hospital expenses, vocational rehabilitation services, and temporary total disability benefits for the period from March 12, 1984, through April 4, 1986, as a result of the first accident, and for the periods from May 11 through September 10, 1983, and from June 26, 1984, through April 4, 1986, as a result of the second accident. The court rejected Rodriquez' contention that she is permanently totally disabled as a result of the partial loss of use of both her arms and awarded her permanent partial disability benefits based on a 20-percent loss of use of her right arm as the result of the first accident and a 20-percent loss of use of her left arm as the result of the second accident.

At the time of Rodriquez' first accident, Prime Meat Processors was insured by Fireman's Fund, and at the time of the second accident by Aetna/Cigna. For a time, the two insurers paid equal shares of Rodriquez' temporary total disability benefits. However, apparently on the basis of Kratochvil's statement in his written report of July 6, 1984, that Rodriquez sustained both of her injuries during the second accident, Fireman's Fund stopped making payments on April 11, 1985.

CAUSE OF DISABILITIES

In reviewing workers' compensation cases this court is not free to weigh the facts anew; rather, it accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case. Thus, the factual findings of the compensation court on rehearing will not be set aside unless clearly wrong. *Hernandez v. Farmland Foods*, 227 Neb. 629, 418 N.W.2d 765 (1988); *Kuticka v. University of Nebraska-Lincoln*, 227 Neb. 565, 418 N.W.2d 593 (1988); Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986). In testing the sufficiency of the evidence to support the findings of the compensation court on rehearing, every controverted fact must be resolved in favor of the successful party, who is to have the benefit of every

inference that can be drawn therefrom. *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987).

A finding with regard to causation of an injury is one for determination by the compensation court as the fact finder. *Kingslan v. Jensen Tire Co., supra.* Given Rodriquez' conflicting versions of how she sustained her injuries and disabilities, it cannot be said the compensation court's finding on rehearing that the disability of Rodriquez' right arm resulted from the first accident and that of her left arm from the second accident is clearly wrong.

COMPENSABILITY OF DISABILITIES

The compensation court on rehearing found that notwithstanding Rodriquez' inability "to perform work for which she has previous training or experience," she was not entitled to permanent total disability benefits, explaining that the following language of § 48-121(3) applies only when multiple members are injured and the resultant disabilities are the product of a single accident:

> In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, but not amounting to total and permanent disability, compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively. The total loss or permanent total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or hearing in both ears, or of any two thereof, in one accident, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. [Subdivision (1) specifies the benefits for total disability.] In all other cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total and permanent disability shall be determined in accordance with the facts. . . . In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those

> produced by the injuries named therein.

Single member permanent disabilities are compensated under an earlier portion of § 48-121(3), which provides in pertinent part:

> For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; *Provided*, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable, viz: . . . . For the loss of an arm, sixty-six and two-thirds per cent of daily wages during two hundred twenty-five weeks [but not more nor less than the amounts specified in Neb. Rev. Stat. § 48-121.01 (Cum. Supp. 1986)].

Rodriquez contends the court below misread the multiple-member disability language of § 48-121(3), claiming that a worker who sustains the partial loss of use of two or more members as the result of separate compensable accidents may, if he or she is in fact rendered totally disabled thereby, receive total disability benefits.

In reaching its conclusion that the multiple-member language of § 48-121(3) applies only when two or more members are injured in the same accident, the compensation court relied upon *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984); Rodriquez correctly observes that this reliance was misplaced. Although the *Krijan* court observed that the injured worker in that case had suffered permanent partial disability of two members in one accident as well as prior injuries in a separate accident, that observation was not directed to the question presented in this case. Indeed, in *Krijan* there was neither dispute as to whether the injury to both members was in fact sustained in a single accident, nor argument that the language questioned in this case applied only to disabilities arising out of injuries sustained in a single accident. Nevertheless, the compensation court's legal conclusion as to the import of the language at issue is correct.

The question now before us may be phrased as being whether the "in one accident" requirement of § 48-121(3) applies not only to the "total loss or permanent total loss of use of both" specified members, or any two thereof, but as well to "all other

cases involving a loss or loss of use of both" those members, or any two thereof.

In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result. *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987); *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985); *Reed v. McClow*, 205 Neb. 739, 290 N.W.2d 186 (1980). It would be outrageously absurd indeed to provide that one who totally lost, or lost the total use of, multiple members could receive total disability benefits if and only if such occurred in a single compensable accident, but provide that one who lost something less than all of two or more members, or lost something less than the total use of two or more members, could receive total disability benefits although such disabilities were produced by different compensable accidents. There is no basis upon which we can conclude that such an absurd intention lurked in the minds of our legislators. Quite the opposite is true; the legislative history establishes the intent to have been "to change the method of paying workmen's compensation when two members of an injured employee's body suffer less than total disability *in one accident* to provide that compensation be paid for each member separately." (Emphasis supplied.) Introducer's Statement of Purpose, L.B. 807, Labor Committee, 83d Leg., 2d Sess. (Jan. 29, 1974). The statements made by a judge of the compensation court during the course of the committee's hearing on L.B. 807, if such statements constitute a part of the legislative history—a matter we need not and do not decide—do not, contrary to Rodriquez' suggestion, belie the introducer's statement of purpose. Prior to the enactment of L.B. 807, the relevant statutory language provided:

> The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. . . . In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those produced by the injuries named

> therein.

Section 48-121(3) (Reissue 1974). The judge appearing before the committee explained that frequently the results under that language were inequitable, for a worker sustaining relatively minor multiple-member injuries frequently received more compensation benefits than a worker suffering more severe injury to the body as a whole. He then went on to explain that under L.B. 807,

> if there is a two member disability which actually results in a total permanent disability, he would be totally and permanently disabled and would get the maximum for life. So he would be protected, the one who is seriously injured. If he completely loses two members, it is a presumption in the law. If it is something less than a 100% of two members, and, in fact, results in total permanent, he would get total permanent. But if it is something less than total permanent, he would not get lifetime benefits, which he does get at present.

Labor Committee Hearing, L.B. 807, 83d Leg., 2d Sess. 3 (Feb. 6, 1974). We read the judge's comments to have been made within the context of the introducer's statement; he was therefore explaining the consequences of injuries to multiple members arising from a single accident. We do not read his comments to claim that L.B. 807 would operate irrespective of the number of accidents involved. Indeed, he could not have so claimed, for it must be remembered that the schedule of benefits contained in § 48-121 (Cum. Supp. 1986) is subject to the requirement contained in Neb. Rev. Stat. § 48-101 (Reissue 1984), that there be personal injury "caused . . . by accident," not accidents. (Emphasis supplied.) (L.B. 807 made no change in § 48-101.)

PAYMENT FOR WAITING TIME AND ATTORNEY FEE

This then brings us to the cross-appeal of Fireman's Fund. Where there is no reasonable controversy regarding an employee's claim for workers' compensation, Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986) authorizes the award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

Whether a reasonable controversy exists is a question of fact, and this court is bound by the findings of the compensation court on rehearing, to the extent such findings have support in the evidence. *Mendoza v. Omaha Meat Processors, supra; Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906 (1983).

While it is true that Kratochvil's report of July 6, 1984, created doubt as to whether the first accident, which is the only one Fireman's Fund covered, caused temporary total disability, there is no question but that temporary total disability existed and that under the circumstances, the employer, Prime Meat Processors, was liable therefor, irrespective of which of the two accidents caused it. Thus, the compensation court on rehearing erred only in not assessing the waiting time payment and attorney fee against the employer, thereby leaving the employer and its insurers free to resolve which insurer owed the contractual obligation to indemnify the employer, a question which was of no concern to Rodriquez. See *Franklin v. Pawley*, 215 Neb. 624, 340 N.W.2d 156 (1983), wherein the appellant Pawley, a contractor, argued that the school for which he was working at the time employee Franklin was injured was Franklin's true employer by action of statute, and therefore liable for Franklin's injuries. For his part, Franklin cross-appealed, seeking an award of a waiting time penalty and an attorney fee. After refuting Pawley's argument, this court reinstated the waiting time penalty and attorney fee awarded on initial hearing, but denied on rehearing, and noted that "the record discloses that there was no reasonable controversy as between Pawley and Franklin. Whether [the school] was a statutory employer and therefore jointly and severally liable would not in any manner have affected Pawley's independent liability." *Id.* at 630, 340 N.W.2d at 160.

The provisions of Neb. Rev. Stat. § 48-146 (Cum. Supp. 1986), requiring that policies insuring liability arising under the Nebraska Workers' Compensation Act provide that jurisdiction over the insured shall be jurisdiction over the insurer and that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against the insured, do not authorize the compensation court to ignore the separate

identities of the insured and insurer.

DECISION

Accordingly, the award of the compensation court on rehearing is affirmed but modified to the extent, and only to the extent, that the waiting time payment and attorney fee assessed against Fireman's Fund be assessed against Prime Meat Processors.

While the cross-claim filed by Fireman's Fund did not succeed in reducing the amount of the award, neither did Rodriquez respond to the cross-claim. Thus, Rodriquez is not entitled to the award of an attorney fee in this court under the provisions of § 48-125.

AFFIRMED AS MODIFIED.

GRANT, J., dissenting.

I respectfully dissent. As noted in the majority opinion, the compensation court found that although plaintiff was unable to perform work for which she had previous training or experience, she was not entitled to permanent total disability benefits for the stated reason that Neb. Rev. Stat. § 48-121(3) (Cum. Supp. 1986), while permitting a finding of total disability when a worker suffers a two-member partial disability in one accident, does not authorize such a finding where a worker suffers the same partial disabilities in *two* accidents. It seems to be undisputed by the compensation court or the parties that after incurring the second accident, the plaintiff was totally disabled. Therefore, as a result of two accidents, 8 months apart, occurring while plaintiff was working for the same employer, she was rendered 100 percent disabled.

It seems to me that we are considering form over substance in approving the compensation court's findings in this case. It is true that § 48-121(3) mandatorily provides: "The total loss or permanent total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or hearing in both ears, or of any two thereof, in one accident, *shall* constitute total and permanent disability . . . ." (Emphasis supplied.)

The sentence following that just quoted in § 48-121(3) reads: "In all other cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both

ears, or of any two thereof, total and permanent disability shall be determined in accordance with the facts."

The Workers' Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act. *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978); *Behrens v. American Stores Packing Co., ante* p. 18, 421 N.W.2d 12 (1988). *Spiker, supra* at 506, 270 N.W.2d at 303, further states: "The policy of the act should not be thwarted by technical refinements of interpretation."

If the result of plaintiff's injuries in two cases is "determined in accordance with the facts," this plaintiff, in this case, would be awarded permanent total disability benefits.

It appears to me that, in the case before us, the statute must be so construed. I would reverse.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT, V. ROBERT R. NASH, APPELLEE.

421 N.W.2d 41

Filed March 25, 1988. No. 88-108.

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

Charles A. Kandt, Lincoln County Attorney, for appellant.

P. Stephen Potter, for appellee.

BOSLAUGH, J.

This is an interlocutory appeal by the State under Neb. Rev. Stat. § 29-116 (Reissue 1985) to review the order of the district court sustaining the defendant's motion to suppress statements made by him to state patrolmen on February 17, 1987.

The record shows that on February 16, 1987, a search warrant was served on the defendant, Robert R. Nash, at his residence in North Platte, Nebraska. As a result of the search a number of items were seized from his residence and a vehicle. Nash was present during the search, but was not placed under

arrest. According to the defendant, Sgt. James J. Parish of the Nebraska State Patrol told Nash at that time that he was in a great deal of trouble and that it would be to his benefit to talk to the State Patrol.

Later that day, Nash contacted his attorney, P. Stephen Potter, and requested that Potter contact the State Patrol. Potter then spoke with Sergeant Parish, who briefed Potter on the search warrant and the background of the investigation. Sergeant Parish said that it would perhaps be to Nash's benefit to talk to them and provide his side of the story. According to Parish, he did not indicate in any way that such meeting would be confidential.

Potter called Lt. Terry Dowling of the State Patrol the following day and arranged for his client to meet with the State Patrol that afternoon. Lieutenant Dowling testified that during the conversation, Potter stated that he would like to bring Nash in for a "clear-the-air type meeting" and give the State Patrol an idea of Nash's involvement in the case. According to Lieutenant Dowling, he did not in any way indicate that such a statement would be confidential or in lieu of prosecution.

Nash and Potter arrived at the State Patrol office around 4 or 5 p.m. that day and met with Sergeant Parish and Investigator Teddy D. Mashek. During the interview Nash was not under arrest, no charges had been filed against him, he was free to leave at any time, and his attorney was present with him at all times. No *Miranda* warnings were given. During the interview Nash made certain admissions, shortly after which Potter ended the interview.

Nash testified that, prior to his admissions, Sergeant Parish told him that the conversation would be confined to the State Patrol building and that the conversation would be confidential. Nash stated that Potter was with him at all times, including the time at which Sergeant Parish told him his statements would be in confidence.

Potter did not testify that he heard this promise of confidentiality. The closest his testimony came to this matter was during the following:

> THE COURT: Mr. Potter, you said that you felt the conversation with the State Patrol was to have been off the

> record and confidential in the form of seeking a negotiated settlement.
>
> Could you point out any specific statements made by anyone with the State Patrol that gave you that feeling or impression?
>
> MR. POTTER: My conversations — it was my understanding that was the purpose of the meeting, to see if there was any possibility. If there was no possibility, then there was no need to proceed with a formal contract with the State Patrol; that there was certain information that they needed or wanted to talk to Mr. Nash about, and that this was the best way in which to do it.

Sergeant Parish testified that he remembered some discussion during the interview regarding Potter's concern for his client's safety and of Nash's fear of physical retribution, but that he remembered no agreement that the conversation would be confidential.

Investigator Mashek remembered discussing Nash's concern for his personal safety, but did not believe there were any conditions placed on what use would be made of the statements. He stated that the interview was conducted as he would conduct any interrogation of a witness or criminal suspect.

Potter testified:

> I agreed to meet with the Nebraska State Patrol and to talk with the investigators and have my client visit with them. I felt that the conversation was one in negotiations in that through my works with the State Patrol, I find that the State Patrol is of the highest integrity.
>
> . . . .
>
> It disturbs me because I feel that the meeting was one arranged in confidentiality, off the record, to try to facilitate the best interests of my client and try to work out something with the State Patrol that would be beneficial to the State Patrol.

He further testified, on cross-examination, that no offers of negotiation were discussed or made by the State Patrol in regard to potential charges, potential immunity, potential reduction of charges, potential testimony, or anything else, but

that he believed they were in the process of exchanging information to determine whether there was a possibility that negotiations could be made. He further admitted that nothing was said to the effect that they were in the process of negotiations. Potter knew that only the county attorney's office had the authority to enter into plea agreements and that only the county attorney's office or the court could grant immunity.

The trial court found there was no improper inducement, threat, or promise by the Nebraska State Patrol in eliciting the statements from Nash during the interview, but that it appeared there was a misunderstanding or lack of communication between Potter and Nash, and the State Patrol. The court stated on the record that it would sustain the motion and suppress the statements for two reasons. The court began by noting that Nash had previously requested the court to allow Potter to withdraw from the case, which the court had refused to do until Nash secured other counsel at the time of the hearing, and the trial was set for the next day.

The court stated:

> [E]ven if the motion to suppress is overruled, Mr. Potter is placed in the situation of deciding with his client whether Mr. Potter should testify during the course of the trial to attempt to show the jury that the statement made by Mr. Nash was not made voluntarily....
>
> ... Mr. Potter would be placed on the horns of a dilemma and would not be in a position to properly represent Mr. Nash if he did not testify and would be in an unethical position if he chose to testify with Mr. Nash having no alternate counsel to continue with the remainder of the trial.
>
> So for that reason and for the second reason that it does appear to be a misunderstanding whether this conference was to be confidential or off the record, the Court is going to sustain the motion to suppress....

The findings of fact made by a trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* ____ U.S. ____, 108 S. Ct. 180, 98 L. Ed. 2d 133 (1987); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

Although the trial court stated, "I'm not suggesting in any way that there was any improper inducement or threat or promise by the Nebraska State Patrol in eliciting the comment or comments from Mr. Nash during the February 17, 1987, interview," the court sustained the motion to suppress, at least in part, upon the basis that there was a misunderstanding between Nash and the patrol as to whether Nash's statements were to remain confidential. Nash testified positively that Sergeant Parish had said to Nash that "the conversation we had in the Nebraska State Patrol building would be confined to the Nebraska State Patrol building." Although the reason appeared to be that Nash and Potter feared for the safety of Nash if his accomplice learned that he had become an informer, the statement, if made, had broader implications. If the testimony of Nash is accepted as true, then a reasonable man in the situation of Nash could believe that any statement he made would remain confidential and, thus, would not be used against him. That would be a substantial inducement to make a statement and would prevent a finding that the statement was voluntarily made.

In *State v. Smith*, 203 Neb. 64, 66-67, 277 N.W.2d 441, 443 (1979), we said:

> Before taking the statement the police officer stated that if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court. This was an inducement which under the circumstances of this case rendered the statement involuntary. In State v. McDonald, 195 Neb. 625, 240 N.W.2d 8 (1976), we stated: "To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

The record does not show clearly that the trial court accepted the testimony of Nash as true. On the other hand, a finding that a misunderstanding sufficient to require that the statements be suppressed would have to be based on a finding that the defendant's belief that he had been promised confidentiality was reasonable. That, in turn, depends upon his statement that

Sergeant Parish said the statements would be confined to the patrol building.

In view of the conflicts in the evidence, and the finding of the trial court, I conclude that the order sustaining the motion to suppress must be affirmed.

AFFIRMED.

DELBERT L. BISHOP, APPELLEE, V. FARM BUREAU LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT.

421 N.W.2d 423

Filed April 1, 1988. No. 86-141.

1. **Jury Instructions: Proof: Appeal and Error.** To establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden. The burden is upon the party complaining to show that it was prejudiced by the court's refusal and that the tendered instruction is both a correct statement of the law and applicable to the facts and evidence in the case.
2. **Jury Instructions: Appeal and Error.** In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
3. _____: _____. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.

Appeal from the District Court for Perkins County: JACK H. HENDRIX, Judge. Affirmed.

Marvin O. Kieckhafer of Kay and Kay, for appellant.

J.L. Zimmerman of Atkins Ferguson Zimmerman Carney P.C., for appellee.

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

WHITE, J.

This is an appeal from the district court for Perkins County. The appeal arises out of an action brought by plaintiff-appellee, Delbert L. Bishop, against defendant-appellant, Farm Bureau Life Insurance Company. Bishop is seeking recovery of

approximately $11,000 under a health insurance policy issued by Farm Bureau for medical expenses incurred as a result of medical care furnished to his wife, Lois Bishop. The expenses related to Mrs. Bishop's undergoing a mastectomy of her left breast on or about July 18, 1983.

Plaintiff's petition alleged, and defendant's answer admitted, that Farm Bureau issued a policy of health insurance to the Bishops effective June 1, 1983. There is also no dispute that the policy included health care coverage for Lois Bishop. Following receipt of a request for benefits payable under the policy, Farm Bureau denied coverage for the mastectomy-related claims and made no payments.

Farm Bureau's answer raised two affirmative defenses, one relating to a policy provision relating to preexisting conditions, and the second alleging certain misrepresentations and omissions of medical history on the part of the Bishops. Farm Bureau also counterclaimed, seeking reformation of the policy to reflect a rider provision excluding coverage for disease or disorder of the breasts.

Trial on this matter was to a jury. At the close of the evidence, plaintiff requested the court to direct a verdict in favor of plaintiff, arguing that defendant had not proved the defenses alleged in its answer. The court sustained the motion in part, holding that the defendant had not established that there was a preexisting condition. However, the court overruled the motion in part and instructed on the second affirmative defense, that of misrepresentation of fact in the application. The court further dismissed the cross-petition. The jury returned a verdict in favor of Bishop in the amount of $10,999, and judgment was entered accordingly. Farm Bureau appeals.

Appellant assigns two errors. First, it alleges that the trial court erred in instructing the jury regarding the elements necessary to prove the appellant's defense based on misrepresentation of facts on the insurance application. Specifically, Farm Bureau argues that proof that the misrepresentation was made with "intent to deceive" is not necessary to avoid the policy.

Farm Bureau's second assigned error alleges that the trial court erred in failing to give the following instruction submitted

by appellant: "When a person applying for insurance makes an untrue statement or omission with respect to a material fact peculiarly within his or her knowledge, the jury may, from the mere occurrence of the false statement or omission, conclude that it was made knowingly with intent to deceive."

A brief summary of the facts relating to the alleged misrepresentations seems in order at this point. Bishop had a health insurance policy with National Health when he purchased the Farm Bureau policy. He testified that he decided to change his coverage to a policy with less deductible because "I decided with our boys growing up and possibility of going to be more activities and on the road more . . . the deductible [on the National Health policy] was a little more than I felt we maybe should risk."

On May 12, 1983, the Bishops met with a Farm Bureau agent in their home and completed an application for group health insurance. The 1-page application contained 20 questions which were asked of the Bishops and the answers to which were recorded by the agent in the spaces provided.

The question and answer at issue in this litigation are as follows: "Have you or any person applying for this insurance: . . . 19. Consulted any physician, been advised to have medical treatment or been hospitalized in the past 5 years?" As to Lois Bishop, the following answer was recorded by the agent: "[x] Yes . . . . Bronchitis - medication - no remaining effects, wintr [sic] 81 & 82, Dr. Spencer - Ogallala Clinic." No other entries relating to Lois Bishop's medical history were recorded on the application.

Following Mrs. Bishop's mastectomy and the submission of the claim for benefits to Farm Bureau, Bishop was notified that the company was investigating the claim for further information. The evidence at trial revealed that Lois Bishop had been treated for "recurring bouts of mastitis involving the left breast," first noted in 1981. She sought treatment for the condition on July 9 and November 16, 1981, and September 3, 1982. The 1981 episodes of mastitis "responded well to the administration of antibiotics" and hot wet packs, and in 1982 the "inflammatory process subsided promptly" with the same treatment. In addition, Lois Bishop had a mammogram in

November of 1982 at the request of her doctor. She testified that she never saw the report, but her physician called her and "told me that I should come back maybe in six months for — just have something to go by." She stated that the doctor told her nothing that alarmed her or caused her any concern.

After the investigation, Farm Bureau sent a letter to the agent who completed Bishop's application, which stated, in part, as follows:

> The information received indicates that Mrs. Bishop has had this condition for quite some time and was being treated in the months prior to policy issue.
>
> The reports were shown to the underwritter [sic] and had we had the information at the time of issue, there would have been a breast rider added to the policy which excluded any coverage for disease or treatment of the breast.
>
> As all information confirms that this is a pre-existing condition, we must deny this claim.

As to Farm Bureau's first assigned error, we note that appellant argued this identical issue to this court in *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). Farm Bureau's position in *Luebbe*, as well as in the case at bar, is that in cases where the insured makes a misrepresentation of fact, proof of intent to deceive is unnecessary. We held to the contrary in *Luebbe*, and we are not prepared to change our position.

The trial court correctly instructed the jury on the elements necessary to prove Farm Bureau's defense of misrepresentation.

Appellant's second assigned error alleges that the trial court erred in failing to give an instruction requested by Farm Bureau. To establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden. The burden is upon the party complaining to show that it was prejudiced by the court's refusal and that the tendered instruction is both a correct statement of the law and applicable to the facts and evidence in the case. *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986); *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981).

Farm Bureau alleges that the trial court's refusal to give the requested instruction, as set forth earlier in this opinion, was prejudicial because a lack of such instruction "[told] the jury that when they considered the 'knowingly with intent to deceive' element . . . they had to find direct, affirmative evidence on the scienter issue, particularly on the 'intent to deceive' portion of the element." Brief for Appellant at 24. It further suggests that the suggested instruction *must* be given to the jury in order to make the jury aware that indirect circumstantial evidence is relevant to the issue. We cannot agree.

In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error. *Steed v. Oak Ridge Equestrian Ctr.*, 224 Neb. 792, 401 N.W.2d 495 (1987). A review of the record reveals that the trial court instructed the jury on proof by direct or circumstantial evidence. The instruction stated in part: "Evidence . . . is circumstantial where it is not directly known but is reasonably inferred from one or more other facts which are know [sic]. Such inference is reasonable if it naturally and logically follows the known fact or facts according to the common experience of mankind."

Taken as a whole, the instructions given in this case fairly and fully instructed the jury on Farm Bureau's theory of the case. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983). While it would not have constituted error to give the requested instruction, we hold that the circumstantial evidence instruction adequately instructed the jury as to the inferences which could be drawn from one or more facts which were known. Appellant alleges nothing which supports its view that the refusal to give the requested instruction was prejudicial error.

Appellee has requested that this court allow a reasonable sum as attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1984). In accordance with the statute, we award appellee an attorney fee for services in this court, in the amount

of $1,500.

We affirm the decision of the district court.

AFFIRMED.

BARRIE WELSH, APPELLEE AND CROSS-APPELLANT, V. WILLIAM M. ANDERSON, APPELLANT AND CROSS-APPELLEE.

421 N.W.2d 426

Filed April 1, 1988. No. 86-201.

1. **Appeal and Error.** Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
2. **Negligence: Damages: Time.** The doctrine of mitigation applies only to postevent occurrences.
3. _____: _____: _____. A plaintiff's failure to fasten his seatbelt necessarily occurs *before* defendant's allegedly negligent act and, therefore, is not consistent with any burden on plaintiff to minimize damages.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Gary L. Hoffman and Michael A. Fortune of Erickson & Sederstrom, P.C., for appellant.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

FAHRNBRUCH, J.

A Douglas County jury awarded the plaintiff, Barrie Welsh, $75,000 primarily for head injuries she suffered in a two-car accident. In a special verdict, the jury found that 75 percent of Welsh's injuries could have been prevented had she been wearing a seatbelt at the time of the collision. The trial judge refused to reduce the damages award by the 75 percent because the judge found Welsh had no duty to wear a seatbelt. The defendant, William M. Anderson, appeals. We affirm.

Defendant's only assigned error is the trial court's failure to

reduce Welsh's damages award by 75 percent. The defendant contends that nonuse of an available seatbelt constitutes a failure by the injured plaintiff to mitigate her damages.

The accident around which this case revolves occurred in Omaha, Nebraska, on June 8, 1984, at approximately 10 p.m. Welsh was driving her 1978 Toyota eastbound on Dodge Street. Anderson, driving a 1984 Ford Mustang GT owned by his employer, Atchley Ford, was westbound on Dodge.

A witness to the accident testified that Anderson swerved north across three lanes of traffic, struck the curb, went up onto the grass at 87th and Dodge, lost control of his vehicle, spun back across three westbound lanes on Dodge and the turning lane, and went up over the median and directly into the path of Welsh's Toyota. The plaintiff's vehicle struck the driver's door on defendant's vehicle. Prior to losing control of his vehicle, Anderson was traveling in excess of 50 miles per hour, according to the evidence.

On impact, the plaintiff, who was not wearing a seatbelt, was thrown forward into the windshield of her car. Welsh injured the left side of her forehead. By time of trial, the injury had required three reconstructive surgeries and was likely to require at least two more surgical procedures. A reconstruction expert expected Welsh's face to be permanently scarred.

Welsh's petition in the district court claimed that Anderson was negligent in (1) failing to keep a proper lookout; (2) failing to keep his vehicle under reasonable control; (3) operating his vehicle left of the center; (4) operating his vehicle at an excessive rate of speed; and (5) driving his vehicle while intoxicated. Anderson's third amended answer admitted his negligence and claimed that Welsh's failure to wear her seatbelt constituted failure to mitigate her damages. After the third amended answer was filed, Anderson filed a motion in limine seeking to prevent proof before the jury of any intoxication on his part. Contrary to plaintiff's cross-appeal, this motion was properly granted, and the jury did not hear any prejudicial evidence about defendant's drinking. Neb. Rev. Stat. § 27-403 (Reissue 1985); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

The jury trial was held to determine the amount of damages for which Anderson was liable. Welsh presented evidence on the details of the accident and her condition following the event. There was evidence Welsh had past medical expenses of $6,719.51, lost wages of $182.50, and would have future medical expenses approximating $5,000, or nearly $12,000 out-of-pocket expenses. The jury verdict was for $75,000. Had the court permitted the 75-percent reduction, Welsh would receive $18,750.

Anderson called Dr. Donald Huelke as an expert witness. He testified how people are injured in motor vehicle accidents and how such injuries can be prevented through the use of seatbelts. It was his opinion that, had she worn a shoulder-lap seatbelt, Welsh would not have contacted the windshield and, therefore, Welsh would not have sustained the forehead injury necessitating reconstructive surgery.

Whether the doctrine of mitigation of damages applies to the use of seatbelts is a question of law. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *In re Estate of Ritter,* 227 Neb. 641, 419 N.W.2d 521 (1988); *In re Estate of Walker,* 224 Neb. 812, 402 N.W.2d 251 (1987); *Knoell v. Huff,* 224 Neb. 90, 395 N.W.2d 749 (1986).

Clearly, Welsh had no statutory duty to wear her seatbelt. This accident occurred before passage of the Nebraska seatbelt law, which in part was later repealed by referendum. See Neb. Rev. Stat. § 39-6,103.04 (Cum. Supp. 1986 & Supp. 1987). The accident also occurred before the effective date of Neb. Rev. Stat. § 39-6,103.08 (Cum. Supp. 1986). That section permits the reduction of a plaintiff's damages award by up to 5 percent if the plaintiff was not wearing a seatbelt. Because the Legislature did not clearly evidence an intent that it apply retroactively, § 39-6,103.08 is not a factor in this case. *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984); *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978); *Brown v. Sullivan*, 195 Neb. 729, 240 N.W.2d 51 (1976). The only issue to be decided here is whether the failure to wear a seatbelt constitutes a violation of Welsh's duty to mitigate her damages.

Mitigation of damages is defined by Black's Law Dictionary 904 (5th ed. 1979), as follows:

> [The] [d]octrine of "mitigation of damages," sometimes called [the] doctrine of avoidable consequences, imposes on [an] injured party [the] duty to exercise reasonable diligence and ordinary care in attempting to minimize his damages *after injury has been inflicted* and care and diligence required of him is the same as that which would be used by [a] man of ordinary prudence under like circumstances.

(Emphasis supplied.) See, also, *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978); *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

Whether the mitigation doctrine applies when an injured plaintiff was not wearing a seatbelt is a question of first impression in Nebraska. However, several other states have considered this issue.

New York leads those states deciding that not wearing an available seatbelt constitutes failure to mitigate damages. *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). Arizona, New Jersey, and Florida have joined New York in holding that a damages award may be reduced to reflect additional or enhanced injuries. *Law v. Superior Court of the State of Arizona*, No. CV-86-0607-PR (Ariz. Jan. 12, 1988) (1988 WESTLAW 1624); *Dunn v. Durso*, 219 N.J. Super. 383, 530 A.2d 387 (1986); *Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984).

However, a clear majority of states considering the issue have decided that the mitigation doctrine does not apply in seatbelt cases. *Hagwood v. Odom*, ____ N.C. App. ____, 364 S.E.2d 190 (1988); *Hillier v. Lamborn*, 740 P.2d 300 (Utah App. 1987); *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Fudge v. City of Kansas City*, 239 Kan. 369, 720 P.2d 1093 (1986); *Schaeffer v. Burdette*, 33 Ohio Misc. 2d 12, 514 N.E.2d 952 (1986); *Clarkson v. Wright*, 108 Ill. 2d 129, 483 N.E.2d 268 (1985); *Thomas v. Henson*, 102 N.M. 417, 696 P.2d 1010 (1984), *modified* 102 N.M. 326, 695 P.2d 476 (1985); *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981); *Daly v. General Motors*

Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *McCord v. Green*, 362 A.2d 720 (D.C. 1976); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976); *Fischer v. Moore*, 183 Colo. 392, 517 P.2d 458 (1973); *Britton v. Doehring*, 286 Ala. 498, 242 So. 2d 666 (1970).

The District of Columbia considered the seatbelt issue in *McCord v. Green, supra*, a case which is factually similar to the present case. The District of Columbia court considered New York's holding in *Spier v. Barker*, saying:

> With all deference to the New York Court of Appeals, however, we do not deem this rule applicable to cases like *Spier* or the instant one, for it assumes that the trier of fact may attach significance to purely fortuitous events in which the chain of causation may be discerned only by hindsight. The doctrine of avoidable consequences . . . comes into play only after the defendant has committed the wrongful act but at a time when plaintiff still has an opportunity to avoid the consequences in whole or in part. Surely the situation before us does not fall into that category . . . .

362 A.2d at 725. The District of Columbia court equated the doctrine of avoidable consequences and the duty to mitigate damages. *Id.*

State v. Ingram, supra, is an Indiana Supreme Court case in which the court held that a defendant cannot raise the mitigation of damages issue where the plaintiff failed to wear a seatbelt. The court stated:

> [T]he doctrine [of mitigation of damages] cannot logically encompass the so-called "seat belt defense." The act of buckling or not buckling a seat belt is an act the injured party must perform before the injury causing the act occurs. . . . *[T]he question of whether mitigation of damages has occurred looks to the acts of the injured party only after the injury has occurred.*

(Emphasis supplied.) 427 N.E.2d at 448.

The Court of Appeals of North Carolina recently stated that "*the duty to minimize damages arises only after the negligent act of defendant.* A plaintiff's failure to fasten his seat belt necessarily occurs *before* defendant's allegedly negligent act

and therefore is not consistent with any burden on plaintiff to minimize damages." (Emphasis supplied.) *Hagwood v. Odom, supra* at ____, 364 S.E.2d at 192.

We agree with the reasoning and the conclusions of the majority of courts above cited. We, therefore, hold that the doctrine of mitigation applies only to postevent occurrences. Failure to wear a seatbelt is not a postevent occurrence. Defendant is not entitled to have Welsh's damages reduced.

In view of our holdings, the balance of appellee's cross-appeal is moot. The verdict of the district court is affirmed.

AFFIRMED.

LOIS K. STEVENS, APPELLANT, V. LEO F. STEVENS, APPELLEE.

421 N.W.2d 429

Filed April 1, 1988. No. 86-229.

Pleadings: Appeal and Error. This court cannot consider on appeal a judgment entered by the trial court on a pleading not included in the transcript.

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

Fred J. Ferraro of Stehlik, Smith, Trustin & Schweer, for appellant.

Sally Millett Rau of Walsh, Fullenkamp, Doyle & Rau, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

HASTINGS, C.J.

Petitioner wife has appealed from a decree of dissolution of marriage, assigning as error the division of property, the awarding of visitation rights to the respondent husband, and the overruling of her motion for a new trial.

The transcript contains plaintiff's petition for legal

separation, a decree of dissolution after "trial on the Cross-Petition of the Respondent," a motion for a new trial claiming failure to receive notice of the trial, and the judge's minutes and journal entry indicating the overruling of the motion.

Neb. Ct. R. of Prac. 4A(1)a (rev. 1986) provides that the transcript shall contain "[s]uch of the pleadings upon which the case was tried, as designated by the appellant."

Neither the praecipe required by the rule to be filed with the clerk of the district court nor the "Cross-Petition" (responsive pleading) upon which the case was tried was included within the transcript. As indicated in rule 4A generally, it is the duty of the appellant to provide this court with the proper transcript. We cannot consider a judgment entered by the trial court on a pleading not included in the transcript. *Brown v. Johnson*, 58 Neb. 222, 78 N.W. 515 (1899).

There being nothing before this court upon which any relief can be given, the judgment of the district court is affirmed.

AFFIRMED.

BERT A. SCHRINER, APPELLANT, V. MEGINNIS FORD COMPANY, APPELLEE.

421 N.W.2d 755

Filed April 1, 1988. No. 86-242.

1. **Summary Judgment.** In ruling on a motion for summary judgment, a court is obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom.
2. **Public Policy: Statutes.** Public policy includes those matters embodied in state statutes.
3. **Public Policy: Courts.** Courts should proceed cautiously if called upon to declare public policy, absent some prior legislative or judicial expression on the subject.
4. **Public Policy: Legislature.** Declaration of public policy is normally the function of the legislative branch.
5. **Actions: Libel and Slander.** Falsely accusing one of a crime is actionable as libel or slander per se.

6. **Employer and Employee.** An at-will employee may not be discharged for reporting to law enforcement officials the suspicion that his or her employer violated the criminal code if the report is made in good faith and for reasonable cause.
7. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

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

Timothy D. Loudon of Tate and Alden Law Firm, P.C., for appellant.

Richard P. Garden, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

CAPORALE, J.

Plaintiff-appellant, Bert A. Schriner, alleges he was wrongfully discharged from his employment with defendant-appellee, Meginnis Ford Company. The district court sustained Meginnis Ford's motion for summary judgment and dismissed Schriner's action. Schriner assigns as error the district court's failure to recognize a public policy exception to the terminable-at-will rule. We affirm.

Since this matter arises from the entry of a summary judgment, we are obligated to view the evidence in the light most favorable to Schriner and to give him the benefit of all reasonable inferences which may be drawn therefrom. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). See, also, *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

So viewed, the affidavits submitted in evidence in connection with the motion establish that on February 19, 1979, Meginnis Ford hired Schriner as a body shop mechanic for an indefinite term and agreed to pay him a specified hourly rate. On July 22, 1980, Schriner purchased a used vehicle from his employer. As a part of that transaction, he was provided an odometer mileage

statement which recited that, to the best of Meginnis Ford's knowledge, the actual mileage of the vehicle was 48,282.

In March 1985, while Schriner was still employed by Meginnis Ford, the vehicle developed severe engine damage while being driven on a trip to York and back to Lincoln. At this time the odometer read approximately 70,000 miles. The mechanic who worked on the vehicle stated to Schriner that it was "virtually impossible" for a vehicle with such low mileage to have sustained such severe damage; severe enough that it could not be repaired. The mechanic also suggested to Schriner that the odometer must have been rolled back prior to his purchase of the vehicle.

Schriner then went to the Lancaster County clerk's office, where he was "mistakenly" informed the records indicated that the vehicle had over 100,000 miles when it was purchased by him. That statement reinforced Schriner's suspicion that Meginnis Ford had fraudulently represented the mileage of the vehicle.

Subsequently, on March 22, 1985, Schriner contacted the Nebraska Attorney General's office concerning the possible violation of state odometer laws. Schriner did not first inform Meginnis Ford of the suspected violation because he mistrusted his employer as the result of prior disputes concerning the vehicle and certain of Schriner's work records. On March 25, 1985, a member of the Attorney General's office visited Meginnis Ford and investigated the transaction in question. Schriner was later informed that the Attorney General's office found the evidence insufficient to establish odometer fraud in connection with Schriner's vehicle.

On March 27, 1985, James Campbell, an owner of Meginnis Ford, went to the body shop with files in hand and yelling at Schriner. Schriner, Campbell, and Schriner's supervisor, Paul Becker, then went into Becker's office, where Campbell asked Schriner why he went to the Attorney General's office. The meeting resulted in the termination of Schriner's employment because Meginnis Ford "could not 'have this sort of stuff going on around here.' " Campbell later offered to give Schriner a good recommendation.

The general rule in this jurisdiction had been that if there were no contract for a fixed term of employment, the employer

could discharge, or the employee could leave employment, at his or her own pleasure. *Stewart v. North Side Produce Co.*, 197 Neb. 245, 248 N.W.2d 37 (1976) (citing *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 240 N.W. 764 (1932)). In *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 316, 299 N.W.2d 147, 151 (1980), we recognized, however, that

> the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.

(Citations omitted.)

We also acknowledged that the terminable-at-will rule could be restricted by contract or statute. *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985); *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982). We further appreciated that while at-will governmental employees may be discharged for no reason at all, they may not be discharged on a basis which infringes upon constitutionally protected interests. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986). See, also, *Devine v. Dept. of Public Institutions*, 211 Neb. 113, 317 N.W.2d 783 (1982); *Nebraska Dept. of Roads Emp. A. v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973); *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983), *appeal after remand* 787 F.2d 1245 (8th Cir. 1986).

Most recently, in *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987), we declared that the provisions of the Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1987), prevented an employer from discharging an employee on the basis that he refused to submit to a truth and deception examination. Section 81-1932 of the act provides, among other things, that, with an exception not relevant to the facts in

Ambroz, no employer may require as a condition of continued employment that a person submit to a truth and deception examination. Section 81-1935 makes violation of the act a Class II misdemeanor, punishable by imprisonment for up to 6 months and a fine of up to $1,000. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1986). Notwithstanding the lack of a provision in the act specifically creating a civil cause of action for one discharged because of a refusal to submit to a truth and deception examination, we determined that the act pronounced a public policy that such terminations of employment were not to take place with impunity. In reaching that decision we relied upon *Townsend v. L.W.M. Management, Inc.*, 64 Md. App. 55, 494 A.2d 239 (1985), and *Molush v. Orkin Exterminating Co., Inc.*, 547 F. Supp. 54 (E.D. Pa. 1982), for the proposition that such a result is permissible when a legislative enactment declares an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge.

Meginnis Ford correctly points out that the case presently before us differs from that presented in *Ambroz*, in that *Ambroz* rests upon a statute which specifically prohibits an employer from requiring that as a condition of continued employment, an employee submit to a truth and deception examination, whereas in the present case there is no statute which prohibits an employer from discharging an employee who reports an employer's suspected criminal behavior to law enforcement officials.

Meginnis Ford also correctly notes that the case under consideration differs from those cases in which an action for wrongful discharge was based on an employee's refusal to participate in criminal conduct such as is found in *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987) (employee refused to dispense leaded gasoline into automobile designed to use unleaded gasoline); *Schmidt v. Yardney Electric Corporation*, 4 Conn. App. 69, 492 A.2d 512 (1985) (employee agreed to testify about participation in falsification of insurance claim, at least in part to redress fraud in which he had participated); *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987) (employee refused to tamper with odometers); *Freidrichs v. Western Nat. Mut. Ins. Co.*, 410

N.W.2d 62 (Minn. App. 1987) (employee warned not to report substandard results of pressure tests he conducted on boilers); and similar cases.

Meginnis Ford cautions that to extend the *Ambroz* principle to the facts of this case is to invite commercial chaos. It directs our attention to, among other cases, *Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987), in which the court observed, in the course of holding there was no claim where the employee had been discharged to prevent the disclosure to higher officers of his corporate employer the existence of commercial bribery and alteration of records, that limiting claims for wrongful discharge to situations involving the actual refusal to engage in illegal activity, or the intention to fulfill a statutory duty, ties claims for wrongful discharge to a manageable and clear standard. (Similar concerns were also expressed by the dissenting judges in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), the holding of which is discussed later in this opinion.) The *Adler* court further noted: "As a general prudential rule, legislatures have traditionally been reluctant to impose affirmative obligations on citizens to report or prevent crimes because defining what is a crime and to whose knowledge is a very difficult and intrusive inquiry. This reluctance imparts caution to this court." 830 F.2d at 1307.

Yet we cannot overlook that the Legislature of this state has declared it to be unlawful to engage in odometer fraud, Neb. Rev. Stat. §§ 60-2301 et seq. (Reissue 1984 & Cum. Supp. 1986), and has made such fraud a Class IV felony, § 60-2307 (Cum. Supp. 1986), punishable by imprisonment for up to 5 years and a fine of up to $10,000, Neb. Rev. Stat. § 28-105 (Reissue 1985). In applying a public policy exception to the termination-at-will rule, the Illinois Supreme Court, in *Palmateer v. International Harvester Co., supra*, observed that there is no public policy more basic than the enforcement of a state's criminal code. It therefore held that one claiming to have been discharged because he had informed law enforcement officers that an unnamed coemployee might be violating the criminal code in an unspecified manner, and had agreed to gather further evidence and to testify if a trial were held, stated

a cause of action.

The Supreme Court of Hawaii, in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982), recognized that public policy can be difficult to define, but quoted with approval a definition which included in public policy those matters embodied in state statutes. In holding that public policy protected one presumably discharged because she gave truthful answers in an antitrust investigation, the *Parnar* court nonetheless cautioned:

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Of course, the plaintiff alleging a retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy.

Id. at 380, 652 P.2d at 631. We agree with that caveat and agree as well with the observation in *Adler, supra*, that courts must use care in creating new public policy and that " 'recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.' " (Citations omitted.) *Adler* at 1306.

We are not, however, being asked here to declare public policy; the issue is whether, by virtue of the enactment of §§ 60-2301 et seq., there exists such a clear declaration by the Legislature of important public policy as to warrant a judicial determination that the policy is to be enforced by recognizing a cause of action for wrongful discharge under appropriate facts. We must conclude there does.

It must also be recognized, however, that accusing one of a crime is a very serious matter, serious enough that our law makes such a false accusation actionable as libel or slander per se. *Hutchens v. Kuker*, 168 Neb. 451, 96 N.W.2d 228 (1959).

See, also, *Treutler v. Meredith Corporation*, 455 F.2d 255 (8th Cir. 1972). Consequently, an action for wrongful discharge lies only when an at-will employee acts in good faith and upon reasonable cause in reporting his employer's suspected violation of the criminal code.

In this case Schriner had reasonable cause to believe that odometer fraud had been committed by someone, but not necessarily by Meginnis Ford. He knew that the vehicle was used; there is nothing in the evidence which suggests that Schriner saw anyone at Meginnis Ford change the odometer or that Schriner had reason to believe that Meginnis Ford routinely or otherwise engaged in such a practice. In the absence of such evidence, it cannot be said Schriner had reasonable cause to believe that Meginnis Ford had violated the odometer fraud statutes or that he acted in good faith in reporting such a suspected criminal act by his employer.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). This is such a case.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

WHITE, J., dissenting.

I agree with the majority's holding that a cause of action for wrongful discharge exists where an employee is terminated following a report of suspected criminal activity on the part of his or her employer. I cannot agree, however, with the conclusion that the employee in this case did not have reasonable cause to believe that his employer may have violated the odometer fraud statutes.

Given the conclusion reached by the majority on the facts of this case, I believe we may be creating an unavailing cause of action. The rigorous standard imposed upon employees to establish reasonable cause in these cases may well bury

meritorious claims forever.

The majority holds that an employee must present evidence suggesting that he or she witnessed an employer commit a crime *or* have reason to believe that the employer routinely *or otherwise* engaged in such criminal activity. The majority admits in this case that "Schriner had reasonable cause to believe that odometer fraud had been committed by *someone* . . . ." I believe that "someone" *includes* his employer. If Schriner had reasonable cause to believe someone rolled back his car's odometer, it cannot possibly be unreasonable to infer that the business from which he purchased the vehicle may have been the culprit. Schriner then had reason to believe that his employer, the seller in this circumstance, had *"otherwise engaged in"* odometer fraud, even without evidence that such was a routine practice or without actually witnessing the act.

This court, in this opinion, is asking employees who suspect employers of criminal activity for a level of certainty above that required for law enforcement agencies to obtain search warrants to enter our homes. In issuing search warrants authorities deal in probabilities, not certainties. We have held that only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987).

I wholeheartedly agree with the majority that "accusing one of a crime is a very serious matter . . . ." That is precisely why causes of action such as libel, slander per se, and malicious prosecution exist. Such laws serve as a deterrent for false accusations and vengeful and frivolous legal actions.

Given that this court has recognized a cause of action in this case in favor of Schriner, a summary judgment is not proper in this case. Schriner had reasonable cause to believe that his employer, as the vehicle's former owner, may have changed the car's odometer. Further, the issue of whether Schriner acted in good faith is a question of fact for a trier of fact and is not properly disposed of by summary judgment. I would have reversed and remanded this cause for further proceedings.

GRANT, J., joins in this dissent.

MAX HOLMAN, APPELLANT AND CROSS-APPELLEE, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLEE AND CROSS-APPELLANT.

421 N.W.2d 430

Filed April 1, 1988. No. 86-278.

1. **Waters.** When diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface waters does not apply.
2. _____. It is the duty of a lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein. This is a continuing duty.
3. _____. The duty to refrain from structural obstruction of a natural drainageway is imposed upon private proprietors and public authorities as well.
4. **Waters: Liability: Damages: Proof.** Where water from another source has been added to water from a source for which a defendant is liable, and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
5. **Proximate Cause: Damages: Proof.** It is the plaintiff's burden to establish the proximate cause of his injury.

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

Dixon G. Adams, for appellant.

Lyman L. Larsen and James L. Schneider of Kennedy, Holland, DeLacy & Svoboda, and Paul F. Peters of Paul Peters, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

BOSLAUGH, J.

The plaintiff, Max Holman, owns an irregularly shaped 40-acre tract of land in Sarpy County, Nebraska. The tract is bordered on the south by the north bank of the Platte River, on the west and north by the right-of-way of the Burlington Northern Railroad, and on the east by U.S. Highway 73-75.

In 1968, the U.S. Army Corps of Engineers constructed a levee system, known as R-613, to protect land lying east of the

plaintiff's property from flooding. As a part of that project a floodgate was installed on the west end of a culvert, described as a 4- by 4-foot concrete box culvert, which runs underneath Highway 73-75 and provides drainage from west to east. When the floodgate is closed, no water can pass through the culvert.

When the project was completed, it was turned over to the defendant, Papio Natural Resources District, for operation and maintenance.

In June 1984, the largest flood ever recorded on the Platte River occurred. A flood of this magnitude had a statistical probability of occurring about once in 50 years. On June 14, 1984, the floodgate at the culvert was closed, preventing any water from draining through the culvert.

The plaintiff commenced this action on September 7, 1984, to recover damages caused by the flooding of his property alleged to have resulted from the closing of the floodgate and to enjoin the defendant from closing the floodgate in the future.

Although the plaintiff sought damages for an alleged taking and damaging of his property in violation of Neb. Const. art. I, § 21, we treat the case as an action in equity for injunctive relief. We review the trial court decree de novo without reference to the findings of fact made by the trial court, but take into consideration the fact that the trial court saw and heard the witnesses and viewed the premises and gave appropriate weight thereto. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

The plaintiff's property is protected by a dike, privately constructed, which commences near the Highway 73-75 bridge over the Platte River and runs west along the bank of the river, then north and east along the boundary of the Burlington Northern right-of- way, and then south along the east boundary of the plaintiff's property. The Missouri Pacific Railroad right-of-way is located west and north, parallel and adjacent to the Burlington Northern right-of-way. Sometime after the R-613 project was completed, the county constructed a "plug" or tie-back dike between the plaintiff's dike and the Burlington Northern grade near the bank of the river. This dike tends to prevent floodwater from the river's entering the "ditch" between the plaintiff's dike and the railroad grade.

The evidence shows that a natural drainageway, which the

plaintiff refers to as "Blackman's Creek," exists along the northern edge of the plaintiff's property. At an earlier time, trestles on the railroads allowed water draining from the north to flow under the railroad tracks and then drain to the east away from the plaintiff's property. Later, the trestles were filled in and culverts were constructed through the railroad grades. When the culverts became clogged, water would seep through the subgrade and then flow to the east.

Highway 73-75 crosses the railroad tracks on an overpass. Around 1967, as a part of the R-613 project, the grade of the highway was raised so that it forms an embankment protecting the property to the east from floodwaters coming from the west. Water which formerly drained to the east along the south edge of the Burlington Northern right-of-way now drains to the south along the west edge of the highway, then to the east through the culvert, then to the north along the east edge of the highway, and then to the east along the course of the natural drainageway.

The record shows that in the early morning hours of June 14, 1984, a portion of a dike located just upstream from Holman's land on the same side of the river, and known as the gun club dike, gave way.

On the morning of June 14, 1984, Marlin Petermann, an engineer employed by the defendant, received a call from field personnel at the site of the flooding. He arrived at the site at approximately 10 or 10:30 a.m. He observed water to be inundating the area to the west of Highway 73-75 and saw water passing through the box culvert to the protected side of the R-613 project. He further observed that water was entering the Holman property across a low spot in Holman's dike, located at the northeast corner of his property and nearly adjacent to the box culvert. Petermann testified that between 10:30 a.m. and 2:30 p.m. (before the floodgate was closed), the water level in Holman's small lake rose approximately 5 feet. The rise was due, he said, primarily to the water's flowing over the low point in the dike, and also due to seepage. Water from the small lake then flowed south over Holman's driveway and into the larger lake to the south.

James Dean Miller, a median equipment operator employed

by the defendant, testified that he attempted, pursuant to instructions, to close the floodgate around 10 that morning. However, as he attempted to close the gate using an electric drill as power, Holman threw the drill into the water. Miller stated that he returned to the site later that afternoon and closed the floodgate around 2:30 to 2:45 p.m.

Holman disputed the testimony that the floodgate was closed around 2:30 p.m. and testified that the gate was closed at 10:30 a.m. He stated that no water had crossed his dike adjacent to the floodgate until shortly after 10:30 a.m. He stated that the water crossed his driveway around noon, after having filled up the small lake.

Petermann testified that the water was indeed going over the driveway at the time Holman indicated, but that it was not due to the closing of the floodgate because the gate was not closed until 2:30 p.m. It was his opinion that the Holman property would have flooded regardless of whether the floodgate was open or shut. He based his opinion on the fact that the water was already flowing over the low point in the dike before the floodgate was closed.

The low spot on Holman's dike has an elevation of 967.5 feet above mean sea level. At the time the floodgate was closed, the elevation of the water at the floodgate was 968.6 feet above mean sea level, about 1.1 feet higher than the low spot on the dike. The inlet elevation of the culvert is 961.99 feet; the outlet elevation is 961.2 feet. Water flowed over the low point for an additional 9 days.

The floodgate was closed by the defendant pursuant to the instructions contained in the operation and maintenance manual prepared by the Corps of Engineers, which provided that the floodgate should be closed if water at the gate's location reached a level of 967 feet above mean sea level. That elevation was chosen because at the time the Corps of Engineers was working on the project, a site survey indicated that the low point of Holman's dike had an elevation of 966.8 feet above mean sea level. The fact that more current surveys indicate a low point of 967.5 feet was explained by Petermann as a change that occurred by adding dirt or somehow raising that portion of the dike since the original site survey in 1968.

However, the evidence is that the floodgate was not closed until the water reached 968.6 feet, 1.6 feet higher than the level specified for closing the gate and 1.1 feet higher than the low point on the dike.

The trial court found that Holman had failed to establish the presence of a watercourse, that the rule of law as to surface waters should apply instead, and that Holman's land was already flooding when the floodgate was closed. The trial court enjoined the defendant from closing the floodgate until water reaches a height of 967 feet above mean sea level and refused to award damages to Holman.

Holman has appealed and makes the following four assignments of error: (1) The court erred in finding that the culvert was not located in a natural watercourse; (2) the court erred in applying the law as to surface waters not concentrated in a watercourse; (3) the court erred in refusing to enjoin the defendant from closing the floodgate; and (4) the court erred in refusing to award damages. The defendant has cross-appealed and contends that the trial court erred in enjoining it from closing the floodgate until water reaches 967 feet above mean sea level.

Neb. Rev. Stat. § 31-202 (Reissue 1984) provides that "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." The failure to find that the culvert was located in a statutory watercourse is of no consequence in this case. The evidence shows that it is located in a natural drainageway, and the rule applicable to diffused surface waters does not apply.

In *Belsky v. County of Dodge*, 220 Neb. 76, 82, 369 N.W.2d 46, 51-52 (1985), we said:

> "[W]hen diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. . . . '[A] natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage

> channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein, and that this is a continuing duty.'
>
> "At common law the right to drain surface waters into depressions, draws, swales, and drainways which existed in the state of nature was recognized. Lower lands are, at common law, under a natural servitude to receive the surface water of higher lands flowing along natural depressions on the surface of the ground. This is so, whether or not a live watercourse occupies the natural course. . . .
>
> . . . .
>
> "This court has recognized the right of an upper proprietor to drain surface waters through a well-defined natural course, whether the course be ditch, swale, or drain in its primitive condition, and that such flow cannot be arrested or interfered with to the injury of neighboring proprietors."

Quoting from *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

Robert Dreessen, a civil engineer called by the plaintiff, testified that a natural drainageway exists from the point at which the floodwater entered the ditch (from underneath the railroad tracks), continues to the northeast (adjacent to and south of the railroad tracks) past the viaduct, and then continues east. He based his opinion upon examination of aerial photographs, a quadrangle map of the area, and his own visual inspection of the area. He further testified that the Platte River is a meandering stream and that meandering streams tend to braid. Braiding refers to a process whereby water meanders and shifts at a relatively frequent rate from side to side. When the river leaves a meander and starts to accrete, it can leave isolated cutoff channels. The farther away the braid is from the river, the less likely it is to be silted in by the process of flood-borne sediment. He testified that if the railroad embankments were built at the time the braided channel was beginning to

close, the presence of the embankments would tend to retard the accretion process downstream, because water being transported downstream to the east would tend to stop and deposit its sediment load at the railroad embankment.

Chester Worm, a civil engineer employed by the Corps of Engineers, also testified that the Platte is a braided stream. By use of a red marker he transposed from exhibit 73, a 1938 aerial photograph, an area of braid onto exhibit 91, which is a 1982 aerial photograph. The area of braid shown on exhibit 91 follows the approximate line of the drainageway previously identified by Dreessen. Worm testified that the ditch between the Holman property and the railroad tracks and continuing east through Highway 73-75 could have been a natural vent or outlet of the flood channel of the Platte River.

Petermann testified that he believed that the ditch was at one time a braided channel of the Platte. He based his opinion on the fact that the railroad tracks once had trestles underneath them and that he believed the trestles were located at the approximate location of where the culverts under the embankments are today. The purpose of the trestles was to act as a bridge over a stream. The water's running through those trestles indicates there was a braid of the Platte River at that location.

Agnes Burton, a longtime resident of the area, testified that in the early 1900s trestles located under the railroad tracks provided drainage through the embankments. She testified that the water was there winter and summer, that it was approximately 6 to 8 feet deep, and that the water flowed to the east when there was a hard rain. Water entered this area from the hills to the west, and, while she did not know where the water ended up, she did know that it flowed as far east as the Allied Chemical Plant. The Platte River merged with this creek when the water was high in the Platte.

Albert Hartung, a former resident of the area who lived in La Platte in 1918, recalled the railroads' getting water out of the creek south of the Burlington railroad tracks. The source of the water was springs to the west and the Platte River when it rose. The water flowed from west to east and crossed the highway south of the Burlington tracks.

Holman testified that rainwater enters the creek from the hills to the west, flows through the culverts under the embankments, and then flows east and then south to the box culvert.

This testimony shows that "Blackman's Creek" was a portion of a prior braid of the Platte River and that the drainageway was formed in a state of nature.

The fact that the water now flows south along the west edge of the highway, then east through the culvert, and then north back to the original course of the drainageway is not important. As we pointed out in *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985), the mere presence of an artificial element in a drainageway does not destroy its characterization as a natural drainageway. It is only where an essential part of the drainageway is artificial or manmade that such characterization may be precluded.

"A natural drainway must be kept open to carry water into streams, and, as against the rights of an upper proprietor, a lower proprietor cannot obstruct surface water which has found its way into and is moving in a natural drainage channel or depression." *Belsky, supra* at 84, 369 N.W.2d at 53.

"[O]ne building a structure across a natural drainway has a continuing duty to provide natural passage for water reasonably anticipated to move in the drainway occupied by the obstruction." *Belsky, supra* at 84-85, 369 N.W.2d at 53. See, also, *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951).

"Such duty to refrain from structural obstruction of a natural drainway is imposed upon private proprietors and public authorities as well." *Belsky, supra* at 85, 369 N.W.2d at 53. See, also, *Purdy v. County of Madison*, 156 Neb. 212, 55 N.W.2d 617 (1952).

It is clear from the evidence in this case that the floodgate at the west end of the culvert is an obstruction in a natural drainageway when it is closed. The effect of closing the floodgate is to cause water accumulated and flowing in the drainageway to pond and rise and eventually flood the plaintiff's property if in sufficient quantity. The evidence fails to show any right of the defendant to flood the plaintiff's

property by closing the gate. The fact that the plaintiff's property may be flooding to some extent at the time the gate is closed does not give the defendant a right to add additional floodwater to that which the plaintiff may otherwise be subjected to. The trial court should have enjoined the defendant from closing the floodgate unless and until such a right is acquired by eminent domain or otherwise. The cross-appeal is without merit.

Holman's final assignment of error is that the district court erred in refusing to award damages for injury to his land occasioned by the closing of the floodgate.

> [W]here water from another source has been added to water from a source for which a defendant is liable, and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.

Johnson v. NM Farms Bartlett, 226 Neb. 680, 691, 414 N.W.2d 256, 265 (1987).

The record in this case shows that water was entering onto Holman's property prior to the time the floodgate was closed. No attempt was made by Holman to differentiate between damage that would have occurred regardless of the closing of the floodgate and damage that occurred due to the closing of the floodgate.

"It is the plaintiff's burden to establish the proximate cause of his injury." *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1, 4, 305 N.W.2d 888, 890 (1981). The failure to establish the damages directly attributable to the waters impounded by the floodgate precludes the plaintiff from recovering any damages in this action. *Johnson v. NM Farms Bartlett, supra.*

That part of the judgment of the district court denying damages to the plaintiff is affirmed. In all other respects the judgment is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

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

IN RE CONSERVATORSHIP OF THE ESTATE OF ELIZABETH G. MARTIN, A PROTECTED PERSON.
ELIZABETH G. MARTIN, A PROTECTED PERSON, APPELLANT, V. DONALD L. ELLISON, CONSERVATOR, ET AL., APPELLEES.

421 N.W.2d 463

Filed April 1, 1988. No. 86-466.

1. **Guardians and Conservators: Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1985), are reviewed for error on the record.
2. **Guardians and Conservators.** A conservator generally is required to observe the standards in dealing with the assets of an estate as would be observed by a prudent man dealing with the property of another.
3. **Guardians and Conservators: Appeal and Error.** Application of the wrong standard of care by the trial court constitutes error on the record.

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

David L. Kimble of Souchek & Kimble, for appellant.

James M. Egr of Egr and Birkel, for appellee Ellison.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

CLARK, D.J.

Donald L. Ellison, conservator for the estate of Elizabeth G. Martin, a protected person, filed a motion for approval of account and resignation as conservator with the county court for Butler County. Elizabeth Martin, the protected person, through her attorney, filed an answer and cross-petition against Ellison and the bond surety company, alleging that Ellison had negligently breached his duties as conservator and that the estate of Martin had been damaged.

An evidentiary hearing was held in the county court, following which the county court found that Ellison had "exercised such care as a prudent man would exercise in dealing with his own property . . . ." The county court then approved Ellison's accounting and approved his resignation as conservator.

The district court for Butler County found on appeal that

there was no error on the record and affirmed the county court.

Elizabeth Martin appeals the ruling of the district court on the grounds, among others, that the county court applied the wrong standard of care to the performance of Ellison as conservator and that this constituted error on the record, which should have resulted in reversal by the district court.

We review the case, as did the district court, for error on the record. See Neb. Rev. Stat. §§ 30-1601 and 24-541.06 (Reissue 1985).

Prior to 1975, Nebraska statutes defined the standard of care to be that "which men of prudence, discretion, and intelligence acquire or retain for their own account in the management of their own affairs, not in regard to speculation, but in making investment of their own funds with a view to probable income as well as probable safety of the capital involved." Neb. Rev. Stat. § 24-601 (Cum. Supp. 1974). Cf. § 24-601 (Reissue 1975).

With the adoption of the Uniform Probate Code, effective January 1, 1977, the new standard was set out in Neb. Rev. Stat. ch. 30 (Reissue 1985). Section 30-2646 provides: "In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by section 30-2813."

Section 30-2813 provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . . ."

Further, the comments under § 30-2813, which were taken directly from the comments to the Uniform Probate Code, state:

> This is a new general provision designed to make clear the standard of skill expected from trustees . . . . It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:
>
> "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . ."
>
> By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in

> some decisions regarding the duty of a trustee concerning investments. See Estate of Cook, (Del. Chanc. 1934) 20 Del. Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

The case of *In re Estate of Wm. H. Cook, Dec'd.,* 20 Del. Ch. 123, 125-26, 171 A. 730, 731 (1934), referred to in the comments under § 30-2813, states:

> The rule of a trustee's duty is generally stated to be, that he is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.
>
> When this rule which is applicable to a trustee's duty generally is given specific application to the matter of investments, it needs, for the purposes of the instant case, to be supplemented by at least two observations.
>
> The first is, that the external standard of "such care and skill as a man of ordinary prudence would exercise in dealing with his own property" is not the standard he would use in dealing with his own property if he had only himself to consider; his "duty rather is" (quoting Lindley, L. J., in the case of *Re Whiteley*, 33 Ch. Div. 347, 355) "to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." In other words he must take no risks which would not be taken by an ordinarily prudent man who is trustee of another person's property.

The Supreme Court of New Hampshire, in following the rule set out in the *Cook* case, found that the trial court's finding that the trustee had exercised his best judgment and the care and skill which a man of ordinary prudence would exercise in dealing with his own property was too liberal. The New Hampshire court found that it was not sufficient that the trustee should use the care and skill of a man in investing his own property, but that there was the additional requirement that he should use the caution exercised by a prudent man in conserving the property.

"In making investments the trustee is under a duty not

> only to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property, but he must use the caution of one who has primarily in view the preservation of the estate entrusted to him, a caution which may be greater than that of a prudent man who is dealing with his own property."

Miller v. Pender, 93 N.H. 1, 3, 34 A.2d 663, 665 (1943) (quoting from 2 A. Scott, The Law of Trusts § 174 (1939)).

> Not only must the trustee deal with trust property with ordinary prudence but he is held to two additional standards: (1) since he is dealing with the property of another for whom he is morally bound to provide, he must avoid even those risks which he might take with his own property and (2) he must take no risk which endangers the integrity of the trust corpus.

DuPont v. Delaware Trust Company, 320 A.2d 694, 697 (Del. 1974). See, also, *Wilmington Trust Co. vs. Coulter, et al.*, 41 Del. Ch. 548, 200 A.2d 441 (1964).

It is apparent that the Legislature, in adopting the Uniform Probate Code, set a different and higher standard of care for a conservator than had previously prevailed in Nebraska.

The order of the county court for Butler County reflects that this standard was not employed by the county court. This constitutes error on the record, which compels reversal. In view of this finding, it is not necessary to, and we do not, consider other grounds for reversal advanced by Martin in this appeal.

The cause is reversed and remanded to the district court for Butler County with directions to remand to the county court for further proceedings in conformance with this ruling.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL, APPELLEE, V. RANDALL J. STODOLA, APPELLANT.

421 N.W.2d 436

Filed April 1, 1988. No. 86-612.

1. **Administrative Law: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
2. _____: _____. An agency is limited in its rulemaking authority to the powers delegated to it by the statute which it is to administer.
3. _____: _____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
4. _____: _____. An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions to dismiss.

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

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

WHITE, J.

This is an appeal from an order of the district court for Dodge County affirming a judgment entered by the county court.

Appellant, Randall J. Stodola, was a patient at the Hastings Regional Center from February 14 to March 7, 1983. Neb. Rev. Stat. § 83-364 (Reissue 1987) provides, in part, that "[w]hen any person is admitted to a state institution . . . the patient and his relatives shall be liable for the cost of the care, support, maintenance, and treatment of such person to the extent and in the manner provided by this act." The Department of Public Institutions (DPI) is authorized by statute to assess against the patient or his relatives all or part of the cost of care according to their ability to pay. Neb. Rev. Stat. §§ 83-365 to 83-368 (Reissues 1981 & 1987).

In this case DPI determined that appellant was liable for the full cost of his care. This determination was based on a presumption of "ability to pay" which arose out of appellant's failure to provide DPI with complete information regarding his assets, specifically, an insurance authorization form.

Subsequent to DPI's determination, no payments were made by appellant on the amount due. Consequently, the State filed an action against Stodola, pursuant to Neb. Rev. Stat. § 83-375 (Reissue 1987), to recover the amount determined to be due. The petition simply alleged that Stodola had been a patient and received care at the Hastings Regional Center; that such persons are, by statute, liable for costs of care; that DPI determined that Stodola had the ability to pay $2,474 (the full cost of his care); and that the State had demanded payment, but such had not been made. Following a trial to the county court for Dodge County, the court entered judgment against Stodola for the full amount plus interest. Upon appeal to the district court, that judgment was affirmed.

Appellant's sole assignment of error alleges that the court erred in not finding DPI rule 2-(3) (1975) invalid as being broader than Neb. Rev. Stat. § 83-370 (Reissue 1987) and, accordingly, ineffective to constitute a basis for finding a patient liable for the full cost of care because of failure to furnish DPI with financial information.

The statutes and DPI rule relevant to the question on appeal in this matter are set out below. Section 83-368 (Reissue 1981) provides:

> The department shall determine the ability of a patient to pay by consideration of the following factors: (1) Taxable income reportable under Nebraska law; (2) the patient's age; (3) the number of his dependents and their ages and mental and physical conditions; (4) the patient's length of care or treatment; (5) his liabilities; and (6) his assets.

Section 83-370 provides: "When any *relative* willfully fails to furnish to the department, upon request, the information required by this act as to his taxable income, such relative shall be determined to have ability to pay the entire cost determined under this act." (Emphasis supplied.)

DPI rule 2-(3) provides as follows:

> FAILURE TO FURNISH INFORMATION. When any *patient or relative* willfully fails to furnish financial information (includes but is not necessarily limited to a copy of their state tax return and a completed financial questionnaire) to the Department within 20 days from the date requested, such person/s shall be deemed to have the ability to pay the full cost of any care, support, maintenance and treatment rendered to the patient. The Department may give consideration to extenuating circumstances with regard to the 20 day limitation.

(Emphasis supplied.)

At trial appellant argued that DPI's determination of his ability to pay was improper and invalid because it did not comport with the statutes which authorize such determinations. The question to be answered on this appeal is whether there existed a valid and proper DPI determination of ability to pay which could constitute the basis for a money judgment against appellant. We find that the determination was improper and thus cannot be the basis for a judgment against appellant.

Section 83-368, quoted above, sets forth factors to be considered in determining a *patient's* ability to pay. Neb. Rev. Stat. § 83-369 (Reissue 1987) sets forth factors to be used by DPI in determining a *relative's* ability to pay if a patient is unable to pay the entire cost. These factors are nearly identical. Section 83-370 allows DPI to presume that a *relative* has ability to pay the entire cost in situations where "any *relative*" fails to furnish information *"as to his taxable income."*

Neb. Rev. Stat. § 83-371 (Reissue 1987) directs DPI to "adopt appropriate rules and regulations for making the determinations required by this act." Appellee in this case argues that § 83-371, in conjunction with § 83-370, authorized DPI to enact rule 2-(3), set forth above. We cannot agree.

There is no doubt that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984). However, the agency is limited in its rulemaking authority to the

powers delegated to it by the statute which it is to administer. *Id.* In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Id.*; *United States v. Larionoff*, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977).

DPI has promulgated a rule, rule 2-(3), which enables that agency to exercise powers beyond those *actually* delegated to it by the Legislature. Furthermore, rule 2-(3) is not consistent with § 83-370. The Legislature has provided that DPI has the burden of proving that determinations of "ability to pay" are based on criteria set forth in the statutes. Section 83-370 allows an "exception," so to speak, by allowing DPI to presume an "ability to pay the entire cost" of care if "*any relative* willfully fails to furnish . . . information . . . as to his *taxable income*." (Emphasis supplied.) It seems clear that DPI rule 2-(3) goes well beyond the statute and allows such a presumption for an entirely different class of persons. Rule 2-(3) modifies and enlarges § 83-370 to include *any patient* who fails to furnish, presumably, *any* financial information requested by DPI. As appellee notes in its brief, it is undisputed that an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *County of Dodge v. Department of Health, supra.*

This court has previously held that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language. *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988). Had the Legislature intended a presumption of a patient's ability to pay full cost of care if such person failed to provide certain financial information, it clearly could have included a provision such as § 83-370 which would have covered *patients*. It is not, however, within DPI's power to alter or enlarge the scope of burdens of proof and presumptions which have been set forth by the Legislature.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

DONALD L. JOHNSON, JR., APPELLANT, V. RON BARTEE ET AL., APPELLEES.
JOHNNY BOSTON, APPELLANT, V. GARY GRAMMER ET AL., APPELLEES.

421 N.W.2d 439

Filed April 1, 1988. Nos. 87-105, 87-106.

1. **Sentences: Prisoners: Time.** Absent approval of the Board of Pardons, the good time sentence reductions of 1975 Neb. Laws, L.B. 567, are not applicable to offenders who started to serve prison sentences prior to August 24, 1975, the effective date of L.B. 567.
2. _____: _____: _____. In considering the application of good time credits to sentences begun prior to August 24, 1975, Neb. Rev. Stat. § 83-1,107(2) (Cum. Supp. 1974) yields to the special provisions of Neb. Rev. Stat. § 83-1,111(5) (Cum. Supp. 1974).

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellants.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

GRANT, J.

Donald L. Johnson, appellant in case No. 86-105, brought a habeas corpus action, pro se, seeking his release from the custody of defendants-appellees (collectively referred to herein as DCS, that is, Department of Correctional Services) on the ground that DCS had failed to give him proper credit, after Johnson violated parole, for "especially meritorious behavior or exceptional performance of his duties" (Neb. Rev. Stat. § 83-1,107(1) (Cum. Supp. 1974)). Johnson had earned the credits before he was released on parole on July 19, 1979.

Johnny Boston, appellant in case No. 86-106, sought the same relief, pro se, in a habeas corpus action, for the same reason. Since both cases involve the application of the good time statutes to offenders' terms of incarceration, the cases

were consolidated in this court for briefing and argument, and this opinion will control both cases.

Some difficulty is presented in each case in determining the exact thrust of each appellant's position, because the petitions were filed pro se. Counsel was later appointed for the hearings in the trial court and on this appeal.

The record in the *Johnson* case contains the following stipulation of facts:

> [O]n December 27, 1972, the petitioner began serving a sentence of not less than five years nor more than fifteen years following his conviction of assault with intent to inflict bodily injury. On that sentence, he served 51 days of jail time credit.
>
> On July 19, 1979, the petitioner was granted a discretionary parole. At the time that this discretionary parole was granted to the petitioner, his mandatory parole date, taking into account good time and the jail time credit was October 24, 1982.
>
> On March 1, 1982, the petitioner was charged with violating the discretionary parole and this parole was revoked by the Nebraska Parole Board on April 5, 1982. At the time of the revocation of his parole, the petitioner's mandatory parole date was October 25, 1982. In calculating that mandatory parole date, the plaintiff had credit for ten months and three days of earned good time or meritorious good time.

Johnson's habeas corpus hearing was held on January 7, 1987. In that hearing, an official timesheet containing the computations of DCS relating to Johnson's prison sentence was stipulated into evidence. This computation sheet showed a full discharge date included the 10 months 3 days of meritorious good time which Johnson had accumulated prior to his discretionary parole on July 19, 1979. The trial court denied Johnson's writ, holding that Johnson had violated his discretionary parole and that meritorious good time in the fact situation of the *Johnson* case did not have to be credited to him.

The record of the habeas corpus proceedings of the second appellant, Johnny Boston, showed the following. Boston was sentenced in Douglas County District Court on October 29,

1970, to 10 to 15 years for robbery. Boston received a discretionary parole on August 17, 1978. At the time Boston was granted his discretionary parole, he had a mandatory parole date of October 23, 1979. Boston had accumulated 11 months 11 days of meritorious good time at the time of his discretionary parole.

This discretionary parole was determined to be delinquent as of March 20, 1979, and revoked on September 8, 1980. The record shows that at some time during this parole Boston served a sentence in the State of California. The record also shows that on August 12, 1985, Boston was sentenced to a 1-year sentence for escape, to be served consecutively. The board determined that Boston lost his meritorious good time. The parties have agreed that if this meritorious good time were restored, Boston would be immediately entitled to a discharge.

Appellants assign three errors: (1) The trial court's judgment was contrary to law and not supported by sufficient evidence; (2) The trial court erred in failing and refusing to comply with the statutory language of § 83-1,107(2), which guaranteed to each appellant that his meritorious good time would not be forfeited or withheld after he was released on parole; and (3) The trial court erred in failing to follow, apply, and observe the simple, direct, and specific language of the applicable statute. We hold appellants' contentions are not correct, and affirm the order of the trial court in each case.

Read together, the three assignments of error are encompassed in one fundamental issue which must be resolved. The issue involves interpreting the interaction between § 83-1,107(2) and Neb. Rev. Stat. § 83-1,111(5) (Cum. Supp. 1974). With regard to these statutes, appellant Johnson asks this court to reexamine the issue presented in *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987), and determine whether meritorious good time can be used "solely" for determining parole eligibility or whether such time could also be used to determine the date of a prisoner's absolute discharge.

In *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983), we held that, absent approval of the Board of Pardons, the good time sentence reduction provisions of 1975 Neb. Laws, L.B. 567, are not applicable to an offender who started to serve his

sentence prior to the effective date of L.B. 567, which was August 24, 1975. Since appellants were sentenced in December of 1972 and October of 1970 respectively, we must apply the statutory scheme in force at that time. Counsel for both parties states the effective statutes are contained in the cumulative supplement of 1974. See § 83-1,107(3).

We first examine the then-applicable statutes. Section 83-1,107 states in part:

> (1) The chief executive officer of a facility shall reduce, for parole purposes, for *good behavior and faithful performance of duties* while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. *In addition, for especially meritorious behavior or exceptional performance of his duties*, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:
>
> (a) From his *minimum term*, to determine the date of his eligibility for release on parole; and
>
> (b) From his *maximum term*, to determine the date when his release on *parole becomes mandatory* under the provisions of section 83-1,111.
>
> (2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. *No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.*

(Emphasis supplied.)

Some parts of this statute are of particular importance to resolution of the instant case. First, subsection (1) provided for two distinct, separately defined types of good time: (1) "good behavior and faithful performance of duties" and (2) "especially meritorious behavior or exceptional performance of his duties." In *Boston v. Black, supra*, we labeled the former

as "regular good time" and the latter as "meritorious good time." The phrase "good time" refers to both regular and meritorious good time. We will use these labels in these cases.

The distinction between meritorious and regular good time is important in interpreting the second sentence of subsection (2). Appellants concede, and we agree, that regular good time could be forfeited and withheld at any time, provided statutory procedures were followed. This was not true for meritorious good time. Subsection (2) stated that meritorious good time could not be forfeited or withheld after an offender was released on parole. Appellants argue that this language was controlling throughout the parole procedure.

In § 83-1,107, descriptions of discretionary parole and mandatory parole were set out. The time and interval during which a discretionary parole could be granted was bounded by the earliest discretionary parole date (minimum sentence less the sum of regular and meritorious good time) on one end and the mandatory parole date (maximum sentence less regular and meritorious good time) on the other. This resulted in three distinct periods during an offender's sentence: (1) sentencing to the date on which discretionary parole became available; (2) the period during which discretionary parole was available (discretionary parole date to mandatory parole date); and (3) the period after mandatory parole date but before final discharge date.

In *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987), the parole was violated during the third period, the mandatory parole period. Appellants in the instant cases, however, violated discretionary paroles and were therefore in the second period. If a discretionary parole were violated during this second period *and* the violation occurred within 12 months of the mandatory parole date, then an additional statute came into play. Section 83-1,111(5) provided: "Nothing herein shall require the mandatory parole of an offender who has violated a discretionary parole within twelve months of the date when his parole would otherwise be mandatory."

Appellants argue that *Wounded Shield*, rather than harmonizing § 83-1,107(2) with the other good time statutes, in effect judicially repealed § 83-1,107(2). Such a contention is

incorrect. Section 83-1,107(2) was controlling during the period between the date discretionary parole became available and the date 12 months before mandatory parole. During this period of discretionary parole, meritorious good time could not have been forfeited after an offender was released on parole.

During the 12 months immediately preceding the mandatory parole date, § 83-1,111(5) controlled the granting or withholding of good time credits, not § 83-1,107(2). At that time, without the existence of § 83-1,111(5), § 83-1,107(2) would admittedly control. However, § 83-1,111(5) did exist, and it served to preempt the control of § 83-1,107(2) for the 12-month period prior to mandatory parole date. We hold § 83-1,111(5) is a specific statute and § 83-1,107(2) is a general statute. In that situation, the general statute yields to the special. *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

Our holding in *Wounded Shield* controls the period from the mandatory parole date to the date of mandatory discharge. *Wounded Shield* does not control the cases before us. The offender in *Wounded Shield* violated a mandatory rather than a discretionary parole. Thus, in the instant cases, § 83-1,111(5) controls.

Section 83-1,107(1) clearly stated that good time, both regular and meritorious, is subtracted from the maximum term for "parole purposes." The statute did not provide that such good time had to be applied for purposes of reducing the maximum term. The second sentence of § 83-1,111(5) stated that "Nothing herein shall require the mandatory parole of an offender who has violated a discretionary parole within twelve months of the date when his parole would otherwise be mandatory." This language was controlling in stating that meritorious good time could be withheld during the period which is 12 months prior to the mandatory parole date. However, appellants are now nearing their maximum term and question whether the meritorious good time remains in existence for purposes of computing their discharge date. Appellants argue that this good time remains in existence and that § 83-1,107(2) is controlling.

This argument failed to acknowledge the fundamental

definition which was set forth in § 83-1,107(1). Under that statute, good time, by definition, existed only for parole purposes at the time of appellants' sentencing. Good time is defined by statute and thus is controlled by the statutes which confer it. Appellants, Johnson and Boston, both violated their discretionary paroles within 1 year of their mandatory parole dates. Section 83-1,111(5) controlled this period of their sentences. DCS acted within its statutory authority in withholding appellants' meritorious good time in each case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MILTON L. McPHAIL, APPELLANT.

421 N.W.2d 443

Filed April 1, 1988. No. 87-280.

1. **Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Roger C. Lott, for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Milton L. McPhail, appeals his convictions by a jury of the crimes of robbery, Neb. Rev. Stat. § 28-324(1) (Reissue 1985), and using a weapon to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1985). He assigns three errors: (1) denying defendant's pretrial motion to dismiss court-appointed counsel and to appoint substitute counsel; (2) denying his motion to dismiss for failure of the State to prove a prima facie case; and (3) failing to grant a new trial or, in the alternative, dismissing the case at the end of the evidence because the circumstantial evidence was insufficient to sustain a conviction against the defendant.

David Huebner, an engineering student at the University of Nebraska, testified that on the evening of September 15, 1986, he was studying while seated on the bedroom floor of his apartment at 1327 D Street, Lincoln, Nebraska. He heard the front door open and close. Hearing no other usual sounds, he looked toward the bedroom door and saw a black male, wearing a kerchief over his face and gloves, standing in the doorway. The intruder entered, said it was a stickup, and shoved and held Huebner's head against the wall. The intruder held a metal object against Huebner's head and asked where his money was. The intruder removed Huebner's wallet from a rear trouser pocket and handed it to a second man then in the room, who indicated that there were bank cards in the wallet. They bound Huebner's legs and arms and put him on the bed. The men asked Huebner for the access code number for one of the bank cards. Since there was confusion identifying the access codes with the three bank cards that were in the wallet, Huebner told the men to write the access codes that he gave them, which one of the men did by using a piece of Huebner's study graph paper taken from a table. Huebner was then gagged and warned not to move from the bed for 5 minutes. After hearing the men leave the building, Huebner hopped to a neighbor's apartment and telephoned the Lincoln Police Department, using the 911 emergency number, and reported the details of the robbery. Huebner testified the wallet contained between $5 and $10, three bank cards, and possibly a pay stub from Olsson Associates, where Huebner worked part time. Huebner could

not identify the robbers. He described the metal object held to his head during the robbery as "some type of a knife against my temple. . . . I believe it was metal. . . . [I]t was an ice pick or some type of knife . . . being used as a thrusting weapon . . . ."

The police dispatcher immediately broadcast the robbery details, including the bank card information. In response to the broadcast, Lt. John D. Packett, in a patrol car, drove past the FirsTier Bank, 13th and M Streets, on the way to the robbery scene, which was about eight blocks from the bank. Near the bank, Packett observed two black males entering the bank lobby, where there are automatic teller machines (ATMs). He parked the cruiser and entered the bank, where he observed the two men; one was using an ATM. Packett ordered them to face the wall; both men ran out of the building and separated. Packett and other responding police officers pursued the two men on foot. The man pursued by Packett was soon located and arrested in a parking lot about two blocks from the bank; he was identified as defendant, Milton McPhail. The other fleeing man, located and arrested nearby, was identified as Gregory McCoy.

At the time of defendant's arrest, personal searches revealed a knife in his rear trouser pocket and a pay stub from Olsson Associates bearing Huebner's name as employee found in a shirt pocket.

While pursuing McCoy from the bank, an officer observed McCoy discard an item, later recovered and identified as Huebner's wallet. Also recovered in a search of the pursuit route were an NBC Bank-In-The-Box card bearing the name of David L. Huebner and a piece of graph paper bearing numbers identified by Huebner as paper taken from his room and the access code numbers to his bank cards. The wallet contained three $1 bills.

Randall Pierce, a security guard on duty at the bank, was viewing the security monitors. He noticed a police officer in the lobby and locked on to the video camera in that area. When the two men ran from the bank, Pierce went to the ATM machine and found Huebner's card in the machine. The videotapes were included in the evidence.

Cynthia Werner testified that she was sitting in her car

parked near the front of the bank. She saw two black males run up to and enter the bank. Soon, the police arrived and the two men ran away.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987).

MOTION TO DISMISS COUNSEL

" ' "[T]he right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. . . ." ' " *State v. Hoffman*, 224 Neb. 830, 835, 401 N.W.2d 683, 686 (1987).

When a defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to the court for the removal of counsel, his only alternative is to proceed pro se if he is competent to do so. *State v. Bratton,* 187 Neb. 460, 191 N.W.2d 612 (1971); *State v. Clark,* 216 Neb. 49, 342 N.W.2d 366 (1983).

The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration. *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985).

Prior to trial, defendant filed a motion to dismiss his court-appointed counsel and to appoint substitute counsel. At the hearing, it developed that defendant had requested his counsel to file motions for (1) dismissal for lack of evidence, (2) copies of police reports, (3) return of personal belongings held by the police, and (4) habeas corpus relief. The evidence was that defendant's counsel had filed a plea in abatement which was denied, that defendant did not understand the nature of a habeas corpus proceeding, and that the judge had informed defendant that as an alternative he could "hire your own lawyer or you can represent yourself."

The record shows nothing more than unfounded

dissatisfaction with appointed counsel. No good cause having been shown, there was no abuse of discretion, and the motion was properly denied.

CIRCUMSTANTIAL EVIDENCE

Defendant was charged with two felonies occurring on September 15, 1986. Those charges were: count I, he "did forcibly, and by violence, or by putting in fear, take from the person of David Huebner money or property of value with the intent to steal"; and count II, he "did use a knife or other deadly weapon to commit a felony or did unlawfully possess a knife or other deadly weapon during the commission of a felony which may be prosecuted in a court of this state, to-wit: Robbery."

The second and third assignments are discussed together. "[C]ircumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt." *State v. Hunt*, 224 Neb. 594, 596, 399 N.W.2d 806, 807 (1987).

It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction. *State v. LynCook,* 227 Neb. 719, 419 N.W.2d 686 (1988).

Defendant denies his guilt and argues that he was a victim of his untimely arrival at the bank and his unexplained flight from the bank. He testified that upon his arrival on the corner beside FirsTier, he had met an acquaintance, McCoy. They decided to get a drink someplace, and defendant and McCoy decided to go into FirsTier, where defendant could withdraw some money from his savings account. At the entrance to FirsTier, McCoy found a bank card on the sidewalk, which McCoy attempted to use while defendant stood nearby giving him instructions on how to use the card in the machine.

The jury could find that defendant's explanation was overcome by the evidence, including Huebner's testimonial account of the robbery, his description of one of the robbers and of the property taken from him, and these circumstances: defendant's hasty arrival on foot at the bank within minutes

after the robbery that occurred a few blocks away; the attempted use in the ATM machine of Huebner's bank card; Huebner's pay stub from Olsson Associates found in defendant's pocket; the knife found in defendant's pocket; and the recovered items discarded by McCoy when fleeing, namely, Huebner's wallet, a card bearing Huebner's name, and the piece of graph paper taken from Huebner bearing his two bank card access code numbers.

A guilty verdict may not be set aside on appeal for insufficiency of the evidence where the evidence sustains some rational theory of guilt. *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987).

The evidence, together with all of its inferences, strongly supports the jury verdict that defendant was guilty of both counts in the information beyond a reasonable doubt. There is no merit to any of defendant's assigned errors.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. J.C. FRELO, APPELLANT.

421 N.W.2d 447

Filed April 1, 1988. No. 87-422.

1. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's determination that the state's peremptory challenges were not motivated by intentional discrimination should not be reversed on review by this court unless that determination is clearly erroneous.
2. **Sentences: Appeal and Error.** Ordinarily, a sentence imposed within statutory limits will not be overturned on appeal, absent an abuse of discretion.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

HANNON, D.J.

The defendant was convicted of possession of cocaine with intent to deliver, and he was sentenced to imprisonment for not less than 3 nor more than 5 years. He assigns two errors: one, that the trial court erred in overruling the defendant's motion for a mistrial on the basis that the prosecuting attorney struck 4 of 5 black persons on the panel of 24 venire members that had been passed for cause. The defendant also claims the sentence was excessive.

No record was made of the jury selection process. Immediately after the jury was impaneled and sworn, the defendant's counsel moved for a mistrial, based on the selection of the jury. He stated that of the 24 persons passed for cause, the prosecutor used peremptory challenges to strike 4 of 5 black venirepersons. The court then allowed the defense counsel to state that the defendant is black and jury panel members Nos. 11, 14, 21, 22, and 9 are black and that only one of those stricken was asked questions. The trial judge then asked the prosecutor, "Do you wish to speak to it . . . ?" The prosecutor then stated he was not sure what the case required and asked if he should go down the list. The judge said, "Perhaps it might be wise."

The prosecutor stated in turn the number of each black member of the panel and his reason for striking or keeping the particular member. He stated one panelist was stricken because she was unemployed, and the prosecutor believed he had defended her many times during the years 1973 through 1981 for misdemeanor violations. Another person was stricken because she lived close to some persons who were believed to be in the same drug distribution chain as the defendant. Another prospective juror lived next door to a family that was a victim of a serious crime handled by the prosecutor, and some members of that family were very unhappy with the outcome of that case. The prosecutor was afraid the panelist might agree with the side of the family that was unhappy with the result of that prosecution and be influenced by it. The last juror stricken had had some difficulty when he sat as an alternate juror on another jury. The judge interjected that he was waiting for the defense to strike that juror, and defense counsel agreed there was a

problem with that juror. The prosecutor stated that he left the other black person on the jury because during examination she seemed to agree with his explanation of legal concepts. The prosecutor also said that of the three alternates called, one was a black person, who was left on because, upon examination, he seemed like a good juror. The judge then stated that each juror in the box was personally asked if this was his or her first time as a juror. The judge then stated that, based on the reasons given, the motion was overruled. The defense counsel then stated that the prosecutor had always been fair with him.

The defendant relies upon the case of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Since the *Batson* decision, this court has considered its effect in four cases, to wit: *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987); and *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988). In *Walton, supra*, as in this case, the trial judge did not make a specific finding that the defendant had established a prima facie case of purposeful discrimination, but it was held that he impliedly did so when he asked the prosecutor to articulate the reasons for striking the black members of the panel. Without engaging in an extended discussion of whether the defendant made a prima facie showing of purposeful discrimination in accordance with *Batson, supra*, we will assume for the sake of argument that a prima facie case was properly established. However, we believe that the prosecution articulated an adequate, neutral explanation for the exclusion of each juror in question.

In *State v. Alvarado, supra* at 200, 410 N.W.2d at 121-22, this court held, "[T]he trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous." In *State v. Walton, supra* at 563, 418 N.W.2d at 592, it was held, "The same rule is to be applied in reviewing the trial court's determination as to the adequacy of the State's 'neutral explanation' of its challenges. . . . [T]he trial court's determination . . . should not be reversed on review by this court unless that determination is

clearly erroneous." In this case one black juror and one black alternate were not stricken, and both the judge and the defense counsel seemed to agree that one of those stricken would not be a good juror for any party. As to the unemployed panelist who was stricken, a feeling that unemployment might give rise to a prejudice was approved in *State v. Walton, supra*. The other reasons given amount to a claim by the prosecutor that he has a reasonable basis to believe that the particular jurors might harbor a predisposition toward the defendant, or against the State or the prosecutor. Many facts would necessarily go into determining whether the reasons given are adequate. On the basis of the record in this case, the holding by the trial court that the explanations were adequate would not be clearly wrong.

In denying the motion for mistrial, the trial judge stated, "[B]ased on the reasons given [by the prosecutor]" the motion was overruled. Such record as is presented to this court would justify such a ruling on the basis that the State gave adequate "neutral explanation" for its challenges.

The defendant also assigns as error the allegedly excessive sentence. In support of the argument the defendant maintains his involvement in the crime was not great and that the presentence report indicates the defendant had no prior criminal history. This court has said, " '[T]he punishment for a criminal act should in all circumstances be commensurate with the offense.' " *State v. Bocian*, 226 Neb. 613, 618, 413 N.W.2d 893, 896 (1987). It is necessary to review the evidence.

At the trial the defendant testified that he was hired in California to drive a recent acquaintance he knew as "Blood" to Omaha to visit a child. He was to be paid $500 upon returning. Blood was the same man the Omaha police knew as Edward Wyrick. The defendant testified that they drove from Los Angeles to Omaha without rest. He claims to have slept and to have had no idea that Wyrick might have cocaine with him until he saw some drug preparation materials in the hotel room. He testified that he had no knowledge of the drug activities of Wyrick.

In mid-August of 1986, the Omaha police started to investigate the possible drug activities of one Edward Wyrick. On September 6, 1986, a police officer received information

that Wyrick, accompanied by another black man, was back in Omaha and staying at the Residence Inn. The police officer made arrangements for surveillance to begin the next day. On September 6, he also drove to the hotel and happened to see Wyrick and the defendant get into a Corvette automobile and drive away. The next morning, at 9, two police officers began surveillance from a room at the inn. They were in a room from which they could see the room where the defendant and Wyrick were staying, as well as the parking area associated with the room. At about 12:50 p.m., the defendant left the room and walked to the Corvette parked in the lot. He opened the door and appeared to bend down in the front seat and then in an area behind the seat. In approximately 30 seconds he returned to the hotel. At about 1:25 in the afternoon the defendant and Wyrick left their room together. The defendant was carrying a large brown grocery sack, which he placed in the trunk of a 1979 Chevrolet Malibu which was sitting near the Corvette. After checking to see if the trunk was locked, the defendant got into the passenger seat of the Corvette and drove off with Wyrick. Within two blocks, other police officers who were part of the surveillance stopped the Corvette.

After the vehicle was stopped, the police saw what they suspected to be cocaine on the floorboard on the driver's side of the Corvette, as well as packets of what appeared to be cocaine packaged for street sale protruding from a purse which was under the driver's seat. The defendant and Wyrick were placed under arrest. When the vehicle was searched, six packages of cocaine were found in the Corvette.

Later, the hotel suite was searched. It consisted of two rooms, one above the other, joined by a stairway. The downstairs room was equipped with a foldaway bed, and the room above was a bedroom. In the lower room, the police found what appeared to be a residue of cocaine on a table, and a playing card and small pieces of plastic were on the table. In the bedroom, they found a baggie containing cocaine in a jogging jacket, an electric gram scale, and Seal-A-Meal packages.

When the Malibu was searched, the sack which the defendant had placed in the trunk contained several packets of cocaine. Some of it was crack cocaine, some rock cocaine, and

one packet was cocaine in powdered form. The sack also contained a loaded .38-caliber handgun, a package of Mannitol, a glass vial containing a clear liquid, and a Dazey Micro-Seal machine. The last three items were identified as items regularly used by those in the drug trade to cut and package cocaine. In all, the police found 40 grams of cocaine, with an approximate street value of $7,000.

Obviously, the jury did not believe the defendant. The presentence report does not show the defendant to have been convicted of serious criminal activity, but it shows a long history of contact with police, and would be more than sufficient to demonstrate that the defendant was no novice. The evidence would establish that Wyrick was the leader, but it also established the defendant to be a knowing helper in an interstate drug distribution trade.

"Ordinarily, a sentence imposed within statutory limits will not be overturned on appeal, absent an abuse of discretion . . . ." *State v. Hodge and Carpenter*, 225 Neb. 94, 104, 402 N.W.2d 867, 874 (1987). That case and the following cases involving controlled substances show that the sentence imposed in this case is clearly within the area of the trial court's discretion, to wit: *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988); *State v. Whitehurst*, 224 Neb. 174, 396 N.W.2d 288 (1986); *State v. Kenny*, 224 Neb. 638, 399 N.W.2d 821 (1987); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY DEAN KLEINBERG, APPELLANT.

421 N.W.2d 450

Filed April 1, 1988. No. 87-501.

1. **Search Warrants: Affidavits.** An inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant.
2. **Motions to Suppress: Search Warrants: Police Officers and Sheriffs.** Evidence seized pursuant to a defective search warrant is not subject to being suppressed where the warrant was executed by officers who acted in good faith and reasonably believed that they were executing a valid warrant.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

William L. Binkard, for appellant.

Kurt A. Hohenstein, Dakota County Attorney, Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

BOSLAUGH, J.

The defendant, Jeffrey Dean Kleinberg, was convicted of possession with intent to distribute marijuana and sentenced to 24 months' probation. He has appealed and contends that the trial court erred in overruling his motion to suppress evidence discovered during a search of his automobile on November 25, 1986.

The record shows that on November 25, 1986, a confidential informant advised Captain John Sanders of the South Sioux City Police Department that he had observed marijuana in the trunk of the defendant's gold Buick on November 24, 1986, and that the automobile was located at 709 East 22d Street in South Sioux City, Nebraska. The informant also stated that he had spoken with the defendant, and the defendant had plans to deliver the marijuana to a person in Minnesota by 3:30 p.m. on November 25, 1986.

Having received reliable information regarding illegal activities from this informant in the past, Sanders then drove to

709 East 22d Street and observed a 1980 gold Buick Regal two-door automobile, license No. 70-L871. Sanders verified that the vehicle was registered to the defendant. Sanders then talked with Chief of Police Gene Claxton about obtaining a search warrant to search the defendant's automobile.

Sanders then went to the county attorney's office and gave the information to a deputy county attorney, who prepared an affidavit and a search warrant.

The affidavit, which was signed by Sanders, alleged that the property to be seized was "three to four clear plastic zip-lock bags, with each bag containing three pounds of marijuana, a controlled substance"; that it was under the control or custody of "Jeff Klineberg [sic], 709 East 22nd Street, South Sioux City, Nebraska"; and that it was concealed or kept in a "1980 tan to beige Buick Regal, 2 door automobile, lic. # Neb. 70-L871, whose owner is Jeff Klineberg [sic]." Finally, the affidavit set forth the facts regarding the confidential informant and his seeing the marijuana in the trunk of the defendant's automobile as well as being privy to the conversation about the anticipated delivery of the marijuana in Minnesota.

The search warrant prepared by the county attorney's office, instead of authorizing a search of the defendant's automobile as requested in the affidavit, directed Sanders to search "*Jeff Klineberg* [sic], 709 East 22nd Street South Sioux City, Nebraska, *which* is located at his residence." (Emphasis supplied.) The description of the property to be seized was identical to the description contained in the affidavit.

Unaware of the discrepancy between the affidavit and the search warrant, Sanders, Claxton, and Patrolman Adams served the warrant and the affidavit on the defendant at his home on November 25, 1986. Neither the defendant's person nor his home was searched, but only the automobile described in the affidavit, where the marijuana was found.

Following his arrest, the defendant moved to suppress the evidence seized from the trunk of his car, alleging that the search was unreasonable and not made pursuant to the search warrant.

The State filed a resistance to the motion to suppress, supported by affidavits of Sanders, Claxton, and Adams. In his

affidavit, Captain Sanders stated:

> [I]t was our intention and understanding that we were to be permitted to search the vehicle as per the affidavit and the information we had received . . . and that we reasonable [sic] relied upon our understanding of the area to be searched as included in the affidavit and complaint for search warrant . . . .
>
> . . . [W]e believed we had obtained a proper search warrant based upon an affidavit, that I relied upon the same in good faith in searching the automobile and that it was our intention to search the automobile and only the automobile at the time of the search; that we did not become aware that the search warrant did not call for a search of the automobile until long after said search had been conducted, fully believing that we had the authority to search the automobile as per the affidavit . . . .

Sanders finally stated that "I did not type any of said information on either the affidavit or search warrant, but that I did read the affidavit prior to my signing the same and found it to be valid and swore to the same . . . ."

Similarly, Chief of Police Claxton stated in his affidavit:

> [I]t was our understanding that the warrant was issued for a search of the defendant's vehicle as evidenced in the affidavit for search warrant, and is evidenced by the information the confidential informant provided us that the location of the marijuana was in the trunk of said vehicle.
>
> 6. That I, in good faith relied upon the affidavit and search warrant and did not realize that said search warrant contained language which did not specifically call for a search of the trunk, even though language in the search warrant and the affidavit specifically indicate that the location of the marijuana was in the vehicle which was searched.
>
> 7. That I did not prepare the affidavit or search warrant myself and relied upon the County Attorney's office to prepare said affidavit and upon the Court for the issuance of said search warrant; that at no time did we ever intend to search anything other than the trunk of the vehicle, and

> we in good faith, relied upon the affidavit and search warrant in searching said trunk.
>
> 8. That I did not become aware that there was a discrepancy in the search warrant until long after said search had been conducted.

Finally, Patrolman Adams stated:

> I did not participate in the preparation of the affidavit or the search warrant and my only knowledge was received from Captain Sanders and Chief of Police Gene Claxton that we were to search a vehicle owned by Jeffrey Kleinberg, for marijuana contained in the trunk; that I at no time had any knowledge that we were to search anything other than said vehicle and I, in good faith believed that said search warrant allowed for a search of said vehicle; I did not read or review such search warrant prior to said search, but in good faith believed that said search warrant called for a search of said vehicle and nothing else.

The trial court found that the officers executing the warrant had acted in good faith and that the discrepancy between the affidavit and the warrant regarding the place to be searched was the result of an inadvertent scrivener's error, and overruled the motion to suppress.

The trial was to the court, with the case submitted on affidavits and stipulations of the parties, and with the defendant renewing his objection to the evidence seized during the search of his automobile. The trial court sentenced him to 24 months' probation.

All of the assignments of error relate to the ruling on the motion to suppress. The defendant argues that the search of his automobile was illegal because the warrant authorized only a search of his person.

A number of cases have held that an inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant.

In *State v. Carson*, 482 So. 2d 405, 406 (Fla. App. 1985), the court held: "An affidavit may cure a defective search warrant

where the affidavit is (1) incorporated into the warrant by express reference; and (2) physically attached to the warrant." (Citation omitted.)

The court found that the purpose of the attachment requirement is to make

> "the affidavit of probable cause immediately available to the person whose premises are entered, and explains to him at the outset the reason for this intrusion on his privacy. And it avoids any possible claim or suspicion by the citizen involved that the affidavit later located in the official file was inserted after the fact of the search."

(Citation omitted.) *Id.* at 406-07.

In *Bloom v. State*, 283 So. 2d 134, 136 (Fla. App. 1973), the court held:

> Some decisions, however, have permitted an affidavit to cure a defective search warrant where the affidavit and the search warrant are such that they can be reasonably said to constitute one document. Two requirements must be satisfied to reach this result: first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.

In *People v. Fragoso*, 68 Ill. App. 3d 428, 386 N.E.2d 409 (1979), the warrant listed a street address as the place to be searched, but failed to specify the city, county, or state of the search. The court held: "Errors in addresses and, indeed, omissions as to portions of addresses are not *per se* fatal to the validity of a warrant," *id.* at 432, 386 N.E.2d at 413, and that reference to the supporting affidavit "as a factor in determining the validity of a search warrant is clearly permissible where the affidavit is attached to the warrant, incorporated by reference, or as is the case here, where the officer who signed and swore to the affidavit also executed the search warrant." *Id.* at 433, 386 N.E.2d at 413.

In *United States v. Hayes*, 794 F.2d 1348 (9th Cir. 1986), the defendant challenged warrants for a search of his medical offices as unconstitutionally overbroad. The court considered the question of whether affidavits could be considered to

determine whether a search warrant lacked particularity and found that "[A]n affidavit may be relied on to provide the requisite particularity in an otherwise overbroad warrant only 'if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein.' " *Id.* at 1354, citing *United States v. Hillyard*, 677 F.2d 1336 (1982). Additionally, the court held: "The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize." 794 F.2d at 1355.

In *Rickert v. Sweeney*, 813 F.2d 907 (8th Cir. 1987), IRS agents executed a search warrant which authorized them to seize almost anything imaginable—records, papers, documents, ledgers, telephone books, computer hardware, checks, money orders, etc.—for a period from January 1, 1980, to April 30, 1986. The affidavit in support of the warrant was not provided to the appellant at the time of the search because it had been sealed as confidential by the district court. In discussing whether reference can be made to an affidavit to cure a defect in a warrant, the court said:

> An affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant. . . . Sufficient particularity may also be provided even if the affidavit is merely present at the search. . . . In any event, some measure must be taken not only to limit the discretion of the executing officer but also to inform the subjected person what the officers are entitled to take.

(Citations omitted.) *Id.* at 909.

Although the affidavit provided the necessary restrictions on the search, the warrant was held to be invalid because the affidavit was not incorporated in the warrant nor present at the scene of the search.

In *United States v. Bonner*, 808 F.2d 864 (1st Cir. 1986), the warrant was defective because the address of the premises to be searched was omitted. The affidavit, however, contained a detailed physical description of the premises, which, except for the address, appeared in the warrant. The court characterized the defect as a "minor, technical omission," and stated:

> The agents, having previously conducted the surveillance, knew exactly which house they wanted to search, described it accurately and in detail in their affidavit, and searched only that house without delay after the warrant issued. We hold that the Bonner residence was described with sufficient particularity, and although the address was inadvertently omitted, there was no reasonable probability that another premises might be mistakenly searched; thus, the search warrant was valid.

Id. at 866-67. See, also, *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987); *State v. Tramantano*, 28 Conn. Supp. 325, 260 A.2d 128 (1969); *Commonwealth v. Truax*, 397 Mass. 174, 490 N.E.2d 425 (1986); *United States v. Strand*, 761 F.2d 449 (8th Cir. 1985).

In this case the warrant referred to the affidavit, and the affidavit accompanied the warrant and was served on the defendant at the same time as the warrant. Under these circumstances, the affidavit may be used to cure the defect in the warrant resulting from the error of the scrivener.

The facts in this case also establish that the officers acted in good faith in executing the warrant and were not aware of the defect in the warrant until long after the search had been completed.

In *Massachusetts v. Sheppard*, 468 U.S 981, 104 S. Ct. 3425, 82 L. Ed. 2d 737 (1984), the warrant was defective because it failed to particularly describe the items to be seized. The affidavit, however, listed the items to be seized, and the search was limited to the items listed in the affidavit. The U.S. Supreme Court held that the evidence should not be suppressed, even though seized pursuant to a defective warrant, because the officers had acted in good faith in executing what they reasonably believed was a valid warrant. See, also, *United States v. Clement*, 747 F.2d 460 (8th Cir. 1984).

In *United States v. Bonner, supra,* the court held, also, that the evidence seized pursuant to the warrant was admissible under the good faith exception. In that respect the court said:

> In the instant case, the agents also took every step that could reasonably be expected of them. An affidavit was prepared and presented to a neutral magistrate. After

> grammatical corrections were made by the magistrate, who concluded that probable cause was established, the search warrant was issued, with the detailed physical description of the premises taken from the affidavit attached onto the warrant. At this point, the agent had an objective, reasonable basis to believe that the fourth amendment's warrant requirement was satisfied. The responsibility for the inadvertent omission of the address on the warrant itself, must be borne by the magistrate, as the final reviewing authority. And, as the exclusionary rule does not serve to deter the errors of judges, but rather the errors of police officers, this court must conclude that it is inappropriate here. *Leon*, 468 U.S. at 916, 104 S.Ct. at 3418.

808 F.2d at 867.

In this case the trial court found specifically that the officers acted in good faith.

"In determining the correctness of a trial court's ruling on a motion to suppress evidence, the Supreme Court will not overturn the trial court's findings of fact unless such findings are clearly erroneous." *State v. Bonczynski*, 227 Neb. 203, 205, 416 N.W.2d 508, 510 (1987); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Vrtiska,* 225 Neb. 454, 406 N.W.2d 114 (1987). As we view the record, the trial court's findings regarding the validity of the search and the overruling of the defendant's motion to suppress were not clearly erroneous.

The judgment is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. I recognize the existence of the law set out in the majority opinion concerning the ever-increasing extension of the meaning of search warrants by referring to the affidavit of the officer seeking the warrant, and the growing reliance on the "good faith" of the officer, rather than on the words actually signed by an impartial magistrate authorizing an invasion of an individual's rights. I believe, however, that we should go no further than absolutely necessary in approving the extension of the invasions of constitutionally protected privacy. To do otherwise is to handle constitutional rights too cavalierly.

The affidavit herein states that the contraband property sought is

> concealed or kept in, on, or about the following described place or person, to wit: in a 1980 tan to beige Buick Regal, 2 door automobile, lic. # Neb. 70-L871, whose owner is Jeff Klineberg [sic]; *that said property* is under the control or custody of Jeff Klineberg [sic], 709 East 22nd Street South Sioux City, Nebraska; *and is located at his residence.*

(Emphasis supplied.) The officer has sworn that the contraband is located in two different places: in a described car and in a described residence.

The issuing magistrate signed a search warrant, which included the following authorization: "You are therefore commanded, with the necessary and proper assistance, to search the following described place or person, to-wit: Jeff Klineberg [sic], 709 East 22nd Street South Sioux City, Nebraska, which is located at his residence."

The majority opinion lifts the prosecuting authorities up by their own bootstraps to determine the meaning of the search warrant by relying on the understanding of those who served the warrant, not by relying on the language within the four corners of the warrant itself. The magistrate was confronted with conflicting factual allegations that must be deciphered. After being told by sworn affidavit that the contraband was located both in defendant's car and in defendant's residence, the magistrate authorized the search of defendant himself, and included the unnecessary words "which is located at his residence." The trial judge, and the majority in this court, find it necessary to determine that "which" must mean "which vehicle." I submit it is just as accurate to say that "which" refers to "which property" (which the officer has sworn is "located at his [defendant's] residence"). Constitutional rights should not hang by such a grammatical thread.

The majority, without giving weight to what the magistrate signed, tells us that because the officers believe they could search the defendant's car, they may so search. I fear the logical followup to this case is to require that officers seeking a search warrant need only allege any number of facts in the affidavit

and then ignore the specific authorization given to them by an impartial magistrate, and do what the officers want to do. It seems we are relieving the magistrate from intelligently issuing search warrants and reducing the function of the magistrate to a ministerial office.

If officers submitting an affidavit are entitled to rely in every case on all the terms of the affidavit, rather than the terms of the search warrant, such officers are entitled to assume they have far more power than the issuing magistrate and that the magistrate would not dare to issue a lesser warrant and thus limit the authority the officers seek.

If the warrant had been examined and served as written, and assuming no marijuana was found on defendant's person (a fact we do not know from the record), there would be time to process a warrant authorizing the search of the residence or the car in further search for the contraband.

I see no need, in this case, to conclude that the county attorney and the issuing magistrate had no idea what they were doing in preparing and signing documents seeking and authorizing invasion of a person's privacy. If the county attorney did not know what he was seeking where, I see no need to aid him in confusing the magistrate.

I believe the evidence seized under the warrant in question should have been suppressed and that, without such evidence, defendant's guilt has not been proved beyond a reasonable doubt. I would reverse and dismiss.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY L. HOOK, APPELLANT.

421 N.W.2d 456

Filed April 1, 1988. No. 87-522.

Convictions: Appeal and Error. In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on the credibility of the witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province to resolve. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Fredrick F. Neid, for appellee.

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

HASTINGS, C.J.

Defendant has appealed his convictions by a jury of burglary, first degree sexual assault, use of a knife to commit a felony, and attempted robbery. He appeals and assigns as his sole error the claim that the evidence is insufficient as a matter of law to sustain the convictions. We affirm.

The victim testified that sometime after she had retired for the night, she awakened and saw a man standing at the foot of her bed. The man wore a nylon stocking over his face, which he periodically rolled up, allowing the victim to see his face. She further described the clothing which he was wearing, including a pair of dirty work gloves.

She then described in graphic detail how the man put a knife to her throat and asked her for money, and how he pulled the covers from her, began to rub her legs, and told her he wanted to "make love." He forced her onto her back, straddled her, and cut her nightgown with his knife; he placed his fingers in her vagina, moving them in and out several times, and then began oral sex; he unzipped his pants, unsuccessfully attempted to

enter the victim with his penis, and instructed her to take hold of it and put it in, which she refused to do. He then placed the knife at her vagina, threatened to cut her, and demanded Vaseline, which she denied having. The victim was forced down the hallway, where he cut her nightgown again until it fell off, leaving her naked. She was taken into the living room, where he again rubbed his hand between her legs; he touched her on the buttocks. He then took her to the bathroom, where the light was on, and put her in the shower while he searched for Vaseline. Finally, the intruder turned off the bathroom light and returned to the hallway. At this point, the victim broke away, unlocked the front door, and ran outside, screaming for help.

At about this time, George Adams, a resident in the victim's apartment complex, was outside walking his dog before he went to work at 4 a.m. On the stairwell, Adams ran into a young man who was looking for a party he had heard about. Being unsuccessful in helping him, Adams accompanied the young man outside, where three of the man's friends were waiting. The men visited for 10 or 15 minutes. The young men then began to leave. A moment later, Adams heard the victim screaming for help, saw her naked, and then, 2 or 3 seconds later, he heard running footsteps coming toward him from the second floor and observed a man running.

The victim pointed to the man running and said to Adams, "That's him, get him." Adams observed the man pulling something off his face and noticed that he had leather gloves on. Adams, with help from the four young men, who were still in the area, caught this man, who had stumbled on a patio step. This man was the defendant. Adams held him until the police arrived.

The police recovered a "buck" knife from the defendant, which the victim identified as the one or like the one that had been used against her in the crimes committed. Nearby, the police recovered a leg from nylon panty hose, which had been used as a mask, and two leather gloves.

The defendant's truck, in which the police discovered two packs of Camel cigarettes and a pair of work gloves similar to the ones found in the yard, was parked nearby. Two packs of Camel cigarettes were also found in the victim's bedroom. The

victim did not smoke. The police shone a light on the defendant, and the victim identified him as her attacker.

The defendant denied all involvement in the crime. He gave a story of having been engaged in a great deal of drinking, and he had parked his truck and proceeded to walk to get some air. He then forgot where he had parked his truck. He decided to try to find a friend, "Kathy," whom he had not seen in several years. Although it was later determined that no woman by that name lived at that address, he believed that her apartment was at 120 South 38th Avenue, the building where the victim resided. While looking for Kathy's car, he heard loud footsteps, heard someone yelling at him to stop, and became frightened and started running. He agrees that he was caught and held by Adams for the police.

Although the defendant claimed that he was so intoxicated that he could not continue driving, and in fact forgot where he had parked his truck, the police officers who arrested him felt that he was not drunk. Moreover, the defendant, after being handcuffed, showed a police officer where his truck was parked up the street and stated that it belonged to him and he "really needed to get it home."

The victim had several excellent opportunities to observe her attacker and positively identified the defendant as that person. The clothing worn by the defendant, his knife, his work gloves, and the Camel cigarettes, all were convincing circumstances of his guilt. His untruthful statements about his intoxication and the locating of his truck were significant factors.

In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on the credibility of the witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province to resolve. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Lane,* 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Brown,* 225 Neb. 418, 405 N.W.2d 600 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

JOHN E. RUST, APPELLANT, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

421 N.W.2d 458

Filed April 1, 1988. No. 87-662.

Habeas Corpus: Prisoners. In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ of habeas corpus. The writ of habeas corpus is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

John E. Rust, pro se.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellees.

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

PER CURIAM.

John E. Rust was convicted of first degree murder and three counts of shooting with intent to wound, maim, or kill. Rust was sentenced to death on the murder conviction and imprisonment for three concurrent terms of 16 2/3 years to 50 years on the shooting convictions. Rust's convictions and sentences were affirmed on appeal to this court. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

On April 20, 1987, in the district court for Lancaster County, Rust filed a petition for a writ of habeas corpus. In his petition, Rust did not claim that his sentences to death and imprisonment were invalid; rather, he claimed that rule 6(16), ch. 4, of the rules of the Nebraska Department of Correctional Services imposes ex post facto punishment concerning the crimes for which Rust is convicted. Rust alleges that none of the sentences imposed, for the murder conviction or the shooting convictions, contained a provision for solitary confinement. However, rule 6(16), adopted after imposition of sentences on

Rust and during his incarceration in the Nebraska Penal and Correctional Complex to serve those sentences, authorizes solitary confinement of those awaiting the death penalty. Rust argues that such solitary confinement or administrative segregation is a punishment applied retrospectively and is, therefore, a violation of the constitutional prohibition against an ex post facto law, see, Neb. Const. art. I, § 16, and U.S. Const. art. I, § 10; a violation of the double jeopardy clause, see, Neb. Const. art. I, § 12, and U.S. Const. amends. V and XIV; and a violation of the separation of powers. The State filed a motion to quash Rust's petition, alleging that Rust was challenging the conditions of his confinement, which is not a proper function of a petition for a writ of habeas corpus.

The district court made the following determination: "Petitioner is challenging the conditions of his confinement by petition for habeas corpus. This cannot be successfully done in the State of Nebraska." Thereupon, the district court dismissed Rust's petition for a writ of habeas corpus.

Rust's petition relates to conditions of his confinement while incarcerated at the Nebraska Penal and Correctional Complex under the control of the Department of Correctional Services. Rule 6(16), questioned by Rust, pertains to the manner of his confinement as one convicted of first degree murder and awaiting the death penalty.

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

Hawk v. Olson, 146 Neb. 875, 880, 22 N.W.2d 136, 139 (1946).

> The availability of habeas corpus in Nebraska is restricted. . . .
>
> We have consistently held that to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had

> jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held.

Piercy v. Parratt, 202 Neb. 102, 105-06, 273 N.W.2d 689, 691 (1979).

Although Rust suggests that the Department of Correctional Services does not have the authority to make regulations concerning solitary confinement of inmates at the Nebraska Penal and Correctional Complex, in *Board of Regents v. County of Lancaster*, 154 Neb. 398, 403, 48 N.W.2d 221, 224 (1951), this court stated:

> The exercise of a legislatively-delegated authority to make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations, is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consequently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred.

In *Pruitt v. Parratt*, 197 Neb. 854, 856, 251 N.W.2d 179, 181 (1977), we stated:

> This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. In re Application of Dunn, 150 Neb. 669, 35 N.W.2d 673; Swanson v. Jones, 151 Neb. 767, 39 N.W.2d 557. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. § 29-2801, R.R.S. 1943; In re Application of Dunn, *supra*. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. In re Application of Dunn, *supra*.

See, also, *Anderson and Hochstein v. Gunter*, 226 Neb. 724,

414 N.W.2d 281 (1987).

Whatever Rust may view as incorrect about the conditions of his confinement, his complaints under the circumstances are inappropriate subject matter for a petition and proceedings for a writ of habeas corpus. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES M. PETITTE, APPELLANT.

421 N.W.2d 460

Filed April 1, 1988. No. 87-733.

1. **Postconviction.** Generally, an evidentiary hearing on a motion for postconviction relief is not required when the files and records in a defendant's case show that the defendant is not entitled to such relief.
2. **Postconviction: Proof.** One seeking postconviction relief has the burden to establish the basis for such relief.
3. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
4. _____: _____. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
5. **Rules of the Supreme Court: Postconviction: Appeal and Error.** Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits. Any matter which can be determined from the record on direct appeal is considered when ruling on a motion filed pursuant to rule 3B and is not subject to relitigation in an action brought pursuant to the Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).

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

James M. Petitte, pro se.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

PER CURIAM.

James M. Petitte appeals from an order of the district court for Sarpy County, denying Petitte's second "Motion To Vacate And Set Aside Judgment And Sentence" filed pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). After reviewing the files and records in Petitte's case, the district court denied Petitte's motion without an evidentiary hearing because the grounds alleged were known and available at the time Petitte filed a previous motion for postconviction relief.

In 1982, pursuant to a plea agreement, Petitte pled guilty to charges contained in a multiple-count information, that is, robbing a convenience store and a restaurant in Sarpy County, Nebraska. As the result of Petitte's guilty pleas, the district court found Petitte guilty on each of the robbery charges. On February 9, 1982, after a presentence investigation, the district court sentenced Petitte to imprisonment for 10 years on the conviction for robbery alleged in the first count of the information and imprisonment for 5 to 15 years on the conviction for robbery alleged in the information's second count. The sentences ran consecutively. On direct appeal, the convictions and sentences were affirmed by this court without opinion in *State v. Petitte*, 212 Neb. xxiv (case No. 82-164, Sept. 22, 1982), where the assignments of error alleged only that the sentences were excessive.

On December 5, 1984, Petitte's first motion for postconviction relief was denied, and on January 2, 1985, counsel was appointed to represent Petitte in an appeal from such denial. On appeal the judgment of denial was affirmed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). *State v. Petitte*, 219 Neb. xxv (case No. 85-015, May 2, 1985) (motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed).

On July 13, 1987, Petitte filed his second motion for postconviction relief, claiming that the grounds alleged therein were not available and known when he filed his first motion.

Among the grounds asserted in Petitte's second motion are: (1) violation of his right to due process and to effective assistance of counsel in that his trial counsel failed (a) to challenge prejudicial, incorrect, and inflammatory information contained in the presentence investigation report, and (b) to call certain witnesses on Petitte's behalf at the sentencing hearing; (2) violation of his privilege against self-incrimination; and (3) violation of his right to due process and a fair trial by virtue of the sentencing judge's consideration of other offenses for which Petitte was not charged. In denying Petitte's motion, the district court stated:

> Although there are bare allegations that the grounds for the relief sought were not available or known to the defendant at the time he filed his first motion for postconviction relief, all of the factual allegations contained in the motion, the files and records of this case, clearly show that each of the grounds alleged were known and available at the time the earlier postconviction relief was filed.

Generally, an evidentiary hearing on a motion for postconviction relief is not required when the files and records in a defendant's case show that the defendant is not entitled to such relief. *State v. Pribil*, 227 Neb. 397, 417 N.W.2d 786 (1988); *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). Furthermore, one seeking postconviction relief has the burden to establish the basis for such relief. *State v. Pribil, supra*; *State v. Scholl, supra*; *State v. Rivers, supra*. "In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous." *State v. Williams*, 224 Neb. 114, 116, 396 N.W.2d 114, 116 (1986).

> A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987). See, also, *State v. Pribil, supra*; *State v. Rubek*, 225

Neb. 477, 406 N.W.2d 130 (1987) (mere fact that issues are rephrased does not change rule).

"A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion." *State v. Nance*, 227 Neb. 581, 584-85, 418 N.W.2d 598, 601 (1988). See, also, *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983); *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971).

In this case, before he was sentenced, Petitte had the opportunity to review the presentence investigation report under Neb. Rev. Stat. § 29-2261 (Reissue 1979) (now Reissue 1985). In a case where the presentence report concerning an appellant may be material on appeal, an appellant may examine that report pursuant to Neb. Ct. R. of Prac. 3A (rev. 1986). In the direct appeal of Petitte's conviction, Petitte's counsel stated that he had reviewed the report before sentencing was imposed and raised no objections. Any relevant question concerning the accuracy of the presentence report could have been litigated either in Petitte's direct appeal from his conviction, or, under appropriate circumstances, in the proceedings as the result of his first motion for postconviction relief. Likewise, the other grounds for relief set forth in Petitte's second motion, namely, violation of his privilege against self-incrimination and right to effective assistance of counsel, existed and could have been raised when Petitte filed his first motion. Although the judgment of Petitte's sentences and convictions was summarily affirmed by this court pursuant to rule 3B, and his first motion for postconviction relief was subsequently denied,

> relief granted pursuant to rule 3B constitutes the disposition of a direct appeal on its merits, for in such a case this court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered when ruling on a motion filed pursuant to rule 3B and is not subject to relitigation in an action brought pursuant to the Postconviction Act.

State v. Bean, 224 Neb. 278, 279, 398 N.W.2d 104, 107 (1986).

See, also, *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986).

Since the file and record in this case show that Petitte's motion to vacate and set aside his conviction does not raise matters entitling him to relief under the Postconviction Act, the district court properly denied Petitte's motion without an evidentiary hearing. See *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985).

AFFIRMED.

FLOYD R. GILBERT, APPELLANT, V. ARCHBISHOP BERGAN MERCY HOSPITAL, APPELLEE.

421 N.W.2d 760

Filed April 8, 1988. No. 86-091.

1. **Jury Instructions: Appeal and Error.** All instructions must be read together, and if they taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
2. _____: _____. It is the trial court's duty to instruct the jury on the issues presented by the pleadings and supported by the evidence.
3. _____: _____. The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
4. **Verdicts: Appeal and Error.** When a party has secured a judgment from a jury on facts in issue, the party has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
5. **Jury Instructions: Appeal and Error.** It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
6. _____: _____. An instruction which contains a legal basis for its giving, even though it may be redundant, is not generally erroneous unless it unduly emphasizes a particular point or issue.
7. **Negligence: Presumptions.** Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Ronald J. Palagi, Joseph B. Muller, and Martin Spellman, for appellant.

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

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

HASTINGS, C.J.

Plaintiff, Floyd R. Gilbert, has appealed a jury verdict in favor of the defendant, Archbishop Bergan Mercy Hospital, in his medical malpractice lawsuit. The plaintiff assigns as errors the giving by the trial court of only a statutory instruction on the standard of care without additional explanatory instructions and the submitting of instruction No. 9, which "commented on expert testimony, and informed the jury to disregard such testimony." We affirm.

The general rule which is applicable in this case is that all instructions must be read together, and if they taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *Bergman v. Anderson*, 226 Neb. 333, 411 N.W.2d 336 (1987).

On July 6, 1979, plaintiff underwent a lumbar laminectomy at the defendant hospital. The surgery was performed by Dr. Joseph F. Gross. Under the usual practice before an operation, anesthesiologist Dr. Thomas E. Spoonhour positions and pads the patient's arms and hands, although he had no recollection of this special case. A nurse anesthetist, Mary Ann Reinhart, assisted and monitored the plaintiff's condition at 5-minute intervals throughout the surgery, checking for slippage of pads. The ulnar nerves were checked every 30 minutes.

At 11 a.m., the plaintiff was returned to his hospital room, where he suffered extreme pain, back spasms, and tingling in his arms and hands. The nurses on staff were informed of plaintiff's complaints by members of his family. An entry in the nurses' notes, dated July 7 at 5:30 a.m., reflects the complaints. Elbow pads were ordered at 8 a.m. on July 8, and given at 3 p.m. that day. Testimony also showed that both Nurse Reinhart and Dr. Spoonhour knew that a failure to pad and position a

patient could result in ulnar nerve pressure and damage, but no abnormalities in procedure were noted.

Gilbert developed ulnar nerve damage which resulted in his inability to use the last two fingers on each hand and left his hands in a claw-like deformed position. Plaintiff's petition alleged that the hospital staff was negligent in failing to properly protect and monitor his elbows during surgery and in failing to give proper postoperative care. Testimony was adduced by the plaintiff's experts that the standard of care had not been met.

Neurologist Dr. Alfredo Socarras testified that the standard of care was not complied with, feeling that there was a failure at the time of the procedure that caused the disability. Anesthesiologist Dr. Robert Goolsbee stated that he believed the plaintiff did not receive proper care and that the injury was preventable.

Orthopedic surgeon Dr. Larry Glaser admitted that ulnar nerves can be injured by aggravation or agitation of the nerve being stretched over the bony portion of the ulnar notch, even though proper padding is used.

Experts, neurologist Dr. John Goldner and Dr. Glaser, opined that the standard of care was satisfied by the nursing staff. Dr. Goldner felt that the plaintiff's injuries were caused by internal pressure and his prior arthritic condition.

The jury was instructed on the medical standard of care for negligence, without explanatory instructions. The instruction (instruction No. 3) followed Neb. Rev. Stat. § 44-2810 (Reissue 1984) directly, and reads:

> A statute of the State of Nebraska in force at the time involved in this case provides: "Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the

same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances."

By statute, a hospital is a "health care provider" as is an anesthesiologist and a nurse anesthetist.

In this case, the nurse anesthetists and the other nurses in the evidence are employees of the defendant. The Court has determined as a matter of law that the anesthesiologist acted as the agent of the defendant. Accordingly, any acts or omissions of the nurse anesthetists, the other nurses, and the anesthesiologist in attendance on plaintiff are the acts and omissions of the defendant.

Plaintiff contends that because the hospital did not qualify under the Nebraska Hospital-Medical Liability Act (Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1984)), the instruction should have referred to the common-law standard of care, rather than the statutory standard of care.

Plaintiff is also critical of instruction No. 9, which is as follows:

> The fact that an injury occurred or the fact that the plaintiff may have sustained damages, if such fact you find, either or both, taken alone without other evidence, facts and circumstances, is no evidence of negligence. When injuries happen as incidents to reasonable use and reasonable care, the law affords no redress. If any injuries of the plaintiff were not caused by negligence of the defendant, plaintiff would not be entitled to recover for such.

Plaintiff did not object to the giving of either of these instructions at the instructional conference.

Plaintiff did tender his requested instructions Nos. 7, 8, and 9, which were as follows:

Requested instruction No. 7:

> A patient is entitled to an ordinarily careful and thorough examination such as the circumstances, the condition of the patient, and the health care provider's opportunities for examination will permit, and, while the health care provider does not insure the correctness of the

> diagnosis, every health care provider is required to use reasonable skill and care in determining through examination the condition of the patient and the nature of the ailment, and the health care provider is liable for a failure, due to want of the requisite skill or care to examine the condition of the patient, with resulting injury or detriment to the patient.

Requested instruction No. 8:

> You are instructed that even though a nurse or other health care provider may have used his/her best judgment in treating a patient, they are not relieved of a charge of negligence against them if it is shown that the judgment used was not such judgment as is possessed and used by nurses or health care providers of ordinary learning, skill, and ability in the community, or similar communities, in which the nurse or health care provider is practicing.

Requested instruction No. 9:

> A hospital must guard against not only known physical and mental conditions of its patients, but must also guard against such conditions as it should have discovered by the exercise of reasonable care.

It is the trial court's duty to instruct the jury on the issues presented by the pleadings and supported by the evidence. *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

> " 'In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.' "

Id. at 568, 407 N.W.2d at 174, quoting *Ellis & Guy Advg. v. Cohen*, 219 Neb. 340, 363 N.W.2d 180 (1985). See, also, *Webber v. City of Omaha*, 190 Neb. 678, 680, 211 N.W.2d 911, 913 (1973): "He is now barred from contending that their submission was erroneous."

Instruction No. 3 is said to be inadequate because it (1) failed to instruct the jury concerning the proper standard of care and

(2) was not supplemented by explanatory instructions. Plaintiff asserts that the common-law standard of care should have been given rather than the statutory standard of care because the defendant hospital did not qualify under the terms of the Nebraska Hospital-Medical Liability Act.

Section 44-2821(1) directs that

> [a]ny health care provider who fails to qualify under the Nebraska Hospital-Medical Liability Act shall not be covered by the provisions of such act and shall be subject to liability under doctrines of common law. If a health care provider shall not so qualify, the patient's remedy shall not be affected by the terms and provisions of the Nebraska Hospital-Medical Liability Act.

Plaintiff's argument maintains that a common-law standard should have been given. Yet, in his brief, plaintiff states with respect to § 44-2810: "The language of that section is language which has been utilized by this Court in numerous cases, and the enactment of that section did not change or alter the basic standard of care owed by health care providers in Nebraska." Brief for Appellant at 11. Thus, the logical extension of plaintiff's argument yields that no prejudice has resulted from the standard of care instruction given because the statutory standard is no different than the common-law standard. The statutory standard can hardly be said to be misleading.

Even if there was error in that the hospital did not in fact qualify under the act,

> We have frequently held that error without prejudice is not ground for reversal, see *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984), and that when a party has secured a judgment from a jury on facts in issue, the party has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured, *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983). See, also, *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978); Neb. Rev. Stat. § 25-853 (Reissue 1985).

Hennis v. O'Connor, 223 Neb. 112, 121, 388 N.W.2d 470, 476-77 (1986).

As previously stated, plaintiff offered three so-called

explanatory instructions which the court refused to give. Requested instruction No. 7 relates only to a failure to diagnose. As correctly pointed out by the defendant, such an issue was not raised by the pleadings nor submitted to the jury.

Plaintiff's requested instruction No. 8, pertaining to the standard of care of nurses, was simply redundant to the court's instruction No. 3, which was given.

Finally, in this regard, plaintiff's instruction No. 9 was unnecessary because it dealt with the hospital's duty to guard against both known and discoverable conditions, whereas there was no question but that the evidence disclosed that defendant's agents were in fact aware of these duties. Furthermore, instruction No. 3 given by the court defined the duties of a health care provider to be to exercise reasonable and ordinary care, skill, and diligence to the same degree that such providers in the community would ordinarily devote to patients under like circumstances. The question was a fact question as to whether defendant in this case exercised such care, and that issue was decided in favor of the defendant.

All of the instructions given to the jury must be read together. There is no prejudicial error if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues. *Bergman v. Anderson*, 226 Neb. 333, 411 N.W.2d 336 (1987). See, also, *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). The instructions at hand fairly submitted the case to the jury. Further, it is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

Plaintiff's complaint as to instruction No. 9 is that it directed a verdict against him and was prejudicially erroneous. The complete instruction reads:

> The fact that an injury occurred or the fact that the plaintiff may have sustained damages, if such fact you find, either or both, taken alone without other evidence, facts and circumstances, is no evidence of negligence. When injuries happen as incidents to reasonable use and reasonable care, the law affords no redress. If any injuries

> of the plaintiff were not caused by negligence of the defendant, plaintiff would not be entitled to recover for such.

Plaintiff is of the opinion that the proposition of law stated in this instruction is an abstract principle which has no application to this case because plaintiff had established a prima facie case. Further, plaintiff finds no legal basis for the instruction in NJI or other sources. Plaintiff stresses that the instruction, in effect, told the jury to disregard the testimony of plaintiff's experts. This is incorrect. The jury was properly instructed regarding expert testimony via instruction No. 7, which states:

> Certain witnesses have been called who testified as expert witnesses. You are not required to take the opinions of experts as binding upon you, but they are to be used to aid you in coming to a proper conclusion. Their testimony is received as that of persons who are learned by reason of special investigation, study, or experience along lines not of general knowledge, and the conclusions of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case.
>
> In determining the weight to be given such testimony you should consider, among other things:
>
> 1. The education, training, experience and knowledge of the expert with respect to the matters about which he testified.
> 2. The reasons given for his opinion.
> 3. The sources of his information.

It must be remembered that instructions are to be reviewed and considered as a whole.

In considering them as a whole it is evident that instruction No. 9 is quite similar to instruction No. 4, which is not challenged. Instruction No. 4 states:

> Before the plaintiff can recover against the defendant on his petition, the burden is upon the plaintiff to prove by a preponderance of the evidence each and all of the following propositions:
>
> (1) That defendant hospital was professionally

negligent in that it departed from the standard of care as defined in Instruction No. 3, in one or more of the particulars of negligence set forth in Instruction No. 2;

(2) That such professional negligence, if any, of the defendant was a proximate cause of injury to plaintiff;

(3) That as a direct and proximate result of said negligence and injury the plaintiff sustained damages; and

(4) The nature, extent, and amount of the damages thus sustained by plaintiff.

If the plaintiff has failed to establish any one or more of the foregoing numbered propositions by a preponderance of the evidence your verdict will be for the defendant. On the other hand, if the plaintiff has established by a preponderance of the evidence all of the above numbered propositions, then your verdict will be for the plaintiff.

This instruction (instruction No. 4) lists all the elements of the tort of negligence and states that each needs to be found by a preponderance of the evidence to support a cause of action, i.e., damage alone without negligence will not support a verdict for the plaintiff. Instruction No. 9 is simply another way of stating instruction No. 4, which correctly stated the law and is in direct accord with NJI 2.01B, labeled "Burden of Proof." A sufficient legal basis exists for instruction No. 9, and although it may be redundant, it is free from error unless the court finds that it unduly emphasized the burden of proof.

In essence, instruction No. 9 simply states that an injury, in and of itself, is not evidence of negligence. Nebraska case law clearly supports such an instruction. In *Wees v. Creighton Memorial St. Joseph's Hospital*, 194 Neb. 295, 302, 231 N.W.2d 570, 575 (1975), this court stated: "Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence."

The defendant's position is supported by *Del Vecchio v. Lund*, 293 N.W.2d 474 (S.D. 1980), and *Orwick v. Belshan*, 304 Minn. 338, 231 N.W.2d 90 (1975), in propounding that instruction No. 9 has to do with allocation of the burden of proof. In *Orwick*, the court stated that the mere fact of an injury instruction routinely given in negligence cases was a precautionary one which has to do with the burden of proof.

Absent involvement of the doctrine of res ipsa loquitur, the defendant in a negligence action is entitled to an instruction that the mere fact that an accident has happened does not mean that anyone has been negligent. See, also, *Jones v Porretta*, 428 Mich. 132, 405 N.W.2d 863 (1987); *Zoterell v. Repp*, 187 Mich. 319, 153 N.W. 692 (1915); *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967). The plaintiff in the present case has not invoked the doctrine of res ipsa loquitur.

Del Vecchio cited *Orwick*, when it considered the propriety of giving a "mere fact of an accident" instruction. The instruction read: " 'The mere fact that an accident happened and a party sustained damages because of such accident, in and of itself, does not give rise to any inference that it was caused by negligence of anyone.' " 293 N.W.2d at 476 n.2. The court determined the *Orwick* analysis correct and found nothing objectionable with the instruction upon retrial.

The giving of instruction No. 9 is directly sustained by Nebraska law. It is apparent that instruction No. 9 was meant to place the burden on the plaintiff to prove that the defendant's negligence was the proximate cause of the injury. By the instruction, the court merely told the jury what it had already stated in instruction No. 4 (burden of proof) and did not offend instruction No. 7 (experts).

The judgment of the district court is affirmed.

AFFIRMED.

EDWARD BENDER AND SONS, A PARTNERSHIP, APPELLANT, V. ERICSON LIVESTOCK COMMISSION COMPANY, INCORPORATED, A NEBRASKA CORPORATION, APPELLEE.

421 N.W.2d 766

Filed April 8, 1988. No. 86-182.

1. **Pleadings: Actions.** Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery.

2. **Warranty: Words and Phrases.** A warranty is an assurance, such as a positive statement, that a subject factually exists as declared, asserted, promised, represented, or affirmed.
3. **Words and Phrases.** Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact.
4. **Warranty: Words and Phrases: Actions.** A misrepresentation and a warranty are not necessarily mutually exclusive and may arise from the same representation on which a cause of action is based.
5. **Motions to Dismiss.** A party against whom a motion to dismiss is directed is entitled to have all such party's relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.
6. **Directed Verdict.** A court cannot decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
7. **Motions to Dismiss: Appeal and Error.** When a trial court sustains a motion to dismiss at the close of a plaintiff's case in chief, the Supreme Court must treat as admitted the truth of all relevant evidence favorable to the plaintiff and must give the plaintiff the benefit of all permissible inferences deducible from the properly admitted evidence to determine whether a prima facie case has been established.
8. **Auctions: Principal and Agent.** An auctioneer, in selling property for another at auction, is the agent of the seller, and his rights and liabilities, in the absence of an applicable statute changing them, are governed by the general principles of the law of agency.
9. **Principal and Agent: Liability.** An agent can be held liable if the agent makes some representation or performs some act on the agent's own responsibility without authorization from the principal.
10. **Fraud.** To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.
11. **Principal and Agent: Liability.** An agent may be held liable for the agent's conduct, such as misrepresentation of a material fact, during a transaction on behalf of the principal.

Appeal from the District Court for Wheeler County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Charles R. Maser, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

SHANAHAN, J.

Edwin Bender and Sons, a partnership (Bender), sued Ericson Livestock Commission Company, Incorporated, concerning the condition of consigned cattle sold by auction at that sale barn. From a directed verdict for Ericson, Bender appeals. We reverse and remand for a new trial.

Edwin Bender, a farmer-livestock feeder with more than 30 years' experience, was a partner with his sons in the cattle feeding business. By mail, Edwin received a notice of the "Fancy Sandhill Cattle Auction" to be conducted by Ericson at its sale barn on August 28, 1982. The prospective auction at Ericson's barn included sales of heifers, such as 300 head consigned by Dan Morgan and which, according to the sale advertisement or notice, were "Gtd open," that is, guaranteed open. An open heifer is not pregnant. To a feedlot operator, pregnant heifers are undesirable as feeder cattle. Obviously, in a cattle feeding operation, the objective is to convert feed into weight-gain in a feedlot heifer. However, if the heifer is pregnant, the feed becomes prenatal nutriment for the pregnant heifer and, in turn, for her unborn calf. Consequently, some of the feed's cost goes unrecovered in the form of the calf, which has little value in an operation intended to finish cattle for market within 5 to 6 months after purchase for the feedlot. On termination of pregnancy, by birth or abortion, a heifer suffers stress, resulting in loss of appetite and weight loss. A pregnant heifer, which has gained weight for market, may have difficulty in giving birth to her calf, another stressful situation, or even die during a birth complicated by her fattened condition. Someone, either the feedlot operator or a veterinarian, may have to assist in the calf's birth by use of a calf-puller, a device to manually extract or "pull" the calf from the pregnant heifer.

Edwin Bender and his wife, Angeline, with their son Tim and

his future wife, attended Ericson's August 28 sale. In Ericson's barn, immediately above the gate through which cattle entered the sale ring, was a sign: "All Guarantees Between Buyer and Seller." On behalf of the partnership, Edwin bought 100 head of Morgan heifers and was interested in a further purchase of approximately 100 head of steers. While Benders were waiting for steers to be brought into the ring, a "bunch of heifers" entered the ring. Heifers were selling for about $6 to $7 per head less than steers. Prompted by the heifer price, Edwin Bender "stopped the auctioneer to verify that they [the heifers] were open." Prior to the auction, Ericson had not disseminated any information or made any representation concerning the heifers. Edwin "stood up and hollered at the auctioneer, 'Are these heifers guaranteed open?' " The auctioneer responded: "Yes, absolutely, there is an affidavit in the office." Relying on the auctioneer's response, Edwin bid on and bought the heifers. Without the auctioneer's representation of the heifers' condition, Bender would not have bought the cattle.

When Edwin went to Ericson's office to pay for the heifers purchased at auction, he gave his check for the cattle and received an unsworn document:

> Heifer Guarantee Contract
>
> I, Vernon Moody, on this 28 day of Aug, 1982, do hereby guarantee 136 head of heifers open. If any of said heifers are found to be with calf, I will refund three (3) dollars per hundred on the purchase price and will pay this refund on the purchase weight of said heifers, sold through Ericson Livestock Commission Co., Inc., Ericson, Nebraska, and purchased by Ed Bender, Address Humphrey Ne.
>
> Proof that heifers were with calf at time of sale must be in the form of a notarized certificate by a licensed veterinarian and must be brought to my attention within a period of 90 days from purchase date. Said heifers must be identified by brand and held ten days to permit inspection by seller.
>
> Brand J3 LH
>
> Signed /s/ Vernon D. Moody
>
> All Guarantees Are Between Consigner and Buyer

Shortly after their arrival at the Bender feedlot, the heifers were put on full feed. In February 1983, Edwin noticed that the Moody heifers "started [to] bloom," "were calfy . . . with calf," and manifested other recognized signs of bovine pregnancy. On February 19, Angeline Bender called the Ericson sale barn, told barn personnel that the Moody heifers were pregnant, and was instructed by the Ericson barn to contact the seller, Moody. Thereafter, the heifers in question started to calve. Many of the heifers experienced difficulty in giving birth, necessitating assistance and attendance by a veterinarian. Some heifers and calves died. Later, when Bender sold the heifers, the sale price was between $2 and $3 per hundredweight less than would have ordinarily been obtained because the heifers had had calves or were pregnant. Therefore, in connection with the pregnant heifers purchased at the Ericson sale barn, Bender contracted veterinarian expenses, received a reduced price on sale of the heifers, and incurred time and expense which would not have been otherwise required if the heifers had been open when purchased by Bender.

In its petition, Bender alleged that, when it purchased the cattle in question, Ericson expressly warranted that the Moody heifers were open, whereas the heifers were pregnant, and that Ericson misrepresented the pregnant heifers as open, which resulted in Bender's eventual damages. Ericson denied any misrepresentation and also alleged that it had made no "warranties" except those authorized by the consignor, Moody, and that, in accordance with a prevailing "custom and practice" in the area, "auction barns and livestock commission companies . . . never undertake to guarantee the animals sold in any manner whatsoever, including that heifers are open." Further, Ericson alleged that Bender received "a heifer guarantee contract" from the seller, Moody, and that all guarantees were between the "consignor and buyer."

In light of the evidence, set forth above, Ericson moved for a directed verdict at the conclusion of Bender's case. The district court concluded:

> The Plaintiff [Bender] bought the cattle subject to an "affidavit in the office". This affidavit was in fact a heifer guarantee contract, which was delivered to the Plaintiff at

> the time they paid for the cattle. The Plaintiff knew they had received the contract, accepted the same and are bound by the terms of the contract. In other words, they received what the auctioneer told them they would receive, and they accepted it.
>
> Therefore, there being no question of fact for the jury to decide, the Defendant is entitled to the directed verdict as a matter of law.

Accordingly, the court directed a verdict in favor of Ericson.

Among its assignments of error, Bender contends that the district court committed reversible error in sustaining Ericson's motion for the directed verdict.

As we construe Bender's petition, the cause of action is based on Ericson's statement as an express warranty and a misrepresentation of a material fact. "Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery." *Waite v. Samson Dev. Co.*, 217 Neb. 403, 407, 348 N.W.2d 883, 886 (1984). See, also, *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983).

A warranty is an assurance, such as a positive statement, that a subject factually exists as declared, asserted, promised, represented, or affirmed. See, *Long v. Carpenter*, 154 Neb. 862, 50 N.W.2d 67 (1951); *McGuire v. Thompson*, 152 Neb. 28, 40 N.W.2d 237 (1949). Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact. See, *Caruso v. Moy*, 164 Neb. 68, 81 N.W.2d 826 (1957); *Pasko v. Trela*, 153 Neb. 759, 46 N.W.2d 139 (1951). A misrepresentation and a warranty are not necessarily mutually exclusive and may arise from the same representation on which a cause of action is based. See *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal. 2d 501, 86 P.2d 102 (1939). "A party against whom a motion to dismiss is directed is entitled to have all such party's relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence." *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 449, 412 N.W.2d 56, 73-74 (1987).

A court cannot decide an issue as a matter of law unless the

facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. See *Rahmig v. Mosley Machinery Co., supra.* "Thus, in a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question." *Rahmig v. Mosley Machinery Co., supra* at 449, 412 N.W.2d at 74.

> When a trial court sustains a motion to dismiss at the close of a plaintiff's case in chief, the Supreme Court must treat as admitted the truth of all relevant evidence favorable to the plaintiff and must give the plaintiff the benefit of all permissible inferences deducible from the properly admitted evidence to determine whether a prima facie case has been established.

Gordman Properties Co. v. Board of Equal., 225 Neb. 169, 177, 403 N.W.2d 366, 371-72 (1987).

Bender's claim has two important aspects: the type of sale at which Bender purchased the cattle, and Ericson's role in making the statement or representation concerning the condition of the heifers.

Bender bought the heifers in a sale by auction, which was complete with the "fall of the hammer" at the sale ring. See Neb. U.C.C. § 2-328 (Reissue 1980) (sale by auction). Therefore, if sale of the Moody heifers was complete at the fall of the auctioneer's hammer, whether Ericson's representation induced Bender to purchase the cattle must be determined from the facts preceding the hammer's fall, which completed the auction sale. The district court concluded that Bender's bid was induced by the "Heifer Guarantee Contract" in Ericson's office, a document delivered to Bender on payment for the auctioned heifers. We cannot agree with the district court's conclusion and most assuredly disagree that Benders "received what the auctioneer told them they would receive." The Bender bid was an induced response to the auctioneer's representation that the heifers were not pregnant. Without that representation, Bender would not have bought the heifers. The evidence establishes that the auctioneer's positive assurance and categorical representation concerning the heifers' "open" condition caused the "fall of the hammer," not the auctioneer's

mention of some document with unspecified contents. What the auctioneer represented as the heifers' condition and what Bender received as the result of the sale induced by the auctioneer's representation are two different and diametrically opposed facts. Having determined the nature of the sale and the inducement to Bender for purchase of the heifers, we examine Ericson's role regarding its statement or representation concerning the heifers' condition. "An auctioneer, in selling property for another at auction, is the agent of the seller, and his rights and liabilities, in the absence of an applicable statute changing them, are governed by the general principles of the law of agency." 7 Am. Jur. 2d *Auctions and Auctioneers* § 60 at 412 (1980).

There is no doubt that Edwin Bender realized that Ericson, in conducting the auction, was acting as an agent in the sale of the Moody heifers, although the identity of the seller was not known by Bender before the sale. From the sign at the sale ring, "All Guarantees Between Buyer and Seller," one might reasonably infer that Ericson unambiguously disclaimed any involvement in effecting "guarantees" concerning auctioned cattle and might further infer Ericson's acknowledgment that any "guarantees," as representations of the condition of auctioned cattle, were not part of Ericson's activity in conducting an auction for sale of consigned cattle. On the basis of those inferences from the sign's wording, the necessary conclusion would be that Ericson, as agent for the sale, did not have authority to make any "guarantees" or representations concerning cattle auctioned in the sale ring.

In *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980), this court reviewed a buyer's cause of action against a realtor, based on the realtor's express warranties concerning the construction and fitness of the house purchased by Suzukis, and stated:

> It is generally recognized that "[a]s a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent." 3 C.J.S. *Agency* § 361 (1973). . . .
>
> However, an agent can be held liable if he makes some representation or performs some act on his own

> responsibility without authorization from his principal. See 3 C.J.S. *Agency* § 362 (1973). But "[t]his rule is intended to apply only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction . . . ." *Id.*
>
> The express warranties alleged and evidence presented do not place Gateway in excess of the authority of the agency and, therefore, the granting of summary judgment for Gateway on Suzukis' third cause of action [warranties] was proper.

207 Neb. at 566-67, 299 N.W.2d at 766.

If Ericson's representation about the heifers' condition was made outside its authority in the auction or without authorization from Moody, Ericson, acting on its own rather than as agent for a principal, may be liable as the result of its warranty that the heifers were "open." The postauction "Heifer Guarantee Contract," which in essence is a limitation of damages recoverable from Moody, is a sorry substitute for the auctioneer's categorical representation or warranty just before the hammer fell to complete the auction sale of the Moody heifers. Bender is left with no claim based on an unrestricted warranty against the heifers' pregnancy—which induced Bender's purchase of the cattle, unless Ericson may be accountable for the "open" warranty without Moody's authorization. Under present Nebraska law, *Suzuki v. Gateway Realty, supra*, the evidence adduced in Bender's case presented questions of fact for the jury.

Even if one were to conclude that the sign's wording, "All Guarantees Between Buyer and Seller," does not negate Ericson's authority to make any warranty concerning the heifers' condition, there remains the issue concerning Ericson's fraud by misrepresentation of a material fact.

To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the

intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

Willard v. Key, 83 Neb. 850, 120 N.W. 419 (1909), involved a misrepresentation in the sale of land. Key owned the land. Carrig was Key's agent for the sale to Willard. In negotiations for the sale, Carrig stated that the tract contained 352 acres, whereas, in fact, there were 335 acres in the parcel to be sold. Carrig did not know the number of acres in the subject tract, but relied on information received from Key. When the shortage of acres was discovered after purchase of the land, Willard sued Carrig and Key. Summons was served on Carrig in Platte County, where he resided, and on Key in Merrick County, where he resided. From a judgment for Willard, Key appealed and contended that he could not be compelled to defend the fraud action in Platte County because Carrig, although a Platte County resident, was not a proper defendant joined with Key in the action. In finding that the district court for Platte County had jurisdiction over the parties and affirming the judgment for Willard, this court expressed:

> Carrig was made a party and properly served in Platte County, and, if plaintiff was not entitled to recover against him, the judgment against the appellant must be set aside for the want of jurisdiction, without regard to the merits of the case. The question therefore is: Did the ignorance of Carrig as to the number of acres in the tract of land, which he was selling for his codefendant, excuse him from liability to the plaintiff? The evidence shows that he told the plaintiff that there were 352 acres, by a positive statement of the fact, and without communicating to the plaintiff that his only source of information was the appellant. Relying upon this and like statements of the appellant, the plaintiff purchased the land in controversy.
>
> We are of the opinion that Carrig's ignorance of the untruthfulness of his representations does not excuse him from liability. In *Phillips v. Jones*, 12 Neb. 213, it is said: "And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular

> matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief." The principle there announced has been adhered to by this court in every case where that question has been before it.

83 Neb. at 851-52, 120 N.W. at 419.

Thus, as recognized in *Willard v. Key, supra*, an agent may be liable for the agent's fraudulent conduct, such as a misrepresentation of a material fact, during a transaction on behalf of the principal. Cf. *Morfeld v. Bernstrauch*, 216 Neb. 234, 239, 343 N.W.2d 880, 883 (1984): " 'An agent is personally liable to third persons for [the agent's] misfeasances and positive wrongs. . . .' " (Quoting from *Kuchar v. Bernstrauch*, 192 Neb. 225, 219 N.W.2d 764 (1974).)

Bender's evidence showed that (1) Ericson represented the heifers to be open, a material fact inducing Bender's eventual bid and purchase of the heifers; (2) the heifers were pregnant; (3) without knowledge concerning the truth of its representation, Ericson represented that the heifers were open; (4) Ericson intended that Bender would rely on the heifers' represented condition as an inducement to bid on and purchase the heifers; (5) in purchasing the heifers, Bender may have reasonably relied on the auctioneer's representation that the heifers were not pregnant; and (6) as the result of the purchase induced by Ericson's misrepresentation, Bender was damaged. Whether Ericson's representation of the heifers' condition was made recklessly under the circumstances and whether Bender reasonably relied on Ericson's representation were jury questions.

On the record presented, Bender was entitled to have the questions about Ericson's warranty and misrepresentation of a material fact submitted to the jury. The district court's directing a verdict on those questions is reversible error. Consequently, the district court's judgment is reversed, and this matter is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION, APPELLEE, V. MEDICAL CENTER, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLANTS.
RAYMOND L. LEMKE, APPELLANT, V. BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION, APPELLEE.
WILLIAM VENARD ET AL., APPELLEES, V. YALE F. TRUSTIN ET AL., APPELLANTS.
YALE F. TRUSTIN ET AL., APPELLANTS, V. WILLIAM VENARD ET AL., APPELLEES.
BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION, APPELLEE, V. TRUSTLAND COMPANY, A PARTNERSHIP, ET AL., APPELLANTS.

421 N.W.2d 773

Filed April 8, 1988. Nos. 86-381, 86-382, 86-383, 86-384, 86-385.

1. **Final Orders.** A conditional order of dismissal to become effective in the future upon failure of a condition is wholly void as it does not perform in praesenti.
2. **Courts: Judgments.** Although the clerk of the district court is authorized to spread upon the court journal the proceedings had and relief granted by the court, and to that extent is responsible for entry of the judgment, such clerk has no authority to perform the judicial function of rendering a judgment.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Craig A. Knickrehm of Nelson & Harding, and Bruce H. Brodkey of Batt & Brodkey, for appellants.

Walter M. Calinger, for appellees.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

HASTINGS, C.J.

Appellants (hereinafter defendants) in these five cases have appealed from an order of the district court which vacated a previous purported order to dismiss the cases. We affirm.

Two of these cases have been pending in excess of 8 years. Summary judgment was entered in favor of the plaintiffs in June of 1981. We reversed and remanded with directions to permit the defendants to file amended answers and setoffs. See *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982). The very little progression subsequent to

the remand included discovery by way of plaintiffs' taking of Raymond L. Lemke's deposition on May 5, 1983.

Various progression letters were issued by the court administrator of the district court during 1984 and 1985. On November 12, 1985, plaintiffs' counsel was permitted to withdraw from the case and present counsel entered his appearance.

On November 19, 1985, a hearing was held on the defendants' motions to dismiss for lack of prosecution. The following entry was made: "This entry applies to 768/76, 823/210, 810/183, 823/86. Certif[icate] of readiness will be filed w/in 120 day [sic] or this case and those referred to above, by this entry, are dismissed (SAD)."

On February 24, 1986, plaintiffs filed various motions requesting that they be allowed to amend their pleadings, have a referee appointed, and consolidate for trial. On March 3, 1986, the defendants filed a motion to compel answers to interrogatories and a motion to require production of documents.

A hearing on plaintiffs' motions was originally scheduled for March 18, 1986 (within 120 days of the November 19, 1985, order), but defendants agreed to attempt to reschedule that hearing and consolidate it with one originally scheduled for March 13, 1986. Plaintiffs' attorney found it necessary to be out of town at that time, so the March 13 hearing had to be rescheduled. The court's bailiff was contacted by the secretary for plaintiffs' counsel, but the court was no longer available for March 18. The first available date was April 22, 1986.

The cases were all dismissed on March 20, 1986, by entry of a dismissal by the clerk of the district court, apparently pursuant to rule 4K of the Rules of Practice for the Fourth Judicial District (rev. July 1985).

Rule 4K provides in pertinent part that

> in all civil cases not certified as ready for trial within the time frames prescribed by this rule, the court administrator shall give notice by mail to each counsel and/or each party that, within thirty (30) days from the date of the notice, the case must be certified as ready for trial, unless the Court by order extends the filing of the

> certificate to a specific date. If no certificate is filed within the prescribed time, the case will stand dismissed for lack of prosecution and the Clerk *shall* enter the dismissal. . . .

(Emphasis supplied.) Counsel for the parties were notified of the dismissal the following day.

On April 16, 1986, a hearing was held on plaintiffs' consolidated motion to reinstate, filed April 10, 1986. The court held an in-chambers conference with counsel and stated:

> Okay, my ruling is this. I am going to vacate my docket entry of November 19th. I am looking you in the eye and I am telling you that the spirit and specific language have now merged into this docket entry, and the docket entry will be the case will be certified for trial within 33 days or it will, by this entry, stand dismissed. And I want you, before you leave, to get a time for the trial of the case.

The subsequent docket entry, dated Friday, April 18, 1986, reads:

> 768-075 BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION VS. MEDICAL CENTER, LTD., A NEBR. LIMITED PARTNERSHIP, ET AL
>
> Order dismissing case and also cases 768/76, 823/210, 810/183, 823/086 is vacated and these cases reinstated. Cases mentioned above will be certified for trial within thirty three (33) days or each will, by this entry, be dismissed.
>
> STEPHEN A. DAVIS, JUDGE

Defendants argue that the order of dismissal which was vacated was the one entered on November 19, 1985. Therefore, because that action was taken out of term, it may not stand, due to plaintiffs' failure to bring themselves within the provisions of Neb. Rev. Stat. § 25-2001 (Reissue 1985). However, we have held as recently as *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987), that a conditional order such as that entered on November 19 is wholly void as it does not "perform in praesenti."

It is also suggested that the "order" spread on the record by the clerk on March 20 was a valid order and that the court abused its discretion in vacating that order. The clerk of the

district court does have certain powers, as specified by Neb. Rev. Stat. § 25-2214 (Reissue 1985) as follows:

> The clerk of . . . the [court] shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes and by the common law. In the performance of his duties he shall be under the direction of his court.

However, neither that statute nor the rules of the court are sufficient to confer judicial powers upon a clerk.

Neb. Rev. Stat. § 25-1301 (Reissue 1985) provides as follows:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
>
> (3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.

All that the clerk did in this case was to attempt to spread on the journal the purported judgment entered by the court on November 19, which, as we have held, was a void order.

The judgment of the district court is affirmed.

AFFIRMED.

LINDA J. LOWRY, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

421 N.W.2d 775

Filed April 8, 1988. No. 86-425.

1. **Summary Judgment.** On ruling on a motion for summary judgment, a court is obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom.

2. _____. 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. **Insurance: Fraud: Pleadings: Proof.** In order for a misrepresentation by concealment to constitute a defense to an action on a contract of insurance, the insurer must plead and prove (1) that the misrepresentation was made knowingly with intent to deceive, (2) that the insurer relied and acted upon such statement, and (3) that the insurer was deceived to its injury.
4. **Insurance: Fraud.** A misrepresentation is material if the insurer would not have issued the policy had it been aware of the true facts.
5. _____: _____. An insurer need not make an independent investigation and may rely on the truthfulness of the answers in an application for insurance as long as there was nothing to put it on notice of the falsity of any of the answers.
6. _____: _____. An insurer is injured if it accepts an insured it normally would not have accepted but for the misrepresentation.
7. _____: _____. When an applicant for insurance makes an untrue statement with respect to a material fact peculiarly within the applicant's knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude the false statement was made knowingly with intent to deceive.
8. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right; it may be established by acts and conduct from which an intention to waive may reasonably be inferred.

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

Robert F. Bartle and Tim O'Neill of Nelson & Harding, for appellant.

Patrick W. Healey of Healey, Wieland, Kluender, Atwood & Jacobs, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

CAPORALE, J.

Plaintiff-appellant, Linda J. Lowry, brought this action to recover a death benefit under a binder of automobile insurance issued by defendant-appellee, State Farm Mutual Automobile Insurance Company, to her and her deceased husband, James M. Lowry. State Farm moved for summary judgment, claiming it had rescinded the binder ab initio because in applying for the

insurance, plaintiff's decedent misrepresented his driving history. Plaintiff appeals from the sustainment of that motion, claiming the district court erred in (1) determining that an insurer may unilaterally rescind a binder extending automobile insurance coverage, (2) determining as a matter of law that plaintiff's decedent made material misrepresentations in applying for the insurance, and (3) failing to determine that, by its dilatory and inconsistent conduct, State Farm waived any right it might otherwise have had to rescind the binder. We reverse and remand for further proceedings.

On January 3, 1985, plaintiff's decedent applied for automobile insurance coverage on two vehicles. As part of the application process, he was asked whether, during the last 5 years, the "applicant, any household member, or any regular driver: a. Had license to drive or registration suspended, revoked or refused? b. Had an accident or sustained a loss? c. Been fined, convicted or forfeited bail for traffic violations?" Decedent responded that he had received one citation for a speeding violation in April 1982. In reliance upon that response and the payment of the first month's portion of the 6-month premium, State Farm immediately bound coverage.

On January 9, 1985, the decedent, through no fault of his own, was killed while driving one of the insured vehicles.

As part of its underwriting investigation, State Farm, on January 11, 1985, obtained a report from the Nebraska Department of Motor Vehicles which revealed that decedent had speeding convictions in October 1981 and December 1982, a driving while intoxicated conviction in March 1983, and a stop sign violation conviction in June 1983. As a result of the intoxication conviction decedent paid a $200 fine, was placed on probation for 6 months, and had his driver's license "taken for 60 days." It also appears that at some time decedent had obtained "high risk" insurance coverage.

On January 23, 1985, plaintiff received a notice directed to her and the decedent advising that the second portion of the premium would become due on February 3, 1985. Plaintiff made timely payment of this portion of the premium. As noted earlier, the premium was established for a 6-month period of coverage; however, decedent had asked for and was granted the

privilege of paying that premium in monthly installments, for which privilege State Farm added a service charge. Such notices are prepared 13 days before the date the premium is due and are mailed automatically even during the period State Farm views an application for coverage to be under consideration for acceptance or rejection.

On February 4, 1985, a State Farm claim committee reviewed the matter and caused a letter to be mailed to plaintiff on February 12, 1985, advising her that because of decedent's "material misrepresentation" concerning his driving record, State Farm was "rescinding" and would "treat as void from inception any and all insurance contracted for . . . ." At the same time, State Farm returned to plaintiff all sums which had been paid on the premium.

The evidence discloses that State Farm normally does not, without prior underwriting approval, issue standard liability policies to individuals convicted of driving while intoxicated and that State Farm would not have bound the coverage in question had the fact of decedent's intoxication conviction been known to it.

Since this matter arises from the entry of a summary judgment, we are obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom. Moreover, 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. *Schriner v. Meginnis Ford Co., ante* p. 85, 421 N.W.2d 755 (1988); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

Plaintiff's first assignment of error, which claims that an insurer may not unilaterally rescind automobile liability coverage, is without merit. In drawing a distinction between cancellation and rescission, we recently reaffirmed that, under appropriate circumstances, an insurer may rescind ab initio even the limited class of automobile liability insurance policies

contemplated by Neb. Rev. Stat. §§ 44-514 through 44-521 (Reissue 1984). *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985), *on recertification* 224 Neb. 598, 400 N.W.2d 250 (1987).

Thus, we confront the issue presented by the second assignment, Could the trial court determine as a matter of law that decedent's failure to reveal his intoxication conviction constituted a material misrepresentation upon which State Farm relied to its detriment?

As noted in *Glockel v. State Farm Mut. Auto. Ins. Co.*, 224 Neb. 598, 400 N.W.2d 250 (1987), we have permitted rescission both under and independent of the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1984), which reads:

> No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

We have stated that in order for a misrepresentation by concealment to constitute a defense to an action on a contract of insurance, the insurer must plead and prove (1) that the misrepresentation was made knowingly with intent to deceive, (2) that the insurer relied and acted upon such statement, and (3) that the insurer was deceived to its injury. See *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). See, also, *Bishop v. Farm Bureau Life Ins. Co., ante* p. 74, 421 N.W.2d 423 (1988); *Nelson v. Cheney,* 224 Neb. 756, 401 N.W.2d 472 (1987). A misrepresentation is material if the insurer would not have issued the policy had it been aware of the true facts. See, *Equitable Life Assurance Soc'y v. Joiner*, 222 Neb. 504, 384 N.W.2d 636 (1986); *White v. Medico Life Ins. Co., supra*. We have also said that an insurer need not make an independent investigation and may rely on the truthfulness

of the answers in an application for insurance as long as there was nothing to put it on notice of the falsity of any of the answers. *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983). *Equitable Life Assurance Soc'y v. Joiner, supra*, further suggests that an insurer is injured if it accepts an insured it normally would not have accepted but for the misrepresentation.

Since State Farm does not claim that decedent's other convictions would have disqualified him from coverage, the only significant concealment was the intoxication conviction and the effect it had upon the status of decedent's license to drive. There is no factual dispute but that State Farm relied upon decedent's concealment of those facts, nor that State Farm was injured thereby as a matter of law, for it accepted a risk it would not have accepted but for the concealment of that occurrence.

Thus, the crucial question with respect to the second assignment of error is whether it can be said as a matter of law that decedent concealed those facts knowingly and with the intent to deceive. *White v. Medico Life Ins. Co., supra*, observes that when "an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, *the finder of fact* may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive." (Emphasis supplied.) *Id.* at 906, 327 N.W.2d at 610. See, also, *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 187 N.W. 787 (1922).

Plaintiff's suggestion that decedent did not remember that he was convicted of driving while intoxicated and deprived of his driver's license as a consequence, and did not understand that such events fell within the ambit of the questions asked in the application, stretches the limits of credulity. The fact decedent acquired high risk insurance makes the suggestion particularly difficult to accept. Nonetheless, it cannot be said as a matter of law that decedent had the requisite recollection and understanding; the circumstances make the matter a question for the trier of fact. Accordingly, the summary judgment in favor of State Farm must be reversed.

While the foregoing resolution of the second assignment of

error disposes of this appeal, we, because the issue may become material during the course of further proceedings, nonetheless turn our attention to plaintiff's remaining claim, that State Farm waived any right it might otherwise have had to rescind the coverage.

The waiver argument rests upon State Farm's acceptance of a premium payment after decedent's death and its delay in advising plaintiff of its rescission for a period of 34 days after the death and 32 days after it had learned the true nature of decedent's history.

As noted in *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971), a waiver is a voluntary and intentional relinquishment of a known right; it may be established by acts and conduct from which an intention to waive may reasonably be inferred.

In *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987), a notation on the check tendered in payment of the premium due the current month, i.e., the month written on the check, precluded its application to the premium which had not been paid during the preceding month. We concluded as a matter of law that the insurer's acceptance of that check constituted a recognition of the continued validity of its life insurance policy as a binding obligation and that the insurer, therefore, had, as a matter of law, waived the policy provision empowering it to declare a forfeiture for nonpayment of the premium due the preceding month.

However, the situation at hand is not like that presented in *Bohannon*. The insurer in *Bohannon* attempted to do what the check it accepted specifically prohibited, apply it to a past-due premium. Since the insurer could not do that, it had the options of rejecting the check and declaring the policy void for nonpayment of the premium, rejecting that check and insisting upon payment of the past-due and current premiums, or accepting the check as tendered and thereby waiving the right to declare a forfeiture for nonpayment of the earlier month's premium. At the time the installment due notice was dispatched and the installment payment accepted in this case, State Farm had not yet decided how to treat the matter of decedent's concealment. Whether the time State Farm took to make its

decision and communicate it to plaintiff, combined with its billing for and temporary acceptance of a premium payment after decedent's death, waived its right to rescind cannot be determined as a matter of law; the circumstances present a question for the finder of fact.

State Farm's argument, that in any event neither sending the premium notice nor its temporary acceptance of that installment payment can be considered to be a waiver of any of its rights, must be rejected. State Farm premises its contention on the facts that the notice was generated by a computer programmed to prepare and dispatch such documents at a predetermined date and that such computer function is not part of its underwriting department.

The fact an entity chooses to generate its documents by electronic rather than human means provides no basis for automatic absolution of its errors, be they errors of omission or commission. State Farm is as responsible for the product of its machines as it is for the product of its people. Neither is it any answer to say that the underwriting department does not know what the billing department does; it is State Farm's responsibility to coordinate its own functions.

The summary judgment entered in favor of State Farm is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. GREGORY MCCOY, APPELLANT.

421 N.W.2d 780

Filed April 8, 1988. No. 87-467.

1. **Right to Counsel.** The right of an indigent defendant to counsel does not include the right to counsel of defendant's own choice.
2. **Juror Qualifications.** A party who fails to challenge prospective jurors for disqualification and does not use his peremptory challenges to remove such jurors from the panel waives any objection to their selection.

3. **Convictions: Appeal and Error.** In determining whether there is sufficient evidence to sustain a conviction in a criminal case, this court will not resolve conflicts of evidence, evaluate explanations, pass on the credibility of witnesses, or reweigh the evidence presented to the jury.
4. **Verdicts: Appeal and Error.** The verdict in a criminal case must be sustained if the evidence, viewed most favorably to the State, is sufficient to support the verdict.
5. **Sentences: Probation and Parole: Appeal and Error.** In the absence of an abuse of discretion, an order denying probation and imposing a prison sentence within the statutory limits will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

GRANT, J.

After trial to a jury in the district court for Lancaster County, the defendant, Gregory McCoy, was found guilty of robbery, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985), and use of a weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). The defendant was sentenced on the robbery count to an indeterminate term of incarceration of from 3 to 7 years, consecutive to a sentence already being served by the defendant. The defendant was sentenced on the use of a weapon charge to a term of 1 year, consecutive to the sentence imposed on the robbery charge. The defendant appeals and sets out 11 assignments of error, which may be consolidated into 5, that the district court erred: (1) in overruling the defendant's motion to have effective counsel appointed to replace the attorney appointed to represent defendant; (2) in exercising defendant's peremptory challenges, after defendant refused to do so, by striking the last six jurors called at defendant's trial; (3) in overruling the defendant's motion to dismiss based upon defendant's having been subjected to an "illegal lineup"; (4) in determining the evidence was sufficient to support a finding of

guilty by the jury; and (5) in refusing to place the defendant on probation and imposing an excessive sentence. For the reasons set out below, we affirm.

The record shows that on the evening of September 15, 1986, the victim, David Huebner, a student at the University of Nebraska, was alone in the bedroom of his apartment in Lincoln, Nebraska, while studying. At approximately 8:40 p.m., he heard the door to his apartment open and saw a black man wearing a red handkerchief over his face enter the bedroom. The victim was unable to make any other observation about the person. The intruder announced, "This is a stick-up," and shoved the left side of Huebner's head into the bedroom wall, so that Huebner was unable to see the intruder. The intruder placed a sharp object against Huebner's temple and then took Huebner's wallet from his back pocket. Huebner heard his wallet being opened by a second individual in the apartment, who said, "He has bank cards." Huebner never saw the second intruder. The individual holding Huebner then moved him onto the bed while pressing the sharp object against Huebner's head. After he was tied up by the two intruders, Huebner told them the security code numbers for the two bank cards. Although Huebner was unable to see whether the intruders were writing down the numbers, he did have paper and pencils available in the bedroom. The two men then left the apartment.

Within minutes after the men left, Huebner was able to hop over to the apartment unit directly across the hall. The victim's neighbor then called the police. Lt. John D. Packett of the Lincoln Police Department was on routine patrol duty that evening and was informed of the robbery through radio dispatch. At approximately 8:55 p.m., Lieutenant Packett proceeded to an automatic teller machine located at FirsTier Bank at 13th and M Streets in Lincoln. As he approached the bank, Packett saw two black men going into the front door of the bank. Lieutenant Packett followed the men into the bank, saw them at an automatic bank teller machine, and observed the two men engaging in "some type of activity" at the machine. Packett attempted to detain the two men, but they avoided the officer and ran in opposite directions from the bank, leaving a

bank card in the machine. A security guard, who had been observing the two suspects, removed the bank card, which belonged to Huebner, from the machine.

Police Officer Jerome Thraen joined in the chase and followed the defendant. When the officer caught defendant, the defendant threw an object toward a nearby alley. The object was later found to be a billfold. A subsequent search of the defendant's clothing revealed a pocketknife and an item that appeared to be a scalpel. Upon retracing the escape route, Officer Thraen discovered the second bank card belonging to Huebner and a torn piece of graph paper with the word "Frist" and Huebner's security code numbers written on it. The tear on the piece of graph paper appeared to fit the tear on a piece of graph paper in Huebner's apartment.

The second suspect was also apprehended by the police, following a foot chase. A search of the second suspect revealed a steak knife in the suspect's back pocket, $8 in cash, which was the amount of money Huebner testified was in his wallet, and a paycheck stub which belonged to Huebner.

In his first assignment of error, defendant contends that the trial court erred in overruling the defendant's motion to have effective counsel appointed to replace the attorney already appointed to represent the defendant. That attorney had been permitted to withdraw as counsel, at defendant's request. Defendant contends that the trial court should have sustained the defendant's "request" for effective appointment of counsel, rather than requiring the defendant to proceed either pro se or with the assistance of counsel with whom the defendant did not have a "meaningful attorney-client relationship."

The record reflects that prior to trial the defendant filed a motion to dismiss his counsel, alleging that the public defender appointed to defend him was "racist, vindictive (virulent), and has stated his ardent belief in the defendant's guilt." The motion did not contain a request for alternative counsel. The motion was overruled on January 9, 1987. On January 26, 1987, at defendant's request, the public defender appointed to represent defendant, Harry Moore, was given leave to withdraw as defendant's counsel, and the same public defender was appointed as standby counsel. Moore was present throughout

the trial, but did not actively participate.

We first note that while the sixth amendment guarantees the indigent defendant the right to effective assistance of counsel, the sixth amendment does not guarantee a "meaningful relationship" with his or her counsel. *Morris v. Slappy,* 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). The right of an indigent defendant to counsel does not include the right to counsel of the defendant's own choice. *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

A defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel. *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983); *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976).

The defendant has failed to demonstrate a justifiable reason for refusing to accept the services of his court-appointed attorney. An indigent defendant who refuses the services of his court-appointed counsel and elects to proceed pro se has not been denied effective assistance of counsel. *State v. Clark, supra*; *State v. Blunt, supra*. The defendant refused the services of his attorney, elected to proceed pro se, and was further provided, under protest, with the services of standby counsel. Defendant's first assignment of error is without merit.

In his second assignment of error, the defendant contends that the district court erred in striking the last six jurors called. Defendant argues that the court "should have randomly struck six jurors on behalf of the defendant." Brief for Appellant at 16. In his brief, the defendant submits that, although defendant waived any objection to any particular juror, in effect, the judge should act as an advocate for defendant and randomly strike jurors.

The record reflects that prior to jury selection, the defendant announced that he would not participate in the proceedings. Prior to the striking of any jurors, the court informed the defendant that the court would strike the last six jurors called in the event the defendant did not exercise his peremptory challenges. The State struck one of the last six jurors called. The defendant was asked on each strike whether he desired to strike a juror and declined to do so. The last six jurors remaining,

after the State had stricken one of the six last called, were stricken from the prospective jury one at a time. At the close of the State's evidence, the defendant requested a mistrial because the jury was selected in a prejudicial manner. The motion was denied. At the close of all the evidence, the defendant renewed the motion, which was denied a second time.

A mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial. *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987). The failure to timely object constitutes a waiver of the objection on appeal. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

Furthermore, a party who fails to challenge prospective jurors for disqualification and does not use his peremptory challenges to remove such jurors from the panel waives any objection to their selection. See *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). Since the defendant was advised of the consequences of failing to exercise his peremptory challenges, elected to waive that right, and made no timely objection, this assignment of error is without merit. To hold otherwise would obviously establish a challenge from defendant that the trial judge had stricken the wrong jurors in randomly reducing the prospective jury to a trial jury.

In his next assignment of error, defendant contends that the trial court erred in overruling the defendant's motion to dismiss which was based upon the defendant's having been subjected to an "illegal lineup." On January 28, 1987, the defendant filed a motion to dismiss, alleging that the victim's neighbor who had called the police at the victim's request had been brought to the jail to identify the defendant while the defendant was in custody. Defendant contends the neighbor posed as a police officer at that time. Testimony at trial was to the effect that this alleged incident never took place and that the individual whom the defendant believed to be the victim's neighbor was a police officer who was present when a handwriting test was administered to the defendant. Furthermore, the neighbor never identified the defendant during the course of the trial, and no identification from any lineup was offered into evidence. This assignment of error cannot be comprehended and is without merit.

In his final assignments of error, the defendant contends that the evidence was not sufficient to support the defendant's convictions and that the district court erred in imposing an excessive sentence and refusing to place the defendant on probation.

In determining whether there is sufficient evidence to sustain a conviction in a criminal case, this court will not resolve conflicts of evidence, evaluate explanations, pass on the credibility of witnesses, or reweigh the evidence presented to the jury. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Richardson*, 227 Neb. 274, 417 N.W.2d 24 (1987). The verdict in a criminal case must be sustained if the evidence, viewed most favorably to the State, is sufficient to support the verdict. *State v. Lane, supra*. Circumstantial evidence is sufficient to support a finding of guilty if the evidence and reasonable inferences drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

Although the victim was unable to give an eyewitness identification of the defendant, the jury could find from the evidence presented at trial that the defendant committed the charged offenses. A knife found in the possession of the defendant was similar to that used during the course of the robbery, as testified to by the victim. The jury could have concluded that footprints found near the victim's apartment were made by the shoes worn by the defendant. The defendant was identified by police in the bank while attempting to use the automatic teller machine. The victim's bank card was left in the machine used by the defendant. A retracing of the flight path taken by the defendant revealed a second bank card belonging to the defendant and a torn piece of graph paper with the word "Frist" and the victim's security code numbers written on it. A jury could conclude that the paper was torn from a piece of graph paper found in the victim's apartment. There was ample evidence, if believed, to support the jury's finding of guilt.

As to defendant's excessive sentence claim, in the absence of an abuse of discretion, an order denying probation and imposing a prison sentence within the statutory limits will not

be disturbed on appeal. *State v. Lane, supra*; *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). The record shows that the defendant has a history of prior misdemeanor convictions. Robbery is a Class II felony, which is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. The use of a weapon to commit a felony is a Class III felony, which is punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment. Both are violent crimes. Defendant's sentences were well within those limits. We find no abuse of discretion in the sentences imposed on the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED B. OLIVA, APPELLANT.

422 N.W.2d 53

Filed April 8, 1988. No. 87-597.

1. **Rules of Evidence.** Neb. Rev. Stat. § 27-401 (Reissue 1985) embodies the modern view that evidence is probative if it tends in any degree to alter the probability of a material fact.
2. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

WHITE, J.

The defendant, Fred B. Oliva, was found guilty by a jury of

the offense of first degree assault. The assault victim was the defendant's wife, Lupe Oliva.

Three witnesses testified for the State. According to Lupe Oliva, on the morning of November 1, 1986, she and her husband began arguing, after which a struggle ensued. The defendant pinned her on the couch and hit her in the face. This episode continued for about 1 hour, during which time the defendant made a number of verbal threats. The defendant used Vise-Grips to hit Lupe and to crush her fingers. During the assault Harold Spoor, the defendant's ex-son-in-law, came into the house. He was apparently unable to do anything to end the attack. The defendant twisted Mrs. Oliva's arm behind her back, and it made a popping sound. The defendant and Harold Spoor took Lupe to the hospital so that her arm could be treated. On the way to the hospital the defendant told Lupe to tell the people at the hospital that she had fallen down the stairs. While alone in the x-ray room, Lupe told an attendant the truth about the matter. The State introduced a number of photographs taken of Lupe Oliva after the assault.

Bruce Holcomb was the doctor who examined Lupe at the hospital. He testified that she had a spiral fracture of her right humerus and contusions and abrasions to the fingers on both hands. The fracture was consistent with a twisting, torquing injury. The injuries to her hands were caused by isolated episodes of trauma consistent with injuries that could be caused by the use of Vise-Grips. Viewing the injuries in their totality, it was the doctor's opinion that they were not caused by one generalized fall.

Harold Spoor also testified for the prosecution. According to Spoor, when he came into the house, Lupe and Fred Oliva were arguing. The defendant was pinching Lupe's fingers with Vise-Grips and hitting her. Spoor did not intervene because he knew that the defendant carried a pistol. He heard Lupe's arm snap when the defendant was twisting it.

The defendant testified that he saw a packet of cocaine fall out of Lupe's pocket, which upset him, and he began to argue with her. While he was still in bed, he heard her run out of the bathroom and then trip and fall down the steps.

The defense moved in limine to exclude testimony

concerning the defendant's prior misconduct. The motion was sustained, but the court noted that the evidence might be relevant to another issue depending on how the defense developed its case.

During cross-examination defense counsel questioned Lupe Oliva about the defendant's physical condition in an attempt to show Fred Oliva was physically incapable of assaulting his wife. The pertinent questioning is as follows:

> Q Isn't it true all the while you have known Fred Oliva he has been on disability?
>
> A Yeah.
>
> Q The disability is because of a curvature of the spine problem; is that correct?
>
> A Yes.
>
> Q He can't work because of that; is that correct?
>
> A That's what they say.
>
> Q And he gets a social security check for that; does he not?
>
> A Yes.
>
> Q He has been doing this ever since you have known him?
>
> A Yes.
>
> Q He also has a heart condition; does he not?
>
> A Yeah.
>
> Q He was admitted to the hospital with a heart attack on September 30th of 1986; is that correct?
>
> A They really didn't know what was wrong. There was a lot of problems.

Defense counsel continued at some length, questioning Lupe Oliva about the defendant's physical ailments.

On redirect examination, the deputy county attorney elicited the following testimony over the defendant's objection:

> Q Counsel asked numerous questions concerning Mr. Oliva's physical ability, with respect to ability to work and so forth. Is this the first time you have had an altercation or fight with your husband?
>
> A No.
>
> . . . .
>
> Q Is this the first time your husband has performed

physical violence upon you?

A No.

Q How many previous times has he physically assaulted you?

A It's been several times and there has been other people in the household when he had done it.

Q Would it be fair to say this was the most severe beating he has given you?

A Yes.

The trial judge overruled the defendant's objection to this evidence because the defense raised the issue of physical impossibility or improbability, thereby opening the door for the testimony as to the prior assaults.

On appeal the defendant claims the court erred in allowing into evidence the testimony of Lupe Oliva concerning prior incidents of assault. We affirm.

The defendant relies on the definition of relevant evidence contained in Neb. Rev. Stat. § 27-401 (Reissue 1985) in making the following argument:

> All the prosecutor elicited from Lupe was the fact that the Defendant had physically assaulted her on several occasions prior to November 1. Nowhere does the evidence show the date, type, length, or character of the physical assaults. The fact that prior assaults have taken place does not necessarily make it relevant to whether the Defendant was physically capable of assaulting Lupe on November 1. General assaults could mean just about anything.

Brief for Appellant at 4-5. The argument is not that the evidence fails to address a material issue (physical ability), but that the evidence is so lacking in probative force that it should have been excluded. The modern view, however, is that evidence is probative if it tends in any degree to alter the probability of a material fact. See, 1A J. Wigmore, Evidence in Trials at Common Law § 37.4 (P. Tillers rev. 1983); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). The view is codified in § 27-401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence."

Thus, the defendant's objection that the inference of physical ability does "not necessarily" follow from the evidence offered by the prosecution is untenable. See McCormick on Evidence § 185 at 543 (E. Cleary 3d ed. 1984). It is enough if the evidence offered could show that a material fact is slightly more probable than it would appear without that evidence. The evidence concerning previous episodes of physical violence met this minimum burden of relevance.

In *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), this court held that admission of a codefendant's conviction as evidence against the defendant was error under § 27-401 because the evidence lacked any probative value whatsoever. We said: "With all the variables and unknown quantities entering another jury's verdict, any connection between [codefendant's] conviction and [defendant's] guilt is reduced to a possibility, not the rational relationship based on likelihood required for relevant evidence." *Id.* at 789-90, 366 N.W.2d at 434. Similar language was again used in *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986). As we have said, § 27-401 requires only that the degree of probativeness be something more than nothing. The above-quoted language should not be read as requiring any degree of probativeness beyond that which is necessary under § 27-401.

Consideration of probative value does not end with the determination that the prior assaults were relevant. Under Neb. Rev. Stat. § 27-403 (Reissue 1985), relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." In this case the evidence of prior assaults was only minimally probative on the issue for which it was offered, physical ability. The jury would have to assume first that the prior assaults were at least severe enough to show that, in the past, the defendant was physically capable of inflicting the type of harm that was inflicted on November 1, 1986. The validity of such an assumption or inference was called into question by the victim's own statement that the assault on the date in question was the most severe. The jury

would also have to infer that the defendant's physical condition had not deteriorated to any material extent between the time of the prior assaults and the assault on November 1. Such an inference is made less tenable by the fact that there was no evidence as to how much time elapsed between assaults, and also by the fact that there was evidence that just 1 month prior to the assault the defendant suffered a possible heart attack. A chain of inferences is no stronger than its weakest link. The probative force on the issue of physical ability was at best weak.

The evidence of prior assaults was, however, extremely probative on the one issue for which it may not be offered: character of the accused. See Neb. Rev. Stat. § 27-404(2) (Reissue 1985). The prosecution's failure to show a material relationship between the prior assaults and the assault in question suggests that the State was more interested in attacking the defendant's character than determining whether the defendant was in fact physically capable of committing the crime.

Without passing on the issue of whether the admission of the prior assault testimony was an abuse of discretion, we note that an erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). In this case there was overwhelming evidence to establish the defendant's guilt beyond a reasonable doubt. Lupe Oliva testified at length about the events of November 1, 1986. The emergency room physician's testimony as to the nature of her physical injuries and the photographs of those injuries indicate that she was in fact assaulted. Lupe Oliva's testimony was also corroborated by an eyewitness, who testified that the defendant pinched his wife's fingers with Vise-Grips, hit her, and broke her arm by twisting it behind her back. Juxtaposed to this evidence we have the defendant's testimony that his wife fell down the stairs. The defendant's credibility was, of course, essential to this defense. Even without the prior assault testimony, however, the defendant's version of the events was incredible. His story was contradicted by expert medical testimony, eyewitness testimony, and photographic evidence. If any error was committed by the inclusion of the prior assaults,

it was harmless beyond a reasonable doubt. The conviction is therefore affirmed.

AFFIRMED.

RONALD DEAN RODGERS, APPELLEE, V. ROGER SPARKS, DOING BUSINESS AS SPARKS CONCRETE, AND THE HARTFORD INSURANCE COMPANY, THIRD-PARTY PLAINTIFF, APPELLANTS; CORNHUSKER CASUALTY COMPANY, THIRD-PARTY DEFENDANT, APPELLEE.

421 N.W.2d 785

Filed April 8, 1988. No. 87-599.

1. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
2. _____: _____. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.
3. _____: _____. A duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his knowledge according to his qualifications in the field of chiropractic, and the weight of his testimony is a question for the fact finder.
4. **Workers' Compensation: Expert Witnesses: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
5. **Workers' Compensation: Appeal and Error.** A finding with regard to causation of an injury will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Francis L. Winner of Winner, Nichols, Douglas, Kelly and Arfmann, for appellants.

Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellee Ronald D. Rodgers.

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Cornhusker Casualty Company.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

PER CURIAM.

This is an appeal in a proceeding under the Workers' Compensation Act. The plaintiff, Ronald Dean Rodgers, alleged that he was injured on July 25, 1983, while employed as a laborer by the defendant Roger Sparks, doing business as Sparks Concrete.

According to the plaintiff, he was injured while working at a feedlot, pouring a cement slab and putting up steel pipes. Rodgers testified he was attempting to hold up a steel pipe, which weighed approximately 200 pounds, when he developed a sharp stabbing pain in his chest and back and then collapsed and had trouble breathing. At his own request, he was taken to see Dr. Daryl Wills, a licensed chiropractor, that same day.

Dr. Wills' examination consisted of examining Rodgers' thoracic spine with palpation, motion palpation, and ranges of motion. Rodgers refused to have an x ray taken. Dr. Wills diagnosed the injury as an acute moderate to severe traumatic thoracic juxtaposition with associated myalgia, neuralgia, and deep and superficial muscle spasm. Dr. Wills testified that in layman's terms Rodgers had pulled the muscles in his back, which shifted vertebrae, and developed pain, nerve irritation, and muscle spasms. He further testified that this was a cartilaginous injury in which the heavy lifting depressed the shoulder girdle, which depressed the rib cage. The torquing of the ribs brought a strain on the cartilages. There are lightning joints between the cartilages and the sternum in the rib area, which are held by thin ligament structures both anteriorly and posteriorly. When an injury or trauma is experienced, those ligaments are stretched and/or torn.

Dr. Wills' treatment for this condition included therapy to the muscles, chiropractic manipulations, and pulse ultrasound therapy to the thoracic and external or chest spine. Rodgers was also placed in a rib orthopedic appliance.

After the initial visit on the day of the injury, Dr. Wills treated Rodgers on July 27 and July 29, 1983, for aches, weakness, and pain. Rodgers returned on August 16 and 19 and

October 25, 1983. Rodgers continued to have problems relating to rib irritation and again sought treatment, on November 18, 1983. Rodgers continued to work after the accident until September 29, 1983, doing the same kind of work. He returned to work in April 1984, after the winter layoff, again doing the same type of work.

In June 1984, while still employed by Sparks, Rodgers was injured while pushing a wheelbarrow filled with cement, and which weighed about 300 pounds, through approximately 6 inches of sand. While pushing the wheelbarrow, he experienced a sharp stabbing pain and fell to the ground. In comparing this with the previous injury, Rodgers testified that it felt like the exact same pain. He visited Dr. Wills the next day, June 19, 1984. Dr. Wills diagnosed the injury as acute traumatic costovertebral and costosternal juxtaposition, with associated intercostal myalgia and neuralgia. As compared to the earlier injury, Dr. Wills testified that it involved the same area of the spine and that this diagnosis was consistent with the previous diagnosis.

Rodgers visited Dr. Wills again on June 21, 1984, and on May 13, 1985, he saw Dr. Wills, with complaints that he felt his ribs were out of place. Rodgers continued to visit, with complaints of chest pain, on May 20, June 1, August 5, September 10, and December 18, 1985. On December 18, 1985, x rays were taken for the first time. Dr. Wills testified that the x rays indicated that Rodgers had rotational problems of the vertebrae and a marked subluxation of one of his ribs. He explained that subluxation is an off-centering of the joint fixed within a range of motion so that it cannot move freely.

Dr. Wills again saw Rodgers for chest complaints on January 3, 1986; on February 4, for stiffness of the cervical spine; on February 19, for neck discomfort and chest pain; and on March 12, for cervical spine stiffness, headache, and chest trouble. He returned for similar problems on April 16, May 1, and August 14, 1986.

Rodgers testified that since the accident on July 25, 1983, he has had pain in his chest and rib area whenever he lifts something heavy.

On August 7, 1986, Rodgers filed a petition in the Workers'

Compensation Court, claiming that he was injured on July 25, 1983, while working for Sparks, who was at that time insured by The Hartford Insurance Company.

Hartford answered, denying liability, and alleging that Rodgers' injury took place on June 18, 1984, during a time when Cornhusker Casualty Company was the employer's insurance carrier.

After a hearing before a single judge, the compensation court found that the second injury on June 18, 1984, caused Rodgers' disability, and dismissed the petition as to Sparks and Hartford. The court also dismissed a third-party complaint against Cornhusker Casualty because the statute of limitations barred recovery for the accident of June 18, 1984.

On rehearing before a three-judge panel, the compensation court found that the accident on July 25, 1983, caused Rodgers' disability and that the second accident on June 18, 1984, only exacerbated the original injury. Two judges awarded compensation for temporary total disability, 20 percent loss of earning power, rehabilitation benefits, chiropractic expenses, and an attorney fee. The third member of the panel found that the plaintiff's loss of earning power did not exceed 5 percent and that rehabilitation benefits should be denied because the plaintiff could return to the work for which he had previous training or experience. The third-party complaint against Cornhusker Casualty was again dismissed.

Sparks and Hartford have appealed.

The appellants' principal assignment of error is that the compensation court erred in relying exclusively on the testimony of a chiropractor to establish medical standards beyond the scope of chiropractic.

In workers' compensation cases,

> Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 785, 408 N.W.2d 280, 289 (1987). See, also, *Hamer v. Henry*, 215 Neb.

805, 341 N.W.2d 322 (1983); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981).

> [W]here the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.

Hamer v. Henry, supra at 809, 341 N.W.2d at 325.

The issue here is whether the testimony of a chiropractor was "competent medical testimony."

Under Neb. Rev. Stat. § 71-177 (Reissue 1986), the practice of chiropractic is defined as being one or a combination of the following, without the use of drugs or surgery:

> (1) The diagnosis and analysis of the living human body for the purpose of detecting ailments, disorders, and disease by the use of diagnostic X-ray of the axial skeleton excluding the skull, physical and clinical examination, and routine procedures including urine analysis; or (2) the science and art of treating human ailments, disorders, and disease by locating and removing any interference with the transmission and expression of nerve energy in the human body by chiropractic adjustment, chiropractic physiotherapy, and the use of exercise, nutrition, dietary guidance, and colonic irrigation.

Although it is clear that a chiropractor is not licensed to engage in the practice of medicine and surgery as defined under Neb. Rev. Stat. § 71-1,104 (Reissue 1986), the practice of chiropractic is a skilled profession. Neb. Rev. Stat. § 71-179 (Reissue 1986) requires:

> Every applicant for a license to practice chiropractic shall (1) present satisfactory evidence that he has completed a four-year course in an accredited high school; (2) present proof of graduation from an accredited college of chiropractic; and (3) pass an examination prescribed by

> the Board of Examiners in Chiropractic in the subjects of anatomy, adjusting, bacteriology, chemistry, chiropractic physiotherapy, hygiene, pathology, roentgenology, orthopedics, physiology, symptomatology, palpation, principles and practice of chiropractic; *Provided*, that the Board of Examiners in Chiropractic may waive the written examination for an applicant who holds a National Board of Chiropractic Examiners Certificate who meets the requirements of this section and who satisfactorily passes all oral and practical examinations of the Board of Examiners in Chiropractic.

In *Chalupa v. Industrial Commission*, 109 Ariz. 340, 509 P.2d 610 (1973), the court considered the extent to which a licensed chiropractor could testify as an expert in an Industrial Commission hearing. The court granted review to correct an incorrect statement of law contained in the lower court's decision, which had stated in part that " 'while a chiropractor or naturopath may give testimony as to observable facts within his realm of knowledge and training, any other testimony he might offer which takes the form of medical conclusions (as to causation or disability, for example) cannot be regarded as expert medical testimony.' " 109 Ariz. at 341, 509 P.2d at 611.

The Arizona court noted that while chiropractors, unlike physicians, were not competent to give expert testimony in the entire medical field, they were competent as expert witnesses in their limited field of practice. The court held that, regardless of chiropractors' limitations,

> [W]e do not believe that a statute which allows [a chiropractor] to manipulate or treat by hand articulations of the spinal column denies him the right to diagnose the reasons for that treatment. We believe that he is a competent witness to testify as to causation of any abnormalities of the spine.

109 Ariz. at 341-42, 509 P.2d at 611-12.

In *Fries v. Goldsby*, 163 Neb. 424, 435, 80 N.W.2d 171, 178 (1956), we said that "a duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his knowledge according to his qualifications in the field of chiropractics, and the weight of his testimony is a question for

the jury." What must now be determined is whether causation and permanency are within the scope of the field of chiropractic.

Other courts appear to hold, generally, that chiropractors are competent to express an opinion as to the cause of an injury, its probable effects, and its permanency.

In *Miss. Farm Bureau Mut. Ins. Co. v. Garrett*, 487 So. 2d 1320 (Miss. 1986), the court held that one who is qualified as an expert in chiropractic may state an opinion regarding diagnosis, causation, and prognosis of an injury when the testimony is carefully limited to the field of chiropractic. "The fact that medical doctors . . . might even be qualified to give better and more reliable opinions is beside the point." 487 So. 2d at 1327. The court stated it is within the discretion of the trial court as to whether a chiropractor's testimony would be helpful.

In *Klingman v. Kruschke*, 115 Wis. 2d 124, 339 N.W.2d 603 (1983), a chiropractor was allowed to give his opinion concerning the cause and permanence of the plaintiff's injuries in light of the fact that proper foundation was laid. The chiropractor based his opinion on his examination of the plaintiff and on statements made by the plaintiff during the examination that the neck stiffness had begun after the accident. The chiropractor diagnosed it as an injury to the cervical spine with associated nerve damage. The court held that the plaintiff's statements regarding neck stiffness provided sufficient foundation for the chiropractor's conclusion that the accident caused the injuries, and noted that it was for the jury to weigh the credibility.

In *Stevens v. Smallman*, 267 Ark. 786, 590 S.W.2d 674 (1979), the court held that a chiropractor could express his opinion as to whether the plaintiff was permanently disabled from an auto collision, where the chiropractor had examined the plaintiff, taken a history of his complaints, and treated him over a period of several months. The chiropractor was permitted to testify that the patient had muscle spasms in the cervical area, misalignment in the vertebral column, limitation of motion in the cervical area, and continuing pain, and that because the muscle spasms and pain had not cleared up during months of treatment, the patient had suffered a 5- to 7-percent permanent disability.

In *Line v. Nourie*, 298 Minn. 269, 215 N.W.2d 52 (1974), the court allowed a chiropractor to testify that the plaintiff had suffered general spinal sprain and strain and that as a result, some of the muscles had lost their ability to hold the vertebrae in place and, further, that the cause of this condition was an automobile accident and that plaintiff had suffered a 15- to 20-percent permanent partial disability of the mid and upper thoracic spine. The court held it permissible for a chiropractor to render opinions based on reasonable chiropractic certainty as to the probable effects, permanency, and future medical requirements, where proper foundation for such opinion has been laid.

Finally, in *Badke v. Barnett*, 35 A.D.2d 347, 316 N.Y.S.2d 177 (1970), the court rejected an argument that chiropractors should not be permitted to give expert medical testimony on questions of diagnosis, prognosis, and causal connection because they lack the extensive training of a physician. The court held that because chiropractors are extensively trained in the practice of chiropractic and are qualified to treat patients suffering from chiropractic ailments, a chiropractor should be deemed competent to testify as an expert witness and express his opinion as to the nature of a chiropractic ailment and its probable cause and duration. Hence, it was proper for the chiropractor to testify that, based on his examination of the plaintiff, she suffered from a subluxation, or a slight overriding of one vertebra against the other. This caused nerve roots in the vertebral openings to be pinched, which in turn caused muscle spasms. The chiropractor testified that it was his opinion that the auto accident was the cause and the injuries were permanent. The court rejected the argument that this testimony was beyond the scope of chiropractic and was entering the fields of neurology and orthopedics, because the chiropractor spoke of nerves and bone solely in the context of the subluxation he had detected in the plaintiff's spinal column.

The witness in this case, Dr. Wills, was a qualified expert in chiropractic. He obtained his degree as a doctor of chiropractic in 1973 and has practiced in the profession ever since. During the course of his training he studied anatomy, physiology, microbiology, chemistry, bacteriology, and public health. The

doctor of chiropractic program consists of 2 years of preprofessional study and 5 years of professional study, including clinical work. He averages 50 hours per year of continuing education and is currently president of the Nebraska chiropractic association.

Being qualified as an expert, Dr. Wills was properly permitted to testify that, in his opinion, Rodgers' injury was caused by the lifting of a heavy pipe on July 25, 1983, and that the second incident on June 18, 1984, was an exacerbation of the original injury. He was properly permitted to testify regarding the percentage of Rodgers' disability. Sufficient foundation existed for his opinion regarding disability because of his repeated treatments of Rodgers over the years and because of his education in spinal impairment ratings.

The second and third assignments of error are that the court erred in making an award having no competent evidence to support it and erred in making an award for an injury where the only competent evidence showed a different and separate injury was responsible.

Dr. Bruce Claussen, an orthopedic surgeon, examined Rodgers on December 18, 1986, and found no abnormalities in the costosternal area where the breastbone meets the ribs. There were no abnormalities as to the cervical and thoracic spine, and Rodgers had an acceptable range of motion. Rodgers did have some tenderness in the front of the chest in the area where the breastbone meets the ribs, at about the third rib. Dr. Claussen referred Rodgers to a radiologist for x rays. X rays made of the area of the third rib indicated no abnormalities. Dr. Claussen testified that he could not explain the popping sound Rodgers complained of in his ribs, but stated it possibly could be due to the strain of the muscles and the ligaments. Dr. Claussen was of the opinion that the plaintiff had no disability as a result of either of the incidents, but on a "purely speculative basis" it was possible he might have an impairment of 2 to 3 percent or less.

Dr. Wills testified that the cause of Rodgers' first injury on July 25, 1983, was his lifting of the heavy pipe. In describing the relationship between this injury and the wheelbarrow incident on June 18, 1984, he testified that the pain Rodgers felt as he pushed the wheelbarrow was due to an exacerbation of his first

injury. He explained that the injury Rodgers sustained on July 25, 1983, involved a stretching or tearing of the ligaments, in which case there would be a deformation of the connective tissue, resulting in scar tissue which would not allow healing. The popping sound Rodgers reported hearing in his chest was due to joints that were torn loose and did not heal properly. He stated that Rodgers had never healed properly and when Rodgers returned for treatment in June 1984, he treated his condition as an exacerbation of the original injury.

He further testified that Rodgers' injury is a permanent condition with respect to Rodgers' experiencing pain upon heavy lifting, pushing, or pulling.

As to the extent of disability, Dr. Wills was of the opinion that Rodgers had a 15-percent disability as to his work capacity and a reduction of approximately 25 percent of his preinjury capacity for performing such functions as bending, stooping, lifting, pushing, pulling, climbing, or other comparable physical efforts. He explained that work disability does not correlate directly with impairment, in that a patient can have an impairment rating of a certain percentage and a disability rating of a different percentage based upon the type of work that the patient does.

When the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court. *Nice v. IBP, inc.*, 226 Neb. 538, 412 N.W.2d 477 (1987); *Ward v. City of Mitchell*, 224 Neb. 711, 400 N.W.2d 862 (1987).

A finding with regard to causation of an injury will not be set aside unless clearly wrong. *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987). The findings of fact made by the Workers' Compensation Court after rehearing have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Kuticka v. University of Nebraska-Lincoln*, 227 Neb. 565, 418 N.W.2d 593 (1988).

Since there was competent testimony to support the award for Rodgers, the judgment of the compensation court is affirmed.

The plaintiff is allowed $1,000 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KIM M. BRITT, APPELLANT.

421 N.W.2d 791

Filed April 8, 1988. No. 87-642.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to support a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.
2. **Controlled Substances: Proof: Evidence.** Constructive possession of a controlled substance may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the contraband.
3. **Controlled Substances: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a finding of guilt of possession of a controlled substance with intent to distribute, deliver, or dispense.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

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

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

GRANT, J.

After a jury trial to the district court for Douglas County, the defendant, Kim M. Britt, was found guilty of possession of heroin with the intent to distribute, deliver, or dispense, and guilty of possession of marijuana with intent to distribute, deliver, or dispense. Both crimes were in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1986). The defendant was sentenced to imprisonment for a period of 5 to 7 years on the heroin count and 3 to 5 years on the marijuana count, with the sentences to be served consecutively. In his only assignment of error on appeal, the defendant contends that the evidence was insufficient as a matter of law to sustain the convictions. We affirm.

The record shows the following. On October 21, 1986, Donald Gorum was driving his car and saw defendant at a street corner in Omaha, Nebraska. Defendant asked Gorum for a ride to Shelia Lee's residence, where defendant was then residing. Lee is the mother of Britt's son, Kim Britt, Jr. As Gorum and defendant drove up to the Lee residence, they saw that a police cruiser was in the area. After hesitating for a few minutes, defendant got out of the car. As he was getting out of Gorum's car, defendant tossed "a packet of stuff in a cellophane pack" back in the car and said, "Just in case the Police are here." This packet contained small tinfoil-wrapped packets containing a substance later determined to be heroin.

When defendant entered the residence, he was informed by police that a search, pursuant to a search warrant, was in progress at the residence; that he was named in the warrant; and that he was under arrest. After defendant was informed that he was under arrest, a police officer approached Gorum, who had remained in his car, and asked for permission to search the vehicle. Gorum consented to the search. As a result of the search of the Gorum vehicle, the police found the cellophane packet containing eight packages of heroin, packaged for street sale, and a black leather jacket, which Gorum stated belonged to defendant. Gorum stated that defendant had been carrying the jacket when he picked him up. A pocket of the jacket contained three bags of marijuana. Police officers later discovered a large bag of marijuana inside the lining of the jacket.

Among the items seized in the search at the residence were a corn chip container containing approximately 23 bags of marijuana packaged for street sale, a gram scale, a hand scale, and four small bags of marijuana. Lee was placed under arrest. The cases against Lee and defendant were consolidated for trial, but during the trial this defendant's motion for mistrial was granted and that case continued on against Lee only. The disposition of her case can be found in *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987), and needs no further discussion here. Defendant was later tried in a separate trial.

We first note that, in resolving a challenge to the sufficiency of the evidence to support a conviction in a criminal case, it is

not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Richardson*, 227 Neb. 274, 417 N.W.2d 24 (1987); *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987). Such matters are for the trier of fact, and the conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the conviction. *State v. Lane, supra*; *State v. Richardson, supra*; *State v. Charron, supra*.

Defendant contends that there was insufficient evidence to establish that he possessed the controlled substances with the intent to distribute, deliver, or dispense. The evidence before the jury, however, if believed, showed that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance. Such evidence is sufficient to support a finding of possession. *State v. Lee, supra*; *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). Constructive possession of a controlled substance may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the contraband. *State v. Sotelo, supra*; *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987); *State v. Lee, supra*.

Defendant contends that there was no evidence linking him to the drugs at the searched residence, nor was there evidence linking him to the drugs found in the Gorum vehicle and in the leather jacket. Donald Gorum, however, testified at trial that he had known the defendant all his life and that the defendant had informed him 2 or 3 days before the defendant was arrested that defendant was then residing with Lee because defendant's brother had "kicked him out" of his previous residence. Gorum additionally testified that defendant was buying groceries at the residence and could "come and go as he pleased."

As to the substances found in the Gorum vehicle, Gorum testified that he did not know that there were drugs in his vehicle until the defendant tossed the heroin at him. Gorum further testified that the black leather jacket containing the marijuana belonged to the defendant and had been left in Gorum's car by

the defendant when defendant left the car.

Furthermore, Gorum testified that he had seen the corn chip canister at the residence while defendant was living there. Although the defendant had been living at the residence for only a few days, Gorum testified that he had purchased marijuana from defendant at the searched residence and that the defendant had supplied the marijuana from the corn chip canister. Defendant attacks the credibility of Gorum's testimony due to the fact that Gorum himself had been charged with possession and intent to deliver, but it is not the province of this court to pass on the credibility of the witnesses. *State v. Richardson, supra*; *State v. Charron, supra*.

The marijuana seized during the search of the residence was packaged in 23 baggies. Testimony at trial referred to the quantities as "dime or nickel" bags and indicated that the marijuana was packaged for street sale. Further testimony showed that heroin is commonly sold on the street in "beans" and that the heroin found in the Gorum car was packaged into eight "beans" suitable for street sale. Such evidence was circumstantial evidence to prove defendant's possession of the contraband was for sale. Circumstantial evidence is sufficient to support a finding of guilt of possession of a controlled substance with intent to distribute, deliver, or dispense. *State v. Hunt, supra*; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

The jury could properly find that the defendant was in possession of the heroin and marijuana found in the Gorum vehicle and was, additionally, in possession of the marijuana found at the searched residence. The jury could have properly found that the heroin in the car and the marijuana at the residence were packaged for street sale and were thus possessed by defendant with the intent to distribute, deliver, or dispense.

We determine that the evidence was sufficient to support the jury's finding of guilt on both counts. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ALLEN BODFIELD, APPELLANT.

421 N.W.2d 794

Filed April 8, 1988. No. 87-657.

1. **Convictions: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt.

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

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellant.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

GRANT, J.

Defendant, Michael Allen Bodfield, was convicted of burglary by a jury in the district court for Dawson County. After a later hearing, the trial court found defendant to be a habitual criminal, as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985), and sentenced him to 11 to 20 years in the penal complex. On appeal to this court, defendant assigns three errors: (1) that the court erred in failing to find that the evidence was insufficient to support a conviction of burglary; (2) that the trial court erred by communicating with the jury, through the clerk of the court, in the absence of defendant or his counsel; and (3) that the trial court erred in encouraging the jury to reach a verdict. We affirm.

The record shows that on the morning of October 18, 1986, the owner of the Seventh Street Market in Cozad, Nebraska, reported a burglary at her store. A Cozad Police Department officer met the owner at the front door of the business. The

officer's investigation of the scene showed that an intruder had broken in through a window on the east side of the building and removed several items, apparently through the back door. Items missing from the store included a cash register, some change from a drawer underneath the cash register, and three cases of beer. The change totaled approximately $13. The officer also observed dirt on the floor, which appeared to have fallen out of the bottom of a shoe or boot.

Outside the store, the investigating officer located a footprint in a roughed area of dirt approximately 20 feet from the broken window. He also observed tire tracks that appeared to be from a smaller wheelbased vehicle and that went through the alley which ran beside the store, and then turned to the south.

Upon completing his investigation of the scene, the officer proceeded to a location, at 810 East 4th in Cozad, where he believed there had been a smaller vehicle. He then knocked on the front door, but no one answered. The house had been rented to Joe Barela and was his residence. At this point, the investigation was terminated for the day.

On October 25, 1986, pursuant to a valid search warrant, a Cozad police officer searched the house rented to Barela and found a cash register which the owner of the Seventh Street Market identified as the cash register which had been stolen during the October 18 burglary. The cash register was found in a closet, wrapped in a blanket.

During defendant's trial on March 23, 1987, a witness testified that defendant told her that he, along with Mike Lee, had broken into the Seventh Street Market. Defendant also told the witness that on the day of the burglary, the two men had been drinking all day at Joe Barela's house and ran out of beer. The witness further testified that defendant had told her that the other man broke the window, climbed in, took some beer, and handed it down to defendant.

Also testifying at defendant's trial was a witness who spent time in the cell adjacent to defendant's cell at the Dawson County jail, while defendant awaited trial and this witness was awaiting sentencing on an unrelated crime. This witness testified that he heard defendant tell Mike Lee that "he was

sorry that he didn't want to get anybody else involved when they did the Burglary."

On November 6, 1986, defendant was arrested by the Cozad police on an unrelated matter. During questioning, after the officer had informed defendant of his rights under the *Miranda* decision, the officer noticed defendant was wearing a pair of hiking boots. These boots were confiscated and sent to the State Patrol laboratory in Lincoln. No report from the crime laboratory was submitted into evidence, but the officer testified that the confiscated boots would have made impressions similar to those found outside the window at the Seventh Street Market after the burglary in question.

During further questioning of defendant, defendant denied any knowledge of the burglary in question, but did tell the officer that Joe Barela should have known the cash register in his rented house was stolen. The police officer further testified that he asked defendant about the burglary in question and that "Mr. Bodfield [defendant] said he was out of town during that time and I asked him if he could tell me what date the Burglary occurred on and he said he had no idea."

After the prosecution rested, the defendant did not testify and did not call any witnesses. The jury was sent to deliberate at approximately 1:40 p.m. on March 23, 1987. At approximately 2:45 p.m., the clerk of the district court was directed by the district judge to inform the jury that the Dawson County courthouse had been closed due to a blizzard since approximately 1:30 p.m. and that the jury could either stay in the courthouse and deliberate to a verdict or cease deliberations for the day and return to the courthouse on Wednesday, March 25, 1987, to continue deliberations. At approximately 2:50 p.m. on March 23, the jury returned a verdict of guilty. After the jury was polled, the judge accepted the verdict and entered the verdict of guilty.

With regard to defendant's first assignment of error, concerning the sufficiency of evidence, this court has held that

> " '[i]t is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be

> sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . .' "

State v. Babcock, 227 Neb. 649, 651, 419 N.W.2d 527, 529 (1988); *State v. Patrick*, 227 Neb. 498, 418 N.W.2d 253 (1988).

During defendant's trial, the jury had an opportunity to hear the witnesses testify and to pass on their credibility. The jury heard two separate witnesses testify that they had heard defendant admit that he had committed the burglary. The jury also heard a police officer testify that he found the stolen cash register in defendant's friend's house and that defendant had told the officer that he (the defendant) was out of town at the time of the burglary, although he did not know when the burglary occurred. The officer also testified that defendant wore boots which left marks similar to those at the scene of the burglary.

Although much of the evidence adduced at defendant's trial is circumstantial, we held in *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987), that one accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the State, we hold that the evidence is sufficient to establish defendant's guilt.

Defendant next assigns as error that the trial court committed prejudicial error by communicating with the jury in the absence of and without notice to defendant and his counsel. The clerk of the district court's affidavit, which was admitted into evidence during a hearing on a motion for new trial, clearly sets out the clerk's communication with the jury. The court informed the jurors of the inclement weather and gave them the option of either continuing with their deliberations or ceasing their deliberations for the day and continuing on March 25, 1987.

During the hearing on the motion for new trial, the district judge stated:

> As far as the communication with the jury, my recollection is that defendant's attorney, who obviously is not present counsel, was present, and the jury was simply

> informed of the situation, due to the situation with the courthouse being closed. And there is no evidence this affected their deliberations in any way, shape or form.

Defendant's point on this assignment of error is that there was a communication with the jury in the absence of defendant or his counsel. At the hearing on defendant's motion for new trial, the court stated counsel was present when the clerk was sent to talk to the jury. There is no evidence or argument presented or even suggested to the contrary. This assignment of error is without merit.

There clearly was a communication to the jury, and defendant's third assignment raised the question whether the communication was inappropriate in that it encouraged the jury to reach a verdict. In *Brockman v. State*, 163 Neb. 171, 79 N.W.2d 9 (1956), this court had a similar communication to the jury before it. In that case, the communication involved an inquiry as to "whether or not the jurors desired to continue their deliberation or, due to the lack of facilities to accommodate the jury overnight, to go to a hotel for the night and further deliberate the next day." *Id.* at 182, 79 N.W.2d at 15. The jurors retired to the jury room and continued their deliberations, eventually reaching a verdict of guilty without further contentions. In that case, we observed:

> The court was not asking for information, and gave no directions nor any urging to do or not to do any particular thing. Insofar as proceedings in the instant case are concerned, there is no indication that the statement made by the trial court could amount to coercion or any attempt to influence the verdict of the jury.

Id.

A comparable type of communication was present in the instant case. The clerk of the court, under instruction from the judge, informed the jurors of the weather and advised them of their options. This communication was not an instruction on the substantive issues of the case, nor was it an attempt to coerce or accelerate deliberation to a verdict, such as the instruction in *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664 (1970). We recognize the principle that a trial judge must not coerce a verdict or intimidate a jury, but the communication in this case

does not rise to the level of coercion or intimidation.

The communication was not an instruction giving the jury any standards to use in deciding the case. The case of *State v. White*, 191 Neb. 772, 217 N.W.2d 916 (1974), cited by defendant, is inapplicable to the facts of this case. In *White*, the court instructed the jury as to an issue that was before the jury. This court held that the giving of a supplementary instruction in the absence of defendant and his attorney was error. We characterize the type of communication in the case before us as a housekeeping action and hold that the communication to the jury in this case was not an attempt to encourage or coerce a verdict and was not prejudicial error.

The verdict and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELEAZAR MORENO, ALSO KNOWN AS ELIASAR GARZA, ALSO KNOWN AS ELEAZAR MORENO ALVARADO, APPELLANT.

422 N.W.2d 56

Filed April 8, 1988. No. 87-690.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Verdicts: Appeal and Error.** The verdict in a criminal case must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Robbery: Evidence: Proof.** The taking of property under Neb. Rev. Stat. § 28-324 (Reissue 1985) does not need to be from the "person." It is sufficient if the property is taken from the individual's personal presence, protection, or control.
4. **Criminal Law: Evidence: Proof.** To establish an alibi defense, a defendant must show (1) he was at a place other than where the crime was committed, and (2) he was at such other place such a length of time that it was impossible for him to have been at the place where and when the crime was committed.
5. **Jury Instructions.** The trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed.

6. **Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
7. **Sentences.** In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his 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.
8. _____. The seriousness of the offense is an important factor in the setting of a sentence.
9. _____. Evidence as to a defendant's life, character, and previous conduct is highly relevant to the determination of a proper sentence.

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

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellant.

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

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

FAHRNBRUCH, J.

A jury convicted the defendant, Eleazar Moreno, of brutally assaulting, robbing, and falsely imprisoning a 69-year-old woman after he participated in burglarizing her home in the early morning hours of December 22, 1986.

On the burglary and robbery charges, Moreno, known as Eliasar Garza, also known as Eleazar Moreno Alvarado, was given concurrent prison sentences totaling 10 to 20 years. On the assault and false imprisonment charges, Moreno was given concurrent prison sentences totaling 6 to 15 years, those sentences to run consecutively to the burglary and robbery sentences. Moreno appeals both his convictions and sentences. We affirm.

The defendant assigns the following as errors: (1) The evidence was insufficient to support the convictions; (2) the trial court erred in failing to give the alibi instruction offered by the defendant; and (3) the sentences imposed are excessive and

were an abuse of discretion by the trial judge.

With respect to the defendant's first assignment of error, this court has repeatedly stated that in resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988); *State v. Patrick*, 227 Neb. 498, 418 N.W.2d 253 (1988); *State v. Richardson*, 227 Neb. 274, 417 N.W.2d 24 (1987); *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987). The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Patrick, supra*; *State v. Patman*, 227 Neb. 206, 416 N.W.2d 582 (1987); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

Taking a view of the evidence most favorable to the State, the record reflects that Charlotte Meyer, 69, went to bed about 10:45 p.m., December 21, 1986. Her bedroom was located on an upper floor of her home which was situated on a farm southwest of Gering, Nebraska. The doors to the home were locked when Meyer retired.

Meyer was awakened by a light's being turned on in the hall outside her bedroom. She saw a tall man and a short man standing in the hall. Meyer spoke, and the tall man, whom Meyer later identified as the defendant, Moreno, immediately came into her bedroom. Moreno was wearing a white straw hat with a tall, high crown. He pinned Meyer to her bed, with his knees straddling her body. Moreno began choking Meyer with his hand. He hit his victim in the eyes with his fist and beat her face. Meyer asked the man's identity. He responded, "We're Cubans." She then asked him what he wanted and he responded, "Money." Meyer told him she did not have any money. Moreno again struck Meyer in the face and eyes.

Eventually, the defendant removed himself from the bed. Then he stuck his fingers into Meyer's mouth. Meyer testified she bit down "real hard" on two of his fingers, perhaps hard enough to draw blood. Thereupon, Moreno grabbed Meyer by her hair and pulled her out of bed. The defendant dragged his victim downstairs and outside to the back cement terrace. He

told her to "Get up." When Meyer responded that she could not get up, Moreno kicked her in the right breast with his boot. He then pulled her up, and in response to her plea, he assisted her back into the house. As they got near her bedroom, Meyer could see a blanket on the floor with her typewriter, Skil saw, and jewelry on it. The short man, whom Meyer had seen in the hall with Moreno, was at Meyer's dresser sorting and taking jewelry from a drawer and placing it on the blanket.

The defendant shoved Meyer onto her bed and again beat her head and eyes. The defendant repeated his request for money, and again Meyer said she had no money. Meyer said she would write Moreno a check. Her vision had become blurry because of the beatings. Her bed was soaked with her blood. The victim requested that Moreno take her to the bathroom so she could rinse her bloody eyes to permit her to see to write the check. When she got in the bathroom, one of the men grabbed Meyer's hands from behind. An electric razor cord was placed around Meyer's neck. A photograph of Meyer's neck showed the injuries inflicted by Moreno and where the razor cord had been. Meyer's hands were bound very tightly behind her back, and Meyer dropped to the floor saying, "I give up." The men then left the bathroom and continued to ransack Meyer's house. Meyer waited on the bathroom floor until she heard the men leave the house, get in their car, and drive away. Meyer then crawled around the house on her knees and tried unsuccessfully to use the telephone with her teeth and tongue. Some 12 to 14 hours after the crimes were committed, her daughter found Meyer, weak from loss of blood, on the kitchen floor near a baseboard heater, where she was attempting to keep warm.

Meyer described her injuries: All bones around the eyes were crushed; fractures on both sides of the skull; cuts above both eyes; bruises to the neck, entire face, right breast, knee and right arm; numbness of the teeth and one side of the face; and damage to the thumbs caused by them being tied back when her hands were bound behind her. Meyer suffered permanent damage to her right eyeball, which could not move up or down after the beatings. Surgery only partially corrected that condition. She still suffers severe glaucoma and blurry vision from the beatings. An emergency room physician substantially

corroborated Meyer's injuries and added that her back was also bruised.

On January 3, 1987, law enforcement officers executed a search warrant at a house in Scottsbluff where Moreno was staying. The officers found Meyer's jewelry, Skil saw, tool box, jewelry box, a Harlan County belt buckle, and a hat which Meyer identified as the hat worn by the defendant at the time he committed the crimes against her. The officers also found blankets which were stolen from the Meyer home.

Maria Ansria, a restaurant worker, testified that Moreno showed her some rings and pendants. While he was showing the jewelry to her, the witness observed a handkerchief wrapped around one of Moreno's hands. Ansria testified she took a ring from the defendant because he owed her some money. The ring was identified by Meyer as one that she had owned since she was in high school. The victim testified that the ring was in her house the night she was attacked.

From the oral and physical evidence in this case, a jury could find beyond a reasonable doubt that during the early morning hours of December 22, 1986, the doors to the Meyer home were locked; that entry to the home was gained through a back door by willfully, maliciously, and forcibly breaking the door's window; and that whoever entered the home did so with intent to commit the felony crime of robbery and with the intent to steal property of value because both of those are precisely what the intruders accomplished upon entering the Meyer home.

Under Neb. Rev. Stat. § 28-507(1) (Reissue 1985), "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."

Moreno admitted that he was at the Meyer farm, but denied that he entered the home or participated in any of the crimes committed there in the early morning hours of December 22, 1986. The defendant claims he was intoxicated from alcoholic beverages and marijuana at the times the crimes were committed. Moreno testified he left the vehicle he had been riding in to find two companions who, for a period of time, had absented themselves from the vehicle. Moreno's denial of

entering the Meyer home fades into oblivion by overwhelming evidence to the contrary. A jury could infer beyond a reasonable doubt that the car in which the defendant was riding did not arrive at the Meyer home by happenstance. There was uncontroverted evidence that Moreno worked on the Meyer farm approximately 3 months before the crimes were committed. Moreno's fingerprint was found on a glass fragment of the broken back door window, the door where entry was gained. Items taken from the Meyer home were located in the house where the defendant resided. The defendant displayed some of the items stolen from Meyer's home to a restaurant worker, who testified, not only to that fact, but also that the defendant's hand was wrapped in a handkerchief. A jury could infer beyond a reasonable doubt that it was Moreno's fingers Meyer bit during the course of the crimes against her. Most devastating to the defendant's denial of being in the Meyer home was the testimony of Meyer herself. She positively identified Moreno as the man who beat her, dragged her by the hair to the outside cement patio, and kicked her in the breast with his boot. She also identified clothing found in the defendant's residence which Moreno wore at the time of the crimes.

From the direct and circumstantial evidence, a jury could find beyond a reasonable doubt that if the defendant was not solely responsible for the Meyer burglary, he certainly was an aider and abettor. An aider and abettor may be prosecuted as the principal offender. Neb. Rev. Stat. § 28-206 (Reissue 1985); *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987); *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985). The evidence is overwhelming that Moreno participated in the burglary of the Meyer home, and his conviction of that crime should be affirmed.

In regard to the robbery charge, Neb. Rev. Stat. § 28-324 (Reissue 1985) provides: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever."

The taking of property under § 28-324 does not need to be from the "person." It is sufficient if the property is taken from the individual's personal presence, protection, or control. See,

State v. Bird Head, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980).

As previously set forth, the record is saturated with evidence that it was Moreno who used force and violence while Meyer's possessions were taken from her personal presence, protection, and control. Meyer observed these possessions being sorted for asportation from her home. The items were found in the defendant's residence and were identified by Meyer as being some of the possessions taken from her during the attacks. Moreno displayed some of the stolen items to a restaurant worker. The jury, from common experience, could find beyond a reasonable doubt that the stolen items had value. Again, the evidence is overwhelming that Moreno participated in the robbery of Meyer and that his conviction of that crime should be affirmed.

Assault in the first degree is committed when a person "intentionally or knowingly causes serious bodily injury to another person." Neb. Rev. Stat. § 28-308(1) (Reissue 1985). The facts previously set forth in this opinion demonstrate that Moreno knowingly and intentionally inflicted numerous serious bodily injuries upon Meyer. She was choked, battered, bruised, dragged, and kicked by Moreno. Her right eye was permanently damaged, her thumbs were severely injured, her bones were broken, and she became anemic from loss of blood. The intensity and severity of Meyer's injuries attest to their seriousness. The evidence is overwhelming that Moreno is guilty of assault in the first degree and that his conviction for that crime against Meyer should be affirmed.

"A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury . . . ." Neb. Rev. Stat. § 28-314(1) (Reissue 1985).

After the defendant had choked, beaten, and dragged Meyer through her home and outside, and after beating Meyer again, Moreno took her to the bathroom, where she intended to wash the blood from her eyes. It was there that she was again choked, this time with the cord from an electric razor. She was left with

her arms tied tightly behind her back. Meyer was imprisoned in her own home. Before she was bound, she had "given up." She lay on the bathroom floor until Moreno, who had terrorized her, and his companion had left in an automobile. Meyer was not only exposed to the risk of serious bodily injury by the imprisonment, she suffered it. Photographs reflect a substantial amount of Meyer's blood in her bed, on the bathroom floor, in the hallway, on the stairway, in the kitchen, and on the cement patio. Loss of blood caused Meyer to become anemic. She crawled around her house on her knees. She was cold. She could not leave the house to seek assistance. Because her hands were bound, she could not use the telephone to seek help. At trial, there was sufficient evidence from which the jury could find beyond a reasonable doubt that the defendant, either as an aider and abettor or solely, restrained the defendant under terrorizing circumstances or under circumstances which exposed Meyer to the risk of serious bodily injury. Moreno's conviction for that crime should be affirmed.

The defendant attempted to invoke what is commonly called an alibi defense. To establish an alibi defense, a defendant must show (1) he was at a place other than where the crime was committed, and (2) he was at such other place such a length of time that it was impossible for him to have been at the place where and when the crime was committed. *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *Mays v. State*, 72 Neb. 723, 101 N.W. 979 (1904); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985).

Although admitting he was at the Meyer house, Moreno claims he remained outside the home while the crimes were committed. He also claims he was too intoxicated from alcohol and marijuana to commit the acts charged. It is inherent in the verdict that the jury rejected those two claims. The defendant's admission that he was at the Meyer home eliminates the necessity for an alibi instruction. There is no evidence in the record which even suggests that the defendant in this case was so far from the crime scene that it would have been impossible for him to have committed the crimes. His fingerprint on the back door glass fragment places him where the Meyer break-in

occurred. There being no basis in the evidence for the trial judge to give an alibi instruction, he properly refused to give it. The trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Scott*, 212 Neb. 625, 324 N.W.2d 670 (1982).

With respect to the defendant's final assignment of error, the record and the presentence investigation report demonstrate that the sentences imposed are entirely appropriate.

This court has repeatedly held, "where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion." *State v. Benzel*, 220 Neb. 466, 479, 370 N.W.2d 501, 512 (1985); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988); *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985).

In this state, the statutory penalty for robbery is not less than 1 nor more than 50 years' imprisonment. Burglary and assault in the first degree carry a statutory penalty of not less than 1 nor more than 20 years' imprisonment, or a fine up to $25,000, or both. False imprisonment carries a penalty of up to 5 years' imprisonment, or up to a $10,000 fine, or both. Neb. Rev. Stat. §§ 28-324, 28-507, 28-308, 28-314, and 28-105 (Reissue 1985). The sentences may each be imposed consecutively. The sentences imposed upon Moreno are all well within the limits prescribed by statute.

In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his 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. *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986); *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984); *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981). The seriousness of the offense is an important factor in the setting of a sentence. *State v. Schreck*, 226 Neb.

172, 409 N.W.2d 624 (1987); *State v. Swillie, supra*; *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981). Evidence as to a defendant's life, character, and previous conduct is highly relevant to the determination of a proper sentence. *State v. Schreck, supra*; *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986).

On the burglary charge, the defendant was sentenced to an indeterminate term of 6 to 15 years' imprisonment and on the robbery charge to an indeterminate term of 10 to 20 years' imprisonment, which sentence runs concurrently with the burglary sentence. On the assault charge, the defendant was sentenced to an indeterminate term of 6 to 15 years' imprisonment and upon the false imprisonment charge an indeterminate term of from 20 months' to 5 years' imprisonment, that sentence to be served concurrently with the assault sentence. The assault and false imprisonment sentences were ordered to be served consecutively to the sentences for burglary and robbery.

The presentence investigation report reflects that Moreno has little respect for the laws of this country. A Mexican citizen, he entered this country illegally on several occasions and has been deported to Mexico on four separate occasions after he committed crimes in the United States. He has used aliases in an attempt to avoid detection of his illegal activities. Moreno has not been honest with law enforcement officials in Nebraska.

The crimes for which Moreno was convicted were cold, calculated, brutal, senseless, and nearly cost the victim her life. Meyer's injuries were so serious that she had to spend 7 days in the intensive care ward of a hospital. She has had to undergo surgery and has the prospect of additional surgery. Obviously, she has suffered psychological damage that will undoubtedly remain with her the rest of her life. Meyer's medical costs totaled $8,491.68 at the time the defendant was sentenced. The record is absolutely devoid of any remorse by Moreno for his crimes or any sympathy on his part for the victim.

Considering the facts that the sentences imposed by the district are within the statutory limits; of the numerous acts of extreme violence involved; that Moreno is addicted to alcohol and marijuana; that Moreno has little respect for the law; that

Moreno has shown no remorse for his crimes; that any lesser sentences would depreciate the seriousness of the crimes Moreno committed; and, most importantly, that the public needs to be protected, we cannot say the trial judge abused his discretion in sentencing the defendant.

None of the defendant's assignments of error have any merit. The convictions and sentences of the defendant, Moreno, are affirmed.

AFFIRMED.

GERALD E. PANWITZ ET AL., APPELLEES, V. MILLER FARM-HOME OIL SERVICE, INC., A CORPORATION, APPELLANT.

422 N.W.2d 63

Filed April 15, 1988. No. 86-212.

1. **Contracts.** Where general and specific provisions in a contract relate to the same thing and are inconsistent, specific provisions will control over general provisions.
2. **Contracts: Vendor and Vendee: Sales: Assignments.** A contract provision prohibiting a vendee's sale or assignment of assets without the vendor's consent does not preclude such assignment or sale without consent if the contract has been fully performed or if the assignee offers and is able to complete performance of the contract.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Howard P. Olsen, Jr., of Raymond, Olsen, Ediger, Ballew & Olsen, P.C., for appellant.

Thomas A. Danehey of Curtiss, Moravek, Danehey & Curtiss, P.C., for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

RIST, D.J.

This action arose out of the following facts and circumstances:

In 1978, defendant purchased from Robert E. and Nola Saxton (Saxtons) certain land in Box Butte County, Nebraska, and inventory, fixtures, and equipment for a farm supply business located thereon, for $140,000, defendant giving its note therefor and securing such note by a mortgage on the real estate purchased.

On June 15, 1984, defendant entered into a contract with plaintiffs for the sale to the latter of the same land plus additional lots, together with fixtures, equipment, and inventory for the farm supply business, now called Terry's Husky, for $200,000, plus an additional amount for inventory. The plaintiffs paid $100,000 at the closing of the contract and gave their note for the remaining $100,000, to be paid in monthly installments of $1,338.40 beginning August 1, 1984, with an option in plaintiffs on April 1, 1988, to pay the balance due, and with certain additional payoff rights thereafter. Plaintiffs' note was secured by a real estate mortgage on the land and lots purchased and a security agreement on the equipment and fixtures.

The following provisions of the contract between the parties are particularly noted:

(1) Paragraph 8, which is denominated "Supply and Freight Agreement," provides that for a period of 10 years, plaintiffs were to purchase all petroleum products from the defendant to the extent defendant could supply them. Subparagraph g of paragraph 8 provides that "[i]n the event that BUYERS [plaintiffs] desire to sell any of the premises, tanks, pumps, and pump read-out meters during the period of the supply and freight agreement as described above, SELLER [defendant] shall have first right of refusal to purchase them." The provision then provides that any offer of purchase be conveyed by plaintiffs to defendant, which had 15 days to exercise its right of first refusal.

(2) Paragraph 12 provides as follows:

> The interest of BUYERS [plaintiffs] in and to the premises and tanks, pumps and pump read-outs shall not be assigned to any other person without the express written consent of SELLER [defendant], except to a partnership or corporation owned solely by BUYERS

> and/or their spouses. . . . Violation of this clause by BUYERS shall be a material breach of the provisions of this Agreement and shall empower SELLER, at its option, to declare the entire balance due and payable and to pursue such remedies which may be available at law or in equity.

In July 1985, plaintiffs determined, for financial reasons, to terminate the business, and on August 2, 1985, entered into a contract with Alliance Cooperative Association (Co-op) for the sale of the land, lots, fixtures, equipment, and inventory, and providing for a computation of a sales price therefor which in part required payment by the Co-op of the amounts due defendant under plaintiffs' note with the defendant previously described, the balance being due and payable April 1, 1988, and Co-op to give its note therefor secured by a real estate mortgage and security agreement on the property sold. Plaintiffs submitted the proposed contract to defendant, pursuant to the provisions of paragraph 8 of the contract previously noted. Defendant did not exercise its rights under said paragraph but claimed a right to refuse to consent to any such sale under paragraph 12 thereof, and advised it would refuse unless plaintiffs included in the contract with Co-op the supply and freight agreement set out in paragraph 8. Such provision was not included in the contract, and defendant advised it would not consent to the sale.

Plaintiffs then brought this action against defendant for a declaratory judgment as to their rights under the contract, alleging in substance that paragraph 8 controlled, and defendant having failed to exercise its right of first refusal, plaintiffs were free to proceed with their contract with Co-op. Defendant in its answer alleged it had two remedies provided by paragraphs 8 and 12, that plaintiffs had breached the contract by selling to the Co-op without defendant's consent, and that the Co-op was not honoring the supply and freight agreement contained in paragraph 8. Defendant also counterclaimed for damages alleged to have resulted from plaintiffs' breach of the contract by selling to the Co-op without defendant's consent and without the supply and freight agreement's being included. Plaintiffs deny defendant had this choice of remedies and

denied the counterclaim. Upon issues' being joined, plaintiffs filed their motion for summary judgment, and defendant filed its motion for partial summary judgment upon its counterclaim with respect to the issue of plaintiffs' breach of contract.

The trial court sustained plaintiffs' motion for summary judgment, holding that paragraph 8g of the contract of the parties was controlling, that paragraph 12 did not apply, and that plaintiffs were not required to include the supply and freight agreement in the sale to the Co-op. The trial court also overruled defendant's motion for partial summary judgment. From this judgment, defendant has appealed and has assigned as error that the trial court (1) erred in finding paragraph 8 of the contract controlling, (2) erred in finding paragraph 12 of the contract did not apply, (3) erred in finding the supply and freight agreement lapsed by reason of plaintiffs' ceasing to do business, and (4) erred in not finding a genuine issue of fact regarding a showing of good faith by plaintiffs in the performance of the contract.

Paragraphs 8 and 12 of the contract are inconsistent. Paragraph 8 provides that, within a specific timeframe, plaintiffs had a right to sell land and equipment subject only to a right of first refusal by defendant, the latter to be exercised within a specific time and, if not so exercised, plaintiffs could then sell to their purchaser. Paragraph 12, on the other hand, provides that no sale or assignment in land or equipment by plaintiffs may be had without defendant's consent. Such requirement follows paragraph 8 in the contract and is without limitation. Paragraph 8 is more specific than paragraph 12. In such a situation, the proper rule of construction is that the more specific term of the contract will control over the general provision of the contract as it relates to the same subject matter. 17A C.J.S. *Contracts* § 313 (1963). Stated otherwise, "If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should be generally held to operate as a modification and pro tanto nullification of the former." 3 A. Corbin, Corbin on Contracts § 547 at 176 (2d ed. 1960). In this jurisdiction, the rule has been that where general and specific provisions in a contract relate to the same thing,

specific provisions will control over general provisions. *State v. Commercial Casualty Ins. Co.*, 125 Neb. 43, 248 N.W. 807 (1933), cited with approval in *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984). Accordingly, we determine paragraph 8 to be controlling, and defendant having failed to exercise its right of first refusal within the time specified after due tender of the proposed contract to it, defendant may not now complain of plaintiffs' proceeding with the contract of sale to the Co-op.

We further note that a contract provision requiring a seller's consent to any future sale or assignment by the buyer is considered to have a limited application; namely, that such provision is intended as security for the seller, and when such security is not at issue, the provision is not enforceable. The majority view is that a contract provision prohibiting assignment without the vendor's consent does not preclude such assignment or sale if the contract has been fully performed *or if assignee offers and is able to complete performance*. The reason for such rule is that such provision is intended merely to safeguard performance on vendee's part so that when performance has been rendered or is presently offered, the stipulation is of no consequence. Annot., 138 A.L.R. 205 (1942).

To the same effect are the cases of *Wagner v. Cheney*, 16 Neb. 202, 20 N.W. 222 (1884), and *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975). *Wagner* also holds that where such provision contains no penalty or forfeiture for its breach, it will not prevent sale or assignment. In this case the contract between the parties contains no such penalty or forfeiture.

We note that nowhere in the record does it appear plaintiffs were in default on any amounts owed defendant. Plaintiffs have paid one-half or more of the total purchase price and secured the balance by mortgage and security agreement, and Co-op in its contract with plaintiffs specifically agreed to pay the debt due from plaintiffs to defendant and to secure the same. No evidence appears that Co-op cannot meet such obligations, or the Co- op's capacity to do so challenged. There is no showing that defendant's security has not been adequately met and continued, and under the general rule above noted,

defendant cannot insist on the consent provision of paragraph 12.

With respect to the supply and freight agreement contained in paragraph 8 of the contract between the parties, there is no provision in such paragraph, or elsewhere in the contract, that if plaintiffs were to sell the land or personal property, they were required to include the supply and freight agreement as a part of the sale. Plaintiffs, upon ceasing business, were no longer required to purchase anything further under such contract and were entitled to sell the property without further consideration thereof.

Defendant argues that there is an issue of good faith involved in plaintiffs' performance under the contract which would bar the granting of summary judgment. Defendant asserts that it was bad faith on plaintiffs' part in not including the supply and freight agreement in the sale contract with Co-op and that plaintiffs are required to prove financial reasons justified their terminating the business.

We note that the supply and freight agreement contains no precondition that must be met before plaintiffs could cease business or sell the property, except for the right of first refusal, and there is no minimum purchase requirement contained therein. We are unwilling, under the facts and pleadings of this case, to read in a condition that plaintiffs must prove good faith before ceasing to operate the business and selling the assets. Even if good faith were an issue, we believe the rule set forth in *HML Corporation v. General Foods Corporation*, 365 F.2d 77 (3d Cir. 1966), is applicable. In a similar situation, where the vendee had no minimum requirement to meet regarding purchases required under a supply agreement, the court held that vendee's notice to vendor that it had no further purchase requirements did not of itself constitute a breach of the agreement. "It follows that since plaintiff [vendor] claimed a breach it was its duty to prove it, and the burden, therefore, rested upon it to show that defendant had acted in bad faith." *Id.* at 83.

We find no evidence in the record that defendant in this case met any such burden or adduced sufficient evidence to raise the issue. Moreover, as we examine the pleadings, we do not find

such issue raised in defendant's answer or counterclaim or in its motion for partial summary judgment. We find defendant's argument is without merit.

Accordingly, we hold that the trial court correctly sustained plaintiffs' motion for summary judgment and overruled defendant's motion for partial summary judgment.

AFFIRMED.

MICHAEL J. FORD, APPELLANT, V. AMERICAN MEDICAL INTERNATIONAL, INC., A DELAWARE CORPORATION, APPELLEE.

422 N.W.2d 67

Filed April 15, 1988. No. 86-247.

1. **Real Estate: Brokers: Words and Phrases.** "Business brokers" are real estate brokers, as defined by Neb. Rev. Stat. § 81-885.01 (Reissue 1987), if the attempted sale or lease involves the transfer of any interest in real estate.
2. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.

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

Thomas C. McGowan of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Lyman L. Larsen and Patricia A. Zieg of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

WHITE, J.

This is an appeal from an order of the district court for Douglas County sustaining defendant-appellee's motion for summary judgment.

Plaintiff-appellant, Michael J. Ford, filed an action against American Medical International, Inc. (AMI), seeking recovery

of $380,000 in fees, which Ford alleges AMI agreed to pay him if the corporation acquired St. Joseph Hospital in Omaha.

According to Ford's petition, AMI, through its representative Kenneth Diamond, requested Ford's assistance in approaching the hospital about a possible acquisition or merger. It is further alleged that AMI orally agreed to pay Ford for his services in an amount equal to 1 percent of the consideration paid by AMI if the acquisition was consummated. "AMI stated that it would prepare a written contract confirming these terms . . . and forward [it] to Ford." That written contract was never received by Ford.

Ultimately, a "lease and agreement" arrangement was entered into between AMI and the hospital. Ford alleges that despite repeated demands for payment of his fees, AMI has refused to pay the commission agreed to by the parties.

AMI moved for a summary judgment in the case based on the Nebraska Real Estate License Act, Neb. Rev. Stat. §§ 81-885.01 et seq. (Reissue 1987). Following a hearing where evidence was adduced by both parties, the district court sustained the motion for summary judgment based on §§ 81-885.01, 81-885.03, and 81-885.06. Ford appeals and alleges that the court erred in finding that he was a "broker" within the meaning of the statute because the transaction was for the acquisition of an *ongoing business*, not *real estate*, as defined by the Nebraska Real Estate License Act. His second assigned error alleges that the district court erred in adopting the so-called New Jersey rule announced in *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 A. 274 (1933).

The Nebraska Real Estate License Act requires that all persons who act as real estate brokers, as defined therein, in exchange for a fee, must be licensed by the State Real Estate Commission. Section 81-885.02 provides that

> it shall be unlawful for any person, directly or indirectly, to engage in or conduct, or to advertise or hold himself or herself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker . . . within this state without first obtaining a license . . . unless he or she is exempted from obtaining a license under section 81-885.04.

Section 81-885.01(1) defines real estate as follows: "Real estate shall mean and include condominiums and leaseholds, as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or nonfreehold, and whether the real estate is situated in this state or elsewhere." Subsection (2) provides in pertinent part that

> [b]roker shall mean any person who for a fee, commission, or any other valuable consideration, or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, or lease or option for any real estate or improvements thereon, or assists in procuring prospects . . . for the listing, sale, purchase, exchange, renting, leasing, or optioning of any real estate . . . or holds himself or herself out as engaged in any of the foregoing.

Further, § 81-885.06 provides in part:

> No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of sections 81-885.01 to 81-885.48, to other than licensed brokers, licensed associate brokers, or licensed salespersons.

At the hearing on the motion for summary judgment, and in this court, AMI contends that even if a fee agreement was entered into between Ford and AMI (a fact which AMI denies), such agreement was "entered into contrary to the laws of the State of Nebraska and the statutes simply bar any action."

Appellant, on the other hand, argues that the Nebraska Real Estate License Act is inapplicable in this case. Ford asserts that the transaction contemplated by AMI and St. Joseph Hospital was *not a real estate transaction*, but instead was for the acquisition of an *ongoing business*. This fact, Ford claims, puts his activities and the transaction related thereto outside the statutes, since any real estate transfer was merely incidental to the acquisition of the ongoing business. Given the clear language of the statutes involved, we cannot agree with appellant's characterization of events. For the following

reasons, we hold that the order sustaining AMI's motion for summary judgment was proper.

The record discloses that Ford owned his own business, Michael J. Ford and Associates, which was a "consulting business primarily in the medical field." The "primary purpose of the corporation" was consulting and constructing surgical centers in Omaha and around the country. Neither Ford nor his corporation held a Nebraska real estate license during the years 1975 to 1985.

Ford's activities in 1983 relating to the AMI-St. Joseph Hospital transaction are described in the pleadings and his deposition as follows:

"[N]egotiating the terms . . . on which Saint Joseph's Hospital would be willing to negotiate, i.e., it required my negotiating the terms that were subsequently in the contract."

"The contract [between AMI and Ford] said that I was to establish the . . . contact with Saint Joseph's Hospital on behalf of AMI and for that I was to be paid a finder's fee."

"Ford . . . was authorized to represent AMI in approaching St. Joseph's Hospital . . . concerning a possible acquisition or merger."

"Ford expended considerable time, effort and expense, including numerous conversations and meetings" wherein he "negotiated the basic terms and conditions of the subsequent acquisition/merger of St. Joseph's Hospital by AMI."

"Ford arranged for [the initial] meeting . . . between AMI and representatives of St. Joseph's Hospital at Ford's office. . . . Ford was present and assisted in negotiations and discussions throughout said meeting."

"Ford was the effective procuring cause of the acquisition . . . ."

When the above-described activities are compared with the language of § 81-885.01, it seems clear that Ford is a "person who . . . with the . . . expectation of receiving [a fee] from another, negotiate[d] or attempt[ed] to negotiate the . . . sale, purchase, . . . or lease" of St. Joseph Hospital, and "assist[ed] in procuring prospects . . . for the . . . sale, purchase, [or] leasing" of said hospital. The final "lease and agreement" transaction between AMI and St. Joseph Hospital, allegedly

procured by Ford's efforts, states that AMI agrees to lease "the Hospital" which is defined as a "fee simple interest in the Real Estate described on Exhibit A, attached hereto . . . ." Exhibit A set forth in exhaustive detail the legal description of all such real estate leased. In addition, the leasehold included "[a]ll tangible personal property, fixtures and equipment . . . upon the Real Estate . . . ."

This transaction may be, in part, a lease of an "ongoing business." However, the enterprise of operating a hospital is not severable from the "real estate and improvements thereon." § 81-885.01(2). Our statutes prohibit *any* unlicensed person (aside from those explicitly excepted in § 81-885.04) from negotiating, attempting to negotiate, or assisting in procuring prospects for the sale or lease of "*any* real estate or improvements thereon." § 81-885.01(2). The transaction in this case clearly falls within the broad scope of this statutory scheme.

The result we reach in this opinion is supported by case law in jurisdictions with statutory language similar to ours. One such example is *Thomas v. Jarvis*, 213 Kan. 671, 518 P.2d 532 (1974). In that case the Supreme Court of Kansas held that a "business broker" who contracts to sell the assets of companies which include real estate is a "real estate broker" and must be licensed, according to the "broad statutory definition." The Kansas statute referred to in that case, Kan. Stat. Ann. § 58-3002 (Supp. 1972), contains language very similar to our § 81-885.01. See, also, cases collected at Annot., 82 A.L.R.3d 1139, § 3 (1978).

We are not unmindful of the fact that the "New Jersey rule" (based upon *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 A. 274 (1933)), adopted by the Kansas court in *Thomas* and set forth above, has been recently modified by the Supreme Court of New Jersey in *Kazmer-Standish Consultants v. Schoeffel Instrum. Corp.*, 89 N.J. 286, 445 A.2d 1149 (1982). The New Jersey court held that an unlicensed business broker may "recover a commission on the portion of the sale of an ongoing business attributable to personal property even if the sale includes an interest in real estate." *Id.* at 293, 445 A.2d at 1152. The modification of *Kenney* was based on the court's

holding that "business brokers" were not included in the statutory definition of "real estate broker." *Id.*; N.J. Stat. Ann. § 45:15-3 (West 1978).

We note, however, that no other state court has followed this "modified New Jersey rule." In addition, Nebraska's statutory definitions of "real estate" and "broker" include language not found in New Jersey's statute. This state has chosen to define brokers as "*any* person" who seeks compensation for the doing of an act described in § 81-885.01(2) as to "*any* real estate *or improvements thereon*." Given Nebraska's definition of "real estate" and "broker" set forth in § 81-885.01, we conclude that "business brokers" do fall within the scope of our statutes if the attempted sale or lease involves the transfer of any interest in real estate.

The only exceptions to the licensure requirement of the act are found in § 81-885.04. The provisions of the Nebraska Real Estate License Act do not apply to:

> (1) Any person, partnership, or corporation who as owner or lessor shall perform any of the acts described in subdivision (2) of section 81-885.01 with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, when such acts are performed in the regular course of or as an incident to the management, sale, or other disposition of such property, and the investment therein; *Provided*, that such regular employees shall not perform any of the acts described in subdivision (2) of section 81-885.01 in connection with a vocation of selling or leasing any real estate or the improvements thereon;
>
> (2) An attorney in fact under a duly executed power of attorney to convey real estate from the owner or lessor or the services rendered by any attorney at law in the performance of his or her duty as such attorney at law;
>
> (3) Any person acting as receiver, trustee in bankruptcy, administrator, executor, or guardian, or while acting under a court order or under the authority of a will or of a trust instrument or as a witness in any judicial proceeding or other proceeding conducted by the state or any governmental subdivision or agency;

(4) Any person acting as the resident manager of an apartment building, duplex, apartment complex, or court, when such resident manager resides on the premises and is engaged in the leasing of property in connection with his or her employment;

(5) Any officer or employee of a federal agency in the conduct of his or her official duties;

(6) Any officer or employee of the state government or any political subdivision thereof performing his or her official duties for real estate tax purposes, or performing his or her official duties related to the acquisition of any interest in real property when the interest is being acquired for a public purpose;

(7) Any person or any employee thereof who renders an estimate or opinion of value of real estate or any interest therein when such estimate or opinion of value is for the purpose of real estate taxation; or

(8) Any person who, for himself or herself or for others, purchases or sells oil, gas, or mineral leases or performs any activities related to the purchase or sale of such leases.

Appellant herein has not alleged in any court that he falls within one of the above-mentioned exceptions, and the record is devoid of any evidence to support such a conclusion. Nor does any party challenge the validity of this statutory scheme and its exceptions. Absent an applicable exception to shield appellant from the statute's sweeping language, we are compelled to conclude that Ford's actions and the transaction involved herein are covered by this act.

Given the result reached in this opinion, it is unnecessary to discuss appellant's third assignment of error.

In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Taking the evidence presented herein in a light most favorable to appellant, even if it is assumed that a valid contract for a "finder's fee" did exist, it would not benefit Ford. Section 81-885.06 bars any action or

recovery on such an agreement in this case. Appellee is entitled to judgment as a matter of law. The district court's order sustaining AMI's motion for summary judgment is affirmed.

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, V. REEVES-GUSTAFSON, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLEES, COMAG CREDIT CORPORATION ET AL., APPELLANTS AND CROSS-APPELLEES.

422 N.W.2d 72

Filed April 15, 1988. No. 86-352.

1. **Mortgages: Assignments.** A provision in a mortgage assigning the possession and rents to the mortgagee, effective upon default, is valid and enforceable.
2. **Security Interests: Debtors and Creditors.** Before a security interest can attach to the property of a debtor, the debtor must have rights in the collateral.
3. **Debtors and Creditors: Crops.** A debtor has no rights in crops until they are planted or otherwise become growing crops.
4. **Landlord and Tenant: Crops: Tenancy in Common.** Generally, where the rent reserved is in kind or a share of the crops to be raised, the landlord and tenant are tenants in common of the growing crops.
5. **Uniform Commercial Code: Real Estate: Liens: Leases.** The creation or transfer of an interest in or lien on real estate, including a lease or rent thereunder, is excluded from the coverage of Neb. U.C.C. art. 9 (Reissue 1980) under § 9-104(j).

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Richard E. Putnam of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Metropolitan Life Insurance Company.

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

BOSLAUGH, J.

This action was commenced by the plaintiff, Metropolitan Life Insurance Company (Metropolitan), for declaratory relief to determine the rights of the parties to the proceeds from a part of the crops grown on land in Wheeler County, Nebraska, owned by Lawrence Reeves, Philip Gustafson, and their spouses (Reeves-Gustafson). Both Metropolitan and the defendant Omaha National Bank claim priority to the proceeds, which have been paid into the district court.

The land involved in this action consists of three tracts, which, for convenience, will be referred to as parcels 1, 2, and 3.

In December 1980, Reeves-Gustafson executed and delivered to Metropolitan promissory notes in the amounts of $475,000 and $325,000, secured by mortgages upon parcels 1 and 2. The mortgages, which were recorded on December 19, 1980, contained the following clause:

> And it is further agreed that in case of a default in the payment of the said principal Note or interest, or any part thereof, as it shall mature, or in case of failure to keep or perform any of the covenants or agreements contained in this indenture, then the second party; its successors or assigns, shall be and is hereby authorized and empowered to take immediate possession of the said premises hereby conveyed and all crops thereon, or to collect the rents therefrom, and apply the proceeds thereof to the payments of the debt hereby secured.

From 1980 to 1983 Reeves-Gustafson executed a series of promissory notes to Commercial National Bank and Trust Company of grand Island and Comag Credit Corporation to obtain operating funds. On Janaury 20, 1983, Reeves-Gustafson executed a promissory note to Commercial National in the original principal amount of $305,719.49. This note was secured by a security agreement dated June 21, 1982, in which Reeves-Gustafson granted an interest in, among other collateral:

> Whether now owned or hereafter acquired by Reeves-Gustafson, all equipment, including but not limited to all farm equipment, tractors, machinery and implements; all farm products, including but not limited

to crops, livestock and supplies used or produced in farming operations; all contract rights and accounts; and any additions, accessions and substitutions thereto; and all products and proceeds thereof.

The crops in the above were on parcels 1, 2, and 3. This interest was properly perfected.

Reeves-Gustafson executed four notes to Comag as follows: (1) on January 25, 1980, in the original principal amount of $136,000; (2) on June 8, 1981, in the original principal amount of $90,076; (3) on June 7, 1982, in the original principal amount of $153,700; and (4) on March 29, 1983, in the original principal amount of $31,000. To secure these obligations, Reeves-Gustafson and Comag entered into security agreements dated April 23, 1980, and June 1, 1981. Among other collateral, Reeves-Gustafson granted Comag a security interest in all of the crops growing or to be grown on parcels 1 and 2, which was properly perfected.

As of January 14, 1986, there was due and owing to Commercial National the amount of $104,311.97 and accrued interest in the amount of $113,132.79. Interest has continued to accrue at the rate of $42.15 per day. As of the same date, there was due and owing to Comag the total principal sum of $331,562.12 and accrued interest in the amount of $183,902.05. Interest has continued to accrue at the rate of $119 per day.

As of January 14, 1986, Reeves-Gustafson was in total default of the combined sum of $416,830.22 under the two mortgages to Metropolitan. Petitions to foreclose the two mortgages were filed by Metropolitan on March 10, 1984.

Because the assets of Commercial National and Comag have been sold to the Omaha National Bank, and it has succeeded to all of the rights of both Commercial National and Comag, Omaha National will be referred to as the defendant.

On April 19, 1984, Reeves-Gustafson leased parcels 1, 2, and 3 to Reginald Dobson and Sons, Inc. (Dobson). The lease on parcels 1 and 2 provided Dobson was to pay 35 bushels of corn per acre as rent. Dobson also agreed to pay rent in the form of crops from parcel 3, but the record does not show the amount to be paid.

During 1984 Dobson grew crops on parcels 1, 2, and 3, which

were harvested in the fall of 1984. Pursuant to the leases, the corn due Reeves-Gustafson was delivered and sold to United Grain Corporation. A check in the amount of $118,192.14, plus the interest thereon, represents the proceeds from the sale of crops due Reeves-Gustafson. Of that amount, $72,192.68 is attributable to parcels 1 and 2.

The trial court found that Metropolitan, by virtue of its mortgages, was entitled to the crop proceeds attributable to parcels 1 and 2 and that Omaha National had a first lien on the portion of crop proceeds attributable to parcel 3. Omaha National has appealed and claims that it is entitled to the proceeds from parcels 1 and 2. Metropolitan has cross-appealed and claims that it is entitled to one-half of the proceeds from parcel 3.

It is undisputed that the funds in controversy are rents which are due Reeves-Gustafson under the leases to Dobson. Omaha National claims the proceeds from the crops on parcels 1 and 2 by virtue of its perfected security interest in crops. Metropolitan claims the proceeds from the crops on parcels 1 and 2 under the assignment of rents clause in its mortgages, which provides that in the event of default, Metropolitan is "authorized and empowered to take immediate possession of the said premises hereby conveyed and all crops thereon, or to collect the rents therefrom . . . ." In *Central Savings Bank v. First Cadco Corp.*, 186 Neb. 112, 181 N.W.2d 261 (1970), we held that such a provision in a mortgage is valid and enforceable.

The issue is whether Metropolitan has the better right to the proceeds from the crops on parcels 1 and 2 because Reeves-Gustafson's interest was rent, or whether Omaha National's security interest attached because growing crops otherwise are subject to a perfected security interest.

Before a security interest can attach to the property of a debtor, the debtor must have rights in the collateral. Neb. U.C.C. § 9-203(1)(c) (Reissue 1980). Under § 9-203(5)(a), a debtor has no rights in crops until they are planted or otherwise become growing crops. Before the security interest of Omaha National could attach to the crops planted by Dobson, Reeves-Gustafson had to have some rights in the crops. Generally, where the rent reserved is in kind or a share of the

crops to be raised, the landlord and tenant are tenants in common of the growing crops. *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959); *Wendt v. Stewart*, 74 Neb. 855, 105 N.W. 550 (1905); *Sims v. Jones*, 54 Neb. 769, 75 N.W. 150 (1898). Reeves-Gustafson planted no crops on parcels 1 and 2, which had been leased to Dobson, but the lease to Dobson contained provisions which gave Reeves-Gustafson an interest in the corn to be paid as rent.

The lease contained a provision that Reeves-Gustafson,

> should they deem it necessary, may, at the cost and expense of [Dobson], employ men and equipment to go upon said premises and cultivate the crops and harvest them or do anything that is necessary to promote their growth or save them at any time before they are in the granaries, the whole expense of the same to be a lien upon [Dobson's] share of said crops.

The lease further provided that Dobson "shall secure the performance of the terms and conditions of this lease on their part by giving to [Reeves-Gustafson] on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during said term."

Reeves-Gustafson's only right or interest in the crops planted and harvested by Dobson was as rent due under the lease to Dobson.

Neb. U.C.C. § 9-104(j) (Reissue 1980) excludes from article 9 coverage "the creation or transfer of an interest in or lien on real estate, including *a lease or rents thereunder*." (Emphasis supplied.)

In *Citizens Bank, etc. v. Wy-Tex Livestock Co.*, 611 S.W.2d 168 (Tex. Civ. App. 1981), the Cockrell Cattle Company had assigned to the bank the rents due it under a lease of a feedyard to International Cattle Systems. Wy-Tex recovered a judgment against Cockrell and then attempted to garnish International for rent payments due Cockrell. The trial court held that Wy-Tex was entitled to $39,372.04 owed to Cockrell. On appeal the judgment was reversed because the Uniform Commercial Code does not apply to an assignment of rents. The court stated:

> In syllogistic form, Wy-Tex's major contention for

affirmance is that under section 9.102(b) of the Texas Business and Commerce Code, the assignment of the rental payments is a security interest; that under section 9.401(a)(3) of the Code, the Bank is required to file a financing statement with the Secretary of the State of Texas to perfect any prior right to the rental payments in question or to preclude subsequent garnishment of such payments; that the Bank did not file such a financing statement with the Secretary of State; and that, because of its garnishment proceeding, Wy-Tex has a prior right to the rental payments in question. It is undisputed that the Bank did not file a financing statement with the Secretary of State and it does not so contend. However, the Bank maintains that section 9.104(10) of the Code excludes this assignment of the lease payments from the operative effect of chapter nine of the Code.

Section 9.102(b) provides: "(b) This chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This chapter does not apply to statutory liens except as provided in Section 9.310."

Section 9.104 provides, in pertinent part: "This chapter *does not* apply . . . (10) . . . to the creation *or transfer of an interest in* or lien on *real estate, including a lease or rents thereunder* . . . (emphasis added)."

In support of its position, Wy-Tex relies primarily on *United States v. PS Hotel Corp.,* 404 F.Supp. 1188 (E.D.Mo. 1975), *aff'd per curiam,* 527 F.2d 500 (8th Cir. 1976). In that case, the court determined that a motel operator's charges for the use of rooms by its customers are accounts receivables rather than rent payments under a lease of an interest in real estate. *Id.* at 1192. Thus, in effect, the court determined that charges for rooms used by the motel's customers are not excluded from the operative effect of chapter nine of the Uniform Commercial Code by section 9.104(10). We do not

consider the court's determination in *PS Hotel Corp.* controlling or persuasive in the case before us.

In this instance, we reiterate that Gene O. Cockrell and Cockrell Cattle Company, Inc., as lessors, leased to International, as lessee, certain real property located in Gray County, Texas, including a feedlot situated thereon for a term of 24 months with a renewal option as provided therein. The lessors unconditionally assigned to the Bank all rents due and payable under the terms of the lease. Section 9.104(10) states that chapter nine of the Code does not apply to a transfer of an interest in real estate including a lease or rents thereunder. In Texas, a lease is an interest in real estate. *Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307, 310 (1935). By using the words "including a lease or rents thereunder," the legislature made it abundantly clear that rents payable under a lease of real property were excluded from the operative effect of chapter nine of the Code. See In the *Matter of Bristol Associates, Inc.*, 505 F.2d 1056, 1064 (3d Cir. 1974).

In *Bristol*, the court construed Section 9-104(j) of the Pennsylvania Code, which is identical to Tex.Bus. & Com.Code Ann. § 9.104(10) and section 9-104(10) of the Uniform Commercial Code. The court concluded: "[T]he drafters who wrote Article 9 and the legislators who enacted it into law intended section 9-104(j) to be interpreted sufficiently broadly to exclude the assignment of a lease and rents thereunder from the operation of Article 9. The burden of those who would propound a different view is to persuade the State Legislature. We should not usurp the legislative function." *Id.* at 1064. Although we find no Texas cases construing section 9.104(10) of the Texas Code, we consider the court's determination in *Bristol* and its rationale persuasive in this instance. Accordingly, we overrule Wy-Tex's contention.

611 S.W.2d at 170-71.

In *In re Bristol Associates, Inc.*, 505 F.2d 1056 (3d Cir. 1974), cited by the Texas court, the issue was whether the Uniform Commercial Code applied to a security interest in a lease given by the lessor. The court stated the question as follows:

> If the assignment of the lease to Girard is a transaction within the scope of Article 9 and if Girard's interest has not been perfected, then Girard cannot successfully assert its security interest against the Receiver. If, however, the assignment of a lease is excluded from Article 9, the filing and perfection provisions of that Article are not applicable, and Girard's security interest in the lease and in the rents from the lease would not be subordinated to the Receiver.
>
> . . . .
>
> The question confronting us here thus becomes whether "an interest in real estate" subsequently employed in a "transaction which is intended to create a security interest" is covered by section 9-102, placing the transaction under the Code, or by section 9-104(j), placing the transaction outside the Code.

505 F.2d at 1058-59.

In holding that the Uniform Commercial Code did not apply to assignment of a lease or the rents thereunder, the court stated:

> The evolution of the Code since its original enactment, the views of authorities and the realities of the pertinent business practices have persuaded us that the intent of the Legislature was to exclude from the filing and perfection provisions of Article 9 the use of a lease as collateral for a loan.
>
> Sections 9-102 and 9-104 have both been amended since their original enactment. Together, the amendments limit the application of section 9-102 where transactions touch realty and, simultaneously, provide greater explicitness in section 9-104(j), exempting both the creation and transfer of interests in realty. The amendments were proposed in order to clarify the Code as ambiguities in language became evident, rather than to alter the direction or scope of the Code.
>
> As originally enacted in Pennsylvania, section 9-102 did not contain subsection (3). In 1959 subsection (3) was added, accompanied by the explanatory Comment 4. Since the effect produced by Comment 4 was not clear, the

Conference of Commissioners on Uniform State Laws and the American Law Institute recommended, in 1962, that the Comment be modified. Before and after the amendment, the relevant portion of Comment 4 read: "However, when the mortgagee in turn pledges this note *and mortgage* to secure his own obligation to X, this Article is applicable to the security interest thus created in the note *and the mortgage* [which is a security interest in an instrument even though the instrument is secured by a real estate mortgage]. (Emphasis indicates the relevant 1962 deletions; brackets indicate the relevant 1962 addition.)" The changes in wording produced two effects. First, deletion of the references to mortgages distinguishes between the pledge of a note, a separate and distinct contract, and the underlying real estate mortgage. Where a promissory note and mortgage together become the subject of a security interest, only that portion of the package unrelated to the real property is now covered by section 9-102. Second, the added language makes explicit that the promissory note itself falls within the scope of Article 9 by virtue of its status as an instrument. Since a lease of real property is clearly not an instrument, inclusion of its assignment in Article 9 by reason of analogy to the promissory note would be strained. The amendments clarify the rationale of applying Article 9 to the promissory note. They refute the possibility that Article 9 reaches out to encompass every transaction colorably included under section 9-102.

The amendments made to section 9-104 lend further support to the position that the legislators did not intend to include in Article 9 the assignment of a real estate lease. As originally enacted, the Code did not contain section 9-104(j); rather, section 9-104(b) excluded from Article 9 coverage "a landlord's lien or a lien on real estate." Act of April 6, 1953, P.L. 3, § 9-104. Following the recommendation of the Permanent Editorial Board of the Uniform Commercial Code, the Legislature in 1959 adopted the language presently set forth in section 9-104(j). Act of October 2, 1959, P.L. 1023 § 9. The

change was promoted by the Board in the interest of "greater clarification and precision as to the types of transactions entirely excluded from the operation of Article 9." 1956 Recommendations of the Editorial Board for the Uniform Commercial Code, 257-58. The language of section 9-104(j) substantially broadens the earlier exclusion by providing that Article 9 does not apply to "the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder."

Our conclusion, that lenders need not conform to the requirements of Article 9 in order to retain their security interest in a real estate lease assigned to them as collateral, is supported, apparently unanimously, by authorities who have considered this problem. Included are many of the persons responsible for the drafting of the Code and its subsequent revisions. Carl Funk, a leading expert on the Code and its application in Pennsylvania, stated that "a bank lending on the security of an assignment of a lease or of the rentals payable by the tenant need not comply with the Code in any way."

In their treatise, Coogan, Hogan & Vagts first aver that a promissory note when used as collateral is covered by the Code even if secured by a mortgage, citing section 9-102(3) and Comment 4. However, they continue by asserting that, "[t]hough estates for years are for some purposes considered personal property, the Code would not seem to cover the mortgage of a lease on realty." 1A Secured Transactions under the Uniform Commercial Code § 16.04[1] at 1698 (1973). The authors cite section 9-104(j) for this proposition. The notion that the assignment of a lease or of rents thereunder as collateral might be considered a security interest in personal property controlled by Article 9 is dismissed as "unduly fearful." The authors state that "[t]he clear intent of section 9-104(j) * * * would be completely nullified" by such an interpretation.

. . . .

One final consideration buttresses the conclusion that the lease when used as collateral should be exempted from

> Article 9. The universal practice of Pennsylvania lenders in these circumstances is to ignore any application of the Code to leases received as collateral. A bank often takes an assignment of a lease or the rents due under a lease as security for a loan. C. Funk, Banks and the Uniform Commercial Code 61 (2d ed. 1964). Collateral of very substantial value is involved in such loans, which are granted regularly and repeatedly in the world of finance. Parties to these loans "are apt to think for good reasons that they are outside the scope of Article 9." Hawkland, 77 Com.L.J. 79, 84 (1972).
>
> . . . .
>
> . . . On balance, this Court concludes that the drafters who wrote Article 9 and the legislators who enacted it into law intended section 9-104(j) to be interpreted sufficiently broadly to exclude the assignment of a lease and rents thereunder from the operation of Article 9.

505 F.2d at 1060-62, 1064. See, also, *In re Patterson*, 64 Bankr. 189 (Bankr. N.D. Ill. 1986); *In re Standard Conveyor Co.*, 773 F.2d 198 (8th Cir. 1985).

With respect to the cross-appeal, Metropolitan claims an interest in the proceeds from the crops grown on parcel 3 only, as an unsecured creditor. Although a part of the crops grown on parcel 3 was due Reeves-Gustafson as rent, Metropolitan acquired no lien on this portion of the crops. In the hands of Reeves-Gustafson, the crops became subject to the lien of Omaha National's security interest, which was paramount to the interest of any unsecured creditor.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

JOE KUBISTA, APPELLANT, V. HAROLD JORDAN, DOING BUSINESS AS JORDAN PLUMBING & HEATING, APPELLEE.

422 N.W.2d 78

Filed April 15, 1988. No. 86-417.

Appeal and Error. In an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence, and this court will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Virginia G. Johnson, for appellant.

Loren L. Lindahl, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

GRANT, J.

Plaintiff, Joe Kubista, appeals from the district court for Saunders County, where he brought an action against Harold Jordan, doing business as Jordan Plumbing & Heating, for breach of contract. The plumbing which defendant installed in plaintiff's new residence was inoperable in that, due to the relative elevation, it was impossible for sewage to flow from the house to the existing sewerline in the adjoining street. The trial court, after a trial to the court, found generally in favor of the defendant on all issues. We affirm.

In August of 1983, construction of plaintiff's new residence in Wahoo, Nebraska, began. Plaintiff had selected a floor plan from a booklet of floor plans and had modified the plan himself to fit his needs. Plaintiff had hired a firm he described as cabinetmakers and builders to be the coordinator of the construction project.

The excavation for the basement and the installation of the basement walls and footings were completed by the end of August. The concrete basement floor was not poured at that time. Plaintiff testified that the construction coordinator knew that plumbing was to be installed in the basement and that

plaintiff did not know how the coordinator knew how deep to have the basement dug.

Plaintiff hired defendant to install plumbing in the new house. Defendant testified he had two oral contracts with plaintiff, the first to install plumbing in the house, and the second, entered into later, to connect the house sewer to the existing city line. Installation of the house plumbing began in early September and was completed to the point where a pipe was installed on the excavated floor and "stubbed out" a few inches from the house below the installed footings. Defendant testified that it was normal procedure to run the sewer pipe out of the house under the footings. The basement floor was apparently then poured. Plaintiff paid defendant for this work.

Defendant testified that plaintiff contacted him a second time, with regard to the hookup of the sewerline and waterline, in the first part of October. A different contractor began digging a trench from the house to the street so that a sewerline could be run from the stubbed-in pipe down to the city sewerline. The pipe must protrude from the house at a higher level than the city sewerline in order to permit gravity flow. After defendant had laid a couple of sections of pipe, he then realized that the stubbed-out line was too deep to allow a downhill flow to the city line.

After defendant informed plaintiff of the problem and explained to him that the problem could be corrected by either installing a sewage pump or tearing up a section of the basement floor and raising the pipe to a sufficient level, plaintiff dismissed defendant. Plaintiff then hired new contractors to correct the problem. The general contractor arranged to cut the concrete floor in the basement and arranged for the existing floor to be partially removed. The plumber then raised the pipes under the basement floor to match the necessary sewer line. To get enough height, the plumber testified, "Well, we broke the floor out and broke the center footing, we had to break it out, and we took a little bit of the underside of the front footing to get enough height."

On appeal to this court, plaintiff assigns as error: (1) The district court erred in not finding that an oral contract existed between plaintiff and defendant and was breached by

defendant's defective performance, and in dismissing plaintiff's petition; (2) the district court erred in failing to award damages to plaintiff for the expense he incurred in correcting the defective performance of defendant, which runs counter to the preponderance of evidence; (3) the district court erred in not finding that the plaintiff had met his burden of proof.

At trial, plaintiff testified that at the time he hired defendant to install the plumbing, he provided defendant with a copy of the floor plan of the first floor and the basement. While testifying, plaintiff noted that the floor plan, which was admitted into evidence, included an instruction stating: "3. Third Street sewer line will be used for the drainage pipe." Plaintiff further testified that he had arranged at the outset for defendant to do both the plumbing and the sewerline. Plaintiff stated that he gave defendant a choice between two contractors to dig the trench for the sewerline from the house to the city line in the street. With regard to the depth at which the plumbing protruded from the house and the proper depth for the sewerline, plaintiff testified as follows:

> A. . . . I never mentioned anything about the depth of the city sewer because whatever I asked him he was able to answer and when I asked about the idea of cap plumbing he said, "We have been doing it for 20 years." And, well, he wanted me — it was like his way of saying, "I have been at this a long time, I know what to do or what should be done."
>
> Q. You had just mentioned that you discussed the depth or you did not discuss the depth of the sewer with Mr. Jordan, is that correct?
>
> A. No, no, I didn't because how was I to know where he should — what the depth should be in the house, that is in the basement and then how much they allow for drainage because if I was a true contractor or plumbing contractor I would not, that would be like subcontracting and, of course, I was a customer not a contractor.
>
> Q. At the time of this conversation did you have any knowledge as to what the depths of the city sewer was on West Third Street?
>
> A. Well, I did check in July of 1983 with the light and

water commissioner, Don Peterson, and he checked a large map that they have there and he said it's approximately seven feet deep.

Q. Did you communicate this knowledge to Mr. Jordan?

A. No. No, I didn't because when I asked about other things, well, he made me feel like I was asking questions that he knows by heart.

Defendant, Harold Jordan, testified regarding the depth of the stubbed-in pipe he installed:

Q. Have you done work like this before where you have hooked up to city utilities?

A. Oh, yes.

Q. Do you generally check as to the depth of the existing utility?

A. Yes, before we started we asked Mr. Kubista and he told us six feet deep.

Q. Do you generally rely upon information given to you by home owners such as Mr. Kubista?

A. Yes.

Q. Are you aware of the fact that the city has information pertaining to the depth of their utilities?

A. Yes.

. . . .

Q. Which would you deem the more appropriate source for that information?

A. Well, we asked him, Mr. Kubista, and he told us he had got this information from the city, so it would be one in [sic] the same.

With regard to plaintiff's first assignment of error, defendant has conceded that a contractual relationship exists between them. The question is whether the services were defectively performed, resulting in a breach. The trial court, in holding that "[u]pon consideration of the evidence, the Court finds generally in favor of the Defendant on all issues," apparently ruled that the performance was satisfactory and thus there was no breach.

Plaintiff seeks damages for breach of contract, and, as such, the suit presents an action at law. See *Washington Heights Co.*

v. Frazier, 226 Neb. 127, 409 N.W.2d 612 (1987). As a result, this court's scope of review is limited to determining whether the judgment entered below is clearly wrong. The findings and conclusions of the trial court in actions at law tried without a jury have the effect of jury verdicts and will not be set aside unless they are clearly wrong. *Washington Heights Co. v. Frazier, supra*; *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987).

In *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 772, 420 N.W.2d 280, 282 (1988), this court stated:

> [I]n an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence, and this court will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party.

See, also, *Washington Heights Co. v. Frazier, supra*.

After considering the evidence, the trial court apparently found that plaintiff did, in fact, communicate with defendant regarding the depth at which the pipe should exit the house and that defendant was justified in relying on this communication. The depth of the basement, as dug, was not controlled by defendant. Defendant's installation of the plumbing at the level of the basement when he was directed to start his work could be considered performance of the contract in a good and workmanlike manner. Defendant merely performed the job he was instructed to do. Viewing the evidence in light most favorable to defendant, we cannot say the trial court's findings are clearly wrong.

Plaintiff next assigns as error that the trial court erred in failing to award damages for expenses plaintiff incurred in correcting the allegedly defective performance of defendant. Since we have held that there was no defective performance, and therefore no breach, the issue of damages is not reached.

Plaintiff's third assignment of error contends that the trial court erred in not ruling that plaintiff had met his burden of proof. In substance, this assignment is simply a restatement of the first assignment. For the above-stated reasons, this

assignment of error is without merit.

The findings of the trial court are affirmed.

AFFIRMED.

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, APPELLEE, V. KURT BLANKEMEYER AND SHARON K. BLANKEMEYER, HUSBAND AND WIFE, APPELLANTS, DAKOTA COUNTY STATE BANK, APPELLEE.

422 N.W.2d 81

Filed April 15, 1988. No. 86-551.

1. **Foreclosure: Liens.** A foreclosure proceeding is brought not to create a lien but to enforce one already in existence.
2. **Foreclosure: Homesteads: Mortgages: Constitutional Law.** Neb. Rev. Stat. § 40-103 (Reissue 1984), providing that the "homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife . . . ," neither contravenes 11 U.S.C. § 522(f)(1) (1982) nor violates Neb. Const. art. I, § 3, or art. III, § 18.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

William J. Rieb, for appellants.

Gregory N. Lohr, for appellee Federal Land Bank of Omaha.

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

CAPORALE, J.

Defendants Kurt and Sharon K. Blankemeyer, husband and wife, appeal from the order of the district court denying them a homestead exemption in certain land and confirming its sale, pursuant to a prior decree of foreclosure, to plaintiff-appellee, The Federal Land Bank of Omaha. The Blankemeyers assert the district court erred in failing to find Neb. Rev. Stat. § 40-103 (Reissue 1984), which provides that the "homestead is subject to execution or forced sale in satisfaction of judgments

obtained . . . on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife . . . ," violates federal law, as well as Neb. Const. art. I, § 3, and art. III, § 18. We affirm.

The Blankemeyers mortgaged their improved 268 acres of farmland in Dakota County, Nebraska, to the bank. At that time each of them executed and acknowledged the mortgage contract, which provides that each relinquished "all rights of homestead" in the mortgaged premises.

After a time, the Blankemeyers failed to make the required mortgage payments. As a consequence, the district court entered a decree of foreclosure and subsequently ordered the property sold in satisfaction of the unpaid liens. The bank purchased the land at the sheriff's sale. In the meantime, the Blankemeyers had filed for protection under the federal Bankruptcy Act and, at the hearing to determine whether the sheriff's sale to the bank should be confirmed, claimed the homestead exemption in question.

It should be noted that the Blankemeyers do not question the factual bases for confirming the sale; their attack is solely a legal one, claiming that § 40-103 contravenes superior federal law and violates the Constitution of this state.

Section 40-103 is part of a larger statutory scheme found at Neb. Rev. Stat. §§ 40-101 to 40-118 (Reissue 1984), which creates and defines the limits of this state's homestead exemption in bankruptcy and forced sales. By the enactment of Neb. Rev. Stat. § 25-15,105 (Reissue 1985), Nebraska rejected the federal bankruptcy exemption scheme; consequently, state exemptions, including the homestead exemption, "apply to any bankruptcy petition filed in Nebraska after April 17, 1980."

The homestead exemption, as applicable to the Blankemeyers, is defined at § 40-101:

> A homestead not exceeding in value six thousand five hundred dollars, consisting of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village . . . .

In the Blankemeyers' view, § 40-103 is in conflict with 11

U.S.C. § 522(f) (1982), which provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such a lien is—
>
> (1) a judicial lien . . . .

Section 522(b) (Supp. II 1984) and its cross-referent, 11 U.S.C. § 541 (1982 & Supp. II 1984), are not at issue.

In sum, the thesis of the Blankemeyers' first argument is that the bank's foreclosure of their defaulted mortgage somehow created a "judicial lien" which may be avoided in bankruptcy under § 522(f)(1), notwithstanding the waiver of homestead exemption which the Blankemeyers executed as part of their mortgage contract with the bank.

The definition of "judicial lien" is found at 11 U.S.C. § 101(32) (Supp. IV 1986): " 'judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Conversely, according to § 101(33), " 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." Further, under § 101(45), " 'security interest' means lien created by an agreement."

The federal bankruptcy court for the northern district of Iowa has considered the very argument the Blankemeyers urge upon this court. In *In re Miller*, 8 Bankr. 672, 673 (Bankr. N.D. Iowa 1981):

> The issue [was] whether the foreclosure of a mortgage [on real estate] pursuant to Iowa law converts the consensual mortgage lien into a judicial lien that may be avoided pursuant to § 522(f)(1) of the Bankruptcy Code.
>
> This Court concludes that a transformation does not take place and no such result was intended by Congress when it enacted the section in question.
>
> . . . .
>
> The legislative history of this section sets out the purpose of subsection (f), which is to " 'protect the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid liens on exempt property. The

> debtor may avoid a judicial lien on any property to the extent the property could have been exempted in the absence of the lien . . .' "
>
> . . . .
>
> The legislative history of [the code section which defines "lien"] provides: "In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens."
>
> There is nothing in the legislative history of the Code that would indicate that Congress intended that a diligent creditor who obtained a judgment in foreclosure with respect to his security interest would thereby lose his rights through avoidance in bankruptcy proceedings by the use of § 522(f)(1). It seems clear that the provision for avoidance of judicial liens was meant to apply to judgments obtained on debts that would otherwise be unsecured.
>
> Neither the language of the Code definitions nor the legislative history suggests that a mortgage lien is avoidable merely because it has been established by judgment in a foreclosure action. The lien of the mortgage was not "obtained" by judgment, levy, etc. As the language of the decree suggests, the lien of the mortgage was simply "established" by the judgment. The mortgage lien was neither extinguished by the foreclosure decree nor merged into the judgment of the foreclosure decree. Nor is there any contention here that [the mortgagee] has, by its actions, waived its consensual mortgage lien.

See, also, *In re Gugenhan*, 55 Bankr. 507 (Bankr. D. Kan. 1985) (equitable mortgages were not "judicial liens" and could not be avoided by chapter 11 debtors under § 522(f)(1)); *In re Grosso*, 51 Bankr. 266 (Bankr. D.N.M. 1984) (judicial liens were avoided under § 522(f)(1) to the extent that they impaired debtor's bankruptcy residence exemption, and debtor would be entitled to that exemption except to the extent that he had voluntarily impaired it through a consensual lien given to secure an unliquidated note for attorney fees); *In re Hart*, 50 Bankr.

956 (Bankr. D. Nev. 1985) (lien, representing former husband's equity in marital residence, arose either by virtue of an express agreement between husband and debtor or by the imposition of an equitable lien to carry out the parties' intent under the divorce decree and, as such, qualified as a security interest rather than a "judicial lien" and was not avoidable under § 522(f)(1)); *In re Simonson*, 44 Bankr. 269 (Bankr. M.D. Pa. 1984), *aff'd* 758 F.2d 103 (3d Cir. 1985) (where debtor's property was fully encumbered even without judicial liens which had been avoided, debtors could not preserve judicial liens for their own benefit and could not fill shoes of judicial lienholders to the detriment of second mortgagee); *In re Boyd*, 31 Bankr. 591 (Bankr. D. Minn. 1983), *aff'd Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984) ("judicial lien," as contemplated by § 522(f)(1), is an interest which encumbers a specific piece of property granted to a judgment creditor who was previously free to attach any property of the debtor's to satisfy his interest but who did not have an interest in a specific piece of property before the occurrence of some judicial action).

As this court noted in *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 592, 223 N.W.2d 425, 428 (1974), "A foreclosure proceeding . . . is not brought to create a lien but to enforce one already in existence."

In their reply brief to this court, the Blankemeyers are particularly vituperative in their criticism of *In re Miller*, 8 Bankr. 672 (Bankr. N.D. Iowa 1981), stating, through counsel, that they "would not rely upon Miller to be the law. Nor . . . cite it for authority to be the law for which it purportedly stands. Miller appears to stand alone. It is a 'maverick'." Reply Brief for Appellants at 3. The Blankemeyers refer this court to five cases, attaching copies thereof to their briefs, which they claim support their position that *Miller* is a legal aberration. Reviewing each of these five cases, we find:

In re Schmidt, 119 Bankr. L. Rep. (CCH) ¶ 69,708 (Bankr. N.D. Ohio Jan. 20, 1984), does not stand for the proposition that foreclosure of a mortgage constitutes a judicial lien under § 522(f)(1). In *Schmidt*,

> The property in question is the debtors' residence which has an appraised fair market value of approximately

> $78,000.00. The property is encumbered by two mortgages totalling approximately $70,825.68 leaving the debtors some $7,174.82 of equity. The debtors claim homestead exemption in the real estate of $10,000.00. 11 U.S.C. § 522(b)(2)(A); Section 2329.66 (a)(1) of the Ohio Revised Code. The judgment lien which is the target of debtors' avoidance effort is for approximately $14,000.00. The narrow question which arises is how much of the judicial lien may the debtors avoid pursuant to 11 U.S.C. § 522(f)(1) . . . .

¶ 69,708 at 84,320. Not only is the *Schmidt* record devoid of any indication that the "judicial lien" somehow arose from the mortgage mentioned above, but the facts suggest the contrary. The *Schmidt* homestead was subject to mortgages in the amount of $70,825.68; the "judgment lien" complained of was in the amount of $14,000. This disparity strongly suggests that the lien at issue in *Schmidt* arose from some source other than the mortgages.

Dominion Bank of the Cumberlands, NA v. Nuckolls, 780 F.2d 408 (4th Cir. 1985), involved a perfected security interest asserted by Dominion Bank in the debtor's restaurant equipment, not a mortgage on real estate. Under Virginia law, " '[e]very householder or head of family residing in [Virginia] shall be entitled . . . to hold exempt . . . real and personal property, or either, to be selected by him, . . . to the value of not exceeding $5,000.' Va. Code Ann. § 34-4 (1984)." 780 F.2d at 410. The court of appeals notes:

> In the loan agreement . . . the Nuckolls expressly waived "the benefit of any homestead exemption to protect property from being used by [the Bank] to pay off the loan. . . ." Under Virginia law such a waiver is enforceable against the debtor. . . . The Nuckolls argue nonetheless that section 522 of the Bankruptcy Code allows them to claim the exemption despite their waiver. . . . We feel . . . that the waiver was properly avoided under . . . section 522(f).

780 F.2d at 411. However, the court of appeals did not rely upon § 522(f)(1) but, rather, upon § 522(f)(2)(B), which provides that

> [n]otwithstanding any waiver of exemptions, the debtor

> may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . (2) a nonpossessory, nonpurchase-money security interest in any . . . (B) implements, professional books, or tools, of the trade of the debtor . . . .

Clearly, *Nuckolls* is inapposite to the Blankemeyers' contention that a judicial decree of foreclosure against mortgaged real estate is a "judicial lien" within the meaning of that phrase in the Bankruptcy Code. Indeed, the *Nuckolls* court cites *In re Ballard*, 5 Bankr. 570 (Bankr. E.D. Va. 1980), for the contrary proposition; the dictum in *Nuckolls* is to the effect that

> a debtor's waiver of the Virginia homestead exemption as to certain real property could not be avoided pursuant to section 522(f) because the security interest "is not a judicial lien nor does the real estate qualify for the exclusion of personal property listed in § 522(f)(2)(A), (B), and (C)."

780 F.2d at 413.

In *In re Jaxtheimer*, 119 Bankr. L. Rep. (CCH) ¶ 69,701 (Bankr. S.D. Fla. Jan. 27, 1984), the lien complained of arose from a money judgment won against the debtor and subsequent judicial raising of an equitable lien in favor of the judgment creditor in the debtor's real property. As noted earlier, a money judgment is not involved in the case before us; rather, a foreclosure of a consensual mortgage lien is involved.

In *In re Sajkowski*, 151 Bankr. L. Rep. (CCH) ¶ 70,538 (Bankr. D.R.I. Apr. 12, 1985), the federal bankruptcy court for the district of Rhode Island held that "[t]he federal homestead exemption covers a debtor's proceeds from a Chapter 7 trustee's sale of the home postpetition. Exemptions are determined at the time the bankruptcy petition is filed. Additionally, properly construed, Section 522(d)(1) applies to the value of the debtor's equity in the residence." (Syllabus of the court.) This holding illuminates the scope of the federal homestead exemption, not the scope of the phrase "judicial lien" in § 522(f). As noted earlier, Nebraska has rejected the federal bankruptcy provisions, preferring its own list of exemptions. § 25-15,105.

The question posed in this case is not addressed in *Sajkowski, supra*. Furthermore, nothing in the opinion indicates that either of the two liens complained of in *Sajkowski, supra*, arose by mortgage foreclosure.

Finally, in *In re Princiotta,* 152 Bankr. L. Rep. (CCH) ¶ 70,563 at 87,112 (Bankr. D. Mass. May 6, 1985), the bankruptcy court held that "a rather curious" land sale contract gave the debtor rights in the real estate against which an exemption could be taken "pursuant to 11 U.S.C. § 522(d)(1) and (5) (1979)," and judgment liens against this property were avoided under § 522(f). *Princiotta* did not involve foreclosure of a mortgage against the property, nor the question in this case: Does a judgment of foreclosure create a "judicial lien"?

Contrary to the Blankemeyers' rather stridently expressed opinion, the bankruptcy court's holding in *In re Miller*, 8 Bankr. 672 (Bankr. N.D. Iowa 1981), is well reasoned and well supported in the cases. The Blankemeyers have failed to bring to this court's attention, nor has independent research unearthed, any case law whatsoever in support of their position. It is clear that a judicial decree of foreclosure merely confirms the preexisting consensual mortgage lien, *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974), and does not create a "judicial lien," as that term is used in § 522(f)(1). The Blankemeyers' first argument is without merit.

The Blankemeyers next contend that § 40-103 violates the mandate of Neb. Const. art. I, § 3, that no person be deprived of property without due process of law.

The gist of the Blankemeyers' second argument is that § 40-103 unconstitutionally prevents them "from enjoying the fruits of 11 USC §522(f)," thereby depriving them "of their homestead property without due process of law." Brief for Appellants at 12. In view of our resolution of the Blankemeyers' first argument, it is clear that their second argument is equally without merit.

Finally, the Blankemeyers contend that § 40-103 violates Neb. Const. art. III, § 18, in that it immunizes the bank from the application of § 522(f), gives the bank a "very special

privilege not accorded others in the same class," and "directly and bluntly discriminates against" the Blankemeyers. Brief for Appellants at 13.

In relevant part, Neb. Const. art. III, § 18, prohibits the Legislature from granting any "corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ." Our analysis of the Blankemeyers' first argument disposes of the first aspect of this third argument. Section 40-103 does not immunize the bank from the operation of § 522(f); the federal statute simply does not apply.

As to the remaining two aspects of their third argument, the Blankemeyers profess astonishment at the notion that "[i]f a judgment debtor owes, for example, $1,000.00 upon an ordinary debt, his homestead property cannot be subjected to a forced sale or an execution. But if the same judgment debtor owes $1,000.00 for a mortgage debt, his homestead can be sold if he does not pay up." Brief for Appellants at 14. We observe, however, that creation of the power to foreclose and levy upon a homestead, although authorized by statute, is achieved not by statute but by agreement between the parties. Thus, in permitting mortgage liens held by "appellee and other banks and financial institutions" to reach their debtor's homestead property, the Legislature has not granted anyone special or exclusive privileges, immunity, or a franchise but, rather, has merely recognized that some debtors may wish to waive their homestead exemption when mortgaging land in order to increase their borrowing power. The Blankemeyers' third argument is therefore as devoid of merit as were the other two.

Since the judgment of the district court is correct, it is affirmed.

AFFIRMED.

ALBION NATIONAL BANK OF ALBION, NEBRASKA, A NATIONAL BANKING CORPORATION, APPELLEE, V. FARMERS COOPERATIVE ASSOCIATION OF ST. EDWARD, NEBRASKA, APPELLANT.

422 N.W.2d 86

Filed April 15, 1988. No. 86-637.

1. **Uniform Commercial Code: Security Interests.** Under article 9 of the Uniform Commercial Code, goods can change character from one class of collateral to another as circumstances change; as this change in character occurs, goods which had previously fallen outside the scope of a perfected security interest in a certain class of collateral may come within the scope of that security interest, and goods previously within the scope of such a security interest may fall outside it.
2. _____: _____. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken; if the steps required for perfection are taken before the security interest attaches, the security interest becomes perfected upon attachment.
3. _____: _____. Where the filing requirements for perfection of security interests under the Uniform Commercial Code differ depending upon the character of the collateral, and where the filing requirements are not met regarding one character of collateral but are met regarding another character of collateral, a security interest in the collateral is perfected as of the time the collateral changes character from that as to which filing requirements were not met to that as to which filing requirements were met.
4. _____: _____. If an otherwise unperfected security interest in collateral of a certain character is not filed at all places required by the Uniform Commercial Code, but is filed at all places required by the code regarding another character of collateral, and the collateral later changes character and becomes that as to which filing meets the requirements of the code, the security interest becomes perfected when the change in character occurs, and the security interest thus perfected has rights superior to all other liens not perfected prior to the time the change in character occurred.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed.

Rodney W. Smith, for appellant.

Larry D. Bird of Treadway, Bird & Albin, P.C., for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

CAPORALE, J.

Defendant, Farmers Cooperative Association of St. Edward, Nebraska, appeals from the judgment entered in favor

of plaintiff-appellee, Albion National Bank of Albion, Nebraska, asserting that the district court erred in finding that the bank had a security interest in and thus a superior right to the proceeds of certain corn delivered to the cooperative by the bank's debtor. We affirm.

Thomas A. Shotkoski and his wife, Veronica, were the operators of a multicounty farm operation. The bank advanced funds to the Shotkoskis for the 1984 crop-year which the Shotkoskis used to pay expenses for their entire operation, including those associated with lands located in Platte and Boone Counties.

The 1984 corn in question was grown by the Shotkoskis in Platte County. After it was harvested, it was transported to, dried, and stored in Boone County. The Shotkoskis thereafter, on February 19, 1985, delivered this corn to the cooperative, in exchange for which the cooperative credited $10,120 against the Shotkoskis' outstanding debt there.

The parties stipulated that at no time did the bank perfect a security interest in the corn by filing any documents in Platte County. The record is clear, however, that the bank held a continuously perfected security interest in the Shotkoskis' farm products in Boone County from August 24, 1981, through the date on which the corn in question was delivered to the cooperative, and thereafter.

We note at the outset that the cooperative does not allege a competing security interest in the subject corn under Neb. U.C.C. § 9-312(2) (Reissue 1980). Rather, the cooperative argues, in essence, that the bank had no security interest in the corn and therefore is not entitled to the proceeds realized from its sale to the cooperative.

Though no longer the law (see Neb. U.C.C. § 9-401 (Cum. Supp. 1986)), at the time relevant to this action, prior to September 1, 1981, § 9-401 provided in part as follows:

> (1) The proper place to file in order to perfect a security interest is as follows:
>
> (a) When the collateral is unharvested crops, then in the office of the county clerk in the county where the land, on which the crops are growing or are to be planted and grown, is located, and in the office of the Public Service

> Commission, where a duplicate copy shall be filed and indexed as a crop lien. There shall be no filing fee or charge for the filing of a duplicate. . . .
>
> . . . .
>
> (c) When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence.

§ 9-401 (Reissue 1980). Clearly, "farm products" are within the meaning of the phrase "other . . . tangible or intangible personal property." *Genoa Nat. Bank v. Sorensen*, 208 Neb. 423, 304 N.W.2d 659 (1981). See, also, *Matter of Sekutera*, 62 Bankr. 387 (Bankr. D. Neb. 1986).

Neb. U.C.C. § 9-109 (Reissue 1980) defines "farm products" as

> crops or livestock or supplies used or produced in farming operations or . . . products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and . . . in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory.

Comment 4 to § 9-109 points out:

> Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. . . .
>
> . . . .
>
> Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this Article. At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand an extensive canning operation would be

> manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

Drying corn, while certainly an act of processing, is not a manufacturing process as that term is understood within the context of article 9 of the Uniform Commercial Code. The corn in question, therefore, constituted a "farm product" while dried and stored on the Shotkoskis' land in Boone County.

The cooperative's difficulty with the result in the court below seems to be an unwillingness to accept the notion that under article 9 of the Uniform Commercial Code, goods can change character from one class of collateral to another as circumstances change; as this change in character occurs, goods which had previously fallen outside the scope of a perfected security interest in a certain class of collateral may come within the scope of that security interest, and goods previously within the scope of such a security interest may fall outside it. *Genoa Nat. Bank v. Sorensen*, *supra*, illustrates this principle. At the time of its decision, a security interest in "unharvested crops" was perfected by filing the appropriate documents in both the county where the crops were growing or to be grown and with the state Public Service Commission, § 9-401 (Cum. Supp. 1978); to perfect a security interest in " 'any other type of tangible or intangible personal property,' " the statute required filing in the debtor's county of residence only. *Genoa Nat. Bank, supra* at 425, 304 N.W.2d at 661. Sorensen had given Fichtl and Nelson secured interests in crops then growing on Sorensen's land; Fichtl and Nelson had filed their financing statements in the county but not with the Public Service Commission. After Fichtl and Nelson had made their county filings, and after the crops had been harvested and stored in an elevator, Genoa National Bank acquired a judgment lien against Sorensen and thereafter levied on the crop in the elevator. This court held that although Fichtl and Nelson had not perfected their interests in the growing crop in time by filing both in the county and with the Public Service Commission, they had timely perfected their interests with respect to the crop in the elevator; once harvested, the crop was no longer

"growing crops" but, rather, had changed character and become another "type of tangible . . . personal property," as to which filing in the county only had perfected Fichtl's and Nelson's security interests. The *Genoa Nat. Bank* court noted that Neb. U.C.C. § 9-303 (Reissue 1980) provided, as it does now, that

> "(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 9-302, 9-304, 9-305 and 9-306. *If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.*"

(Emphasis in original.) *Genoa Nat. Bank v. Sorensen*, 208 Neb. 423, 426, 304 N.W.2d 659, 661 (1981). See, also, § 9-303. In sum, where the filing requirements for perfection of security interests under the Uniform Commercial Code differ depending upon the character of the collateral, and where the filing requirements are not met regarding one character of collateral but are met regarding another character of collateral, a security interest in the collateral is perfected as of the time the collateral changes character from that as to which filing requirements were not met to that as to which filing requirements were met.

Once harvested, transported to Boone County, and dried, the corn in question here was no longer a growing crop in Platte County, but had become a farm product in Boone County, as to which the bank had previously perfected a security interest. We need not determine the precise moment when the change in character of the Shotkoskis' corn from growing crop to farm product occurred; it is sufficient to note that well before the corn was transported to the cooperative, it had been moved to Boone County, had been processed by the Shotkoskis there, and had become a farm product subject to the bank's perfected security interest in the same. *Genoa Nat. Bank v. Sorensen, supra*. In other words, if an otherwise unperfected security interest in collateral of a certain character is not filed at all places required by the Uniform Commercial Code, but is filed at all places required by the code regarding another character of collateral, and the collateral later changes character and

becomes that as to which filing meets the requirements of the code, the security interest becomes perfected when the change in character occurs, and the security interest thus perfected has rights superior to all other liens not perfected prior to the time the change in character occurred.

The cooperative argues that at times relevant to this case, Neb. U.C.C. § 9-402(1) (Reissue 1980) provided in part: "When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned." The bank's financing statements did not contain a description of the land in Platte County, and, therefore, according to the cooperative, the bank's secured interest, if any, in "crops growing or to be grown" in Platte County was not perfected. In this the cooperative may be correct, a matter we need not and therefore do not decide, for the cooperative overlooks the fact that the bank had a perfected security interest in farm products in Boone County; the Boone County land was at all relevant times adequately described in financing statements on file in that county; and by the time the Shotkoskis delivered the corn to the cooperative, that which had once been "crops growing or to be grown" in Platte County had become "farm products" in Boone County by virtue of having been dried and stored there. Under § 9-401(1)(a), the bank had a properly perfected security interest in the Shotkoskis' Boone County farm products.

Since the judgment of the district court is correct, it is affirmed.

AFFIRMED.

PATRICK JAMES CLAY, APPELLEE, V. TERA LYNN CLAY, APPELLANT.

421 N.W.2d 797

Filed April 15, 1988. No. 87-560.

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

Rick G. Wade of Jeffrey, Hahn, Hemmerling & Wade, P.C., and R.L. Jeffrey, for appellant.

Frederick D. Franklin of George Qualley, P.C., for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

PER CURIAM.

The respondent, Tera Lynn Clay, appeals from the order of the district court placing the care, custody, control, and possession of the children of the parties, Patrick James Clay, Jr., and Jill Marie Clay, in and with the petitioner, Patrick James Clay. We have, as required in cases of this nature, reviewed the record de novo to determine whether the district court abused its discretion. *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987).

We find no such abuse; accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE KNIPPLE, JR., APPELLANT.

422 N.W.2d 91

Filed April 15, 1988. No. 87-630.

1. **Trial: Evidence: Verdicts: Appeal and Error.** The Supreme Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. The verdict of the trial court will be upheld if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Trial: Evidence: Appeal and Error.** A trial court's ruling in admitting evidence is

a matter within its sound discretion and will not be disturbed absent an abuse of discretion.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Christopher I. Hansen of Healey, Wieland, Kluender, Atwood & Jacobs, for appellant.

Robert M. Spire, Attorney General, and Fredrick F. Neid, for appellee.

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

BOSLAUGH, J.

After trial to a jury, the defendant, Eugene Knipple, Jr., was found guilty of the theft of property having a value of more than $100 but less than $300 and was fined $750 and costs. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends that the evidence is insufficient to support the finding of guilty and that the trial court erred in admitting an exhibit over an objection as to relevancy.

The record shows there was evidence from which the jury could find that at around 8 p.m. on January 24, 1986, an eyewitness observed the defendant loading plywood into his truck from a jobsite at 245 and 251 Judson Street in Lincoln, Nebraska, where Chadd Construction Company had two houses under construction. Plywood had been delivered to the jobsite that day for use as roof sheeting. There was evidence that from a stack of 70 sheets of plywood delivered that day, 10 to 15 sheets had been used. After the theft approximately 10 sheets were found on the ground at the jobsite where the stack had been located. There was also evidence of drag marks on the ground, suggesting that the plywood had been dragged from the stack to the curb where it had been loaded into the truck. The eyewitness noted the license number of the defendant's truck, identified him from a photographic lineup at the police station that night, and identified him at the trial.

There was evidence that the plywood had a value of $7.90 per sheet plus tax. The jury fixed the value of the property stolen at

$199.18.

As the defendant points out, there were conflicts in the evidence which presented questions for the jury that were resolved against the defendant. The Supreme Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. The verdict of the trial court will be upheld if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988). The evidence of the State, if believed, was sufficient to support a finding of guilty beyond a reasonable doubt.

The State offered an invoice from the Lincoln Lumber Company for 70 sheets of plywood ordered by Noel Chadd Construction on January 23, 1986, for delivery to 245 Judson on January 24. The amount of the invoice was $553.28 plus $27.66 tax. The defendant's objection on the ground of relevancy was overruled and the exhibit received in evidence. Noel Chadd had supplied foundation evidence for the exhibit and had testified that he had ordered the plywood, that it had been delivered to the jobsite, that he had received the invoice, and that it had been paid.

The defendant argues that the exhibit was not relevant because there was no conclusive evidence that the plywood stolen was the exact same plywood covered by the invoice. A trial court's ruling in admitting evidence is a matter within its sound discretion and will not be disturbed absent an abuse of discretion. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

The exhibit was relevant for several reasons. It corroborated the testimony of Noel Chadd and was some evidence of the value of the plywood stolen from the jobsite. The objection was properly overruled.

The defendant testified and denied that he had committed the offense. His other evidence consisted of alibi testimony which the jury chose not to believe.

The judgment is affirmed.

AFFIRMED.

DEBORAH K. ZAVITKA, APPELLEE, V. JOE D. ZAVITKA, APPELLANT.
421 N.W.2d 798

Filed April 15, 1988. No. 87-636.

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

Kent F. Jacobs of Blevens & Jacobs, for appellant.

David L. Kimble of Souchek & Kimble, for appellee.

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

PER CURIAM.

This is an appeal from a decree of dissolution entered by the district court for Seward County, Nebraska. Husband appeals, alleging that the district court abused its discretion in dividing property between the parties and refusing to award alimony to the husband.

> "In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Burton v. Burton, 226 Neb. 550, 551, 412 N.W.2d 486 (1987) (quoting *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987)).

From our review de novo on the record of these proceedings, we find no abuse of discretion by the district court.

AFFIRMED.

SHAROLYN R. CHRISTEN, APPELLANT, V. JAMES W. CHRISTEN, APPELLEE.

422 N.W.2d 92

Filed April 15, 1988. No. 87-708.

1. **Child Custody.** Custody matters are initially entrusted to the sound discretion of the trial judge.
2. **Divorce: Appeal and Error.** In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Divorce: Child Custody: Courts.** Pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986), a district court may maintain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child.
4. **Child Custody: Courts: Modification of Decree.** When a court has retained legal custody of a child, pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986), a question whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

Kimberly D. Mueller of Jeffrey, Hahn, Hemmerling & Wade, P.C., for appellant.

Michael R. Dunn and Richard L. Halbert of Halbert & Dunn, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

SHANAHAN, J.

This is an appeal from an order modifying a decree of dissolution, providing for the physical custody of children.

Sharolyn R. Christen and James W. Christen were married in 1977 and have two children: Matthew, born February 14, 1978, and Rosemary, born August 20, 1979.

After Sharolyn had petitioned for dissolution of her marriage to James, the district court, on December 2, 1985,

found that both parties were fit and proper persons to have the care, custody, and control of their children but that "legal custody of said children should be retained by the Court and that actual physical custody should be placed with [Sharolyn]" subject to James' visitation of the children. See Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986). On July 10, 1986, Sharolyn married LeRoy Holthus. On July 18, 1986, James filed his request for a modification of the dissolution decree, asking that James be granted the "care, custody and control" of the children.

A hearing was held on June 29, 1987, concerning a change of child custody. Evidence showed that Sharolyn and the children were living in the Holthus home with LeRoy and his 15-year-old son. The Christen children, generally, have a good relationship with their stepfather and his son. James was to be married some 6 weeks after the custody hearing and expected to move into a new home with his wife and her two daughters. The court, with counsel for the parties and the guardian ad litem, interviewed the Christen children out of the presence of Sharolyn and James. During that interview, the children expressed their preference to reside with their father, with whom they felt comfortable. Both children expressed some fear, when LeRoy Holthus "throws his temper." Although the children were happy while visiting their father, they became solemn and occasionally cried at return to their mother's residence. A psychological evaluation, received as an exhibit, stated that Rosemary expressed the desire to reside with her father and attend school near her father's residence. In that evaluation, Rosemary indicated fear of her stepfather's anger and described him as frequently losing his temper. A psychological evaluation of Matthew reflected that he strongly identified with his father, to whom Matthew had a firm attachment, and expressed Matthew's wish to live with his father. Matthew indicated fear, when his stepfather became angry, and experienced depression on separation from his father. At the conclusion of the hearing, the district court ordered that "legal custody of the children of the parties, Matthew Christen born February 14, 1978 and Rosemary Christen born August 20, 1979, should be retained by the court and that actual physical custody should be placed

with [James]" subject to Sharolyn's visitation of the children. Sharolyn claims the district court erred in modifying the dissolution decree to change physical custody of the children. "Custody matters are initially entrusted to the sound discretion of the trial judge . . . ." *Cole v. Cole*, 223 Neb. 906, 395 N.W.2d 494, 495 (1986).

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987).

A district court may maintain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child. See § 42-364. See, also, *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987); *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). In *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415-16, we stated:

> Section 42-364, R.R.S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their (the childrens' [sic]) best interests.' * * * The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51.
>
> It is evident that when a court finds it necessary to place

> custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing.

Regarding actions for modification of a divorce decree's child custody provisions, we have said: "A divorce decree fixing custody of minor children should not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action." *Parsons v. Parsons*, 219 Neb. 736, 738, 365 N.W.2d 841, 843 (1985). See, also, *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984); *Ahlman v. Ahlman*, 201 Neb. 273, 267 N.W.2d 521 (1978). Hence, establishing a change in circumstances is, generally, an essential element which must be shown to modify child custody provisions in a divorce decree.

However, when a court has retained legal custody of a child in a dissolution proceeding, requiring a change of circumstances to alter physical custody of a child would impair the court's swift action which may be necessary in the best interests of the child. Therefore, we hold that, when a court has retained legal custody of a child, pursuant to § 42-364, a question whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child.

In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on

the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child. See, § 42-364(1); *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987); *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

Although the district court has made a change with respect to the physical custody of the children, the court still has legal custody of the Christen children. On our de novo review of the record, we find no abuse of discretion by the trial court in its modification of the dissolution decree concerning physical custody of the children. Therefore, the district court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARSHA L. ZELLNER, APPELLANT.

422 N.W.2d 96

Filed April 15, 1988. No. 87-917.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar, for appellee.

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

FAHRNBRUCH, J.

The defendant, Marsha L. Zellner, was convicted after a county court bench trial of shoplifting, in violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1985). She was sentenced to probation. The Douglas County District Court affirmed the conviction and sentence. In her appeal, Zellner claims the evidence was insufficient to convict her. We affirm.

Zellner was a Christmastime seasonal employee for Target Stores in Omaha. On January 3, 1987, her last day of employment with Target, Zellner "clocked out" at 5 p.m. About 6 p.m. she was observed in Target's sight and sound department. Store employees testified Zellner placed a Samsung TV box and an Emerson VCR box in her shopping cart. Store personnel testified that there were no empty boxes near the VCR or TV displays. The boxes in Zellner's cart were stapled or taped shut with factory tape, according to prosecution witnesses. The court found one box contained a VCR and the other a TV. Zellner left the sight and sound department without paying for either the VCR or the television at the cash register in that department. Security personnel were alerted to Zellner's actions.

John Fifer, a Target store detective, began observing Zellner when she was still in the sight and sound department. He verified that Zellner had a VCR box and a TV box in her shopping cart and that the boxes were sealed. Zellner, upon leaving the sight and sound department, went to the domestics department, where she was seen selecting two sets of sheets. Later, she procured one cosmetic item. Fifer watched Zellner go to the checkout lane where a cashier, who the court found was

an accomplice, checked the items in Zellner's cart. A video tape recording of Zellner's movements was introduced into evidence. Fifer, from behind a two-way mirror, observed Zellner at the checkout lane. He saw Zellner put the sheets and the cosmetic item on the desk. The VCR box and TV box were left in the cart. The accomplice appeared to take numbers off the VCR and TV boxes. After paying for the items that the accomplice recorded in the register, Zellner left the store with the TV and VCR boxes still in her shopping cart. She put the boxes into her automobile and left the Target parking area.

The tape from the accomplice's cash register specifically recorded the sale of sheets and makeup. Two apparently fictitious items from the housewares department were also recorded on the register when the accomplice pretended to record numbers from the TV and VCR boxes. The register tape did not indicate a purchase of a VCR or a TV by Zellner, nor did it record any legitimate inventory numbers from the housewares department.

Zellner testified that she clocked out at 5 p.m. on January 3, 1987, and went to an upstairs stockroom where she obtained an empty VCR box and an empty TV box. Zellner said she took boxes downstairs and placed them in her shopping cart. She claimed she then went to the television display area in the sight and sound department. She wanted to look at the Chicago Bears' playoff game which was being aired, she said. Zellner testified she left that department, selected two microwave popcorn poppers, picked up some sheets and a cosmetic item, and headed toward the checkout lanes. Zellner went to the accomplice's checkout lane. The accomplice testified she looked into the boxes in Zellner's cart and that they were empty and did not contain a TV or a VCR.

In finding Zellner guilty, the trial judge held that the circumstantial evidence was overwhelming. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987); *State v. Kane*, 224 Neb. 245, 397 N.W.2d 628 (1986). There also was direct evidence that

Zellner placed a factory-sealed TV box and VCR box in her cart.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

Taking the view most favorable to the State, there was sufficient evidence for the trial court to find the defendant guilty as charged.

Zellner's conviction and sentence are affirmed.

AFFIRMED.

CHIEF INDUSTRIES, INC., APPELLEE, V. HAMILTON COUNTY BOARD OF EQUALIZATION, APPELLANT.

422 N.W.2d 324

Filed April 21, 1988. No. 86-059.

1. **Taxation: Appeal and Error.** An appeal from a judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo.
2. **Taxation: Valuation.** A taxpayer may question the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization.
3. **Taxation: Valuation: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1986) restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other factual question or issue in the taxpayer's appeal.
4. _____: _____: _____. A mere change in the level of the economic relief sought is not such a change of a factual question or issue as to be prohibited by Neb. Rev. Stat. § 77-1511 (Reissue 1986).
5. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.

6. **Constitutional Law: Taxation: Valuation.** The Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property except motor vehicles.
7. **Taxation: Valuation.** Neb. Rev. Stat. § 77-201 (Reissue 1986) requires that all property be taxed at actual value.
8. **Taxation: Valuation: Proof.** The taxpayer has the burden of proving that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property.
9. **Taxation: Valuation: Proof: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board of equalization becomes an issue of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting on the appellant.
10. **Taxation: Valuation.** A taxpayer is entitled to have its property assessed uniformly and proportionately with other property in the county, even though the result may be that it is assessed at less than actual value.

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

Michael J. Owens, Hamilton County Attorney, for appellant.

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

CLARK, D.J.

This is an action on appeal from a finding of the Hamilton County Board of Equalization (hereinafter board), regarding the 1984 real property tax assessment of the taxpayer, Chief Industries, Inc. (hereinafter Chief). Chief owns and operates a trailer-manufacturing facility consisting of seven buildings located in Hamilton County near the city of Aurora. For tax year 1984, the Hamilton County assessor found the actual value of Chief's property to be $1,608,125. Chief appealed to the board on the bases that the valuation was set too high and that it was not equalized with other real property in Hamilton County, particularly agricultural land. The board affirmed the

assessor's action, and Chief appealed to the district court.

Although Chief's appeal was premised on both theories presented to the board, at trial Chief conceded that its property was assessed at actual value and based its argument only on the issue of failure of the assessor to equalize the assessment with those on agricultural land in Hamilton County. Initially, at the board level, Chief sought a reduction to $1,206,093, i.e., a 25-percent reduction. However, after introduction of evidence at the district court trial, Chief was granted leave to amend its prayer to request a reduction of actual value to not greater than $737,808. The board cross-appealed to the district court, seeking an increase in the assessor's valuation.

At trial the district court determined that the actual value of Chief's property as of January 1, 1984, was $1,608,125, as determined by the assessor. The district court further found that the board had systematically valued agricultural land in Hamilton County at 50 percent of its actual value for taxation purposes and that the valuation of Chief's property must be equalized with the values of other real property in Hamilton County. The district court accordingly ordered that the valuation of Chief's property for 1984 be set at $804,062, and found that all taxes levied and/or collected on assessed values exceeding that figure were illegally levied and collected, were a denial of equal protection, and were ordered refunded.

On appeal, the board makes five assignments of error, which may be summarized as follows: (1) The court erred in allowing Chief to amend its petition at trial to reflect a request for a reduction in valuation of its property to an amount less than that originally stated in its protest filed before the board of equalization; (2) the court erred in allowing Chief to present evidence (a study conducted by William Fischer) which Chief had failed to disclose to the board in pretrial discovery; and (3) the court erred in finding that the board had failed to equalize the valuation of Hamilton County property and in reducing the assessment of Chief's property to 50 percent of its actual value.

We first note that an appeal from the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo. *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984);

Fremont Plaza v. Dodge County Bd. of Equal., 225 Neb. 303, 405 N.W.2d 555 (1987). A taxpayer may question the assessed value (actual value) of its real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Fremont Plaza v. Dodge County Bd. of Equal., supra.*

"Neb. Rev. Stat. § 77-1511 (Reissue 1986) restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other *factual* question or issue in the taxpayer's appeal." (Emphasis supplied.) (Syllabus of the court.) *Gordman Properties Co. v. Board of Equal., supra.*

The board cites *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, 106 N.W. 471 (1906), in support of its claim that Chief should not have been allowed to amend the dollar amount of relief sought. In that case, the taxpayer argued excessive valuation to the board based on capitalization of gross receipts. In the district court, the taxpayer argued that the use of pole value multipliers was erroneous because the pole count was incorrect. We held that the latter issue was not raised before the board and could not be raised in district court. Other cases have used a similar rationale. See *Reichenbach Land & Loan Co. v. Butler County*, 105 Neb. 209, 179 N.W. 1015 (1920), where the taxpayer failed to argue before the board but argued in district court that the value of bank stock and shares was not assessable at all. See, also, *Reimers v. Merrick County*, 82 Neb. 639, 118 N.W. 113 (1908), where the taxpayer argued before the board that the property in question was acquired after the assessment date, and in district court argued that the assessment statute was unconstitutional. Also, in *Gordman Properties, supra*, the taxpayer had consolidated appeals for the years 1983 and 1984. In the 1983 hearing, the issue before the board was based solely on the excessiveness of the assessment, but on appeal the taxpayer added the allegation that the value of its property had not been proportionately equalized with all other property. We held that this latter issue had not been presented to the board and therefore could not be

considered on appeal. The distinction, though, is that in these cases there was a different *issue* presented before the court than was presented to the board. In the instant case, the *issues* presented in district court were the same as presented to the board, i.e., the alleged overvaluation of Chief's property and the failure of the assessor to equalize the value of Chief's property with other real property in Hamilton County. There was no change of *issues*, merely a change in the level of economic relief sought. The board's contention in this regard is without merit.

In regard to the board's assignment of error relating to admission of evidence not disclosed in pretrial discovery, it is noted that the trial court, after first sustaining the objection, conducted an evidentiary hearing in this regard. This hearing disclosed considerable confusion between counsel as to whether Fischer's data had been made available to the board. Following this hearing, the court reversed its ruling and allowed the evidence to be introduced. An offer of continuance of trial was declined by the board. Trial courts have broad discretion with respect to sanctions involving discovery procedures. *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985); *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966). We cannot say the trial court abused its discretion in allowing this evidence to be admitted. Further, it would appear from the record that when the exhibit was reoffered, the board withdrew its objection. The board, therefore, cannot now be heard to complain of error in this regard.

At trial, Evelyn Zehr, the assessor for Hamilton County, was called as a witness for Chief. She testified that the method used to evaluate Chief's property was the Marshall Valuation Service manual, which was prescribed by the Nebraska Department of Revenue for use in valuing improvements, and that this publication was used uniformly throughout Hamilton County. Pursuant to the formula set out in this manual, she first arrived at new construction cost, then deducted depreciation. She also inspected the premises. Zehr found the actual value of Chief's property on January 1, 1984, to be $1,608,125.

Zehr further testified that the Nebraska Agricultural Land Valuation Manual was used exclusively for valuation of

unimproved agricultural land. This manual, also prescribed by the Nebraska Department of Revenue, used a valuation technique of capitalization of earnings based on yield production of various types of soil and the geographical location of the land.

Zehr was aware of a Department of Revenue study based on 21 arm's-length sales of unimproved agricultural land which indicated a sales-assessment ratio of 47.74 between the assessment of such agricultural land and comparable sales of such land; i.e., assessed values were at 47.74 percent of what the property sold for on the open market. There was no attempt by Zehr to correlate the land valuation manual process with the fair market value of unimproved agricultural property.

Chief also presented testimony by Dennis Donner, manager of technical services for the Nebraska Department of Revenue for 10 years. Donner holds a bachelor's degree in business administration and has completed specific educational courses in appraisal, valuation, and statistical analysis. He has testified in state and federal courts concerning the use and credibility of the sales-assessment ratio.

Donner testified that part of his duties is the compilation of the annual sales assessment study referred to by Zehr. He defined the sales assessment study as a "measure that measures selling price compared to assessed value by county by classification of property." The information relied on to compile the study is derived from forms sent in by county assessors on arm's-length transactions involving sales of real estate according to classifications of property and the actual selling price thereof. This study is used by the State Board of Equalization and Assessment for intercounty equalization.

Donner further testified that land values in the Nebraska Agricultural Land Valuation Manual set out specific dollar figures that are assigned to different land classification groups and that assessors are required to use these values according to the soil survey in their respective counties. He testified that his sales assessment study for Hamilton County was based on 21 arm's-length sales and that this was a sufficient number of transactions to make the study valid. He felt that the sales-assessment ratio of unimproved agricultural land would

be a good indication of the overall midpoint of the typical sale in relationship to assessed value, i.e., the ratio that is represented in the study (47.74 percent) for unimproved agricultural land is reflective of the entire agricultural unimproved spectrum in Hamilton County for January 1, 1984. He testified that if 100 percent valuation is the goal, agricultural land valuation in Hamilton County should be increased in accordance with the percentages indicated in his study.

William C. Fischer, a real estate appraiser for 22 years, a member of the American Institute of Real Estate Appraisers, and a member of the National Association of Realtors, also testified on behalf of Chief. Fischer supervised a study of open market transaction sales of Hamilton County agricultural land for a period extending from 8 months before to 8 months after January 1, 1984, to compare assessed valuation of such land with the actual sale prices. Every real estate transaction in the Hamilton County clerk's office was examined. Out of the 411 transactions examined, all which could not be considered open market transactions were discarded, and Fischer arrived at 31 arm's-length transactions for the purposes of the study. In regard to these 31 sales, the witness classified each property according to (1) actual consideration; (2) total assessed value; (3) percentage of assessed value to actual value; (4) breakdown of actual land value to assessed land value; and (5) improvements by actual and assessed values. Most of the 31 sales were verified by Fischer by consultation with the realtors or parties involved and by reference to Hamilton County records. Also, he had personally inspected most of the 31 properties.

He, further, did a land classification study to determine what classifications of soil were involved in the 31 sales. This information was obtained from the assessor's records. Fischer defined a sales-assessment ratio as being the assessed value divided by the total actual consideration on the verified sale. He also testified that the size of the parcels (40 to 280 acres) appeared to have no effect on the sale price. He did admit that if a person had to sell agricultural land as a larger tract, he probably would get less than if he sold it in smaller properties.

In his opinion, most of the 31 properties probably were not economic units in and of themselves and that probably one-half of them were sold to next-door neighbors and the other half to someone within a 5- to 10-mile radius. The results of Fischer's compilation were furnished to Gary Hoeltke, another witness, for his use in arriving at a sales-assessment ratio of agricultural lands.

Fischer then testified that he had appraised Chief's property using the three normal approaches: cost, market, and income. In his opinion, Chief's property's value under the cost approach was $1,675,000; under the income approach, was $1,600,000; and under the market data approach, was $1,640,000. He then correlated the three values into a final figure, basing his final figure on which approach he thought was the best approach or a combination of the three approaches. Fischer gave his opinion that the actual value of Chief's property on January 1, 1984, was $1,650,000.

Another expert witness for the plaintiff was Gary Hoeltke, a psychologist and a senior vice president of Selection Research, Inc., of Lincoln, Nebraska. Hoeltke's doctorate from the University of Nebraska-Lincoln is in educational psychology and measurement, with a specialty in statistics and research. Hoeltke examined and reviewed Fischer's study of 31 agricultural sales and found them to be representative of the land in the county, in that they comprised a "miniature Hamilton County" in terms of land classification within the county. Hoeltke then studied the 31 agricultural sales and compared them with the land classification charts of the Nebraska Agricultural Land Valuation Manual used by the assessor to derive an estimate of the sales-assessment ratio for agricultural lands included within that data. Hoeltke concluded that it was his opinion, with 95 to 99 percent confidence, that the average of the agricultural land would fall between 43 and 53 percent in terms of its sales-assessment ratio, with the median being approximately 47 percent. He further testified that six other arm's-length agricultural sales which had been excluded by Fischer also fell in the range of 43 to 53 percent. He pointed out that the study made by Donner was virtually identical to his own conclusions, i.e., 47.74 percent, based on 21

sales.

Hoeltke gave as his opinion that the 1984 sales-assessment ratio of all agricultural land in Hamilton County would be in the range of 43 to 53 percent.

The board then presented testimony of James P. Scott, an associate professor of decision science and chairman of the department of management, marketing, and information systems at Creighton University. Scott testified that he was familiar with the sales-assessment ratios and with the procedure employed by Donner, Fischer, and Hoeltke in gathering the statistical data used in their studies. He felt that data collected by Chief's witnesses were not sufficiently representative to be valid and also pointed out that the parcels sold were smaller than the average farm size in Hamilton County.

Scott suggested that a better procedure would be to take a random sampling of parcels of agricultural lands in the county and then have them appraised by certified appraisers. He felt that sales in the open market are not valid for giving a representative sample of lands which did not sell.

Frank W. Frost testified that he had appraised Chief's property for the board using the cost, market, and income approaches, and by actual inspection of the property. Using the cost approach Frost found the value of Chief's property to be $1,759,675; using the market approach he found it to be $1,675,750; and using the income approach it was found to be $1,677,000. After correlating these results he arrived at his opinion that the actual value of Chief's property was $1,700,000 on January 1, 1984.

Frost further testified he had examined Donner's study and Fischer's summary of 31 agricultural land sales. He criticized these studies on the grounds that the average agricultural land sale was 118 acres, whereas the average farm size in Hamilton County was 416 acres. Frost felt that the sale prices of smaller units of agricultural land might tend to distort rather than to verify the actual value of agricultural land, since such units were not "economic . . . operating" units. He felt that if a farm is assessed as a total operating entity, the sales-assessment ratio should be determined from a study of sales of such operating units. Frost testified that he did not consider sale price to be

synonymous with actual value, and felt that only the income approach should be used to value agricultural land.

Frost did admit that farms have sold for years, all across Nebraska, in smaller units and that the sale of entire farm units is rare. He further agreed the sales-assessment ratio of "non-economic," or smaller, parcels is about 47 or 48 percent in Hamilton County.

The next witness for the board was Bruce Johnson, associate professor of agricultural economics at the University of Nebraska-Lincoln. Johnson stated that the average size of farms in Hamilton County was about 400 acres, including leased ground. He stated that the Nebraska Agricultural Land Valuation Manual is based on earning potential based on soil classification. He felt that a sales-assessment ratio is an imperfect measure when dealing with production property such as agricultural land. Johnson admitted, however, that the agricultural land market may be, in essence, an agricultural parcel market, i.e., where agricultural lands are not sold as whole farm units. Johnson agreed that in the marketplace for agricultural land, parcelization and/or consolidation by existing owners is not only the rule, but almost the absolute rule.

Chief then called Carl D. Novak, an evaluation specialist, as a rebuttal witness. Novak has a doctorate in educational psychology and measurement from the University of Nebraska-Lincoln. He gave his opinion that the data used by Donner, Fischer, and Hoeltke were accurate and probably were the best available. In regard to Scott's opinion that sales are not valid for giving a representative value of lands which did not sell, Novak stated that obviously land not sold cannot have a sales-assessment ratio. Therefore, the only question is whether or not there is reason to believe only undervalued land sold. Novak found "very little" to persuade him that the sample was not representative merely because it was only farmland that was sold. This witness found that Fischer's sample was both adequate and representative, including in geographical distribution, in that the agricultural lands were randomly spread over the entire county.

Novak further felt that the opinion that sales of larger farm

units would produce a higher sales-assessment ratio was not true and that, in fact, in the sample of 31 agricultural sales, the larger parcels have the lower sales-assessment ratios. He further stated that the statistical figure of the size of an average farm is misleading since it is arrived at by dividing the total number of acres by the number of farmers, e.g., if there were 860 farmers and if one farm was 260,000 acres, then the other 859 farms would be 100 acres each.

This witness testified that he independently verified Dr. Hoeltke's findings and found them to be valid.

Neb. Rev. Stat. § 77-201 (Reissue 1986) requires all tangible property and real property to be valued at its actual value for purposes of taxation. " 'Actual value' has been held many times to mean exactly the same as market value or fair market value." *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 300, 344 N.W.2d 620, 624 (1984); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). The evidence in this case clearly reflects, in our opinion, that Chief's property was valued at its actual value by the assessor and that the trial court was correct in its finding in this regard.

Neb. Const. art. VIII, § 1, requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ."

In an appeal from an action of a county board of equalization, the taxpayer has the burden of proving the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. In such a case, there is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation becomes one of fact based on the evidence, with the burden of showing the valuation to be unreasonable resting upon the appellant. *Gordman Properties Co. v. Board of*

Equal., 225 Neb. 169, 403 N.W.2d 366 (1987); *Fremont Plaza v. Dodge County Bd. of Equal., supra.*

In this case, the evidence shows that the assessor arrived at her valuation of agricultural lands in Hamilton County solely by using the Nebraska Agricultural Land Valuation Manual, which is based only on earnings potential arrived at by classification of soil. No attempt was made by the assessor to correlate this evaluation with other techniques of assessment. The evidence produced by Chief, based on studies by the state Department of Revenue and by its own experts and involving arm's-length transactions, clearly showed that agricultural land in Hamilton County was systematically undervalued in Hamilton County by 43 to 53 percent of its actual or fair market value. This evidence was sufficient to dispel the presumption that the assessor had properly performed her official duties in making the assessment. Chief's experts established by clear and convincing evidence that the two dissimilar methods used by her in the assessment of the different types of property resulted in the disparity between assessment of urban and agricultural properties in Hamilton County, and further that this disparity caused a discriminatory and unjust assessment of Chief's property.

The evidence offered by the board, while critical of the statistical methods used by Chief's experts and by Donner in his study for the Nebraska Department of Revenue, has failed to satisfactorily refute the evidence of Chief showing that its property was disproportionately assessed in relation to agricultural lands in Hamilton County.

The right of a taxpayer whose property alone is taxed at 100 percent of its true value is to have its assessment reduced to the percentage of that value at which others are taxed. See, *Fremont Plaza v. Dodge County Bd. of Equal., supra*; *Kearney Convention Center v. Board of Equal., supra.*

Applying that principle to this case, we find that the district court was correct in reducing Chief's assessment by 50 percent. The judgment of the district court is affirmed.

AFFIRMED.

OTTO FARMS, INC., APPELLEE AND CROSS-APPELLANT, V. FIRST NATIONAL BANK OF YORK, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

422 N.W.2d 331

Filed April 21, 1988. No. 86-287.

1. **Conversion: Proof.** In an action in conversion, plaintiff has the burden to prove a right of immediate possession. Plaintiff must also prove a reasonable identification of the property taken.
2. **Jury Instructions: Verdicts.** Jury instructions are sufficient to support a jury verdict when the instructions, read as a whole, fairly submit the case and do not mislead the jury.
3. **Prejudgment Interest: Conversion: Damages.** Prejudgment interest is allowable in an action in conversion only when the damages are liquidated.

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

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

John M. Guthery of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

RIST, D.J.

This is an action in conversion. Plaintiff alleged defendant had converted to its own use corn and soybeans, the property of plaintiff. The jury found for plaintiff, and judgment was entered accordingly. Defendant appeals. Plaintiff cross-appeals on the issue of prejudgment interest.

The record reflects that in 1983 one Ralph Heiden farmed 240 acres belonging to plaintiff under an oral crop lease, each party receiving one-half of the crops grown. In the same year, Heiden also farmed land he owned and several other leased tracts.

Plaintiff's land was planted to corn and soybeans, and following harvest the corn and beans were stored in separate bins without division and were additionally commingled therein with corn and soybeans Heiden had raised on other land. Heiden and the owners of the plaintiff corporation testified

that this lease arrangement had been in effect for a number of years and that the corporation relied annually upon Heiden's estimate and determination of what their crop shares were. At plaintiff's direction, Heiden would deliver plaintiff's share to a local elevator without charge.

In the same year, Heiden had borrowed money from defendant bank and had secured the loan with a security agreement, duly perfected, in all crops, grain, and livestock owned by Heiden.

Heiden's estimate of plaintiff's share of crops for 1983 was 7,500 bushels of corn and 370 bushels of soybeans. Plaintiff has not questioned this determination.

In the spring of 1984 there remained in the bins 1,286.17 bushels of soybeans and 8,960.34 bushels of corn. At that time Heiden was experiencing financial difficulties, was in default on his obligation to defendant, and had determined to cease farming. Defendant, acting under its security agreement in Heiden's grain, went to the bins and, from May 15, 1984, to June 5 of that year, removed all of the amounts of grain last above described, sold it, and applied the proceeds on Heiden's debt.

From the time of harvest in the fall of 1983 until the grain was taken by defendant, Heiden had sold a portion of the corn and beans, delivering the proceeds from said sales to the defendant, which applied it on Heiden's debt. During the same period Heiden fed some of the corn in an unknown amount to his livestock. As indicated above, defendant also had a lien upon the livestock under the security agreement, and in 1984 defendant took possession of the livestock at or about the same time it took possession of the grain, sold the livestock, and applied the proceeds on the debt.

At the time of Heiden's financial difficulties in the spring of 1984, the plaintiff, when it learned he intended to stop farming, directed Heiden to deliver its share of the grain to the elevator, but defendant's taking of the same occurred before any such delivery was effected.

Plaintiff's share of the soybeans was stored in a bin located some miles from Heiden's home farm together with other beans belonging to Heiden. The record reflects no disposition of the

beans prior to defendant's seizure except for the sale by Heiden, defendant receiving the proceeds thereof. The corn was stored in bins on Heiden's home farm and in bins on his mother's land. As indicated, some portion of this corn was sold and accounted for to the defendant and an unknown amount fed to Heiden's livestock.

Heiden testified at trial that no portion of plaintiff's crop shares was delivered to it, nor was it sold and the money paid to plaintiff. Plaintiff's testimony through its owners was to the same effect. There is no evidence to the contrary. Heiden described plaintiff's interest in terms of bushels of corn and beans as previously set forth and testified he left the grain belonging to other people in the bins at the times he took grain therefrom prior to defendant's seizure of the remainder and that there was always more grain in the bins, both corn and beans, than amounted to plaintiff's share of the same.

Defendant assigns as error that the trial court erred (1) in failing to direct a verdict for defendant for the reason plaintiff had failed to prove its ownership of the grain allegedly converted; (2) in failing to grant a judgment notwithstanding the verdict for the same reason set forth in (1) above; (3) in that the verdict was not supported by evidence establishing plaintiff's ownership in the grain allegedly converted; (4) in giving the court's instruction No. 4 and failing to give defendant's requested instruction No. 1; and (5) in that the verdict is contrary to law in that the verdict for damages was based on sole ownership of the grain rather than as a tenant in common.

A jury verdict should not be reversed unless clearly erroneous and should be upheld if supported by any competent evidence. *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

The first three assignments and assignment No. 5 will be considered together, as they involve the issue of ownership.

In conversion, plaintiff's burden is to prove a right of immediate possession at the time of conversion, in this case by proving its ownership of the grain taken, which burden in turn requires a reasonable identification of plaintiff's property. *Elander v. Kellogg Grain Co.*, 174 Neb. 782, 119 N.W.2d 522

(1963). *Elander* is the only Nebraska case dealing with shares of commingled fungible property in a conversion case. In the instant case, the question of such identity involves identifying plaintiff's share of grain in a commingled quantity which included not only plaintiff's grain but that of Heiden. In the circumstances of this case, the only basis of such proof would be for the plaintiff to prove that when defendant took all of the grain in the bins, all of the plaintiff's share was still a part of it and that the quantity or amount of plaintiff's share was determined with reasonable accuracy.

We find the jury could determine the amount of corn and soybeans owned by plaintiff on the basis of Heiden's testimony of such amounts, particularly since the evidence reflects that this was the manner in which Heiden and plaintiff had dealt with the matter over the years. The issue of whether that quantity remained in the bins at the time of defendant's taking is more difficult.

With respect to the soybeans, the only change which had occurred prior to defendant's taking was the sale of some of the beans by Heiden, and the application of the proceeds on his debt by defendant. We determine the jury could find from the evidence that the beans sold came from Heiden's share that was subject to the security agreement with defendant, and no portion came from plaintiff's share. *Elander, supra*, held that where there was commingled grain, a portion of which was mortgaged and the balance owned by the tenant unencumbered, any sale of such grain by the tenant down to the amount encumbered would be held to come from the unencumbered portion. This case also stands for the proposition that the grain does not have to be divided and separated into unencumbered and encumbered shares before this rule is applicable. The tacit position of the court was that absent evidence to the contrary, it would be presumed that grain sold by a tenant was that grain which he had a right to sell.

A corollary of *Elander* is that in a commingled property situation with encumbrances and ownership such as we have here, it may be presumed that, in the absence of evidence to the contrary, a debtor who sold property and applied the proceeds on a secured obligation would sell that property pledged to such

obligation and not the property of another. Heiden's testimony that he removed no grain belonging to another could be considered by a jury as bearing out such presumption and result. Since, therefore, there were more than 370 bushels of beans in the bin at the time of defendant's taking of the entire remaining quantity, the jury could find that plaintiff's share was taken and converted by the defendant.

With respect to the corn, the quantity taken by defendant was greater than the plaintiff's share thereof. The remaining questions deal with Heiden's sale of some of it and his feeding another portion to his livestock. With respect to the sale of corn, the rule would be the same as set out above for the sale of beans inasmuch as defendant received all proceeds from such corn sales.

The matter of Heiden's feeding corn in an unknown amount to his livestock is another matter. If Heiden's share of the grain had been unencumbered, we would follow the rule of *Elander* and find that the grain he fed was his own and not plaintiff's. Here, however, we have the situation that Heiden's grain was subject to defendant's security agreement and plaintiff's share remained its property. In such a situation, we do not see how the presumption from *Elander* can apply, because either way Heiden would be feeding grain that was not free of claim of another. We, therefore, examine the record to determine if there was sufficient evidence for the jury to determine from which share the grain fed was taken. We note the following:

(1) Heiden's testimony was that when he took grain from the bins, he left grain *belonging to other people*. The only such corn belonging to other people was plaintiff's corn. While it is true that Heiden's share was encumbered, it was still his grain, subject to such encumbrance and at that point not yet belonging to defendant.

(2) The grain was fed to livestock in which the defendant had the same security interest as in the grain itself, and which livestock were taken by defendant and sold, and the money applied to the same debt.

On the basis of Heiden's testimony, the jury could find the grain fed was not plaintiff's grain but that of the defendant. The feeding of such grain to livestock in which defendant had a

security interest would be consistent with such testimony and supportive of it. Accordingly, the jury could find that defendant's taking of the corn included plaintiff's 7,500 bushels, since more than that amount was taken by defendant.

We next consider defendant's assignment that the court erred in giving its instruction No. 4 and in failing to give defendant's requested instruction No. 1.

The court's instruction No. 4 set forth the elements of conversion plaintiff was required to prove. The elements set forth were:

> 1. That plaintiff owned and had a right to immediate possession to corn and soybeans stored on the Heiden farms.
>
> 2. That in 1984, defendant took and converted to its own use and benefit through its agent the corn and soybeans owned by plaintiff.
>
> 3. That plaintiff demanded the return of the corn and soybeans from the defendant.
>
> 4. That the defendant refused to return the corn and soybeans.
>
> 5. The nature, extent, and amount of damages thus sustained by plaintiff.

Defendant's requested instruction No. 1 was "The plaintiff must establish the identification of the grain converted by a preponderance of the evidence. A mere possibility or suspicion created by the evidence is insufficient to comprise the required showing of specific identity of the grain allegedly converted."

Defendant's argument is that instruction No. 4 is fatally defective in that it describes the property involved as corn and soybeans stored by Heiden at any point in time and is misleading on the issue of ownership at the time of conversion and that it does not adequately reflect the need to find the amount of grain owned by plaintiff at the time of taking.

We find instruction No. 4, considered as a whole and with the other instructions given, required the jury to find that plaintiff had to prove it owned the grain taken by the defendant, which obviously requires such proof as of the time of taking. It also required plaintiff to prove the quantity it owned at that time. That such matters had to be proved by a preponderance of the

evidence was set forth in the court's instruction No. 5. Instruction No. 5 having correctly defined the quantum of proof, defendant's requested instruction No. 1 cannot be said to add any missing requirement to the court's instructions. We find the court's instructions adequately and correctly submitted the case to the jury. Jury instructions are sufficient to support a verdict when, considered as a whole, they fairly submitted the case and did not mislead the jury. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

We next consider plaintiff's cross-appeal that the instructions should have required the inclusion in plaintiff's damages of prejudgment interest and the rate thereof and that the court erred in not so instructing and in failing to award such interest.

Plaintiff relies primarily upon the cases of *State Securities Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961), and *Mapledge Corp. v. Coker*, 167 Neb. 420, 93 N.W.2d 369 (1958). *Mapledge*, in the body of the opinion, holds that prejudgment interest is payable in conversion. *Svoboda* does so in the court's syllabus and did allow such interest in the judgment, but that opinion proper recites that the measure of damages is the fair market value of the property taken on the date of conversion.

While there are a number of Nebraska cases predating those last cited which state in their syllabuses that prejudgment interest is collectible, we do not find therein or in *Svoboda* or *Mapledge* a discussion of the well-established rule in effect in this state that prejudgment interest is due only if the damages are liquidated. Decisions of the Nebraska court subsequent to *Svoboda* speak only in terms of damages as being the value at the time of conversion, with no mention of interest. See, *Associated Bean Growers v. Chester B. Brown Co.*, 198 Neb. 775, 255 N.W.2d 425 (1977); *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985); *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 379 N.W.2d 742 (1986). The rule requiring liquidated damages as a prerequisite to prejudgment interest in conversion insofar as Nebraska law is concerned was discussed by the U.S. District Court for the District of Nebraska in *United States v. Lambert*, 362 F. Supp. 609 (D. Neb. 1973), in which the court determined that because there was a reasonable controversy on liability and the amount

in dispute was not certain, no prejudgment interest was allowable in that conversion action. The U.S. Court of Appeals for the Eighth Circuit, in *Fremont Nat. Bank v. Collateral Control Corp.*, 724 F.2d 1410 (8th Cir. 1983), held in a conversion action that where damages were liquidated, prejudgment interest was allowable.

The Nebraska rule on liquidated damages is that damages are liquidated when (1) there is no reasonable controversy over liability, and (2) the amount due and the date thereof can be computed without opinion or discretion. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983). If either of these criteria is not met, then the damages are not liquidated.

In the instant case, there was a legitimate issue over the determination of what constituted plaintiff's property and the quantity thereof. For that reason, the damages were not liquidated.

We conclude that the earlier decisions cited by plaintiff did not take into account or consider the rule on liquidated damages and that such rule is in fact applicable. Accordingly, we find that plaintiff was not entitled to prejudgment interest herein.

We, therefore, affirm the judgment of the trial court.

AFFIRMED.

PATRICIA SUE HAMM, APPELLEE AND CROSS-APPELLANT, V. JAMES W. HAMM, APPELLANT AND CROSS-APPELLEE.

422 N.W.2d 336

Filed April 21, 1988. No. 86-302.

1. **Divorce: Appeal and Error.** The review of a judgment relating to the dissolution of a marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the

trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Child Support: Appeal and Error.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the parties as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion.
3. **Alimony.** The ultimate test for determining correctness in the amount of alimony is reasonableness.
4. **Divorce: Attorney Fees.** An award of attorney fees in a dissolution of marriage action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

Jerald W. Kerl of Andersen & Kerl, for appellant.

James L. Nelson of Carlson & Nelson, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

BLUE, D.J.

The marriage of the petitioner, Patricia Sue Hamm, and respondent, James W. Hamm, was dissolved on March 25, 1986. The decree provided that the husband was to pay $350 per month child support and maintain health insurance for the child. The husband was to be responsible for the wife's medical debts, except those related to a broken arm. The wife was awarded alimony of $1 per year for a period of 5 years.

The husband appeals from this decree, assigning as error:

1. The Court erred in awarding child support beyond the husband's ability to pay.

2. The Court erred in ordering the husband to provide medical insurance for the minor child as long as his child support obligation continued and for the wife for six months after the decree.

3. The Court erred in ordering the husband to be responsible for the wife's medical indebtedness presently

owed and not paid for by medical insurance, and arising out of the wife's pregnancy.

4. The Court erred in awarding the wife alimony in the amount of one dollar per year for a period of five years and providing that such alimony could be modified during that time period.

The wife cross-appeals from this decree, assigning as error:

1. The Court erred in awarding the [wife] alimony of only $1.00 per year for a period of five years.

2. The Court erred in ordering the [husband] to pay only $500 of the [wife's] attorney's fees.

The petitioner and respondent were married on October 12, 1984. They separated in March of 1985, and this action for dissolution was filed on March 22, 1985. The couple's child, LeeAnna Sue Hamm, was born on the same date that the petition was filed. Initially, paternity was an issue in this case, but was resolved after the husband conceded that he was the father of LeeAnna. Both parties described the marriage in similar terms, stating that "things were bad from Day One."

The husband attended one semester at the University of Nebraska before joining his father to farm in January of 1975. The husband's assets at the time of the trial totaled $48,515. These assets consisted of a one-half interest in a hog operation with his father, a dairy herd consisting of 71 head of cattle with a value of $38,472, a one-half interest in 6 horses, a one-half interest in 2 pieces of farming equipment, a one-half interest in a farrowing house, a 1981 automobile, a checking account, and the cash value of 3 life insurance policies.

It is difficult to determine the husband's income with any exactness. He receives income from two sources: self-employment as a dairy farmer and his share of the hog operation. As to the dairy business, respondent and his father divided the income as follows: "[W]e each have our own cows, and I take all the offspring off of my animals, and the income off the sale of those, however many animals I sell, and that's my income. My father takes the milk off of my animals and pays the expenses against them." The husband's income in 1985, from the sale of livestock, was $7,319.14. He received $2,450 in 1985 from his share of the sale of hogs. This would give him an

average monthly income of $814.

It is claimed by the husband that he was debt-free prior to his marriage with the petitioner. He now owes approximately $7,900 to a bank, has borrowed $2,600 on his life insurance, and owes his parents $3,200.

The husband testified that his average monthly expenses were $815.64, not including payments on the wife's medical bills.

The wife has an associate degree in livestock production from Southeast Community College in Beatrice, Nebraska. Her work experience is very limited, consisting of helping her father-in-law on the farm. She is presently working part-time as a sales clerk for a gross salary of approximately $420 per month. The wife is suffering from a complication from pregnancy called a postphlebitic syndrome. She has a deep venous thrombosis that involves the proximal veins, causing swelling and pain. It extends from the groin to the middle of the abdomen. While this condition may become worse, it appears to be improving, but is potentially disabling in the future. Her physician testified that the wife is now able to be on her feet and work if she can rest occasionally and elevate her legs. There is evidence that the wife's monthly expenses average $600.87, not including the expense of babysitting.

The review of a judgment relating to the dissolution of a marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Frost v. Frost*, 227 Neb. 414, 418 N.W.2d 220 (1988).

The district court ordered the husband to pay $350 per month child support. In addition, he was ordered to provide medical insurance for the minor child for as long as the child support obligation continued. The cost of such insurance was $87.50 per month during the 6-month period in which the wife was covered, as well, by insurance; following the 6-month period, the monthly payments would be somewhat less than

$87.50.

Although the husband challenges the wife's claimed monthly expenses for the minor child, his main contention is that he simply cannot afford to meet his child support obligation as ordered by the district court.

The Nebraska Supreme Court has adopted child support guidelines effective October 1, 1987. See, *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988); *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987). Although these guidelines were not effective at the time this case was tried, they are helpful in attempting to arrive at a fair amount of child support.

The guidelines provide that each party's monthly share of child support expenses is to be calculated according to the percentage contributed by each parent to the parties' combined monthly net income. These guidelines also specify that day care expenses are to be considered independently of the support amount. The court in *Brandt* stated at 327, 417 N.W.2d at 341:

> [W]e do not suggest that an appropriate child support and expense order may be found to be accurate to the penny by applying the suggested guidelines. Other evidence in a particular case may call for an amount different (either more or less) than the amount calculated by the court through use of the guidelines. A judge may not satisfy his duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested guidelines.

It is difficult to apply precise figures in the child support guidelines in this particular case. The record reflects that the wife received a monthly gross salary of approximately $420. The record fails to indicate her net take-home pay. Also, the record reflects that the husband received approximately $814 per month, but again there is no evidence of his monthly take-home pay. Although only an approximation, since we are not supplied with all of the data to complete the formula, the guidelines indicate that the husband would be responsible for child support in the sum of $168. As also stated in *Fooks, supra*, the court indicated that day care expenses were to be considered separately from the child support award. The wife indicated that the cost of day care in her community is $40 per week or

$172 per month. The respondent should pay 66 percent of this amount, which would result in a total amount of child support of $281 per month. The decree also provided that the husband provide medical insurance for the child for so long as the child support obligation continued. Considering this monthly expense, it appears that a proper amount of child support should be $200 per month.

In *Bird v. Bird*, 205 Neb. 619, 621, 288 N.W.2d 747, 748 (1980), the court noted that "[w]hile the cost of caring for a child is an important consideration in determining child support, equally important is the father's ability to make the payments. It is not advantageous to either party to place the payments for child support beyond the reach or capability of the father."

Considering the Nebraska child support guidelines, pertinent case law, and the facts of the case at bar, it appears that the trial court abused its discretion in awarding the petitioner $350 per month child support while additionally requiring the respondent to provide medical insurance for the minor child.

The district court awarded the wife alimony in the amount of $1 per year for 5 years, with the condition that such award may be modified within this period but, in any event, the alimony should not continue for more than the 5-year period. It is the rule in Nebraska that awarding of alimony in marriage dissolution cases is a matter entrusted to the sound discretion of the trial judge. On appeal, an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987). An appropriate award of alimony must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). The income and earning capacity of each party, as well as the general equities of each situation, must be considered. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

The award of alimony ordered by the trial court indeed seems to take into consideration all relevant factors in this case, as is demonstrated by the language in the decree:

The Court finds that in the usual situation of parties

> married no longer than the parties to this action with no contribution made to the other of any significant amount, no award of alimony would be appropriate. The Court determines, however, that by virtue of petitioner's post-phlebitic condition resulting from her pregnancy though presently only moderately limiting and relatively quiescent, is not yet determinable in terms of duration and limitation, and contains the possibility of being substantially limiting and disabling in the future. By virtue thereof, the Court finds that for a period of five years from the date of this Decree and no longer, respondent should pay to petitioner by way of alimony the sum of $1.00 per year, the first such payment being due and payable forthwith, and a like amount on the anniversary date of this Decree through and including March 25, 1990; that such alimony is modifiable during said five year term but for no longer period upon showing by petitioner after hearing and notice of a material change in her physical condition and circumstances and a need of petitioner for additional alimony by way of support.

No abuse of discretion is found in the trial court's award of alimony in the case at bar. Also, the record reveals that there was no abuse of discretion on the part of the trial court in ordering the husband to provide medical insurance for the minor child, nor in ordering the husband to be responsible for the wife's medical indebtedness arising out of her pregnancy.

The final issue on appeal is the award of $500 to the wife for attorney fees. The husband contends that he should not be responsible for any portion of the wife's attorney fees, while the wife cross-appeals, contending the award should be increased to the sum of $2,000.

The awarding of attorney fees in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

In *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 142-43, 277 N.W.2d 575, 578 (1979), the court stated:

> An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

In applying the guidelines outlined in *Pfeiffer* to the case at bar, it appears that the trial court did not abuse its discretion in awarding petitioner the sum of $500 for attorney fees. As indicated by the transcript in this case, the husband substantially contributed to the high cost of the attorney fees by contesting the paternity of the minor child and resisting the return of the wife's personal belongings.

The wife cross-appeals for $2,000 in attorney fees. This does not appear to be warranted in this case, considering the entire record. The husband does not have the capacity to pay an additional sum for the wife's attorney fees.

The decree of the district court is affirmed. However, it is modified by reducing the child support obligation of the respondent to $200 per month.

AFFIRMED AS MODIFIED.

RICHARD STODOLA, APPELLANT, V. GRUNWALD MECHANICAL CONTRACTORS, INC., APPELLEE.

422 N.W.2d 341

Filed April 21, 1988. No. 86-322.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving him or her the benefit of all favorable inferences which may reasonably be drawn from the evidence.
2. _____. Summary judgment is proper when 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 material facts, and when the moving party is entitled to judgment as a matter of

law.

3. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
4. _____: _____: _____. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to the plaintiff.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded.

Diane B. Metz, for appellant.

J. Michael Coffey of Stave, Coffey & Swenson, P.C., for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

FAHRNBRUCH, J.

Richard Stodola appeals the Douglas County District Court's summary judgment dismissal of his petition for damages resulting from injuries he received when a high-lift device fell upon him. The defendant-appellee, Grunwald Mechanical Contractors, Inc., owned the lift device. We reverse and remand the cause for trial.

Stodola assigns three errors, which can be consolidated into the following: The trial court erred in determining that there were no genuine issues either as to material facts or as to the ultimate inferences to be drawn therefrom.

Only the following allegations in Stodola's amended petition to the district court will be considered: that Grunwald was negligent in its failure to have the device in a proper location out of the path of workers and in its failure to attach the lift device to the ceiling or to equip it with setscrews to lock the wheels in place. In its answer, the defendant generally denied these allegations and claimed that Stodola's contributory negligence was sufficient to bar any recovery.

Other allegations in Stodola's petition which are not argued in his brief, and issues raised in the brief but not alleged in the petition, will not be considered.

In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving him or her the benefit of all favorable inferences which may reasonably be drawn from the evidence. Summary judgment is proper when 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 material facts, and when the moving party is entitled to judgment as a matter of law. *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Moseman v. L & P Investment Co.*, 226 Neb. 677, 414 N.W.2d 254 (1987); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

The depositions of Richard Stodola, Michael A. Stiles, and Robert Nordstrom were admitted into evidence at the summary judgment hearing and provided the following facts. Stodola retired from Skinner Macaroni Company in 1982. He returned to the company on Monday, January 7, 1985, at the request of a former supervisor to help install a new spaghetti dryer. The Friday before the accident occurred, Robert Nordstrom, a Grunwald employee, was operating a high-lift device. Before leaving for the day, Nordstrom placed the lift device in a position to support two 10-foot extensions of pipe which were being attached to the ceiling. The lift was equipped with eight wheels at its base. Four of the wheels were 2 inches in diameter and were factory installed. The other four wheels were 3 inches in diameter and had been installed by Grunwald as a modification. Nordstrom testified that the larger wheels made the lift easier to move.

On Monday, Stodola and another Skinner employee began removing an I-beam which had been placed underneath the dryer for shipment purposes. In the process of removing the I-beam, Stodola backed into the lift device. The lift rolled, toppled, and struck Stodola.

Stodola testified that while pulling an I-beam from beneath the dryer, he backed up and in so doing relied for guidance and instruction upon his coworker. He said he did not notice defendant's high-lift device before the accident, had never before seen such a lift device, and did not know how one

worked. Stodola said he "just barely touched" the lift before it fell on him.

In granting Grunwald's motion for summary judgment, the trial judge found that the defendant's "placement or stabilization of the lift device did nothing more than furnish a *condition* which made the Plaintiff's injury possible." (Emphasis supplied.) The court further found that the defendant's action was not the proximate cause of Stodola's injury.

This court has distinguished between passive negligence, which merely furnishes a condition by which injuries are made possible through the subsequent independent negligence of another, and active negligence, which combines with a subsequent, independent act to cause injury. Passive negligence is not actionable. Active, or continuing, negligence is actionable if it is the proximate cause of the plaintiff's injury. A thorough discussion of active and passive negligence may be found in *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987). That discussion will not be repeated here.

Stodola asserts that Grunwald's failure to stabilize the high-lift device by either fastening it to the ceiling or locking its wheels constitutes an act of continuing negligence for which the defendant is liable. Grunwald argues that the lift was open and obvious and, therefore, only a condition. It is Grunwald's contention that Stodola's injury was caused by his own contributory negligence and by the independent acts of his coworker. The defendant also argues that the failure of Stodola and his coworker to notice the lift is an efficient intervening act of negligence sufficient to cut off any liability on the part of Grunwald.

An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. Further, an efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to the plaintiff. *Delaware v. Valls, supra*. See, also, *London v. Stewart*, 221 Neb. 265, 376

N.W.2d 553 (1985); *Corbet, Inc. v. County of Pawnee*, 219 Neb. 622, 365 N.W.2d 437 (1985).

> [T]he doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury.

Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 281, 125 N.W.2d 708, 711 (1964). See, *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 126 N.W.2d 477 (1964); *Johnson v. Mallory*, 123 Neb. 706, 243 N.W. 872 (1932).

In *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981), this court reversed the ruling of the district court granting the Nebraska Public Power District a summary judgment against the plaintiff. Brown was injured when power district employees negligently allowed smoke to blow across the highway. This court rejected the power district's argument that the smoke was merely a condition, and stated:

> "Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor. . . . The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. *The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law.*"

(Emphasis supplied.) *Id.* at 67, 306 N.W.2d at 171. See *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987).

Whether the defendant's actions constitute active negligence, whether the placement and stability of the lift was an "open and obvious" condition which proximately caused Stodola's injury, and whether the actions of Stodola or his coworker were an

intervening cause sufficient to cut off Grunwald's liability are all questions of fact for the fact finder. See, *Brown, supra*; *Novak, supra*; *Johnson v. Mallory, supra*.

Viewing the record in a light most favorable to the plaintiff, it is clear that issues of material fact exist. Therefore, the granting of Grunwald's motion for summary judgment was not proper. Accordingly, that action by the district court is hereby reversed and the cause remanded for trial.

REVERSED AND REMANDED.

NC + HYBRIDS, A NEBRASKA CORPORATION, APPELLANT, V. GROWERS SEED ASSOCIATION, A TEXAS CORPORATION, APPELLEE.

422 N.W.2d 542

Filed April 21, 1988. No. 86-359.

1. **Garnishment.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy.
2. _____. Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.
3. **Garnishment: Pleadings.** If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, as afforded by Neb. Rev. Stat. § 25-1030 (Reissue 1985), then the garnishee's answer is the only filed pleading containing allegations or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive.
4. **Garnishment.** When a plaintiff institutes a garnishment as a statutory remedy in aid of execution to satisfy a judgment, the plaintiff is bound by the mandatory provisions and consequences prescribed by the garnishment statutes.
5. **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.
6. _____. Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause.
7. **Garnishment.** While garnishment affords the plaintiff a remedy or means to satisfy a judgment, the garnishment statutes also embody a remedy and mechanism for the garnishee to obtain resolution of a question concerning the garnishee's liability and thereby avoid unnecessary and sometimes oppressive litigation.

8. **Garnishment: Pleadings: Judgments.** When a garnishee answers and denies an obligation or indebtedness to the judgment debtor, but the plaintiff fails to contest, controvert, or traverse such denial by the garnishee, a subsequent judgment of discharge, as the result of the plaintiff's failure to respond, is a judgment on the merits as an adjudication of the garnishee's liability to the plaintiff for the obligation or indebtedness to the judgment debtor which is the subject of the garnishment proceeding.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Terry R. Wittler of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

J. Scott Paul of Boland, Mullin & Walsh, for appellee.

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

SHANAHAN, J.

This appeal arises out of garnishment proceedings instituted by NC+ Hybrids after *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985) (NC+'s previous appeal and unsuccessful effort to obtain reversal of an order discharging the garnishee insurance company ("Booker"), which had issued its policy to the judgment debtor (Growers Seed Association), indemnifying against damages sustained by NC+). As noted in our opinion disposing of NC+'s previous appeal, NC+ served garnishment interrogatories on Booker in 1982. In answers to the interrogatories, Booker admitted existence of its policy, but claimed that full payment had been made in accordance with the policy and denied any obligation for further payment under its policy. Because NC+ failed to apply for a determination of Booker's liability within 20 days after the garnishee's answers to NC+'s interrogatories, the district court discharged Booker from the garnishment proceedings. Neb. Rev. Stat. § 25-1030 (Reissue 1985), which was involved in NC+'s previous appeal, provided in part:

> The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If

> the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

In affirming the garnishee's discharge from the proceedings, we stated in *NC+ Hybrids v. Growers Seed Assn., supra* at 299-302, 363 N.W.2d at 365-66:

> Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. . . .
>
> . . . .
>
> In view of the nature of garnishment demanding an expeditious disposition of proceedings, it is reasonable that the Nebraska Legislature sought to protect a garnishee from often unnecessary and sometimes oppressive litigation. [Citation omitted.] To achieve prompt disposition the Legislature has specified a relatively short time for counteraction by a judgment creditor or garnisher in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee.
>
> . . . The answers of the garnishee and the controverted answers or factual allegations in the garnisher's application constitute the pleading for disposition of the liability issue under § 25-1030. . . .
>
> . . . .
>
> If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, the garnishee's answer is the only filed pleading containing allegations or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive. . . .
>
> . . . Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.

In December 1985, approximately 10 months after issuance of our opinion in *NC+ Hybrids, supra*, NC+ served the

insurance company, Booker, with garnishment interrogatories directed toward the same insurance policy which was the subject of the garnishment proceedings involved in *NC+ Hybrids v. Growers Seed Assn., supra*. Booker filed a "Motion to Quash or in the Alternative, Motion for Summary Judgment," alleging that the previous garnishment proceeding had been terminated by discharge of the garnishee and NC + 's interrogatories served in the subsequent garnishment proceeding are the same as those in the prior garnishment proceeding.

The district court sustained Booker's motion and struck NC + 's garnishment interrogatories served in 1985.

In its assignment of error, NC + contends: "The district court incorrectly held that dismissal of a prior attachment and garnishment which was based on procedural grounds, and not upon the merits of the action, was res judicata and barred any subsequent effort by the judgment creditor to recover from the garnishee." (Emphasis in original.)

Booker claims that the doctrine of res judicata justifies the district court's order striking NC + 's interrogatories.

In *Snyder v. Cox*, 1 Wash. App. 457, 462 P.2d 573 (1969), the plaintiff served garnishment interrogatories on the insurance company which had issued its policy to the defendant judgment debtors. In answer to the plaintiff's interrogatories, the insurance company denied it was indebted to the defendants. Snyder failed to controvert the insurance company's denial of indebtedness. Construing a garnishment statute with provisions substantially similar to § 25-1030, the *Snyder* court concluded that a plaintiff's traverse of the garnishee's denial of indebtedness was indispensable for further proceedings to determine the garnishee's liability and remarked:

> A review of the [garnishment] statutes indicates that a plaintiff is furnished a valuable remedy provided he complies with certain mandatory procedures. Inasmuch as compliance with the procedures has been declared mandatory, it is logical to conclude the legislature intended that a defendant's remedy for plaintiff's noncompliance have an equally imperative result.

1 Wash. App. at 461, 462 P.2d at 576.

Thus, when a plaintiff institutes a garnishment as a statutory remedy in aid of execution to satisfy a judgment, the plaintiff is bound by the mandatory provisions and consequences prescribed by the garnishment statutes. See, *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985); *Snyder v. Cox, supra.*

"As a general rule, the word *shall* is considered mandatory and is inconsistent with the idea of discretion." *NC+ Hybrids v. Growers Seed Assn., supra* at 302, 363 N.W.2d at 366. The words *release* and *discharge* have relatively popular and generally accepted meanings. *Release* means "to relieve from something that confines, burdens, or oppresses." Webster's Third New International Dictionary, Unabridged 1917 (1981). *Discharge* means "to relieve of a charge, load, or burden . . . to free from something that burdens . . . release from an obligation." *Id.* at 644.

We note that garnishment statutes provide for a trial as in any civil action if the plaintiff has filed an application for determination of the garnishee's liability and has properly notified the garnishee and the judgment debtor ("the defendant in the original action") concerning such trial to determine liability. See, Neb. Rev. Stat. §§ 25-1030.01 and 25-1030.02 (Reissue 1985).

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. *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983); *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976). In *Vantage Enterprises, supra*, this court expressed:

> " ' "Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." ' "

196 Neb. at 674, 244 N.W.2d at 680 (quoting *Wischmann v.*

Raikes, 168 Neb. 728, 97 N.W.2d 551 (1959)).

Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause. See, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982); *Vantage Enterprises, Inc. v. Caldwell, supra.*

"A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) of Judgments § 19 at 161 (1982).

> The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

The Restatement, *supra* at comment *a*. at 161-62.

NC + suggests that discharge of a garnishee, when the plaintiff fails to file the application for determination of a garnishee's liability in accordance with § 25-1030, is analogous to a plaintiff's voluntarily dismissing a civil action without prejudice. See Neb. Rev. Stat. § 25-601(1) (Reissue 1985) (dismissal without prejudice by a plaintiff before submission of a case to the jury).

We cannot agree with NC + 's suggestion. In contrast with an ordinary civil action, submission of liability in a garnishment proceeding is not under the plaintiff's complete control. Once a plaintiff commences a garnishment, a garnishee has as much interest as the plaintiff in the determination whether the garnishee is liable for payment or delivery of property to the plaintiff. As we pointed out in *NC + Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 300-01, 363 N.W.2d 362, 366 (1985): "The answers of the garnishee and the controverted answers or factual allegations in the garnisher's application constitute the pleading for disposition of the liability issue under § 25-1030."

If the plaintiff absolutely controlled the means to dispose of the liability question in a garnishment proceeding, the legislative objective of "prompt disposition" in garnishments would be frustrated. Therefore, while garnishment affords the plaintiff a remedy or means to satisfy a judgment, the garnishment statutes also embody a remedy and mechanism for the garnishee to obtain resolution of a question concerning the garnishee's liability and thereby avoid "unnecessary and sometimes oppressive litigation." When NC+ failed to file its responsive controversion of Booker's denial of liability and request a determination of the garnishee's liability, § 25-1030 prescribed an unequivocal and mandatory conclusion, "the garnishee shall be released and discharged," as ordered by the district court in the initial garnishment proceeding commenced by NC+ and affirmed in *NC+ Hybrids v. Growers Seed Assn., supra.*

Courts have applied the doctrine of res judicata to garnishment proceedings and have concluded that, when a garnishee answers and denies an obligation or indebtedness to the judgment debtor, but the plaintiff fails to contest, controvert, or traverse such denial by the garnishee, a subsequent judgment of discharge, as the result of the plaintiff's failure to respond, is a judgment on the merits as an adjudication of the garnishee's liability to the plaintiff for the obligation or indebtedness to the judgment debtor, which is the subject of the garnishment proceeding. See, *Knight v. Herring & McGehee*, 161 Ga. 58, 129 S.E. 526 (1925); *Ward v DAIIE*, 115 Mich. App. 30, 320 N.W.2d 280 (1982); *Snyder v. Cox*, 1 Wash. App. 457, 462 P.2d 573 (1969). See, also, 6 Am. Jur. 2d *Attachment and Garnishment* § 393 (1963); 38 C.J.S. *Garnishment* § 295 (1943).

Adhering to the policy embodied in the doctrine of res judicata, we now hold that, when a garnishee answers and denies an obligation or indebtedness to the judgment debtor, but the plaintiff fails to contest, controvert, or traverse such denial by the garnishee, a subsequent judgment of discharge, as the result of the plaintiff's failure to respond, is a judgment on the merits as an adjudication of the garnishee's liability to the plaintiff for the obligation or indebtedness to the judgment

debtor which is the subject of the garnishment proceeding.

In the previous garnishment instituted by NC+ and the subsequent garnishment involved in this appeal, the obligation which NC+ sought to subject to garnishment was any indebtedness which the garnishee (Booker) may have owed to its insured, the judgment debtor, as the result of the garnishee's policy of insurance. Booker's policy and consequent obligations to the judgment debtor are the same in both garnishments commenced by NC+. The question of Booker's liability which was raised in the previous garnishment is the same ultimate question raised in NC+'s subsequent garnishment proceeding. As the consequence of the mandatory disposition dictated by § 25-1030, Booker was released and discharged from liability in the previous garnishment proceeding when NC+ failed to controvert or traverse Booker's denial of liability, as asserted in the answers to interrogatories, and failed to request a determination of the garnishee's liability. When Booker was released and discharged in NC+'s initial garnishment proceeding, that release and discharge resolved any question about Booker's liability to NC+ in a garnishment based on Booker's policy obligation and indebtedness as subject matter for a garnishment. Booker's favorable judgment, as the result of NC+'s failure to take advantage of the opportunity to litigate the liability question, is the conclusion compelled by the very statutes under which NC+ sought its remedy in garnishment. Res judicata precludes another determination of Booker's liability in garnishment because Booker, as a garnishee, has previously obtained a favorable judgment on NC+'s garnishment claim based on Booker's policy of insurance.

The district court's judgment is correct and is affirmed.

AFFIRMED.

ELLEN J. MCALLISTER, APPELLANT, V. MONTY F. MCALLISTER, APPELLEE.

422 N.W.2d 345

Filed April 21, 1988. No. 86-569.

1. **Divorce: Modification of Decree.** Where modification of a dissolution decree is made during the 6-month period, such modification can be made only upon good cause shown after notice to all interested parties and hearing.
2. _____: _____. A hearing is required to modify a dissolution decree when a court, in effect, vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification.
3. **Due Process: Notice.** Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.

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

S. Caporale, for appellant.

Debra Stangl, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

WHITE, J.

This appeal arises out of a dissolution of marriage between the parties to this action. Following a trial held on April 30, 1986, the district court for Douglas County entered a decree of dissolution on May 12, 1986.

Subsequent to the trial, both parties timely filed motions for a new trial. In addition, petitioner's attorney filed a motion to withdraw as counsel, and respondent's attorney filed a motion to compel an inventory of certain Hummel figurines, a major asset at issue in the proceedings. The motions were all set for hearing on May 16, 1986.

At the May 16 hearing the trial judge questioned petitioner, Ellen J. McAllister, regarding allegations that she had sold the Hummel figurines in violation of the original decree. Petitioner told the court that she had sold the Hummels because she thought that was what she was supposed to do.

Upon learning of the sale of the Hummels, the trial judge

determined that the original decree "was not a wise disposition . . . since the Hummels are so subject to manipulation. . . . [T]hey can be concealed. They can be disposed of, because there was no accurate count." The court then ordered, on its own motion, that the original decree be modified. The Hummel figurines were awarded entirely to the petitioner, while her alimony was reduced by a total of approximately $36,700.

The court then overruled both parties' motions for a new trial, overruled the motion to compel an inventory, and granted the motion to withdraw filed by petitioner's counsel.

Petitioner appeals the modification order entered by the district court. The sole assignment of error alleges, in essence, that the court erred in modifying the dissolution decree in the course of a hearing on unrelated motions without good cause shown, without notice, and without an evidentiary hearing. We agree and reverse the order modifying the decree.

This court has previously held that where modification of a dissolution decree is made during the 6-month period, Neb. Rev. Stat. § 42-372 (Reissue 1984), such modification can be made only upon good cause shown after notice to all interested parties and hearing. *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984).

In *Howard v. Howard*, 207 Neb. 468, 299 N.W.2d 442 (1980), we held that a hearing is required to modify a dissolution decree when a court, in effect, vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification.

Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time. *Kirshen v. Kirshen*, 227 Neb. 479, 418 N.W.2d 558 (1988).

Whether or not the petitioner's action of selling the Hummel figurines constituted "good cause" necessary for modification is a question we need not answer. In the absence of notice and an evidentiary hearing on the issue of modification, the trial court abused its discretion when, on its own motion, it modified the dissolution decree in this case. The modification order is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH W. BOYSAW, APPELLANT.

422 N.W.2d 346

Filed April 21, 1988. No. 87-464.

1. **Constitutional Law: Search and Seizure.** U.S. Const. amend. IV and Neb. Const. art. I, § 7, guarantee the right to be free from unreasonable searches and seizures.
2. _____: _____. Absent exigent circumstances, U.S. Const. amend. IV prohibits a warrantless entry into a home to make a felony arrest.
3. **Motions to Suppress: Appeal and Error.** A trial judge's findings of fact in ruling on a motion to suppress will be upheld on appeal to the Nebraska Supreme Court unless clearly wrong; moreover, the trial judge as the trier of fact is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. Thus, in reviewing such a ruling the Nebraska Supreme Court will neither reweigh the evidence nor resolve conflicts therein, as it takes into account the fact that the trial judge observed the witnesses.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

CAPORALE, J.

Following a bench trial, the adult defendant-appellant, Kenneth W. Boysaw, was convicted of having sexually assaulted a 9-year-old girl in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985). Boysaw's five assignments of error combine to raise two issues: whether the district court erred in (1) failing to suppress his statements to the police and (2) finding the evidence sufficient to support his conviction. We affirm.

The evidence adduced at Boysaw's suppression hearing reveals that in the course of investigating the matter, Lincoln Police Officer Bruce M. Bell interviewed the child victim, her mother, and Boysaw's wife, and as a result concluded that Boysaw had sexually assaulted the child. Although no warrant

was ever obtained for Boysaw's arrest, Bell went searching for Boysaw. Not finding Boysaw at his own residence, Bell asked for the help of another officer, and the two, Bell and Lincoln Police Officer Richard Hubka, then went to the residence of one known to be Boysaw's friend. As Boysaw was not at his friend's residence, the two officers, who were in uniform and armed, parked their respective marked police cruisers near the defendant's residence and waited for Boysaw, checking the residence every 15 minutes or so.

Later in the evening, Boysaw's stepson informed the officers that Boysaw had returned to his own residence. The officers then drove to Boysaw's residence and parked in an alley at a distance of approximately 25 feet from the entrance to Boysaw's residence. According to Bell, Boysaw was walking out of his residence as the two officers approached the porch. After Boysaw walked onto the porch, he was escorted to one of the cruisers where he was handcuffed and given the *Miranda* warnings. While seated in the back seat of the cruiser, Boysaw admitted that he took the victim to the basement laundry room of his residence, where he unzipped his pants, exposed his penis, lay on top of the child, removed her underpants, and fondled her vaginal area. While he was so engaged, his wife happened upon the scene, whereupon he left the child to go to the home of a friend. Before leaving, he saw his wife take the victim from the laundry room.

Bell further testified that while Boysaw was being transported to the police station, he told the officers where he had hidden the child's underpants, which the police later found at the described location. Boysaw also gave the police a written statement in which he essentially repeated the sordid details of the event, stressing, however, that he at no time penetrated the child.

Boysaw's version of the events leading to his seizure or arrest differs from those described by Bell. According to his account, he, through his living room window, saw the cruisers arrive. He thereupon went to the doorway as the officers came onto the porch, opened the door, and, while still in his residence, asked if he could help them. Bell then said, "Would you please step out?" or "Would you step out?" It was after that exchange that

Boysaw stepped onto the porch. On cross-examination, Bell admitted that in a report he prepared shortly after the arrest, he wrote that he had asked Boysaw to step outside and that Boysaw had willingly done so. Nonetheless, Bell insisted that Boysaw was in fact walking out of his residence as Bell and Hubka approached.

According to Hubka's testimony, Boysaw was already outside his residence when the two officers approached and was never asked to step outside.

Boysaw does not contend that the officers lacked probable cause to arrest him, but grounds the first issue on the fact that the police did not bother to obtain a warrant prior to arresting him. He claims that as a result his arrest was unlawful, and, therefore, the statements he made to the police must, under *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and its progeny, be suppressed as products of that illegal seizure.

Both the Constitution of this nation and that of this state guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Neb. Const. art. I, § 7. In *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the U.S. Supreme Court held that absent exigent circumstances, the fourth amendment prohibits a warrantless entry into a home to make a felony arrest. However, the U.S. Supreme Court had noted in an earlier opinion that a woman standing in the doorway of her house had no expectation of privacy. Thus, it held her warrantless arrest valid, even though it was made after she retreated into her home, since the arrest had been set in motion while she was exposed to public view, and since probable cause existed and there was a need to act quickly. *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). Accordingly, the court in *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), found that, where there had been no subterfuge in getting the defendant to open the door to his residence in response to a federal agent's knock, the defendant's warrantless arrest at the doorway to his residence was valid. By way of contrast, however, the court in *United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980), *aff'd* 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), held that the

warrantless arrest of the defendant while standing in the doorway of his home, the door of which he had opened in response to the false identification given by government agents, violated the fourth amendment. In *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984), we held valid the defendant's warrantless arrest, which took place outside his trailer home, after a consensual search of the trailer revealed the presence of contraband. The *Horn* court also quoted from the explanation given in *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), that a person is seized or arrested only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that his or her freedom of movement had been restrained, either by means of physical force or by a show of authority. Accord *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

The trial judge appears to have found that Bell had in fact asked Boysaw to step out, as Boysaw claims, but found that Boysaw had not been "intimidated" into leaving his residence; that Boysaw could not reasonably have considered his freedom of movement to have been restrained when he stepped onto the porch; and that Boysaw was not seized or arrested until he left the protection of his residence, at which time he no longer had a reasonable expectation of privacy. The trial judge thus concluded that the arrest was valid.

A trial judge's findings of fact in ruling on a motion to suppress will be upheld on appeal to this court unless clearly wrong; moreover, the trial judge as the trier of fact is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony; thus, in reviewing such a ruling this court will neither reweigh the evidence nor resolve conflicts therein, as we take into account the fact that the trial judge observed the witnesses. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

There is nothing in the record which enables us to say the findings of the trial judge are clearly wrong; thus, we are bound by them. Accordingly, we must conclude Boysaw's arrest did not violate U.S. Const. amend. IV or Neb. Const. art. I, § 7. There is therefore no basis upon which to suppress the

statements Boysaw made to the police.

We must observe, however, that why officers with a duty to uphold the rights of the citizens they police would fail to obtain a warrant under the circumstances of this case, and thereby risk a finding that they had trampled upon the federal or state Constitution, escapes us. Such an attitude will eventually lead to an illegal arrest, thereby destroying what might otherwise have been estimable police work, and to a wail by those very same officers that an offender was "let off on a technicality."

Under the circumstances in this case, however, we are free to move on to a consideration of the second issue, whether the evidence supports the conviction.

Section 28-320.01 characterizes "sexual contact" between an actor who is "at least nineteen years of age" and one "fourteen years of age or younger" as a "sexual assault of a child." Neb. Rev. Stat. § 28-318(5) (Reissue 1985) defines "sexual contact" as including "the intentional touching of the victim's sexual or intimate parts."

At trial, there were not only Boysaw's admissions to the police, as detailed earlier in this opinion, but the child's testimony by deposition that Boysaw "took off my underwear and laid me down and then he unsnapped his pants and unzipped them and pulled his pants half down and touched his private with mine." Moreover, the child's mother testified by stipulation that her daughter reported that Boysaw "had rubbed his hand on her [the child's] vagina." The event is further corroborated by the fact that the child's underpants were found where Boysaw said they would be found. No one could reasonably suggest that the child's "sexual parts" were not touched or that the touching was other than intentional. Thus, the evidence is not only sufficient to support the conviction, it does so overwhelmingly.

Since the record sustains neither of Boysaw's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

PATRICK D. O'TOOLE ET AL., PLAINTIFFS, V. CARL D. BROWN ET AL., DEFENDANTS.

422 N.W.2d 350

Filed April 21, 1988. No. 87-694.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Allan J. Eurek of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for plaintiffs.

Anne E. Winner of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for garnishee.

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

PER CURIAM.

The U.S. District Court for the District of Nebraska has requested this court to answer questions of state law, pursuant to the provisions of Neb. Rev. Stat. § 24-219 (Reissue 1985), which provides that this court may answer questions of law certified to it by the U.S. District Court if there are questions of Nebraska law which may be determinative of the cause then pending in the certifying court and there is no controlling precedent in the decisions of this court.

The "Background Statement" submitted to this court by the U.S. District Court sets out, in part, the following:

> On April 2, 1986, Patrick D. O'Toole and Linda S. O'Toole commenced suit in the United States District Court for the District of Nebraska seeking damages against the defendants for injuries and property damage sustained in an automobile accident that occurred on June 12, 1983.
>
> On October 15, 1986, the parties filed a "Stipulation for Judgment". The stipulation provides, in relevant part, that: (1) the defendants consent to the entry of judgment in favor of the plaintiffs and against the defendants, jointly and severally, in the amount of $30,000.00, (2) the plaintiffs agree not to execute on the defendants' real or personal property with the exception of any

indemnification rights of the defendants that exist in an insurance policy issued by American Family Mutual Insurance Company, (3) the defendants agree that each allegation within the complaint is true, (4) both parties represent that they did not engage in fraud or collusion in regard to the terms of the agreement, and (5) the parties agree that costs shall be taxed against the plaintiffs. Accordingly, this federal court entered judgment against the defendants, jointly and severally, in the amount of $30,000.00, with costs taxed to the plaintiffs, on October 22, 1986.

On November 7, 1986, the plaintiffs filed an affidavit for garnishee summons and a praecipe for the issuance of the garnishee summons. A second affidavit and praecipe were filed on November 17, 1986. On November 10, 1986, the clerk for the United States District Court for the District of Nebraska issued a garnishee summons and order. The summons and order directed the sheriff of Douglas County, Nebraska, to serve the summons and attached interrogatories on American Family Mutual Insurance Company (garnishee).

In their cross-motions for summary judgment the plaintiffs and the garnishee agree that no material issues of fact exist. The allegations within the complaint, admitted as true by the defendants, indicate that on June 12, 1983, the plaintiffs were driving northbound on South Coddington Street in Lancaster County, Nebraska. Approximately one-half mile south of West Burnham Street,

"a group of horses (owned or controlled by the defendants) entered the roadway in front of Plaintiffs' automobile, forcing the Plaintiffs' automobile to leave the roadway and strike the bank of a creek which crossed under the roadway."

The defendants were negligent in the following respects:

"a. In allowing the horses to run free and in a manner in which they could enter a public roadway.

b. In failing to take necessary and prudent steps to

prevent the horses from entering a public roadway.

c. In failing to properly supervise and remove the horses from the public roadway.

d. In failing to provide or failing to properly maintain a fenced enclosure to prevent the horses from entering a public roadway."

Additionally, it is uncontroverted that at the time of the automobile accident a "Farm-Ranch Policy", #26P 80004, issued by the garnishee in favor of the defendants and Etha Harless was in effect. Under "Liability Coverages - Section II" appears "Coverage B - Personal Liability Coverage". Coverage B provides, in pertinent part, that:

"We will pay, up to our limit of liability, all sums for which any insured is legally liable because of bodily injury or property damage covered by this policy."

Also, in effect at that time was a "Special Restrictive Endorsement" to the policy. The restrictive endorsement states that:

"It is hereby agreed and understood that this policy is restricted in the following aspects: Coverage under Section II does not apply to any property damage, bodily injury, sickness or disease, including death resulting therefrom, arising out of the actions of any horses, owned or in the custody of the named insured."

It is undisputed that the garnishee was notified of the pending suit, afforded an opportunity to defend the suit, and requested to indemnify the defendants against any loss occasioned by the suit. Since the garnishee concluded that liability coverage was excluded under the terms of the restrictive endorsement, the garnishee did not defend the suit.

After setting out the foregoing "Background Statement," U.S. District Court certifies three questions:

1. In the absence of the word "all", i.e., "All [c]overage under Section II does not apply to any property damage, bodily injury, sickness or disease, including death resulting therefrom, arising out of the actions of any horses, owned or in the custody of the named insured"

from the restrictive endorsement, is it ambiguous whether the restrictive endorsement applies to Coverage B since Coverages A, B and F require legal liability and Coverages C, G, H, and J do not require such legal liability?

2. Is the phrase "arising out of the actions of any horses" fairly susceptible to more than one interpretation, and if so, is the restrictive endorsement ambiguous?

3. If the restrictive endorsement is unambiguous, does the language "arising out of the actions of horses" require more than the existence of a causal connection between the actions of the horses and the accident or injury for the accident or injury to be subject to the terms of the restrictive agreement?

The first question certified to this court asks whether the absence of the word "all" in the language of the restrictive endorsement creates an ambiguity with respect to whether the restrictive endorsement applies to coverage B, since it requires legal liability.

To answer in the affirmative, we would have to ignore the clear, plain, and unambiguous language of the restrictive endorsement. Plaintiffs seek an answer which would create ambiguity where none exists. The restrictive endorsement expressly excludes "property damage [and] bodily injury . . . arising out of the actions of any horses . . . ." The language of the restrictive endorsement is in no way further qualified. It does not say "no coverage for injuries arising out of the actions of any horses except where there is legal liability." We see no reason why this court should add an additional qualification to the plain and unambiguous language of the restrictive endorsement.

In *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 745, 401 N.W.2d 160, 163 (1987), we observed:

> "It is true that if an insurance policy is ambiguous, it will be construed in favor of the insured. However, an ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). 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. [Quoting *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986).]"

We hold that the absence of the word "all" from the restrictive endorsement does not create ambiguity with respect to the requirement of legal liability. The answer to the first certified question is No.

The second question certified to this court asks whether the phrase "arising out of the actions of any horses" is susceptible to more than one interpretation, and, if so, is the restrictive endorsement ambiguous? We hold that on the facts of this case, the phrase is not ambiguous and therefore is not susceptible to more than one interpretation.

The restrictive endorsement is drafted in plain, ordinary language. We will not attribute something other than a plain, ordinary meaning. In *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 26, 317 N.W.2d 745, 748 (1982), we quoted from *Stone v. Physicians Casualty Ass'n*, 130 Neb. 769, 266 N.W. 605 (1936), as follows:

> " 'It does not follow, however, that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed, nor, indeed, that a court should indulge in scholastic subtleties to extend the rights of the insured.' "

The answer to the second question is that the phrase "arising out of the actions of any horses" is not ambiguous.

The third question asks whether the language of the restrictive endorsement requires more than the existence of a causal connection between the actions of the horses and the accident or injury. The restrictive endorsement uses clear and unambiguous language to specifically exclude injuries "arising out of the actions of any horses."

Where the insureds' loss falls within specific exceptions contained in the policy, the court must apply the exception. *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985); *Thos v. Employers Mutual Cas. Co.*, 215 Neb. 424, 338 N.W.2d 784 (1983).

Recognizing that we are not here deciding an actual case but,

rather, rendering an opinion as to the theoretical meaning of a phrase in an insurance policy under facts recited to us, we do not interpret the language "arising out of" to require more than a causal relationship. Plaintiffs' injuries fall within the exception, and therefore it is this court's opinion that the restrictive endorsement is effective without more than a causal relationship.

Again, we cannot and will not create ambiguity where none exists. In *Safeco Ins. Co. of America v. Husker Aviation, Inc., supra* at 26, 317 N.W.2d at 748-49, quoting from *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 91 N.W.2d 245 (1958), we stated:

> " '[T]he parties to an insurance contract may make the contract in any legal form they desire, and . . . insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.' "

Defendants and garnishee, American Family Mutual Insurance Company, contractually agreed that defendants would bear the risk of any injuries arising out of the actions of horses. In the circumstances presented to us, the phrase "arising out of" is unambiguous. It would be inappropriate for this court to interpret such language as to reassign the risk of loss here to garnishee. To hold that more than a causal connection is required, we would have to attribute something other than the plain and ordinary meaning to the words "arising out of." We apply the plain and ordinary meaning and hold that the phrase "arising out of" does not require more than a causal connection between the accident and the injury. The answer to the third certified question is that the language "arising out of the actions of any horses" does not require more than the existence of a causal connection between the actions of the horses and the accident or injury for the accident or injury to be subject to the terms of the restrictive agreement.

JUDGMENT ENTERED.

HASTINGS, C.J., not participating.

JANICE JOY HARDING, APPELLEE, V. IRVIN DUANE HARDING, APPELLANT.

422 N.W.2d 353

Filed April 21, 1988. No. 87-740.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed as modified.

James S. Jansen of Stave, Coffey, Swenson, Jansen, & Schatz, P.C., for appellant.

Joseph S. Daly and Edward F. Noethe of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

PER CURIAM.

The respondent, Irvin Duane Harding, appeals from the order of the district court modifying the original decree of dissolution to transfer custody, care, and control of the minor child of the parties from the respondent to the petitioner. The district court found that there had been a significant change in circumstances since the date of the original decree and that the change in custody was in the best interests of the child.

We have, as required in cases of this nature, reviewed the record de novo to determine whether the district court abused its discretion. *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987).

We find no such abuse. However, we do order that the order of the district court be modified to provide that the respondent not consume any alcoholic beverages prior to or during any periods of visitation.

AFFIRMED AS MODIFIED.

LYLE G. KOCH, APPELLANT, V. FRIEDEN CONSTRUCTION COMPANY, APPELLEE.

422 N.W.2d 354

Filed April 21, 1988. No. 87-819.

Workers' Compensation: Appeal and Error. The findings, orders, awards, and judgments of the Workers' Compensation Court are conclusive upon all parties unless reversed or modified upon rehearing or appeal as provided by statute. Neb. Rev. Stat. § 48-178 (Cum. Supp. 1986).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Richard Scott, for appellant.

Richard R. Endacott of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

WHITE, J.

This is an appeal from an order of dismissal entered by a three-judge panel of the Nebraska Workers' Compensation Court after rehearing.

It is undisputed that appellant, Lyle G. Koch, was employed by Frieden Construction Company on January 28, 1985. On that date Koch sustained an injury to his left ankle in an employment-related accident. Over the course of the summer of 1985 Koch's ankle was treated with two different leg casts, steroid injections, anti-inflammatory injections, and analgesic injections. In late August of 1985, after removal of the second cast, Koch began noticing pain in his left knee. From November 6, 1985, until January of 1987, Koch underwent three surgeries of the left knee.

Prior to August 2, 1985, Koch filed a petition in the Workers' Compensation Court seeking benefits for temporary total disability and payment of hospital and medical expenses. Following a hearing, a single judge entered an order, dated December 12, 1985, awarding Koch benefits for temporary total disability of $200 per week, and ordered defendant to pay medical expenses as set forth in the award.

In that award the court found the facts to be as follows:

> On January 28, 1985, the plaintiff was in the employ of the defendant as a laborer and while so employed and on said date and while engaged in the duties of his employment *he suffered injuries to his left ankle with subsequent complications of the left knee* as a result of an accident arising out of and in the course of his employment by the defendant when the plaintiff jumped off a low-boy trailer and landed on a pipe, twisting his ankle; as a result of said accident and injury the plaintiff incurred hospital and medical expense and was temporarily totally disabled from January 29, 1985, to October 22, 1985, the date of the hearing, and thereafter through November 21, 1985; since the extent of permanent partial impairment is not yet determinable, the Court reserves to the plaintiff the right to file a further petition herein if the parties are unable to agree on the nature or extent of permanent partial disability.

(Emphasis supplied.) No appeal was had from the 1985 award, and the award became final.

On or about September 15, 1986, defendant-appellee's insurer refused to provide further compensation payments and refused to reimburse Koch for any further medical treatments. On December 19, 1986, Koch filed a second petition in the Workers' Compensation Court, seeking reinstatement of benefits. The petition alleged that the matters in dispute involved the "extent of injury and term of disability."

A hearing was held on this second petition on February 20, 1987. On March 16, 1987, an order of dismissal was entered by the court. Upon rehearing to a three-judge panel, the order of dismissal was affirmed. Plaintiff appeals from the order dismissing his second petition.

Clearly, the December 1985 award "reserve[d] to the plaintiff the right to file a further petition," if necessary, to determine the nature and extent of permanent partial disability. Koch's second petition was seeking just such a determination; however, the hearing on that second petition (as well as the rehearing) went well beyond an assessment of the nature and extent of Koch's disability. The Workers' Compensation Court reopened

the question of "whether the plaintiff sustained an injury to his left knee as a result of the accident of January 28, 1985." A reexamination of that issue was improper.

The question considered by the court at the 1987 hearing on the second petition had already been answered in December of 1985. As noted earlier in this opinion, the court made a finding of fact in the December 1985 award that Koch "suffered injuries to his left ankle *with subsequent complications of the left knee* . . . ." (Emphasis supplied.) As previously mentioned, neither party appealed the 1985 award. Therefore, the findings of the court in the 1985 order are conclusive upon all parties. Neb. Rev. Stat. § 48-178 (Cum. Supp. 1986).

Appellee argues that the award left open the issue of whether Koch's knee injury was caused by or related to the ankle injury. In support of this view it cites the following language from the 1985 award: "The defendant should pay or reimburse the plaintiff for the reasonable expense of his recent knee surgery upon a showing that the same was necessitated by the ankle injury."

We admit that the above-quoted language is confusing when compared to the language cited earlier in this opinion regarding the injuries suffered by Koch. We do not agree, however, that the language cited by appellee left open the causation issue in relation to the knee injury.

As stated previously, the question of whether Koch's work-related accident *caused* an injury to his left knee has been answered and is conclusive. The question of whether the particular knee injury sustained was related to any surgery or medical expense is a different matter. Obviously, defendant's insurer need not reimburse Koch for any specific surgery that was necessary for some reason other than his work-related accident.

Defendant's insurer apparently reimbursed Koch for his first knee surgery, the posthearing surgery referred to in the December 1985 order, without any further judicial mandate or determination. Koch is now seeking compensation for nearly $11,000 in further medical expenses, presumably related to continuing problems with his left knee.

The Workers' Compensation Court acted in excess of its

powers when it dismissed Koch's second petition based on a finding that "plaintiff has failed to prove by a preponderance of the evidence that his accident of January 28, 1985, caused the injury to his knee . . . ." Koch already proved that issue in December 1985. We therefore reverse the order of dismissal on rehearing and order that plaintiff's petition be reinstated. We remand this cause for further proceedings to determine whether the $11,000 in medical expenses, or some part thereof, was incurred by Koch as a result of the work-related knee injury. In addition, plaintiff is entitled to a determination as to the nature and extent of any permanent partial disability resulting from his injuries.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONALD F. ELIASON, APPELLANT, V. THOMAS W. DEVANEY ET AL., APPELLEES.

422 N.W.2d 356

Filed April 21, 1988. No. 87-821.

1. **Jurisdiction.** One who invokes the power of the court on any question other than jurisdiction makes a general appearance so as to confer jurisdiction over himself.
2. **Jurisdiction: Motions to Dismiss.** A motion to dismiss is a request which invokes the power of the court on an issue other than jurisdiction, and is a general appearance.

Appeal from the District Court for Saunders County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

Terri M. Weeks of Edstrom, Bromm, Lindahl & Wagner, for appellant.

No appearance for appellees.

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

PER CURIAM.

This is an action upon two promissory notes alleged to have been signed by the defendants, Thomas W. Devaney and Jess S. Holman. Apparently, the defendant Thomas W. Devaney is a nonresident of Nebraska.

A summons issued April 16, 1984, addressed to Thomas F. Devaney, was sent by certified mail to the defendant at a Los Angeles address. An affidavit of proof of service on Thomas F. Devaney with a return receipt attached was filed on May 10, 1984. On January 2, 1985, the defendant Devaney filed a special appearance. The special appearance was sustained on September 23, 1985, by an order dated October 2, and filed October 4.

On October 15, 1985, the defendant Devaney filed a motion to quash the plaintiff's motion for leave to rehear. The defendant's motion alleged that the plaintiff's motion was not a proper pleading and was, in effect, a motion for new trial, and that plaintiff's motion was premature and a nullity because it was filed October 2, 1985, prior to the filing of the journal entry on October 4.

On June 2, 1987, the plaintiff filed an "Election to Stand on Petition Filed." By an order dated August 25, 1987, and filed August 27, the action was dismissed. The plaintiff has appealed.

The plaintiff's assignments of error allege that the trial court erred in sustaining the special appearance on the ground that the service by certified mail was insufficient, and that the defendant made a general appearance by a motion to dismiss and the motion to quash.

With respect to the second assignment of error, the record shows the following occurred at a hearing on the defendant's special appearance on January 21, 1985:

> [Mr. Muller, attorney for defendant]: . . . Without proper service of summons as set forth in the statutes, the Court has no jurisdiction over Mr. Devaney. He is an out-of-state defendant and this matter cannot proceed forward. It should be dismissed.
>
> MR. WAGNER: Is it your motion that the matter should be dismissed?

> MR. MULLER: Absolutely, right now.
>
> MR. WAGNER: Your Honor, that is participation in an issue other than Special Appearance which is not before the Court. As a consequence, it is a general appearance and the issue is moot.

Apparently, the trial court did not consider the motion to dismiss made by the defendant's attorney as a general appearance because the court believed the defendant's attorney had misspoken.

It has long been held in this jurisdiction that one who invokes the power of the court on any question other than jurisdiction makes a general appearance so as to confer jurisdiction over himself. *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983); *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980). A motion to dismiss is a request which invokes the power of the court on an issue other than jurisdiction and is a general appearance.

In *Bucklin v. Strickler*, 32 Neb. 602, 49 N.W. 371 (1891), a summons had been issued and served upon Strickler. Strickler then filed an affidavit raising technical objections to the form of the summons. At the same time, Strickler made an oral motion to dismiss the case for want of proper service. The trial court sustained the motion to dismiss, and the plaintiff appealed. In reversing the judgment, we stated:

> [T]he motion is too broad. It is to dismiss the action. The most that could be done in any case, where the only objection is that the service is defective, is to quash the summons. In such case the appearance must be limited to that purpose, otherwise it is general.

(Citations omitted.) *Id.* at 607, 49 N.W. at 372.

In *Welch v. Ayres*, 43 Neb. 326, 61 N.W. 635 (1895), in which the plaintiff sued a nonresident, service was had by publication upon Blanchard, one of the defendants. Blanchard moved to dismiss the action for want of jurisdiction, for the reason that she had no property in the state. The trial court dismissed the action, but upon appeal the judgment was reversed. The court stated:

> The motion which was made and sustained was too broad. It should have been limited to the single question of the

> jurisdiction of the court over the person of the defendant Blanchard. The filing of a motion to dismiss the suit constitutes a general appearance. It is a waiver of all defects in the service by publication, and gives the court jurisdiction of the person of the defendant.

(Citations omitted.) *Id.* at 331, 61 N.W. at 637.

In *McKillip v. Harvey*, 80 Neb. 264, 114 N.W. 155 (1907), another case involving a nonresident, the defendant filed a motion to dismiss for the reason that he was a nonresident and had no property or debts owing to him in the State of Nebraska. The trial court sustained the motion, and on appeal the judgment was reversed. The court stated:

> The motion filed by defendant was clearly a general appearance. The rule is well settled in this state that "a defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally."

(Citations omitted.) *Id.* at 266, 114 N.W. at 156.

In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), the trial court overruled the defendant's special appearance. The defendant then filed a motion to dismiss the action due to the plaintiff's failure to comply with a pretrial order. This court held that the motion to dismiss was a general appearance which made the issue raised by the special appearance moot.

Finally, in *State v. Wedige, supra* at 690, 289 N.W.2d at 540, this court stated:

> It has long been the rule that the filing of a motion to dismiss, a motion to make more definite and certain, a motion to strike or for a continuance, or any motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party.

The motion to dismiss which the defendant's attorney made in open court on the record during the hearing on January 21, 1985, may have been made without counsel's realizing the effect of the motion. That, however, would not ordinarily affect the

legal effect of the motion.

It is, however, not necessary to rest the decision on the motion to dismiss made at the hearing on Janaury 21, 1985. The motion to quash, filed October 15, 1985, attacking the plaintiff's motion for leave to rehear, clearly invoked the power of the court on an issue other than jurisdiction over the person of the defendant, and was a general appearance.

It is unnecessary to consider the plaintiff's other assignment of error.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

COMMUNICATIONS WORKERS OF AMERICA LOCAL 7400, APPELLEE, V. JOANN ABRAHAMSON ET AL., APPELLANTS, BONNIE ANGLETON ET AL., APPELLEES.

422 N.W.2d 547

Filed April 29, 1988. No. 86-349.

1. **Courts: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985), the district court and the Nebraska Supreme Court generally shall review appeals from the municipal court (now merged with the county court) for error appearing on the record. If the district court determines to reverse the case, it may enter judgment in accordance with its findings.
2. **Appeal and Error.** Generally, findings of fact made by the trial court in a law action will not be set aside unless clearly wrong.
3. _____. Regarding questions of law, the Nebraska Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. In other words, regardless of the scope of review, this court has an obligation to reach an independent conclusion on a question of law.
4. **Labor and Labor Relations: Contracts.** A union-member relationship is contractual in nature, and the courts may enforce such a contract.
5. **Labor and Labor Relations: Contracts: Breach of Contract: Damages.** Generally, even though a labor contract expressly provides for certain nonexclusive remedies in the case of breach, that does not deprive the injured party of the right to resort to the usual legal remedies of suing for damages for breach of contract.

6. **Labor and Labor Relations.** A labor union may impose reasonable monetary fines to compel participation in a lawful strike, and the courts will enforce these fines if they were authorized by the union constitution or rules.
7. **Associations: Actions: Breach of Contract.** While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be shown that one of its members violated the contractual terms of membership.
8. **Labor and Labor Relations: Contracts: Damages.** The levying of a fine by a union under the terms of a labor contract is not merely the collection of damages, but relates to the power of a labor organization to enforce solidarity among its members.
9. **Labor and Labor Relations: Contracts.** The reasonableness of fines imposed by a union under a union contract is a matter for the court to determine should the union seek judicial enforcement of the fines.
10. **Labor and Labor Relations: Contracts: Damages.** Reasonable fines imposed by a union under a contract with its members may be considered liquidated damages rather than penalties.
11. **Labor and Labor Relations: Contracts.** Although a fine under a union contract with its members may have a punitive effect, that in no way lessens its effect in deterring future strikebreakers and in impressing upon union members the importance of solidarity.

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

Patrick J. Barrett, for appellants.

Thomas F. Dowd of Dowd, Fahey & Dinsmore, for appellee Communications Workers of America Local 7400.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

HASTINGS, C.J.

The Communications Workers of America Local 7400 (the union) sought judicial enforcement of fines it imposed against approximately 70 of its members (the defendants). The municipal court of Omaha (now merged with the county court for Douglas County) dismissed the union's petitions. The union appealed to the district court for Douglas County, which reversed the orders of dismissal and reinstated the fines, plus costs, for the majority of the appealed cases. Thirty-seven of the defendants have appealed to this court. All of the cases were consolidated for the purposes of this appeal. We affirm.

The assignments of error may be classified as follows: The

district court failed (1) to find that the union could not enforce fines imposed under its constitution in a court of law; (2) to find that the fines were in fact penalties and therefore not enforceable; (3) to find that the fines were unreasonable; (4) to find that the trials by the union were not conducted within the requirements of its constitution; and (4) to find that the imposition of the fines was not supported by the evidence.

The review of questions of fact from the municipal court to district court is controlled by Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985), which provides in part that "the district court shall review the case for error appearing on the record made in the county court or on the record made, if prior to July 1, 1985, in the municipal court." Such is also the scope of review in this court. Neb. Rev. Stat. § 25-1911 (Reissue 1985). See, also, *Kuehl v. Diesel Power Equip. Co., post* p. 353, 422 N.W.2d 361 (1988). Additionally, § 24-541.06 provides that if the district court determines to reverse the case, it may enter judgment in accordance with its findings. Findings of fact made by the trial court will not be set aside unless clearly wrong. *Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986).

Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *In re Estate of Ritter*, 227 Neb. 641, 419 N.W.2d 521 (1988). In other words, regardless of the scope of review, the Nebraska Supreme Court has an obligation to reach an independent conclusion on a question of law. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988).

The first assignment of error deals with the issue of whether a union-imposed fine may be judicially enforced, and is a question of law.

Section 1 of article XIX of the union's constitution provides in pertinent part as follows:

> Members may be fined, suspended or expelled by Locals in the manner provided in the Constitution for any of the following acts:
>
> . . . .
>
> (e) Working without proper Union authorization,

> during the period of a properly approved strike in or for an establishment which is being struck by the Union or Local....

There seems to be little question but that from August 7 to 28, 1983, the union was involved in a strike against Northwestern Bell Telephone Company. Also, approximately 150 of the union members crossed the picket lines and returned to work without approval by the union during that time. The defendants were included within those members. Pickets of the union reported the names of those union members, including the defendants, who crossed the picket lines. These names were turned over to union officials. On September 29, 1983, the prosecutor appointed by the union to conduct the trial of the defendants notified the defendants and others, by mail, that they had been charged with violating the union's constitution. A copy of the filed charge, signed and sworn to by the accuser, was attached.

The union's hearings, or trials, were held on October 14, 1983, with two additional dates available for those who could not be there on the scheduled date. The final trial was on November 1, 1983. Although approximately 120 individuals were charged, only about 13 showed up for their trials.

The trial panel consisted of five members selected by the union. For those members found guilty of working during the strike, the panel assessed a fine equivalent to a day's gross wages for each day worked during the strike.

As previously noted, the union brought actions in the Omaha Municipal Court against approximately 70 fined members who refused to pay. The actions were consolidated for trial, but were heard in two divisions. The division I trial, consisting of all members represented by present appellate counsel, was heard February 25 and 26, 1985. The division II trial, consisting of all other members, was heard February 26 and 27 and March 6, 1985. After hearing testimony, the court took the cases under advisement. On April 1, 1985, the court issued its orders dismissing the union's petitions. The municipal court's problem with the imposition of the fines, in essence, was that a member would not necessarily understand the full extent of his liability by merely being informed that he could be fined for crossing the

picket line.

The union appealed to the district court for Douglas County, and on March 18, 1986, it reversed the order of the municipal court as to the majority of the appealed cases. Apparently, the remaining cases were dismissed, as the evidence revealed that those employees had attempted to resign from the union prior to crossing the picket line. The district court held that the union trial hearings were conducted according to the union constitution and that due process was afforded each member on trial; furthermore, the members who chose not to attend their trials or utilize union appeal procedures could not now complain of the procedure used if that procedure was in compliance with the union constitution. Lastly, the court found that the penalties imposed were reasonable. This appeal followed.

According to the appellants, the union's constitution provides for the exclusive remedies of fines, suspension, or expulsion when a union member violates it by crossing a picket line. Since the constitution does not expressly provide for judicial enforcement, they argue that it is not an available option. Furthermore, as a matter of public policy, they say the courts should not interfere in the affairs of voluntary organizations.

The union asserts that the appellants have misinterpreted the provisions of the union's constitution, and makes reference to several cases in which judicial enforcement of union sanctions was approved.

Perhaps the leading case considering the issue of judicial enforcement of union-imposed fines is *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967). Specifically, the question in that case was whether a union which imposed fines for crossing the picket line committed an unfair labor practice by bringing suit for the collection of the fines. The Court held that it did not.

The Court noted that the union-member relationship is contractual in nature and that the courts may enforce such a contract. Although the appellants now argue that the union constitution does not specifically provide for court enforcement, and thus must not allow it, the Supreme Court

considered this very argument and expressly rejected it:

> [T]he potentiality of resort to courts for enforcement is implicit in any binding obligation. Surely it cannot be said that the absence of a "court enforceability" clause in a contract of sale implies that the parties do not foresee resort to the courts as a possible means of enforcement.

Id. at 182 n.9. Further explaining the contractual nature of union membership, the Court stated: "The efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled." *Id.* at 192.

The appellants attempt to distinguish *Allis-Chalmers* on the basis that the fined members in *Allis-Chalmers* were "full members" of the union, while the appellants are merely "financial members." However, the union is correct in its response to this argument; i.e., the "financial member only" argument is inapplicable to this situation, and the appellants have misrepresented the evidence in this regard. There simply is no evidence that the union distinguished between "full members" and "financial members."

The Supreme Court further considered the matter of court enforceability of union fines in *NLRB v. Boeing Co.*, 412 U.S. 67, 93 S. Ct. 1952, 36 L. Ed. 2d 752 (1973). The Court once again noted that the relationship between a union and its members is contractual in nature, and upheld the state court's right to apply local law in enforcing the relationship.

Local 248 UAW v. Natzke, 36 Wis. 2d 237, 153 N.W.2d 602 (1967), was a case arising out of the Allis-Chalmers strike. In *Natzke*, the appellant crossed the picket line and was fined by the union. The appellant did not disagree that the union's constitution constituted a contract, but argued that since the contract only specified the remedies of expulsion or suspension, such remedies were exclusive. The Wisconsin court rejected this argument, relying on *Allis-Chalmers*. The court cited general contract principles for the proposition that even if the contract expressly provides for certain remedies in the case of breach, that does not deprive the injured party of the right to resort to the usual legal remedies of suing for damages for breach of contract. The court concluded: "We hold that when appellant

was fined $100 by plaintiff union, a binding obligation in the form of a debt was created which was subject to collection by court action." 36 Wis. 2d at 251, 153 N.W.2d at 609-10. The holding in *Natzke* was approved by the Wisconsin court in *Local 4453, USA, AFL-CIO v. Wilson*, 88 Wis. 2d 699, 277 N.W.2d 809 (1979), and *UAW, Local 283 v. Scofield*, 50 Wis. 2d 117, 183 N.W.2d 103 (1971).

The New Jersey Superior Court relied in part on *Natzke* and *Allis-Chalmers* in reaching its decision in *North Jersey Newspaper Guild v. Rakos,* 110 N.J. Super. 77, 264 A.2d 453 (1970). The defendant was charged, among other things, with violating the picket line during the strike. The court held: "We incline to the view that the foregoing rule [that the union constitution constitutes a contract, the breach of which is enforceable in state courts] comports with reason and logic and should apply here." *Id.* at 85, 264 A.2d at 457.

The instant case is not the first case to consider the construction of the Communications Workers of America (CWA) constitution. The union brought suit in the Maryland courts to collect a fine imposed against a member for working during a strike in *Walsh v. CWA, Local 2336*, 259 Md. 608, 271 A.2d 148 (1970). Walsh's argument was that "the Union cannot prevail because it seeks to enforce a penalty judicially, although the Union's governing provisions permit only suspension or expulsion as a sanction for non-payment of a fine." 259 Md. at 610, 271 A.2d at 149. Citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967), the court held that "the Supreme Court has foreseen and rejected his contention." 259 Md. at 613, 271 A.2d at 151. The court also relied on *Natzke, supra*, and *Rakos, supra*, in enforcing the fine against Walsh.

The CWA constitution (specifically, article XIX providing for fines, suspension, or expulsion) was also the subject of *Jost v. Communications Workers of America*, 13 Cal. App. 3d Supp. 7, 91 Cal. Rptr. 722 (1970). The picket-crossing member claimed that the fine was not enforceable in state court. The court found *Natzke* and *Rakos* to be directly on point and upheld the right of the union to seek court enforcement of the fine. Under similar facts, a California court affirmed that

ruling 5 years later: "A labor union may impose reasonable monetary fines to compel participation in a lawful strike, and the courts will enforce these fines if they were authorized by the union constitution or rules . . . ." *Posner v. Utility Workers Union of America*, 47 Cal. App. 3d 970, 974, 121 Cal. Rptr. 423, 425 (1975).

The appellants urge reliance on *United Glass Workers etc. v. Seitz*, 65 Wash. 2d 640, 399 P.2d 74 (1965). In *Seitz*, the union member was fined for working behind the picket line. The court denied the union the opportunity to judicially enforce the fine. The union's constitution expressly provided for the suspension or expulsion of any member who failed to pay a fine assessed against him. This court held that this express provision created a presumption that the union intended suspension or expulsion to be the *only* remedies for nonpayment of fines.

However, the decision in *Seitz* is inapplicable to the present case. The constitution in *Seitz* provided an exclusive remedy for nonpayment of union-imposed fines. The CWA constitution contains no such provision. Article XIX provides sanctions for, inter alia, working during a strike, but does not expressly provide for a remedy if the sanctions are not followed. The CWA constitution never reaches the problem of noncompliance with union sanctions, as the constitution in *Seitz* did.

The court in *Jost, supra*, considered the applicability of the *Seitz* case to a CWA case and stated:

> *United Glass Workers v. Seitz, supra*, is the only case found or cited by counsel that refuses to enforce a fine that has been properly imposed after a fair determination. It should be noted that the Washington court does recognize the validity of the fine. Its judgment is based entirely on the specific terms of the union constitution which provides for suspension or expulsion of a member who refuses to pay the fine. . . . The constitution of the Communications Workers of America has no provision similar to the one considered by the Washington court. That case is distinguishable from ours.

13 Cal. App. 3d at Supp. 11-12, 91 Cal. Rptr. at 725. Likewise, the court in *Local 248 UAW v. Natzke*, 36 Wis. 2d 237, 153 N.W.2d 602 (1967), declined to follow *Seitz*, deeming *Seitz* to be

a "minority viewpoint." 36 Wis. 2d at 252, 153 N.W.2d at 610.

Lastly, the appellants maintain that the courts should not interfere in the affairs of a voluntary association. They cite *Straub v. American Bowling Congress*, 218 Neb. 241, 353 N.W.2d 11 (1984), as authority for the proposition that courts will not interfere with the internal affairs of an association. While this may be true in general, *Straub* also says more: "While courts generally do not interfere with the internal affairs of a voluntary association, *an action may be maintained for breach of contract if it can be shown that defendants violated the contractual terms of membership*." (Emphasis supplied.) *Id.* at 244, 353 N.W.2d at 13. Obviously, this is such a situation. Furthermore, it is unclear how lack of judicial intervention would *benefit* the appellants. Without court review, the appellants would lose any chance they might have of being relieved of their responsibility to pay the fine.

Straub limits the court's review to a determination as to whether the voluntary association's actions were consistent with its own rules, fair to the individual, prompted by proper motives, and in accordance with public policy and the law. The errors assigned by the appellants deal with just these issues. Based on judicial precedent, it is clear that this court may review the imposition and validity of the fines.

The appellants argue that the fines were penalties, not liquidated damages, and therefore unenforceable. They contend that the fines are not liquidated damages because they do not bear a reasonable relationship to the actual loss sustained by the union, and because there is no clause in the union constitution providing for liquidated damages.

This argument was considered in *UAW, Local 283 v. Scofield*, 50 Wis. 2d 117, 134, 183 N.W.2d 103, 112 (1971), wherein the court resolved: "The argument unrealistically assumes the equivalency of an ordinary commercial contract and the union membership contract. . . . [T]he levying of a fine was not merely the collection of damages, but was related to the power of a labor organization 'to enforce solidarity among its members.' "

The appellants further contend that the fines were unreasonable because they constituted a total work deterrent,

because the members were not aware that they might be fined, because the members were economically forced to return to work, and because the fines were arbitrarily imposed.

The union argues that the formula for determining the fines was established to *avoid* arbitrary fines. The union also maintains that the issue of "reasonableness" is a matter for the state courts to determine, and directs our attention to cases in which only unreasonable fines were considered penalties.

The U.S. Supreme Court has said that " '[t]he reasonableness of the fines is a matter for the state court to determine should the Union seek judicial enforcement of the fines.' " *NLRB v. Boeing Co.*, 412 U.S. 67, 74 n.9, 93 S. Ct. 1952, 36 L. Ed. 2d 752 (1973), citing *U. O. P. Norplex, Div. of Universal Oil Prod. Co. v. N.L.R.B.*, 445 F.2d 155 (7th Cir. 1971). The Court then went on to cite several cases in which "state courts applying state law [were] quite willing to determine whether disciplinary fines [were] reasonable in amount." 412 U.S. at 76. These cases included *North Jersey Newspaper Guild v. Rakos*, 110 N.J. Super. 77, 264 A.2d 453 (1970); *Walsh v. CWA, Local 2336*, 259 Md. 608, 271 A.2d 148 (1970); *Local 248 UAW v. Natzke*, 36 Wis. 2d 237, 153 N.W.2d 602 (1967); and *Jost v. Communications Workers of America*, 13 Cal. App. 3d Supp. 7, 91 Cal. Rptr. 722 (1970). The Court suggested that state courts are well suited to determine the reasonableness of fines, as they "are often able to draw on their experience in areas of the law apart from labor relations." 412 U.S. at 77.

In order to determine whether the fines were reasonable (and thereby determine whether the fines were "penalties" or "liquidated damages"—see *Walsh v. CWA, Local 2336, supra*), it is helpful to consider the record.

The fines were calculated by assessing 1 day's gross wages for each day worked during the strike. This formula was devised by the trial panel before the hearings. The panel felt that the formula was the most reasonable and evenhanded way to fine the members and that in order to treat all of the individuals equally, the panel would not take into account any deductions which the member may have had taken out of his gross paycheck. The panel did, however, have the authority to

consider other factors in reaching its final decision regarding the fine. For instance, the panel could consider the testimony given by the member at his hearing if he gave adequate reasons for resuming work during the strike, if there were medical reasons for crossing the picket line, or if there were any other particular hardships to be taken into account. The trial panel had the authority to decide not to fine members at all if good reasons were given.

The district court, upon being presented with this evidence, found: "In each case the penalty imposed was roughly equivalent to a day's wages for every day that the defendant was found to have earned a day's wages by crossing the line. This court cannot say that such a penalty is not reasonable."

A similar fine was handed out in *Walsh v. CWA, Local 2336, supra*. Walsh was fined $500 for crossing the picket line, during which time he earned $400. Walsh claimed that the fine was a penalty and that the courts will not enforce a penalty. The court stated that this argument "will not help him." 259 Md. at 614, 271 A.2d at 151. The court found that "a fine, to be judicially collectible, must be reasonable. As we see it, a reasonable fine in labor relations law may be analogized to liquidated damages and an unreasonable fine to a penalty." *Id.*

The fined member also challenged the amount of the fine imposed in *North Jersey Newspaper Guild v. Rakos, supra*. The court noted that the union constitution authorized the imposition of a fine and that under *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967), that fine should not be " 'unreasonably large.' " 110 N.J. Super. at 91, 264 A.2d at 460. The court then concluded:

> While the fine, $500, is characterized by defendant as high, there is no showing in the record that it was unreasonable, or the mere fiat of a union leader. See Scofield v. NLRB, *supra*, 394 U. S., at 430, 89 S. Ct. 1154. The trial judge did not find it to be excessive "in view of the nature of the offenses * * * the manner in which defendant profited from them and * * * in view of current economic conditions." We find no cause to disturb his conclusions. . . . Defendant not only earned income during the period involved but was the recipient of a

> substantial promotion at its end. One of the purposes of the fine was to serve as a deterrent to others who might be inclined to dilute the union's bargaining power by defying its legitimate directives.

110 N.J. Super. at 91, 264 A.2d at 460-61.

The fines and the manner in which they were determined appear to be reasonable. Some members worked almost every day of the strike, while others worked only the last day. The panel's formula took such differences into account. Furthermore, the members were given the opportunity to tell the panel their reasons for returning to work and to have the panel take those reasons into consideration when setting the final fine. Unfortunately, most members chose not to use this opportunity. Under the reasoning of *Walsh*, these reasonable fines may be considered liquidated damages enforceable by the courts.

The appellants assert that the fines must be set aside, as they do not bear a reasonable relationship to the actual damages suffered by the union as a result of the appellants' returning to work. However, the actual damages to the union are impossible to ascertain. It is just such a situation that liquidated damages are intended to cover. As the court held in *UAW, Local 283 v. Scofield*, 50 Wis. 2d 117, 134, 183 N.W.2d 103, 112 (1971), "It is obvious that the measure of damages is difficult to ascertain, however real the damage is to the union which seeks to protect its members from the damages of [unfair labor practices]. . . . This is precisely the type of situation where liquidated damages, if reasonable, are appropriate." That the fines may indeed have had a punitive effect in no way lessens their effect in deterring future strikebreakers and in impressing upon union members the importance of solidarity. The amount of the fines assessed was based on a reasonable calculation and should be upheld.

The appellants contend that the union trials held in October and November 1983 "were conducted in a manner inconsistent with the constitution's provisions" and that they were denied a "fair and impartial trial" as a result. Brief for Appellants at 22. The union constitution, they assert, provides for several requirements which were not met, specifically: The charges were not "submitted" within 60 days, and the appellants were

denied the right to cross-examine the witnesses. Furthermore, the appellants did not see the constitution and were thus unaware of the possibility of being sanctioned for crossing the picket line, and the triers of fact did not themselves understand the meaning of "willfully" or "due process."

Regarding the submission of the charges, the union constitution provides that the written charges must be submitted within 60 days of the time the accuser becomes aware of the alleged offense. The "accuser" testified that he brought the charges against the individuals according to the constitution's provisions. On September 29, 1983, the "prosecutor" notified the members by mail that they had been charged with violating the union's constitution. A copy of the filed charge, signed and sworn to by the accuser, was attached.

The union contends that this written charge, which was properly signed, sworn to, filed, and sent to the individual, was "submitted" at that date, i.e., September 29, 1983, well within the 60-day limit (the strike took place from August 7 to 28, 1983). The appellants contend that the charges were not "submitted" until the trial on October 14, 1983, and, accordingly, no member could be held liable for conduct occurring prior to August 14, 1983. Although the appellants insist that "[a]ll three Union witnesses testified that the charges were 'submitted' at trial on October 14, 1983," they make no reference to the record in this regard. Brief for Appellants at 23. What little testimony there is, is ambiguous. However, the prosecutor explained that the charges were written up by the accuser and sent out to the charged members, and then at trial the prosecutor "read all the names that we charged, and then if anybody was there, then they spoke."

It is apparent that the witnesses were unsure as to the precise meaning of the term "submitt[ing]" the charges as it is used in the union's constitution. It is true that the witnesses appeared to agree that the charges were not submitted until they were read by the "prosecutor" at trial. However, a commonsense contextual reading of the constitution leads to the conclusion that the charges were submitted at the time that they were made out by the accuser and filed with the union. Article XX, § 2, of the constitution provides that the charges shall be in writing,

signed and sworn to by the accuser, and filed with the recording officer of the local. Section 2 further provides that the charges shall contain the facts and the dates of the offense, and shall be submitted within 60 days of the time the accuser becomes aware of the offense. Read as a whole, it seems logical that the charges are "submitted" at the time they are made out and filed with the local office.

The appellants also argue that they were denied the right of cross-examination at their trials. One obvious flaw in this argument, of course, is that only 2 of the 37 appellants even *attended* their trials. The others should not now be allowed to complain that they were denied the right of cross-examination. Furthermore, there is no evidence that any of the charged members who did attend their trials were denied the right to cross-examine the witnesses against them.

In each trial, the union's witness was the accuser, who stated what dates the member allegedly worked during the strike. Appellant Merritt Stinson, who attended his trial, did not attempt to exercise his right to cross-examine the various witnesses, although he had been informed by mail of his right to do so. Mary Gautier, the other appellant who attended her union trial, also did not attempt to exercise her right to cross-examine the union's witnesses. The members were not denied the opportunity to cross-examine the union's witnesses.

The appellants contend that they were never given copies of the union constitution "and therefore had no knowledge that the union had forbade its members to cross picket lines or that they could be subject to fines." Brief for Appellants at 23. However, a copy of the union constitution was available for any member who requested it. The accuser testified that none of the members had ever requested and been denied a copy of the constitution. One of the five appellants who testified at the municipal court hearings specifically stated that she had never asked to see the constitution; the other four did not mention it.

The appellants argue that since they had not seen the constitution, they could not be convicted of violating its provisions. Once again, the appellants did not see the constitution only because they chose not to. Furthermore, it is

very apparent from the testimony that the members were aware that the union did not approve of their returning to work.

In short, the union trials were conducted fairly and in accordance with the provisions of the union's constitution. Although the municipal court found fault with the fine calculation process, it went on to state that the appellants' due process rights had not been violated by the trial procedures. The district court, with which we agree, on appeal observed that "the union trial hearings were conducted in substantial compliance with the union constitution" and that the appellants' due process rights had not been violated.

As discussed in the section of this opinion dealing with the issue of "liquidated damages v. penalties," we agree that the fines were reasonable under the circumstances and are therefore supported by the evidence.

The judgments of the district court are affirmed.

AFFIRMED.

FIRST STATE BANK, FREMONT, NEBRASKA, APPELLANT, V. THOMAS REED AND CARYL REED, APPELLEES.

422 N.W.2d 359

Filed April 29, 1988. No. 86-547.

1. **Uniform Commercial Code: Debtors and Creditors: Sales: Notice.** There is no requirement that a notice of the sale of collateral at private sale advise the debtor that the debtor will be liable for any deficiency.
2. **Uniform Commercial Code: Sales: Notice.** The notice required by the Uniform Commercial Code for the sale of collateral at private sale is reasonable notification of the time after which the collateral will be sold.
3. _____: _____: _____. A notice that collateral will be sold at private sale after a given date is sufficient even though the collateral is sold at more than one sale.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf and Boggy, for appellant.

Kurt A. Hohenstein of Rager & Hohenstein, P.C., for appellees.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

BOSLAUGH, J.

This was a suit to recover a deficiency judgment for the balance due on a promissory note after the collateral securing the debt had been sold and the proceeds applied to the debt. The trial court found that the notice of private sale given by the plaintiff bank to the defendants was insufficient because it "fails to apprise the Defendants that a personal deficiency judgment might be sought against them, and that the Plaintiff failed to give notice for each sale when the collateral at issue was sold in two separate private sales," and dismissed the action. The plaintiff has appealed.

The plaintiff's first assignment of error is that the trial court erred in finding that the notice must advise the debtors that a personal deficiency judgment might be sought against them.

Neb. U.C.C. § 9-504 (Reissue 1980), relating to the sale of collateral after default, provides in part:

> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need

be sent.

After the note was in default and the bank had repossessed the collateral, the bank sent the following notice to the defendants:

> By reason of default on the above mentioned loan, the First State Bank has repossessed the collateral securing said loan, a 1978 Fruehauf Dry Van and a 1977 International. You may redeem said collateral by paying the unpaid principal balance, plus accrued interest, late charges and any reasonable repossession expenses incurred by First State Bank. The redemption period will end ten (10) days from the date of this letter. After September 9, 1985 and without further notice to you, the First State Bank will sell the collateral securing your indebtedness at private sale.
>
> Please be informed that you are responsible for all damages incurred by First State Bank because of your breach of the loan agreement and are subject to the exercise of all rights and remedies available to First State Bank under the law.

After sending the notice to the defendants, the bank had no further contact with them. The 1977 International truck was sold at private sale after September 9, 1985, for $6,000. The proceeds of the sale, less expenditures for repairs and commission, were applied to the debt. The 1978 Fruehauf dry van was sold at private sale for $2,375 after September 9, 1985, and the proceeds applied to the debt. Since the proceeds from the sale of the collateral were insufficient to satisfy the debt, the plaintiff brought this action for a deficiency judgment.

There is no requirement in the statute that the notice to the debtor advise the debtor that the debtor will be liable for any deficiency remaining after the sale of the collateral. The statute provides that "unless otherwise agreed, the debtor is liable for any deficiency." There was no agreement in this case that the debtors would not be liable for any deficiency.

In *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983), the notice sent to one of the guarantors, Vernor L. Hughes, was addressed to him as "President, Central Auto & Truck Supply." This court held that as between Hughes

and Central Auto, the notice was ambiguous. The *Hughes* case is not authority for the proposition that the notice must advise the debtor that the debtor will be liable for any deficiency.

The plaintiff's second assignment of error is that the trial court erred in finding that the plaintiff was required to give a separate notice for each sale when the collateral was sold in two separate sales.

The notice required by the Uniform Commercial Code for the sale of collateral at private sale is reasonable notification of the time after which the collateral will be sold. *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979).

For a private sale or sales of the collateral the statute requires only "reasonable notification of the time after which *any* private sale or other intended disposition is to be made . . . ." (Emphasis supplied.) *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977). There is no requirement that there be a separate notice for each sale when the collateral is sold at more than one sale.

In *Havelock Bank v. McArthur*, 220 Neb. 364, 370 N.W.2d 116 (1985), the notices to the debtors were defective because they advised the debtors that only part of the collateral would be sold, and some of the collateral was sold without any prior notice. However, the opinion notes at 367, 370 N.W.2d at 118, "Obviously, *advising the debtor that numerous pieces will be sold individually* on a given date at a given place, *or even thereafter from day to day until all are sold, would be sufficient*." (Emphasis supplied.)

The judgment is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CHRISTIAN E. KUEHL, JR., APPELLEE, V. DIESEL POWER EQUIPMENT COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT.

422 N.W.2d 361

Filed April 29, 1988. No. 86-559.

1. **Courts: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985), the district court and the Nebraska Supreme Court review appeals from the municipal court, other than those arising from the small claims division thereof, for error appearing on the record.
2. **Appeal and Error.** In an appeal from an action of law tried without a jury, reviewing courts presume the controverted facts were decided by the trier of fact in favor of the successful party; accordingly, those findings will not be disturbed on appeal unless clearly wrong, it not being the province of reviewing courts to resolve conflicts in or reweigh the evidence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed as modified.

Richard J. Bruckner, for appellant.

Richard J. Rensch of Schumacher & Gilroy, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

CAPORALE, J.

Appellee, Christian E. Kuehl, Jr., filed suit in what was then the municipal court of the city of Omaha, seeking $4,737.97 in wages and commissions allegedly due him from appellant, Diesel Power Equipment Company, Inc., under an oral employment contract, and an attorney fee. Diesel Power answered Kuehl's petition and counterclaimed for $7,702.95 in alleged costs and expenses incurred in covering Kuehl's territory for a period during which Kuehl allegedly could not be found. Following a bench trial, the municipal court dismissed both Kuehl's petition and Diesel Power's counterclaim. Both parties appealed to the district court, which entered a $2,483.11 judgment in favor of Kuehl and dismissed Diesel Power's counterclaim. Diesel Power has appealed to this court and assigns four errors, the first three of which repeat in various ways the single assertion that the district court applied the wrong standard of review or misapplied the correct standard in

reversing the municipal court's dismissal of Kuehl's claim. In its fourth assignment of error Diesel Power asserts that the dismissal of its counterclaim is not supported by the evidence. We affirm as modified.

Kuehl entered the employ of Diesel Power at Valley, Nebraska, in July of 1983 at a starting salary of $830 per month, less a $30-per-month deduction for the use of a company automobile. In addition to this salary Kuehl was to be paid commissions of 15 percent of the gross profit on sales and 2 percent on rentals.

By the next February Kuehl became suspicious that Diesel Power was overestimating the cost of its merchandise, thereby reducing the stated gross profit margin on sales and artificially reducing the commissions due its sales personnel. Kuehl testified that he brought his concerns to the attention of the officers and managers of Diesel Power and to his immediate supervisor, Darrell Smith, during a meeting between the two men on July 28, 1984. However, Walter Price, owner and manager of Diesel Power, testified that Kuehl had never complained about the commission plan to him, nor had he heard of complaints to other company officials.

In March or April of 1984, Kuehl was given a raise of $400 per month, bringing his monthly salary to $1,230, minus the $30 automobile use deduction, for a total of $1,200 per month. According to Price, this 50 percent salary increase was given to provide Kuehl "some incentive." Sometime later, Diesel Power reduced Kuehl's salary to its former level, $830 per month minus the $30 automobile deduction. Kuehl first became aware of this salary reduction on August 8, 1984, when, in Kuehl's words, Smith informed him that "Walt had kept my salary back." Smith, who at the time of giving his deposition testimony was no longer employed by Diesel Power, stated there had been no prior discussion with him concerning Kuehl's salary.

Frustrated at Diesel Power's lack of responsiveness to his requests for information regarding the commission plan, Kuehl decided to withhold his customer contact reports from the company, turning in his last set of reports on June 9. According to Kuehl, he withheld these reports in an attempt to force the

company to provide him with certain information pertinent to his commissions.

Kuehl maintains that he was available by phone and mail throughout June and July of 1984 and that he was working during that entire period writing orders and performing other job functions for Diesel Power. Smith also testified that Kuehl was available by phone and working throughout this period. Price, Oren Engler, the office manager for Diesel Power, and William Barnard, Diesel Power's sales coordinator, testified, however, that Kuehl could not be reached during June and July of 1984. Kuehl testified that he attended horseraces in Omaha, Nebraska, "a couple times a week, two maybe three times a week, Saturdays included," during June and July, on some of which occasions he entertained Diesel Power customers. The races started at 4 p.m., by which time Kuehl could have worked an 8- or 9-hour day. According to Kuehl, prior to July 1984, he had taken days off from work from October 3 through 9, 1983, due to back problems and some time in March of 1984 with stomach problems. Kuehl said he informed Diesel Power personnel of these days off; Price, on the other hand, said Kuehl did not inform anyone at the company of these days off.

Price testified that because Diesel Power officials could not contact Kuehl in June and July, he had Smith, then Diesel Power's sales supervisor, cover Kuehl's territory. Smith testified that he visited Kuehl's territory during that period as part of his normal supervisory duties and that he traveled and worked with Kuehl on June 26 and 28 and July 24 and 27, 1984, in his supervisory capacity.

According to Kuehl, he "was informed by Darrell Smith on the 8th of August, that I was terminated. Well, he said Walt Price asked him to fire me that day." Price testified that he wrote a memorandum dated August 16, 1984, directing his employee Engler "to handle the final exit interview with" Kuehl. To Price's knowledge, this interview was conducted on August 21, 1984, the day on which Kuehl returned the company automobile and literature to Diesel Power. During that meeting, Engler discussed with Kuehl, among other things, the "vested interest in certain commissions." The record contains uncanceled checks drawn by Diesel Power on its account at the

First National Bank of Omaha payable to Kuehl, totaling $935.49 for salary and commissions, all except one of which bear a legend denominated "RELEASE STATEMENT" for commissions or salary "paid in full" through a stated month.

Kuehl testified he negotiated none of these checks for fear that by doing so he would have waived his claims to the commission and salary amounts in dispute. The record also contains a letter from Diesel Power to Kuehl stating there was an additional $1,452.62 "of commission items which will be released for payment," exclusive of a check in the gross amount of $95 which is reflected as a $66.21 net check in the $935.49 mentioned earlier. The letter also reflects that $393.74 of the total amount was an estimated figure and "subject to change," but no evidence was adduced which establishes a basis for reducing that figure.

The issue presented by Diesel Power's first three assignments of error is controlled by Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985), which provides, as it has at all times relevant to this appeal, that "[i]n all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court or on the record made, if prior to July 1, 1985, in the municipal court. . . ." Such is also the scope of review in this court. Neb. Rev. Stat. § 25-1911 (Reissue 1985). See, also, *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985). The determination as to whether the district court correctly applied the aforementioned scope of review to this suit for breach of contract, an action at law, *Kubista v. Jordan, ante* p. 244, 422 N.W.2d 78 (1988), in which a jury was waived, is controlled by the principle that reviewing courts presume the controverted facts were decided by the trier of fact in favor of the successful party. Accordingly, those findings will not be disturbed on appeal unless clearly wrong, it not being the province of the reviewing courts to resolve conflicts in or reweigh the evidence. See, *Curlile v. Lindner*, 227 Neb. 510, 418 N.W.2d 256 (1988); *Professional Recruiters v. Wilkinson Mfg. Co.*, 222 Neb. 351, 383 N.W.2d 770 (1986).

Regardless of how one resolves the various conflicts in the evidence concerning whether Kuehl worked during the entire

months of June and July, Diesel Power's own evidence establishes that it conceded it was indebted to Kuehl in the amount of $2,388.11, $935.49 of which is represented by unnegotiated checks and $1,452.62 of which is accounted for by additional commissions Diesel Power admits Kuehl earned. Thus, the municipal court's judgment that Kuehl was entitled to nothing on his petition is clearly wrong, and the district court was correct in reversing it. We cannot, however, agree with the district court's computation of the amount owed Kuehl. The evidence detailed previously establishes that the district court's assessment of Kuehl's damages in the amount of $2,483.11 is excessive by $95, and its judgment must therefore be so modified.

In view of the fact Kuehl has not cross-appealed, we do not consider whether the district court erred in not assessing an attorney fee against Diesel Power under the provisions of Neb. Rev. Stat. § 48-1231 (Reissue 1984). See *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987). That statute requires that where an employee successfully maintains a suit through an attorney for wages not paid within 30 days of the regular payday, an attorney fee equal to at least 25 percent of the unpaid wage shall be awarded. *Barbour v. Jenson Commercial Distributing Co.*, 212 Neb. 512, 323 N.W.2d 824 (1982).

We thus move on to consider the issue presented by the fourth and last assignment of error, whether the district court erred in failing to reverse the municipal court's dismissal of Diesel Power's counterclaim. There was substantial conflict as to whether Kuehl abandoned his employment responsibilities during the entire months of June and July, as well as to what costs, if any, Diesel Power incurred as a result of any such abandonment. Accordingly, it cannot be said the municipal court was clearly wrong in dismissing Diesel Power's counterclaim, and, therefore, the district court was correct in not disturbing that aspect of the municipal court's judgment.

Accordingly, the judgment of the district court is affirmed as modified in this opinion.

Under the provisions of § 48-1231, we additionally award Kuehl the sum of $773.97, one-third of the modified judgment of $2,388.11 less the $66.21 check which was tendered to Kuehl

without the "RELEASE STATEMENT" described earlier, to apply toward the services of his attorney in this court.

AFFIRMED AS MODIFIED.

JAMES E. KIMBROUGH, APPELLANT, V. MARILYN K. KIMBROUGH, APPELLEE.

422 N.W.2d 556

Filed April 29, 1988. No. 86-606.

1. **Property Division.** A division of property is not subject to a precise mathematical formula. Rather, an appropriate division of marital property must turn on reasonableness and the circumstances of each particular case in the light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984).
2. **Alimony: Appeal and Error.** It is an abuse of discretion for the trial court to award alimony in excess of the earning capacity of the paying party.
3. **Child Support: Jurisdiction.** The jurisdiction of the court to order support of children of the marriage is limited to the support of minor children.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

John A. Wolf of Shamberg, Wolf & Bush, for appellant.

James D. Livingston of Cunningham, Blackburn, Livingston & Francis, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

WOLF, D.J.

This is an appeal by the petitioner husband from a decree of dissolution by the district court for Hall County, Nebraska.

After a hearing on May 6, 1986, the district court entered a decree of dissolution on June 6, 1986, which (1) dissolved the marriage of the parties; (2) granted custody of the three minor children to the mother, subject to reasonable visitation by the father; (3) ordered the father to pay child support of $300 per

month per child commencing June 6, 1986, and until each child reaches the age of 19 years; (4) ordered the father to provide major medical insurance on the minor children, with no more than $500 deductible for each child, and keep major medical insurance on the minor child Jaime past the age of majority for such child and for that child's entire lifetime; (5) divided the real and personal property of the parties, and their debts; (6) required the husband to maintain the medical insurance on the wife until the decree becomes final; (7) required the husband to pay the wife alimony in the amount of $1,000 per month commencing June 6, 1986, and continuing each month thereafter until the death or remarriage of the wife; and (8) required each party to pay his or her own costs and attorney fees.

The appellant assigns as error (1) that the trial court erred in the division of the marital property of the parties, including the failure of the court to award the husband certain requested personal property then in the possession of the wife; (2) that the child support was excessive; (3) that the alimony awarded was excessive and for an unlimited term; and (4) that the father was required to maintain medical insurance on a child past majority.

The petitioner and respondent were married in 1963 and are the parents of three children: Jeffrey, born July 7, 1970; Jaime, born November 18, 1973; and Jared, born January 12, 1976. Jaime has multiple birth defects which are a physical handicap to her and require extra care, transportation, and assistance in dressing, and she also has some problems with other bodily functions. Jaime has continuing medical problems and will have medical problems in the future.

PROPERTY DIVISION

Petitioner husband is a doctor of veterinary medicine. The property of the parties consisted of their residence in Grand Island, a veterinary clinic building with veterinary equipment, household goods and furnishings, a 1982 Jeep, a Buick, a Honda, a camper, a boat, and their individual IRAs. There was a mortgage on the residence, a note for a loan from the wife's father, and a mortgage debt on the clinic property.

The only major dispute on valuations between the parties was the value of the veterinary building and equipment. The

husband valued the building and land at $140,000 and the veterinary equipment at $15,000. The wife valued the building and land at $160,000 and the equipment *and practice* at $90,000. The wife's valuation is apparently based on a prior statement of the husband that if he sold his building and practice he would ask $250,000. It is not appropriate to consider the value of the "practice" in making a division of assets when the computation of future child support and alimony would contemplate that the husband would continue the veterinary practice in that community. A similar question was raised in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), where the wife challenged the failure of the trial court to award her a share of the professional goodwill of her husband's medical practice as property division. We there held that any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity which, although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding.

The husband was awarded the veterinary clinic building and equipment, the 1982 Jeep, the boat, and his IRA, as well as the household goods and furnishings in his possession. The wife was awarded the residence, the Honda, the camper, and her IRA. The court assigned the husband to pay the debt to the respondent's father and the loans on the clinic, while the court required the wife to assume the mortgage on the residence. Based upon values furnished to the court, the division of property does not seem unreasonable. The husband received approximately $180,000 in assets, less debts of $147,000, for a net of approximately $33,000. The wife received assets of approximately $92,000, less debts of $42,000, for a net of about $50,000. The above figures do not include any valuations for household goods and furnishings divided, because the household goods were not separately listed or valued by the parties. In the absence of evidence listing the individual items of household goods, furnishings, or other personal property, and their individual values, the court cannot be expected to make a sophisticated division thereof.

A division of property is not subject to a precise

mathematical formula. Rather, an appropriate division of marital property must turn on reasonableness and the circumstances of each particular case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). *Taylor v. Taylor, supra.*

The division of property in marriage dissolution cases is initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Earl v. Earl*, 221 Neb. 574, 379 N.W.2d 261 (1986). We find no abuse of the trial court's discretion in the division of property.

CHILD SUPPORT

During the past few years the wife had been employed at the veterinary clinic as a receptionist and was paid a salary from the business. During the years 1983, 1984, and 1985, the business showed an average annual net profit of $19,750 before deducting the wife's salary. The evidence shows it would cost approximately $10,000 per year for a receptionist, leaving a revised net income for the business of $9,750. If all of the depreciation claimed in the business on an annual basis (approximately $18,000 per year) was added back in as income, the anticipated average gross income of the business in the future would be $27,750, with an estimated tax liability of $3,000, or a net income of $24,750. This would provide the husband $2,062 per month net income.

The evidence further supports the finding that the wife is employable, but on a limited basis because of the care of Jaime, and could reasonably earn a net income of $400 per month. Using the Nebraska child support guidelines adopted by this court, the recommended support for three children would be $862, of which the husband's share would be $722 per month. The district court for Hall County awarded $900 per month for the three children, but the extra amount is not unreasonable considering that one of the children is a handicapped child and will require additional expenditures. Further, the child support should be measured by the fact that when the oldest child is 19 in July of 1989, the child support will reduce to $600 per month, which is slightly less than the child support guidelines for two

children. For the reasons given, this court finds no error in the award of child support at the rate of $300 per month per child.

ALIMONY

In determining whether alimony should be awarded, the trial court should consider what effect, if any, the marriage has had upon the ability of the wife to secure employment in the future and the earning capacity of the husband. The evidence shows that the wife was employed during the early marriage as a secretary-receptionist, that she was employed regularly with the veterinary clinic as a receptionist, and that she currently has some employment. Although the wife has some problem with her eye, there is no indication that this is a handicap which interferes with her employment. The two factors which mainly affect her employability are the scarcity of jobs available in the community and the amount of care she is required to provide Jaime. Alimony is not to be used simply to equalize the income of the parties or to punish one of the parties. It may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or for that period to get proper training for employment. Measuring from the date of the decree, the oldest child will be 19 in 3 years; Jaime, the handicapped child, will be 19 in 6 1/2 years; and Jared will be 19 in 8 1/2 years.

In *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), we stated that it was an abuse of discretion for the trial court to award alimony in excess of the earning capacity of the paying party. In this case the husband, after payment of the $900-per-month child support, will have $1,162 available for his living expenses. Based upon the child support guidelines, the wife will have contributed $140 per month of her $400-per-month net income for the support of the children, leaving her $260 for her living expenses. Assuming these figures, it is apparent that an award of $1,000 alimony per month is unreasonable under the circumstances. Further, we have frequently reiterated the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite time are not favored. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981). Alimony in this case is not in lieu of property division. The

property division was favorable to the wife, and, therefore, the alimony should terminate upon the husband's death, upon the wife's death, or upon the wife's remarriage. In addition, it would be appropriate that alimony terminate 7 years from the date of the decree, which will be after Jaime's reaching the age of 19 years. We therefore modify the alimony award to the sum of $400 per month commencing July 1, 1986, and on the first day of each month thereafter for a period of 7 years, until the death of either the husband or the wife, or until the wife's remarriage, whichever shall first occur.

MEDICAL INSURANCE COVERAGE AFTER AGE OF MAJORITY

The jurisdiction of a court in a dissolution of marriage is defined in Neb. Rev. Stat. § 42-351 (Reissue 1984). The jurisdiction as to custody and support of children is specifically limited to the custody and support of *minor* children. Thus, the order of the district court requiring the father to provide major medical insurance for Jaime's lifetime is excessive and beyond the jurisdiction of the court. Such order is modified to require the father to provide major medical insurance on the children until age 19, with no more than $500 deductible for each child.

The decree of dissolution entered by the district court on June 6, 1986, is affirmed but modified as to the amount and term of alimony, and modified to require major medical insurance to be provided by the father only during the minority of the children.

AFFIRMED AS MODIFIED.

RORICK PARTNERSHIP, A GENERAL PARTNERSHIP, APPELLEE, V. LYDIA HAUG, APPELLANT.

422 N.W.2d 365

Filed April 29, 1988. No. 86-656.

Courts: Jurisdiction: Appeal and Error. To vest appellate jurisdiction in the district court for an appeal from the county court, all that is required is the timely filed notice of appeal and timely deposit of the district court docket fee, as required by Neb. Rev. Stat. § 24-541.02 (Reissue 1985).

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Lydia Haug, pro se.

John J. Reefe, Jr., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

PER CURIAM.

As the landlord and owner of real estate leased as an apartment to Lydia Haug, Rorick Partnership commenced an action in the county court for Douglas County. Rorick alleged that Haug's tenancy in the leased premises was terminated, but that Haug continued in possession of the premises, notwithstanding Rorick's notice to quit. Rorick requested a writ of restitution for the premises and costs of the action. Haug answered and counterclaimed, seeking $40,000 in damages from Rorick. Since the amount of the counterclaim exceeded the county court's jurisdiction of $10,000, see Neb. Rev. Stat. § 24-517 (Cum. Supp. 1986), the county court transferred Haug's counterclaim to the district court for Douglas County. See Neb. Rev. Stat. § 24-302.01 (Cum. Supp. 1986).

In the trial on Rorick's petition, the county court found in favor of Rorick and issued a writ of restitution on May 27, 1986. On May 29, Haug, as required by Neb. Rev. Stat. § 24-541.02 (Reissue 1985) governing an appeal from the county court to the district court, filed her notice of appeal and deposited the district court docket fee with the clerk of the county court. Also, Haug deposited $750 in the county court as

a supersedeas of the writ of restitution. The transcript for the district court proceedings states only:

> Plaintiff appeared through counsel.
> Defendant appeared.
> Evidence adduced.
> Motion for Recusal heard and overruled.
> Motion to file Amended Affidavit sustained.
> Motion on Bond heard.
> Motion sustained.
> Appeal dismissed based upon lack of adequate bond.
> Case disposed of.

In her appeal, Haug argues that dismissal of her appeal was incorrect.

Among the statutes applicable to this case are the following concerning appeals from the county court to the district court:

> (1) In order to perfect an appeal from the county court the appealing party shall within thirty days after the rendition of the judgment or making of the final order complained of:
>
> (a) File with the clerk of the county court a notice of appeal; and
>
> (b) Deposit with the clerk of the county court a docket fee in the amount of the filing fee in district court for cases originally commenced in district court.
>
> (2) Satisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction of the matter appealed, except that in appeals from the county court sitting as a juvenile court the county court may act in accordance with section 43-202.03.

§ 24-541.02;

> In appeals in cases under the Uniform Residential Landlord and Tenant Act no appeal shall operate as a supersedeas of any writ of restitution until the defendant shall deposit an undertaking or cash bond in accordance with section 76-1447.

Neb. Rev. Stat. § 24-541.03(4) (Reissue 1985); and

> In all cases other than appeals from the Small Claims Court, the district court shall review the case for error

> appearing on the record made in the county court . . . . The district court shall render a judgment which may affirm, affirm but modify, or reverse the judgment or final order of the county court . . . . If the district court reverses, it may enter judgment in accordance with its findings or remand the case to the county court for further proceedings consistent with the judgment of the district court.

Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985).

Neb. Rev. Stat. § 76-1447 (Reissue 1986) of the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 24-568 (Reissue 1985) and 76-1401 to 76-1449 (Reissue 1986), provides:

> If either party feels aggrieved by the judgment, he may appeal as in other civil actions. An appeal by the defendant shall stay the execution of any writ of restitution, so long as the defendant deposits with the clerk of the district court the amount of judgment and costs, or gives an appeal bond with surety therefor, and thereafter pays into court, on a monthly basis, an amount equal to the monthly rent called for by the rental agreement at the time the complaint was filed.

Rorick contends that the Uniform Residential Landlord and Tenant Act applies to its action against Haug and then asserts that Haug

> never paid "into court, on a monthly basis, an amount equal to the monthly rent called for by the rental agreement at the time the complaint was filed." Thus appellant was in default on her bond and appellee was entitled to the writ of restitution, which was granted by the District Court.

Brief for Appellee at 6.

As far as we can determine, the district court disposed of Haug's appeal on the basis of a lack of jurisdiction on account of an inadequate supersedeas bond, that is, "Appeal dismissed based upon lack of adequate bond."

To vest appellate jurisdiction in the district court for an appeal from the county court, all that is required is the timely filed notice of appeal and timely deposit of the district court

docket fee, as required by § 24-541.02.

A district court's acquisition of appellate jurisdiction of an appeal from a county court is much like the jurisdiction of the Supreme Court concerning a civil appeal from the district court. See Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 1986): On timely filing of the notice of appeal and timely deposit of the docket fee for the Supreme Court,

> an appeal shall be deemed perfected and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed and such docket fee deposited in the office of the clerk of the district court . . . and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

An appeal to the Supreme Court is deemed perfected when notice of appeal has been timely filed and the docket fee timely deposited. See *State v. Price*, 198 Neb. 229, 252 N.W.2d 165 (1977). See, also, *Fick v. Herman*, 161 Neb. 110, 72 N.W.2d 598 (1955).

In the case before us, the transcript shows that the district court did not review the record made in the county court to determine whether error was committed in the county court and, after such a review, did not affirm, affirm but modify, or reverse the county court's judgment. See § 24-541.06. Instead, the district court dismissed Haug's appeal in view of an inadequate supersedeas bond, the only bond filed in the proceedings. A proper supersedeas might suspend enforcement of the county court's judgment, deferring restitution of the premises until the propriety of the judgment was affirmed on appeal. However, a supersedeas was not required for the district court's jurisdiction to review the county court's judgment, by which the premises were restored to Rorick in the action against Haug. The issue on Haug's appeal to the district court was whether Rorick was entitled to restitution of the leasehold. While the absence of a supersedeas bond or deposit, see §§ 24-541.03 and 76-1447, might otherwise permit enforcement of the writ of restitution pending Haug's appeal in the present case, the question of the right to possession of the premises remained unresolved in the district court, which had

jurisdiction to determine that question but took no action regarding the county court's judgment from which Haug appealed.

Therefore, we remand this matter to the district court for further proceedings in conformity with § 24-541.06.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JUDY DIETER, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, ET AL., APPELLEES.

422 N.W.2d 560

Filed April 29, 1988. No. 87-130.

1. **Administrative Law: Appeal and Error.** The Supreme Court's review of an action taken by an administrative agency is de novo on the record, and this court makes independent findings of fact without reference to those made by the agency whose action is being reviewed.
2. _____: _____. While the Supreme Court's review of an action taken by an administrative agency is de novo on the record, where the evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.
3. **Administrative Law: Due Process: Notice.** In proceedings before an administrative agency or tribunal, procedural due process requires notice reasonably calculated to inform one of the accusation levied; identification of the accuser; a factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board.

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

R.D. Stafford of Brogan & Stafford, P.C., for appellant.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellees.

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

GRANT, J.

This is an appeal from the district court for Madison County, affirming an order of the director of the Department of Social Services (DSS). The order revoked the day-care center licenses of the appellant, Judy Dieter. On appeal, appellant contends that the district court erred in finding that the director reached her order revoking appellant's licenses upon "lawful procedure," in finding that the director's order and the procedure used to reach the order did not violate both the state and federal Constitutions, and in rendering a judgment not sustained by competent, material, or substantial evidence. We affirm.

The record shows the following. Appellant was licensed to operate two day-care facilities in Norfolk, Nebraska, the Playhouse Day Care Center (hereinafter Playhouse I), licensed in 1980, and the Playhouse Too Preschool and Day Care Center (hereinafter Playhouse II), licensed in 1983. DSS had periodically renewed appellant's licenses. Playhouse I is licensed to provide care for 45 children, and Playhouse II is licensed to provide care for 77 children.

Early in February 1985, DSS received complaints about the disciplinary practices at Playhouse II facilities and derogatory remarks made to the children by appellant. On February 28, a licensing specialist for DSS investigated the facilities in order to determine whether appellant was in compliance with the licensing regulations. During the investigation, appellant admitted that she "may have swatted" the children. Appellant then signed a written statement saying that she would not "swat" children from that day on. After appellant signed the statement, the investigator determined that appellant generally was in compliance with the department's day-care regulations. The investigator determined that the allegation involving derogatory remarks made to the children was unsubstantiated.

On January 24, 1986, Officer Robert Lankford of the Norfolk Police Department commenced an investigation after the police department had received complaints of possible mistreatment of children at the day-care facilities. On February 24, 1986, Officer Lankford interviewed appellant at Playhouse I. At that time, appellant informed Lankford that she spanked

children when she had parental permission. Lankford then asked appellant whether she had ever force-fed a child. At the hearing, Lankford testified as to her response:

> Mr. Lankford: Her response verbally was, "do you mean like this".
>
> [Appellees' attorney]: And what did she do?
>
> Mr. Lankford: At the time she made that statement she placed a hand to her face, thumb on one side and fingers on the other and appeared to open her jaw by squeezing them together, the two cheeks. At that point I stated yes, like that, and she replied no, never.

DSS was informed of the investigation in January 1986 and received a written report of the investigation in mid-February. No criminal charges were filed by the police as the result of the investigation. After the initial report was sent, however, Officer Lankford continued his investigation and apprised DSS of "[p]eriodic updatings." DSS received a second written report from Lankford sometime after March 5, 1986. This report consisted of various interviews conducted subsequent to the original report.

In a letter dated March 4, 1986, and hand-delivered to appellant on March 6, the licensing supervisor for DSS informed appellant that her licenses to operate her day-care facilities had been revoked. Attached to the letter was a copy of the "Emergency Declaration and Order" signed by the director. The letter informed appellant that she was entitled to an appeal of the director's decision. The declaration and order stated that the department was acting pursuant to Neb. Rev. Stat. § 71-1915(3) (Reissue 1986), and informed appellant that

> a recent investigation has determined that there is substantial evidence that excessive physical punishment, as a means of discipline, is being used in one or both of the Day Care Centers in violation of licensing standards of the Department of Social Services that appears [sic] at 474 Nebraska Administrative Code, Part 6-002.08G3. There also appears to be substantial evidence of behavior which may be injurious to or which may endanger the health or morals of the children in care, as stated in Part 6-002.08D of the Nebraska Administrative Code.

Section 71-1915(3) sets out the procedure to be followed by the director in the event of an emergency, and provides as follows:

> Whenever the director finds that an emergency exists requiring immediate action to protect the physical well-being and safety of a child in an early childhood program, the director may, without notice or hearing, issue an order declaring the existence of such an emergency and requiring that such action be taken as the director deems necessary to meet the emergency. Notwithstanding the provisions of subsection (1) of this section, such order shall be effective immediately. Any person to whom the order is directed shall comply immediately, except that upon application to the director, the person shall be afforded a hearing as soon as possible and not later than ten days after his or her application for the hearing. On the basis of such hearing the director shall continue to enforce his or her order or revoke or modify it.

On March 17, DSS sent a supplemental notice to appellant. The letter informed appellant that the investigation conducted by Officer Lankford revealed that appellant had been observed spanking, slapping, handling the children roughly, biting, feeding the children by force, pulling the hair of the children left in her care, and using profane language. The letter stated that appellant's conduct was in violation of three specific regulations which had been issued by DSS pursuant to Neb. Rev. Stat. §§ 71-1908 through 71-1918 (Reissue 1986) and which are codified at Neb. Admin. Code tit. 474, ch. 6, § 002 (1986).

On March 12, 1986, appellant requested a hearing on the director's order. The hearing was scheduled and begun by DSS on Monday, March 24, a date which satisfied the 10-day requirement of § 71-1915(3). The hearing continued on March 26 and 28, and April 10, 1986.

At the hearing, several of appellant's former employees testified as to appellant's conduct toward the children in appellant's facilities.

Doris Kuehler, who was employed as a cook at Playhouse II from September until December 1984, testified that appellant force-fed the children whenever they did not finish eating their

meals. Kuehler testified that, in September or October 1984, she observed appellant poke food into E.B.'s mouth with a spoon, hold his mouth shut while he was crying, and warn him to swallow or he would be spanked. Kuehler further testified that she had observed appellant force-feed K.P. until the child vomited into her plate. Kuehler then observed appellant "poke the vomit of spoon [sic] toward [the child's] mouth and generally speaking give up and one of us would take the child and go clean her up." Kuehler testified that she observed appellant forcing S.R. to consume a beverage by holding the child's head back and pouring it down her throat. Kuehler further testified that she had observed appellant spank three of the children at the center.

Kathleen Schwartzer, who was employed at Playhouse II from August 1985 until January 1986 to assist appellant in setting up a preschool program, testified that shortly after she had begun working for appellant, she had observed appellant forcing another child, D.P., to eat french fries after he refused to eat. Schwartzer testified that the child had thrown up, and appellant had told the child he was

> going to eat them anyway. So then she took [D.P.] into the bathroom and you could hear her spanking him and [he] was yelling and crying. He came back out and she sat him down again. [The child] threw up again and when Judy left I proceeded to take him in and clean him up and [D.P.] said, will you please call mom.

Schwartzer testified that on December 9 and 11, 1985, while the children were rehearsing for a Christmas program, she had observed appellant spank two different children, E.B. and D.K. Sally Hanway, who was employed as a preschool teacher at Playhouse II from August 1982 through March 6, 1986, testified that she had observed appellant pull another child, C.B., off the stage and spank him during the rehearsals. Schwartzer further testified that in January 1986, she had observed appellant pulling the hair of J.M. after that child had refused to drink her milk. On another occasion, she had observed appellant slap R.G. after R.G. spit some food out of her mouth.

Elizabeth Piepho, who had been employed as a preschool

teacher at Playhouse II from October 1984 to August 1985, testified that she had observed appellant "shove" apples into S.R.'s mouth after S.R. refused to eat them, sometime after Christmas in 1984. Piepho described the incident as follows:

> [Piepho]: Judy [appellant] would take ahold of [S.R.'s] chin and press it down, take two or three or four pieces of apple and shove them in her mouth which was already full.
>
> [Appellees' attorney]: And then what happened?
>
> [Piepho]: Well, she would start crying, [S.R.] would start crying and then she'd try to chew it up and swallow it but couldn't and then she'd throw it up. She would throw up what she had had earlier.

Piepho further testified that she had observed another child, C.B., being forced to sit in the dark for not eating his food and that appellant had told her that Piepho could spank the children "if they deserved it."

Marcia Pieper, who was employed at Playhouse II from November 1985 until January 1986, testified that she had observed appellant, sometime in January 1986, force-feed a child as follows: "[D.K.] wasn't eating and Judy had sat down and opened his mouth with her hands and put the beans, some beans in his mouth and he spit them out and she slapped him on the face a couple of times."

Jackie Sunderman testified that in November 1985, while she was employed at Playhouse II, she had informed appellant that one of the children, C.B., had bitten another child. Appellant then asked Sunderman if she "bit [C.B.] back." When Sunderman responded that she had not, appellant bit C.B. on his arm. Danita Drenkow, another employee who had observed this same incident, testified that appellant had stated that she had bitten C.B. in order to "show him what it felt like to bite somebody."

The parent of a child who had been enrolled at Playhouse II from May 1984 through January 1986 testified that in January 1986, her daughter informed her that appellant had spanked the daughter and pulled her hair. The parent then confronted appellant at the day-care center, and testified that appellant informed the parent that her daughter "got her spanking because she wouldn't be quiet at nap time."

After the administrative hearing, reflected in 463 pages of testimony, the director of DSS entered an order continuing her earlier order revoking appellant's license. On appeal, in an order dated January 20, 1987, the district court for Madison County affirmed the director's decision.

In her first assignment of error, appellant contends that DSS and its director did not reach the April 29, 1986, order upon "lawful procedure."

This court's review of an action taken by an administrative agency is de novo on the record, and this court makes independent findings of fact without reference to those made by the agency whose action is being reviewed. Neb. Rev. Stat. § 84-918 (Reissue 1987); *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

While the Supreme Court's review of an administrative decision is de novo on the record, where the evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. As stated in *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 117, 416 N.W.2d 222, 223 (1987), a de novo review "does not mean that we ignore the findings of fact made by the board and the fact that it saw and heard the witnesses who appeared before the board at its hearing."

Appellant, in her brief, contends that the director could not have determined that an emergency existed and was attempting to deny appellant "the rights and procedures" granted by subsection (1) of § 71-1915. Brief for Appellant at 13. Subsection (1) sets out the procedures to be used where a nonemergency violation of the regulations exists, and provides for notice and hearing before revocation of a license in that situation.

Appellant argues that the director was required to act in January 1986, as there were no "alleged violations" of those rules after that time. *Id.* We note, however, that although DSS was informed of the investigation in January, DSS did not receive a written report of the investigation until mid-February. At that time, the licensing supervisor for DSS, after reviewing

the report prepared by Officer Lankford, recommended to counsel for DSS that an emergency order be issued. This order was eventually signed by the director. The police report itself was based on statements from witnesses substantiating the allegations of violations of the licensing standards found in the department's March 17 supplemental notice. The evidence contained in the report, as referred to in the notice to appellant, was a sufficient basis to support the director's emergency order under § 71-1915(3).

Appellant further contends in her brief that when an emergency declaration is issued pursuant to subsection (3) of § 71-1915, the director is additionally required to comply with the notice requirements of subsection (1) before revoking appellant's license. Subsection (3) clearly states that, in the event of an emergency situation, the director is entitled to issue an order without notice or hearing, prior to revocation, and that "[n]otwithstanding the provisions of subsection (1) of this section, such order shall be effective immediately." Where the language of a statute is plain and unambiguous, no interpretation is necessary to ascertain the meaning of language in a statute, and in the absence of anything indicating to the contrary, words will be given their ordinary meaning. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986); *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984). Subsection (3) does provide for a hearing after the emergency order has been issued.

We note that in proceedings before an administrative agency or tribunal, procedural due process requires notice reasonably calculated to inform one of the accusation levied; identification of the accuser; a factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board. *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985); *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985). In order to satisfy the requirements for due process, the notice in proceedings before an administrative agency must reasonably provide information regarding the accusation. *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984). Appellant contends that the letter of March 4, 1986, and the

supplemental letter dated March 17 do not "come close to apprising [appellant] of the alleged violations. There are no averments as to time, place, person, and other circumstances . . . ." Brief for Appellant at 14. We note, however, that the letter dated March 4 and the supplemental letter dated March 17 referred to specific violations of standards. Appellant was reasonably provided with notice of the violations charged.

Appellant next contends that she was denied the right to a full and fair hearing. The record shows that on March 12, 1986, appellant requested a hearing, which had to be afforded within 10 days after request as required by § 71-1915(3). The hearing was set for March 24, 1986. On Friday, March 21, prior to the hearing, appellant made a motion for a continuance of the matter. This motion was denied due to the scheduling of DSS' witnesses. The hearing examiner, however, stated that he would grant appellant additional time to prepare her case after the conclusion of the State's case. At the close of the testimony on the first day of the hearing, on Monday, March 24, the hearing examiner continued the hearing to March 26 due to other business. Appellant then objected to that continuance. Appellant's objection was overruled, and the hearing continued, as set out above, on March 26 and 28 and April 10.

Appellant did not request a continuance after DSS concluded its case. At the close of the hearing, on April 10, 1986, the examiner gave appellant 7 days to submit written final argument. The final decision was rendered by the director on April 29, 1986. Appellant contends that the timeframe of the hearing did not provide her with a fair hearing. Although the appellant originally complained that she did not have enough time to prepare her case, she did not ask for a continuance, even though at the start of the hearing the hearing examiner informed appellant that he would continue the hearing for the preparation of appellant's case. Appellant was provided a fair hearing.

Appellant next contends that she was denied a fair hearing because the director, in her final order of April 29, 1986, was the same person who had made the initial determination to revoke appellant's license on March 4, 1986. The combination of investigative and adjudicative functions does not necessarily

create an unconstitutional risk of bias in administrative adjudication. *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981); *Buhrmann v. Sellentin*, 218 Neb. 288, 352 N.W.2d 907 (1984). In *Buhrmann*, appellant contended that his due process rights were violated because the officer before whom the hearing was held had made a prior determination of appellant's guilt. We held in that case that there was no denial of due process because the officer's recommendation to terminate the appellant's employment was reviewed and approved by the Department of Correctional Services.

In *Nevels, supra*, appellant contended that because the commissioner made an initial determination to dismiss an employee and then made the final decision, the commissioner was predisposed to uphold the original decision. The eighth circuit adopted the rule set out in *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), that the " 'risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators . . . .' " *Nevels, supra* at 376. In *Nevels*, the eighth circuit determined that there was no risk of unconstitutional bias in the commissioner's actions.

The record shows that the director made her decision to revoke appellant's licenses at the initial recommendation of the licensing supervisor, and there is nothing in the record to show that the director was not capable of rendering an objective judgment. The director fully complied with the statutory notice and hearing requirements as contemplated by § 71-1915. Appellant's first assignment of error is without merit.

In her second assignment of error, appellant contends that the district court erred in finding that the April 29, 1986, order and the procedures used to reach that order did not violate the state and federal Constitutions. As discussed above, appellant was provided with adequate notice as provided by the statute. The notice required by the statute and afforded to appellant was adequate to comply with all constitutional requirements.

Appellant also contends that the action of the director in revoking appellant's license before she was afforded a hearing unconstitutionally deprived appellant of due process. A hearing before the revocation of a license is not always required,

however. As stated in *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961), was cited in *Morrissey*, holding that " '[c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' " 408 U.S. at 481.

Those concepts were expanded in *Mathews v. Eldridge*, 424 U.S. 319, 323, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), where the Court stated, "The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." *Mathews v. Eldridge* further set out that identification of the specific details of due process generally requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

In the case before us, consideration of the three factors in the light of the private and governmental interests at stake leads to the conclusion that due process, in this case, does not require an evidentiary hearing before the revocation of appellant's day-care facility licenses. The results of investigations submitted to the director disclosed conduct which could well result in harm to children. Balanced against that possible harm was appellant's right to conduct her business. The interest of DSS in ensuring the safety and well-being of the children at the day-care facilities outweighs appellant's interest in the

pecuniary return from her day-care operations. Under the facts of this case, no prerevocation hearing was constitutionally required before the revocation of appellant's licenses. Appellant's second assignment of error is without merit.

In her third assignment of error, the appellant claims that the judgment is not sustained by competent, material, or substantial evidence and that the evidence failed to substantiate the revocation of appellant's licenses.

The record reveals that the appellant had knowledge of the regulations. Appellant was made aware of these regulations when she received her initial licenses and when she was reviewed for regulation compliance. The evidence before the hearing examiner, the district court, and this court is clearly sufficient to support the finding of the director. Portions of that evidence are set out above and will not be repeated here. Appellant did not testify, but she attacked the credibility of various witnesses in cross-examination and introduced evidence which contradicted the evidence presented by the director. Nonetheless, the evidence presented by the State, if believed, is sufficient to support the director's order.

The testimony of the witnesses establishes that appellant engaged in conduct which violated DSS' regulations and which might be harmful to the children. In our de novo review, we find that appellant engaged in such improper conduct and that such evidence is sufficient to support the revocation of appellant's licenses. We affirm the judgment of the district court.

AFFIRMED.

BRENT F. GILBERT, APPELLANT AND CROSS-APPELLEE, V. SIOUX CITY FOUNDRY, APPELLEE AND CROSS-APPELLANT.

422 N.W.2d 367

Filed April 29, 1988. No. 87-281.

1. **Workers' Compensation: Appeal and Error.** Upon review, the findings of fact made by the Workers' Compensation Court after rehearing have the same effect

as a jury verdict in a civil case and will not be set aside unless clearly wrong.

2. **Workers' Compensation.** A disability that is due to natural causes is not compensable under the workers' compensation law. This is true even though the disability occurs while the employee is at work.
3. **Workers' Compensation: Proof.** A disability that is the result of a natural progression of any preexisting condition is not compensable. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.
4. **Workers' Compensation: Presumptions.** There is no presumption from the mere occurrence of an unexpected or unforeseen injury that the injury was in fact caused by employment.
5. **Workers' Compensation: Proof.** The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
6. **Workers' Compensation: Evidence: Expert Witnesses.** For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
7. **Workers' Compensation: Evidence.** A workers' compensation award cannot be based upon conflicting inferences of equal degrees of probability.
8. **Workers' Compensation.** A disability which is the result of a natural progression of any nonoccupational preexisting condition is not compensable under the workers' compensation law. If there is a preexisting occupational disease, then the employer is liable, but only for the degree of aggravation of the preexisting occupational disease.
9. **Workers' Compensation: Evidence: Appeal and Error.** Where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, the Supreme Court must modify, reverse, or set aside the award.

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

LeRoy J. Sturgeon of Smith & Smith, for appellant.

Francis L. Goodwin, for appellee.

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

FAHRNBRUCH, J.

Brent F. Gilbert, plaintiff, appeals a majority decision of a Workers' Compensation Court panel that reduced the award plaintiff received from a single workers' compensation judge. Sioux City Foundry cross-appeals.

We hold that the findings and award of the workers'

compensation panel were clearly wrong and that plaintiff's petition for compensation should be dismissed.

Plaintiff claims the panel erred in three particulars: (1) in failing to either award or deny certain medical expenses; (2) in reducing plaintiff's partial disability award from that granted by the single workers' compensation judge's award; and (3) in failing to award plaintiff rehabilitation services.

Defendant, in its cross-appeal, assigns as error the panel's majority finding that the plaintiff's disability was caused by an accident arising out of and in the course of his employment.

In reviewing a case of this nature, the findings of fact made by the Workers' Compensation Court after rehearing have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Kuticka v. University of Nebraska-Lincoln*, 227 Neb. 565, 418 N.W.2d 593 (1988); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987); Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986).

Plaintiff began working in defendant's foundry in 1978. Prior to knee surgery in 1985, plaintiff operated a "squeezer" machine. That machine was used to mold products in the foundry. The plaintiff contends that he began to have symptoms in his knees and that he permanently injured both of his knees in the operation of the squeezer. Beneath the table portion of the squeezer were two paddles which were operated by the operator, using the side of each of his knees. The evidence is unclear as to whether the knee struck the paddle or whether the knee moved the paddle through pressure alone. The defendant testified that each paddle was moved 1 inch by pressure. The paddles were used to open air valves, one of which permitted air to help pack sand in the molding process and the other of which permitted air to assist in taking the mold apart.

At trial, plaintiff claimed that using his knees to activate the paddles caused his knees to hurt. He also said that several times he fell off a raised grate on which he stood to operate the squeezer. At trial, Gilbert did not claim that his knee problems were caused by a fall or by the twisting of his knees. The plaintiff first sought medical assistance from his family physician. When conservative treatment did not alleviate the

soreness in Gilbert's knees, his family doctor referred Gilbert to an orthopedic surgeon. After further conservative treatment, arthroscopic surgery was performed upon both of Gilbert's knees on August 1, 1985. Arthroscopy revealed two abnormal folds in the synovial membrane, or lining of the joint, in each knee. The folds were caused either congenitally or through improper development of the knees. The folds were excised. Other tissue on the outside of each patella (kneecap) was released to permit the kneecaps to glide properly. The kneecaps had been prevented from gliding properly. In the left knee, there was minimal chondromalacia, i.e., the cartilage was degenerating. It was a wearing-out process.

Gilbert's orthopedic surgeon testified that the folds in Gilbert's knees were congenital. An orthopedic surgeon engaged by the defendant examined the plaintiff. This surgeon testified that the folds in the lining of Gilbert's knees formed while plaintiff's knees were in the developmental stage. Neither surgeon attributed the folds to any trauma or to Gilbert's work. There being no medical evidence to the contrary, it can only be concluded that plaintiff's folds were from natural causes, and any disability caused by them is not compensable. A disability that is due to natural causes is not compensable under the workers' compensation law. This is true even though the disability occurs *while* the employee is at work. Neb. Rev. Stat. § 48-151(4) (Reissue 1984). See, also, *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

Any finding of compensable disability under the workers' compensation law based upon the folds in Gilbert's knees would be clearly wrong.

Next to be considered is whether Gilbert's work on the squeezer machine aggravated a preexisting condition and whether such aggravation, if any, is compensable under the workers' compensation law.

There is no presumption from the mere occurrence of an unexpected or unforeseen injury that the injury was in fact caused by employment. § 48-151. Also, the presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417

N.W.2d 164 (1987); *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987).

Under § 48-151(4), a disability that is the result of a natural progression of any preexisting condition is not compensable. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award. *Kingslan, supra*; *Hayes, supra*; *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985).

In Gilbert's case, his injuries were not of an objective nature. Therefore, medical testimony was required to establish a causal connection between plaintiff's work and his sore knees. *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981).

To completely resolve this case there are three additional rules of law that must be considered: (1) "For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability." *Powell v. W. G. Pauley Lumber Co.*, 217 Neb. 707, 710, 350 N.W.2d 556, 558 (1984); *Husted, supra*; *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983). (2) "An award cannot be based upon conflicting inferences of equal degrees of probability." *Husted, supra* at 114, 313 N.W.2d at 251; *Camarillo v. Iowa Beef Processors, Inc.*, 201 Neb. 238, 266 N.W.2d 917 (1978); *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974). (3) A disability which is the result of a natural progression of any *nonoccupational* preexisting condition is not compensable under the workers' compensation law. But, if there is a preexisting *occupational* disease, then the employer is liable, but only for the degree of aggravation of the preexisting occupational disease. § 48-151(4).

In Gilbert's case, there was a preexisting condition in each of his knees due to natural causes rather than from a preexisting occupational disease. It must then be determined if the soreness in Gilbert's knees of which he complains and which became symptomatic in 1984 was the result of a natural progression of his nonoccupational preexisting condition. If it was, Gilbert is

not entitled to an award.

A fair reading of the medical testimony in this case reflects that it is just as likely that Gilbert's knees became symptomatic from his doing things that a human being does in ordinary life as it is likely that the knees became symptomatic from his work. Gilbert's orthopedic surgeon testified on cross-examination that he could not pinpoint what caused Gilbert's folds to become symptomatic beyond what Gilbert indicated, that his knees had become symptomatic as a result of his work activities. The surgeon also testified: "I don't know exactly how his symptoms developed except that he [Gilbert] indicates that they developed *while* he was working at the foundry." (Emphasis supplied.) Gilbert's surgeon further testified on cross-examination that Gilbert's knees could have become symptomatic just in his ordinary life without Gilbert's ever having worked at the foundry or in a foundry job. He said it would be difficult to separate out the ordinary life activities from work activities as the cause of the symptomatology of Gilbert's knees. The surgeon did not do so.

Defendant's examining orthopedic surgeon testified that whatever a person with a knee development problem does may cause irritation, whether it is working, playing, squatting at home, painting, or anything. So, "*I suppose* technically it could be somewhat associated with his work," said the examining surgeon. (Emphasis supplied.) He added, "I don't know how you divide the two."

The medical testimony in this case is not sufficiently definite and certain to warrant a conclusion that Gilbert's disability was causally connected with his work activities. Indeed, both orthopedic surgeons testified to conflicting inferences of equal degrees of probability that Gilbert's knee symptomatology could have been from ordinary activities or work activities. Assuming arguendo that some of the symptomatology was related to Gilbert's work activities, neither of the surgeons was able to identify which portion of Gilbert's disability could be attributed to his work. Thus, Gilbert's evidence failed to meet two requirements of § 48-151(4): (1) that his preexisting condition was occupationally connected, and (2) that it provide proof of the degree of aggravation from his work for which his

employer would have been liable had the preexisting condition been occupationally connected.

Gilbert simply did not meet his enhanced burden of proof to establish that his knee soreness arose out of and in the course of his employment.

Where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. § 48-185; *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981); *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). See, also, *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

Considering the applicable law and the record, there is not sufficient competent evidence in this case to warrant the making of a compensation award to the plaintiff. The decision of the Workers' Compensation Court finding that Gilbert suffered an injury arising out of and in the course of his employment is clearly wrong. The Workers' Compensation Court panel's decision is, therefore, reversed, and the award is set aside. The cause is remanded to the Workers' Compensation Court with instructions to dismiss Gilbert's petition.

In view of our holding, it is not necessary to discuss Gilbert's assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

GRANT, J., dissenting.

I must respectfully dissent from the conclusion reached by the majority. As stated in the majority opinion, in reviewing a case from the Workers' Compensation Court, we must give the findings of fact made by that court the same effect as a jury verdict in a civil case, and such findings will not be set aside unless they are clearly wrong. *Kuticka v. University of Nebraska-Lincoln*, 227 Neb. 565, 418 N.W.2d 593 (1988). The panel found that plaintiff's disability was caused by an accident arising out of and in the course of his employment.

Plaintiff did a variety of jobs. In the job which required operating the squeezer, plaintiff would go through the operation requiring activating the knee paddles on 250 or 260

smaller jobs per day, or 130 to 175 daily operations on larger jobs. In the course of each operation, plaintiff would activate the right paddle three times and the left paddle twice on the average. The trauma resulting from this continual knee action first resulted in the doctor's advising plaintiff to wear kneepads to strike the paddles. Surgery eventually followed.

Plaintiff's treating doctor testified that "the causes were the folds in the lining of the [knee] joint and the tightness of the support tissues to the outside of the kneecap." The doctor further testified:

> I think his symptoms were sort of the accumulative affect [sic] of his work activities. He did have some minor injuries, but I can't say that I can look back historically at any one of them as the initiating event.
>
> Basically, I have to go on what Mr. Gilbert told me. From what I could assess, this was sort of an accumulative affect [sic] of work and use of his legs in his work activities.
>
> Q Among the activities that he had described, the twisting, the squatting and the pushing the pads and whatever the other ones were, is it your opinion that each of them or any particular one of them were the contributing causes?
>
> A I don't know that I could specify any one of them.

While the doctor could not testify exactly what work activity was a contributing cause of the injury, the fact remains that the doctor testified plaintiff's symptoms were "sort of an accumulative affect [sic] of work and use of his legs in his work activities."

The record also shows that, on cross-examination, plaintiff's doctor responded to the question, "[C]an a person become symtomatic [sic] by doing the things that a human being does in ordinary life, driving an automobile, walking, standing, sitting, squatting?" by testifying, "Yes, they can." It is also clear that defendant's doctor testified generally that no one could pinpoint the cause of plaintiff's injury between ordinary activities and work activities. Nonetheless, although the cross-examination of plaintiff's doctor attacked the doctor's credibility, and although defendant's doctor contradicted

plaintiff's doctor, I believe the credibility of plaintiff's doctor was for the panel and that there was sufficient evidence before the panel to sustain the determination of the panel that plaintiff's disability was caused by his work activities. I would not set aside the award of the panel as being clearly wrong.

WHITE and SHANAHAN, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY LEE BUSTER, APPELLANT.

422 N.W.2d 373

Filed April 29, 1988. No. 87-555.

Jury Instructions: Lesser-Included Offenses. It is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

WHITE, J.

The defendant was convicted by a jury of theft by shoplifting under Neb. Rev. Stat. § 28-511.01 (Reissue 1985). He was sentenced to an indeterminate term of incarceration of not less than 20 months nor more than 3 years, whereupon he instituted this appeal.

The defendant assigns error in that the district court refused to instruct the jury on the lesser-included offense of attempted shoplifting.

The record reveals that on December 11, 1986, Jeff

Bixenmann, head of the loss prevention department at ShopKo, observed a male in the ladies' department throwing items into his cart without checking their prices or sizes. Because of this unusual behavior, he called employee Keith Albert to also observe. They watched the defendant walk to the car stereo display, select a car stereo, and place it in a ShopKo sack in the bottom of his cart. The defendant then attempted to take off the shelf a VCR which was on display. The cord on the VCR was secured behind the display, so the defendant left the area and came back with a pair of wirecutters which he had obtained from another area of the store. The defendant cut the cord on the VCR, placed the VCR in the ShopKo bag in his cart, and secured the end of the sack.

While the defendant procured the wirecutters, Bixenmann looked into the sack in the defendant's cart and saw a car stereo, a ladies' jacket, and some lingerie. He then followed the defendant, who was pushing the cart, through the store. The defendant went past the cash registers, pulled his cart through the first set of exit doors, and was stopped by store security personnel.

The defendant was convicted under § 28-511.01, which provides in part:

> A person commits the crime of theft by shoplifting when he or she, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession of such property or its retail value, in whole or in part . . . [c]onceals or takes possession of the goods or merchandise of any store or retail establishment . . . .

The defendant in this case did not testify, and the record reveals no evidence which would support a finding of attempted shoplifting. There was nothing to suggest that the defendant had taken a substantial step but not yet completed the crime as defined in § 28-511.01. See Neb. Rev. Stat. § 28-201 (Reissue 1985) (criminal attempt). As we stated in *State v. Brown*, 225 Neb. 418, 430, 405 N.W.2d 600, 608 (1987), " 'it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.' " See, also, *State v.*

Tamburano, 201 Neb. 703, 271 N.W.2d 472 (1978). The trial court was correct in refusing the requested instruction.

The defendant further contends that the district court abused its discretion in refusing to place the defendant on probation and instead imposing a sentence which was excessive and disproportionate to the severity of the offense. The sentence is within the statutory limits for a Class IV felony. See Neb. Rev. Stat. § 28-105 (Reissue 1985). After a careful review of the record, we find no abuse of discretion in the imposition of sentence. The judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GILBERT STONE, APPELLANT.

422 N.W.2d 568

Filed April 29, 1988. No. 87-634.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Sexual Assault: Corroboration.** In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
3. _____: _____. After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened.
4. **Sexual Assault: Corroboration: Proof.** The effect of a delay in reporting a sexual assault may be alleviated by proof of a sufficient reason for the delay.

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

Gary G. Washburn, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

BOSLAUGH, J.

After a bench trial the defendant, Gilbert Stone, was found guilty of sexual assault of a child and was sentenced to 2 years' probation. A second charge, attempted creation of child pornography, was dismissed.

The defendant has appealed, and the assignments of error both relate to the sufficiency of the evidence to support the finding of guilty.

The record shows that the defendant is 71 years of age. The alleged victim, a 12- year-old girl, lived across the street from the defendant and his wife. The victim testified that she had known the defendant for 3 or 4 years and that about 2 years prior to trial "he started touching us"; that when he gave the victim and her sister candy, "he bent over and felt me and my sister"; and that he touched her "breast and . . . bottom parts" with the palm of his hand. According to the victim, she did not tell anyone about it at the time because she did not want to get into any trouble. Eventually, when the victim told her mother, the victim was told not to go over to the defendant's house again.

The victim also testified that one touching incident occurred while one of her friends was present. This testimony contradicted the victim's testimony at the preliminary hearing but was corroborated by the testimony of the friend.

The victim's mother testified that at around Christmas 1985, her daughter, the victim, told the mother that the defendant had touched the daughter on her breasts and in the private area.

> "In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue." (Syllabus of the court.) *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980). After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main

> fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened.

State v. Schon, 227 Neb. 482, 484, 418 N.W.2d 242, 244 (1988). The effect of a delay may be alleviated by proof of a sufficient reason for the delay. *State v. Evans*, 212 Neb. 476, 323 N.W.2d 106 (1982). No formal complaint was made to the police until sometime later, when the mother discovered the defendant had given a book with sexual content to the victim.

The defendant testified and denied that he had ever touched the victim for sexual gratification.

There were many conflicts in the evidence and some inconsistencies between testimony given at the preliminary hearing and at the trial. These were all questions for the trier of fact. In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Patrick*, 227 Neb. 498, 418 N.W.2d 253 (1988); *State v. Richardson*, 227 Neb. 274, 417 N.W.2d 24 (1987).

The evidence of the State was sufficient, if believed, to sustain the finding of guilty beyond a reasonable doubt.

AFFIRMED.

ARDITH R. MANDERY, APPELLANT, V. CHRONICLE BROADCASTING COMPANY, A NEVADA CORPORATION, APPELLEE.
RICHARD MANDERY ET AL., APPELLANTS, V. CHRONICLE BROADCASTING COMPANY, A NEVADA CORPORATION, APPELLEE.

423 N.W.2d 115

Filed May 6, 1988. No. 85-978.

1. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the

burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury.

2. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage.
3. **Negligence.** One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent.
4. _____. The distinction between assumption of risk and contributory negligence presents a difference which prevents interchangeable use of those defenses in a negligence action.
5. _____. One does not assume the risk of an unknown or hidden danger.
6. **Negligence: Proof: Circumstantial Evidence: Intent.** Knowledge, as an aspect of conduct in question, involves a state of mind or mental process, which may be proved by circumstantial evidence.
7. **Evidence: Trial: Appeal and Error.** Generally, a litigant cannot initially introduce evidence and later complain about such evidence adduced.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial.

Eugene P. Welch and David M. Woodke of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellants.

Peter C. Bataillon and Robert M. Slovek of Sodoro, Daly & Sodoro, for appellee.

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

SHANAHAN, J.

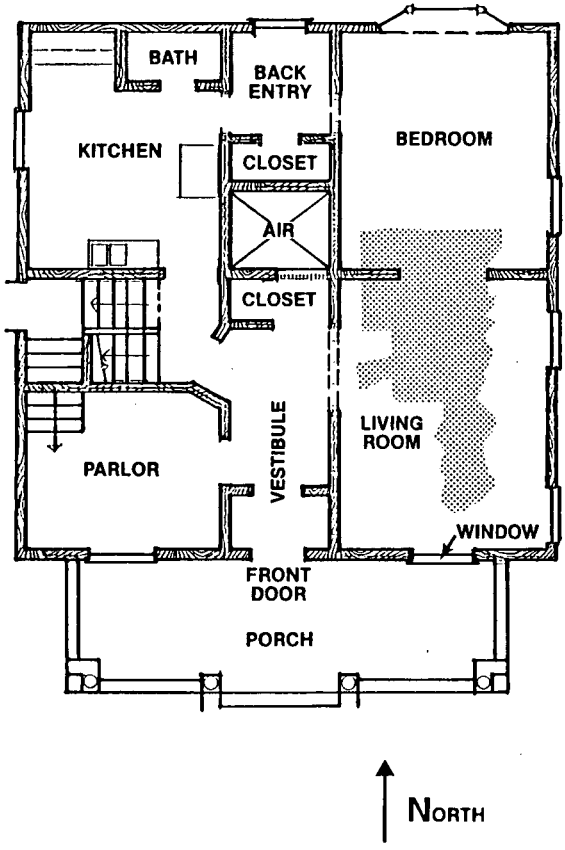
In consolidated cases, Richard Mandery and his wife, Ardith, appeal from judgments on verdicts for Chronicle Broadcasting Company, doing business as WOWT Television Station, Channel 6 (WOWT). Manderys filed separate lawsuits against WOWT, claiming that WOWT's negligence proximately caused bodily injury to Richard Mandery when he fell through the floor of a house owned by WOWT. A general verdict was returned for WOWT in each Mandery case. We reverse and remand for a new trial.

On February 11, 1980, Richard Mandery fell into the basement of WOWT's multiple-story house but, as the result of severe head injuries, was unable to recall anything about events

leading up to the accident and his fall.

As part of an expansion project, WOWT purchased the house in August of 1979 and hired Stitt Construction Company as the general contractor for the project, which included demolition of the house. Stitt contracted with Anderson Excavating and Wrecking Company to demolish the house. Anderson employed Mandery as a heavy equipment operator.

According to Wayne Goetz, chief engineer for WOWT, the house, at the time of WOWT's purchase, was in fairly good condition. The house was neither dilapidated nor condemned. A diagram of the house's first floor follows.



The shaded area in the diagram represents a hole in the floor of the house's living room and bedroom. The living room's east-west width is approximately 13 feet, with 2- by 10-inch wooden joists, 16 inches apart and running east-west, to support the living room-bedroom floor.

Goetz and Larry Land, another WOWT employee, were responsible for maintenance and security of the house. Land daily inspected the house and eventually discovered that transients were entering the house and starting fires. To secure the house, as Land described, WOWT had to "tear off the back porch. Virtually nailed everything shut that we possibly could, locks on the door, that type of thing."

Goetz kept the house key in his office at WOWT, where WOWT employees had unrestricted access to the key. WOWT permitted its employees to look through the house and remove any salvageable items. WOWT employees were not required to notify Goetz or Land before entry into the house or report anything removed from the house. At least 15 WOWT employees entered the house between autumn of 1979 and February 1980.

On the first Saturday of February in 1980, and with WOWT's permission, Francis Gross and Larry Roitstein, WOWT employees, entered the house to remove its wooden floor. The floor consisted of particle board, which was a composition of sawdust and wood chips glued together under pressure, and plywood. The particle board had a 3/4-inch thickness; the plywood, 1/2 inch. The particle board lay on the plywood, which was nailed to and supported by the joists resting on beams on the basement walls. Roitstein described his and Gross' activity after they entered the house:

> First we thought we would remove the flooring from the top. And after realizing that it was glued and nailed and spending quite a bit of time and effort trying to remove the plywood and the particle board, we realized that wasn't going to work.
>
> So we went downstairs into the basement; and with a reciprocating saw, we cut through the 2x10's on both ends. And by either using a pry bar or a hammer or brute strength, we pulled the boards down from above.

Initially, Gross and Roitstein had intended to remove the plywood flooring as well as the joists, but particle board, nailed and glued to the plywood, made salvage of the plywood unfeasible. Gross and Roitstein then went to the basement, cut joists approximately 1 foot from each of the basement walls, and removed the joist-support for a "major area" beneath the living room and bedroom. Each of the severed and removed joists had an approximate length of 10 feet. As they severed the joists, Gross and Roitstein pried and forcibly separated the joists from the overhead plywood to which the joists were nailed. During that process, Gross and Roitstein sometimes tore apart the flooring, which they pulled into the basement. Since they did not pull all the flooring into the basement, Gross and Roitstein left some flooring with broken and jagged edges of the plywood and particle board extending over the basement. After removal of the joists, the only underlying support for the flooring was the stubs of the severed joists, approximately 1 foot long, attached to the beams on the basement walls. Roitstein acknowledged that, if a person stepped on the floor after the joists had been removed, at some point the floor "would give way." The hole in the flooring extended from the living room into the bedroom, as indicated on the diagram.

As they prepared to leave after cutting the joists, Gross and Roitstein nailed a 4- by 8-foot sheet of plywood across the doorway between the living room and vestibule. Gross could not remember whether they boarded up the bedroom's west entry from the kitchen area.

During one of his inspection rounds, Land saw the large hole in the living room floor, and later observed that the vestibule-living room doorway had been boarded up. However, there were no posted warnings concerning the floor, weakened by removal of the supporting joists. No one testified that the absence of joists was visible from any point on the house's first floor. Postaccident photographs depict the stubs of the severed joists, covered by the overhanging floor and visible only from the basement.

Mandery, an Anderson employee for 17 years, was an operator of heavy equipment used to demolish houses and other buildings. He had never been to the WOWT house before

the accident. On the day of the accident, Mandery and another Anderson employee, Ronald Wilson, had completed a job in Bellevue and then left for the WOWT house to be demolished. Mandery was supposed to enter the house and inspect every "nook and cranny" to assure readiness for demolition. The chief concern was the possible presence of children or transients in the house.

En route from Bellevue to WOWT's house, Wilson made an intermediate stop at a landfill, and estimated that he was 5 minutes behind Mandery in travel to the house. On arrival at the house late in the morning, Wilson met James McQuinn, another Anderson employee, who was assigned to demolish the house. Parked in the street in front of the house was Anderson's "lowboy," a tractor with a trailer bearing a bulldozer. Mandery had driven the lowboy from Bellevue to the WOWT house. Wilson and McQuinn walked around the house but did not see Mandery. McQuinn went to the front of the house, peered through a slit in the plywood cover on the living room's south window, and saw the hole in the living room floor. McQuinn recounted his entry with Wilson into the house via the plywood front door, passage into the kitchen area, and observation from the bedroom into the basement:

> We went over to the front door. The plywood was loose, and we just pulled it open and went in. And Ron Wilson went upstairs, and I went around through what I call the kitchen and looked down through the floor and hollered, "Ron, here he is down here." And he [Mandery] was laying [sic] on the basement floor.

There was no plywood cover or other barrier regarding the doorway between the vestibule and living room. Sunlight supplied illumination for the first level of the house. Wilson, who had descended into the basement, found the seriously injured Mandery, face down on the floor. McQuinn went outside and used a truck radio to summon help. While removing Mandery from the basement, ambulance paramedics noticed that "[t]here was debris, flooring-type debris, plywood, lying around him [Mandery]," and there were broken pieces of wood beneath Mandery's body.

In their second amended petitions, Manderys alleged

WOWT's negligence, such as failure to supervise its employees who removed structural support for the house's floor and failure to warn Richard Mandery about the floor's condition. In its answers, WOWT generally denied liability and claimed, without a factually particularized allegation, that Mandery was guilty of contributory negligence in a degree barring recovery and that Mandery had assumed the risk.

Before trial, Manderys' counsel filed a motion in limine for exclusion of testimony consisting of rumors among Anderson employees that Mandery had entered the house through a window. The court overruled Manderys' motion. Anderson employees testified about Anderson's standard procedure for entry into a house to be demolished, namely, entry through a door and use of a crowbar to open a barricaded or locked door. Apparently anticipating eventual introduction of the rumor testimony and on direct examination of Wilson, Manderys' lawyer elicited that Wilson had no firsthand knowledge about the manner of Richard Mandery's entry into the house but that there were rumors among Anderson employees that Mandery may have entered through a living room window. There was no other evidence establishing or indicating how Mandery entered the house.

At the end of a 5-day trial, in its instructions the court submitted the questions of WOWT's negligence and Richard Mandery's contributory negligence and assumption of risk. After deliberating for approximately 14½ hours over 4 days, the jury returned a five-sixths general verdict for WOWT in each Mandery case.

ASSIGNMENTS OF ERROR

In their appeals, Manderys maintain that the district court erred in (1) submitting the defense of assumption of risk; (2) failing to properly instruct on the issue of landowner liability; (3) overruling Manderys' motion in limine to exclude rumor evidence that Richard Mandery entered the house through a window; and (4) failing to give an instruction which, in response to Manderys' motion, would have resulted in the court's specification of Richard Mandery's conduct by which the jury might find Mandery contributorily negligent.

In substance, Manderys contend that the house's dangerous

condition was not just the hole in the living room floor, but included the weakened floor around the hole after severance of the supporting joists. The missing joists, Manderys argue, constituted a hidden and, therefore, unknown danger for Richard Mandery. WOWT submits:

> [B]y no means is the lack of floor joists a hidden danger. . . . What appellant saw, knew and [appreciated] in so walking over to the edge is unknown due to his lack of memory. It can be reasoned, however, that to a man of appellant's judgment, experience and intelligence, particularly in demolishing homes, that the presence of a hole in the floor without visible supporting floor joists was a "red flag" that the floor was unsafe. If the joists supports were present, they would have visibly [dissected] the area of the hole. If any portion of the joists is cut, that [joist] no longer acts as a support as the entire joists must be intact to give support. To then walk over to what is clearly unsupported sheeting, and stand on the edge of that sheeting is to voluntarily assume the risk of injury.

Brief for Appellee at 7.

ASSUMPTION OF RISK VS. CONTRIBUTORY NEGLIGENCE

There is a definite demarcation between assumption of risk and contributory negligence as affirmative defenses, a delineation which may be obscured, if not totally obliterated, by incorrect application of these distinctly different defenses.

When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. See, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *Foland v. Malander*, 222 Neb. 1, 381 N.W.2d 914 (1986); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. See, *Rahmig v. Mosley Machinery Co.*,

supra; *Foland v. Malander, supra*; *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975).

> [E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.

Jensen v. Hawkins Constr. Co., supra at 226, 226 N.W.2d at 350-51.

As expressed in Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984):

> "Knowledge of the risk is the watchword of assumption of risk." Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. "A defect and the danger arising from it are not necessarily to be identified, and a person may know of one without appreciating the other." Knowledge of the general danger may not be enough, and some courts require knowledge of the specific risk that caused the plaintiff's harm. The standard to be applied is, in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence. If, because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.

This court has recognized that, in determining the applicability of assumption of risk, " 'The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory

negligence.' " *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967) (quoting from Restatement (Second) of Torts § 496 D, comment *c*. (1965)).

Concerning the defense of contributory negligence, we have stated: "One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent. [Citations omitted.]" *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 127, 403 N.W.2d 335, 339 (1987).

As we observed in *Rahmig v. Mosley Machinery Co., supra*:

> In contrast with contributory negligence (fault or breach of a duty to exercise such care as an ordinary prudent person would have exercised under the same or similar circumstances), assumption of risk " 'involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care . . . .' "

226 Neb. at 450, 412 N.W.2d at 74 (quoting from *Sandberg v. Hoogensen*, 201 Neb. 190, 266 N.W.2d 745 (1978)).

Thus, the distinction between assumption of risk and contributory negligence presents a difference which prevents interchangeable use of those defenses in a negligence action.

One does not assume the risk of an unknown or hidden danger. *Makovicka v. Lukes, supra*; *Darnell v. Panhandle Coop. Assn.*, 175 Neb. 40, 120 N.W.2d 278 (1963); *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956).

In *Darnell*, a damaged propane system had been installed by Panhandle. Immediately before the explosion resulting from escaping propane, which was the basis for Darnell's action against Panhandle, Darnells detected what they believed was the strong odor of sewer gas. However, the trial court did not submit assumption of risk. From an adverse judgment, Panhandle appealed and contended that the defense (assumption of risk) should have been submitted to the jury. This court, rejecting Panhandle's claimed error in failure to instruct on assumption of risk, stated:

> The doctrine of assumption of risk is applicable where the injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. The rule does

> not apply to an unknown and hidden danger. [Citation omitted.] Assumption of risk is a defense which is independent of the defense of contributory negligence although both defenses may arise under the same set of facts. Brackman v. Brackman, 169 Neb. 650, 100 N.W.2d 774.
>
> The evidence in this case established that Boone Darnell knew that some form of gas was present in the house. There is evidence that he thought the gas came from the sewer system. There is no evidence that he knew the source of the gas until the morning of the explosion. We conclude that the evidence was not sufficient to present a question for the jury as to assumption of risk.

175 Neb. at 52-53, 120 N.W.2d at 287.

In *Hickman v. Parks Construction Co., supra*, the plaintiff sued Parks, a contractor, on account of injuries sustained when Hickman fell into Parks' excavation on the construction site. Hickman realized that construction had taken place on the premises adjoining the place from which he was walking at night. However, Hickman was unaware of the exact nature of Parks' work on the adjoining premises and, in particular, did not know about the excavation on the adjacent tract. The trial court refused to submit assumption of risk as a defense. In affirming an award for Hickman, the court noted:

> In this instance the evidence discloses that the plaintiff had no previous knowledge of the danger—the excavation.
>
> The determination upon this assignment of error effectually disposes of the next one. By this assignment the defendant urges that the court should have instructed the jury in substance that in view of the fact that the plaintiff walked upon ground with which he was unfamiliar and that since he did not use artificial means to light his way he assumed the danger of so walking without lights.
>
> The apparent effort was to have applied to these facts the doctrine of assumed risk. The doctrine may not be so extended. It applies to *known dangers* and not to those things from which, in possibility, danger may flow.
>
> It is of course true that what plaintiff did or failed to do

> in these respects was a matter properly for the consideration of the jury in determining whether or not the plaintiff was guilty of contributory negligence.

(Emphasis in original.) 162 Neb. at 473-74, 76 N.W.2d at 411-12.

In this case, there is no direct evidence that Richard Mandery knew about the missing joists and the resulting weakened condition of the floor. Without his knowledge concerning the weakened floor, Mandery could not understand or appreciate the nature of the impending danger. We realize that knowledge, as an aspect of conduct in question, involves a state of mind or mental process, which may be proved by circumstantial evidence. See, *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Caradori*, 199 Neb. 691, 260 N.W.2d 617 (1977). However, there is no evidence from which an inference might be drawn that Mandery knew of the imminent danger as he walked on the floor above the basement. Anyone walking on the house's first level was unable to see that the joists had been removed. Danger from the missing joists was unobservable and, therefore, latent. Under the circumstances, Mandery could not know that his weight, added to the weight of the floor, which was virtually only self-supported, would cause the weakened floor to collapse, plummeting Mandery into the basement. We conclude that WOWT did not produce sufficient evidence to permit the jury to find that Mandery knew of the floor's dangerous condition, understood or appreciated that dangerous condition of the floor, and voluntarily exposed himself to that danger as the proximate cause of his injuries. Therefore, the defense of assumption of risk should not have been submitted to the jury.

WOWT argues that, even if the district court erred by submitting assumption of risk, there was ample evidence for the verdicts based on Mandery's contributory negligence. However, it is impossible to determine the particular issue or defense on which the jury based its verdicts. As a result of the improper submission of assumption of risk and instruction on that defense, the jury may have found that Mandery did assume the risk, as claimed by WOWT.

Error, to be reversible, must affect a litigant's substantial

right. Neb. Rev. Stat. § 25-853 (Reissue 1985). "The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial." *Johnson v. Anoka-Butte Lumber Co.*, 141 Neb. 851, 858, 5 N.W.2d 114, 118 (1942). See, also, *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355 (1976); *Darnell v. Panhandle Coop. Assn.*, 175 Neb. 40, 120 N.W.2d 278 (1963). The toxin from assumption of risk cannot be separated from the instructional beverage of WOWT's defenses served to the jury. Submitting assumption of risk to the jury was prejudicial to Manderys' substantial rights to a fair trial and constituted reversible error.

Having found reversible error, we nevertheless deem it necessary to discuss Manderys' other assignments of error, because those questions may recur on retrial.

LANDOWNER LIABILITY

Manderys contend that the district court improperly instructed the jury regarding a landowner's liability. The court's instruction did not provide that Richard Mandery's knowledge of the danger did not necessarily bar recovery if the jury found that WOWT should have expected that Richard Mandery would not discover or realize the danger or would fail to protect himself, that is, WOWT should have anticipated the harm to Mandery in spite of his knowledge about the dangerous condition or the obviousness of the risk. On retrial, if the circumstances are such that WOWT should have anticipated the harm to Richard Mandery despite his knowledge of the danger and obviousness of the risk, the trial court and counsel should familiarize themselves with the principles concerning a landowner's liability, notwithstanding an injured person's knowledge of a dangerous condition on the land and obviousness of risk, expressed in *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983); *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983); and *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). Instruction in accordance with the foregoing illustrative cases may become appropriate, depending on the evidence adduced on retrial.

INTRODUCTION OF RUMOR TESTIMONY

Manderys also claim the district court erred in overruling

their motion in limine for exclusion of testimony about the rumor circulated among Richard Mandery's coemployees regarding the possible manner of his entry into the house. According to Manderys, overruling the exclusionary motion in limine resulted in Manderys' trial strategy calling for introduction of rumor testimony "lest the jurors determine that [Manderys'] failure to do so was an attempt at concealment." Brief for Appellants at 27. Generally, a litigant cannot initially introduce evidence and later complain about such evidence adduced. See, *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984); *In re Estate of Hill*, 214 Neb. 702, 335 N.W.2d 750 (1983); *State v. Haile*, 185 Neb. 421, 176 N.W.2d 232 (1970); *Bland v. Fox*, 172 Neb. 662, 111 N.W.2d 537 (1961). Cf. *State v. Roggenkamp*, 224 Neb. 914, 921, 402 N.W.2d 682, 687 (1987): "One who consents cannot receive an injury." Although we have concluded that assumption of risk was inapplicable as a defense to Manderys' negligence claims, assumption of risk is analogously applicable to Manderys' introduction of testimony about the rumor among Anderson employees and Manderys' subsequent appellate complaint concerning adduction of that testimony. A litigant cannot complain about self-inflicted evidential injury.

SPECIFICATION OF CONTRIBUTORY NEGLIGENCE

Neb. Rev. Stat. § 25-833 (Reissue 1985) in part provides: "[W]hen the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Before trial, Manderys did not request an order that WOWT's answer specify Richard Mandery's conduct claimed to be contributory negligence. Nothing in the record indicates WOWT's specific charges of Richard Mandery's contributory negligence.

At the conference on instructions, the court indicated its intention to give instruction No. 3, which summarized the allegations in WOWT's answer, namely, WOWT's general denial of negligence, the allegation of Richard Mandery's assumption of risk, and the allegation that "Richard Mandery was contributorily negligent." Referring to the court's proposed

instruction No. 3, Manderys' counsel stated: "Plaintiff would object to Instruction No. 3, which fails to set forth specific acts of contributory negligence." The court overruled Manderys' objection and gave instruction No. 3. Manderys complain that, on account of the instruction in question, "the jury's considerations were not confined to specific issues within the case." Brief for Appellants at 32.

Quite some time ago, in *Krepcik v. Interstate Transit Lines*, 153 Neb. 98, 115, 43 N.W.2d 609, 620 (1950), this court commented on specificity in an instruction on contributory negligence:

> It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. It necessarily follows that where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination.

The foregoing language in *Krepcik* has been repeated, verbatim or in substance, in subsequent opinions of this court; for example, *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983); *Herman v. Midland Ag Service, Inc.*, 200 Neb. 356, 264 N.W.2d 161 (1978); *Pool v. Romatzke*, 177 Neb. 870, 131 N.W.2d 593 (1964); and *Ripp v. Riesland*, 176 Neb. 233, 125 N.W.2d 699 (1964).

When Manderys failed to request and obtain WOWT's specification of Richard Mandery's conduct claimed to be negligence, WOWT's affirmative defense of contributory negligence remained without a definitive allegation and, therefore, was a functionally all-inclusive allegation concerning Richard Mandery's conduct. Without WOWT's specification of contributory negligence, the jury could properly consider any relevant evidence admitted on Richard Mandery's conduct which had a bearing on the issue of contributory negligence. Under the circumstances, Manderys' complaint about the court's instruction on contributory negligence is without merit.

In view of our determination that the district court committed reversible error by submitting assumption of risk,

the judgments of the district court are reversed, and these matters are remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent on the issue of assumption of risk, particularly the conclusion of the majority that WOWT failed to produce evidence from which the jury could find that Mandery knew of the floor's dangerous condition, that he understood or appreciated the dangerous floor condition, and that he voluntarily exposed himself to that dangerous condition as the proximate cause of his injuries.

It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by the evidence. *Munson v. Bishop Clarkson Memorial Hospital*, 186 Neb. 778, 186 N.W.2d 492 (1971). Assumption of risk is generally a question for the jury. *Kaufman v. Tripple*, 180 Neb. 593, 144 N.W.2d 201 (1966).

Before the defense of assumption of risk may be submitted to the jury, the evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself to the danger which proximately caused the plaintiff's damage. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

> The standard to be applied is, in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence. If, because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.
>
> At the same time, it is evident that a purely subjective standard opens a very wide door for the plaintiff who is willing to testify that he did not know or understand the risk; and there have been a good many cases in which the courts have said in effect that he is not to be believed, *so that in effect something of an objective element enters the*

> *case, and the standard applied in fact does not always differ greatly from that of the reasonable person. Thus, the plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him. . . .*
>
> . . . .
>
> *Since the notion of assumption of the risk rests more fundamentally upon the plaintiff's consent than upon his knowledge, it is quite possible for the plaintiff to assume risks of whose specific existence he is not aware, provided that his intent to do so is made clear. He may, in other words, consent to take his chances as to unknown conditions.* He may certainly do so expressly; and there are a few cases in which the assumption has been found by implication. Thus a guest who accepts a gratuitous ride in an automobile has been taken to assume the risk of defects in the car unknown to the driver, just as the same has been said of a licensee who enters another's premises. Workmen used to be said to assume risks of employment of which they had at least equal means or opportunities of knowledge or discovery with the employer, even though they were unaware of what they were. But if the plaintiff has consented only to a vague and general hazard, and he is unaware of the presence or nature of the specific risk that injures him, his knowledge may be insufficient for the defense to be established.

(Emphasis supplied.) Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487-90 (5th ed. 1984).

This is an unusual case in terms of causation. No one knows exactly how the accident happened. Mandery may have inadvertently stepped or fallen into the hole. Plaintiffs' theory of recovery and their allegations of negligence and the dangers involved do not rely primarily on the presence of the hole in the floor but, rather, go to the lack of joists or support for the remaining living room flooring around the perimeter of the hole. From the record, there is a close question of plaintiffs' proof of causation.

After admitting that it is impossible to factually reconstruct the accident, plaintiffs rest their proof on these circumstances

and their inferences: there was a large hole in the living room floor; the floor joists had been cut and removed in the area of the hole; the remaining perimeter of flooring was unsupported and was claimed to be a hidden danger; plaintiff Richard Mandery gained entrance to the first floor of the house to perform his inspection job preliminary to razing the house; somehow plaintiff stepped on the unsupported perimeter flooring that gave way, throwing him into the basement, as evidenced by pieces of flooring found on the basement floor and underneath plaintiff's body. These facts and circumstances were found sufficient by the trial court to submit plaintiffs' negligence case to the jury, over the objections of the defendant.

The same circumstances that permit an inference that the floor collapsed under Mandery permit an inference that he knew the floor was unsupported because of the absence of joists but assumed the risk by walking into the room toward the hole.

The majority now decides as a matter of law that there was no evidence of assumption of risk to be submitted to the jury even though, in addition to the foregoing evidence, the record shows that Mandery had had 17 years of experience in the dangerous occupation of razing more than 1,000 houses and other buildings that were in all stages of repair and disrepair, with both known and unknown dangerous conditions; it was Mandery's job and duty to *inspect* all parts of the house inside and outside before beginning his demolition procedures; Mandery voluntarily entered the house; there was adequate sunlight in the house for Mandery to observe and appreciate the hole in the floor, the absence of floor joists, and the perimeter flooring; the remaining perimeter of flooring was a danger but not a hidden danger; and if a person stepped on the perimeter of flooring, it might give way.

After taking into account Mandery's long years of experience and his consent to voluntarily enter the house for inspection purposes, I conclude that defendant WOWT did meet its burden of proof for submitting the issue of assumption of risk to the jury. From the evidence and its inferences the jury could find that Mandery must have had knowledge of the hole in the floor and the dangerous condition of the remaining perimeter

of flooring around the hole, that Mandery understood and appreciated that dangerous condition, and that he voluntarily exposed himself to that danger, which proximately caused plaintiff's injuries. The judgment should be affirmed.

BOSLAUGH, J., joins in this dissent.

LEROY BLITZKIE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

422 N.W.2d 773

Filed May 6, 1988. No. 85-1008.

1. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
2. **Tort Claims Act: Liability.** Subject to certain exempted claims, the State Tort Claims Act provides for the State's liability for its torts the same as a private person may be liable for torts.
3. **Tort Claims Act: Courts.** In all suits brought under the State Tort Claims Act, the district court shall follow the rules of civil procedure applicable to private litigants.
4. **Tort Claims Act: Jurisdiction: Venue: Case Overruled.** Insofar as *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), stands for the proposition that venue is a jurisdictional aspect of litigation under the State Tort Claims Act, *Catania* is overruled.
5. **Jurisdiction: Venue: Waiver.** Where the court has general jurisdiction of the subject matter, the right of a defendant to be sued in a particular county is a mere personal privilege which may be waived.
6. **Venue: Waiver.** The question of improper venue in a transitory action is waived unless raised in the answer or by an earlier timely objection before answer.
7. **Tort Claims Act: Venue: Courts.** As part of the civil procedure applicable to suits brought under the State Tort Claims Act, a district court is authorized, under appropriate circumstances, to change the venue of the proceedings or otherwise transfer the site for trial.
8. **Tort Claims Act: Venue: Case Overruled.** Insofar as *Miller v. State*, 208 Neb. 170, 302 N.W.2d 692 (1981), holds that an action brought under the State Tort Claims Act but commenced in an improper venue cannot be transferred in accordance with statutory provisions properly applicable to a change of venue or transfer of action, *Miller* is overruled.
9. **Venue: Appeal and Error.** In the absence of an abuse of discretion by the trial court, the Supreme Court will uphold the trial court's ruling on a request for a change of venue.

Appeal from the District Court for Boyd County: EDWARD E. HANNON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jewell, Gatz & Collins, and Gremer, Koenig, Murray, Johnson & Daley, for appellant.

Robert M. Spire, Attorney General, and John R. Thompson, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

Pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), LeRoy Blitzkie filed a negligence action against the State of Nebraska. The district court for Boyd County entered summary judgment that the court lacked jurisdiction to litigate Blitzkie's claim and dismissed the action. We affirm in part and, in part, reverse and remand for further proceedings.

Blitzkie, a livestock owner residing in Boyd County, filed his amended petition in the district court for Boyd County and alleged negligence of the State in 1979, namely, failure to notify Blitzkie about a virulent and readily communicable livestock disease, pseudorabies, which existed in the area of Blitzkie's farm and later infected his herd. Without objecting to venue, the State filed its answer in 1981 and admitted that pseudorabies was a transmissible disease, but denied that the State was negligent, and further denied that Blitzkie's damages were as extensive as alleged. At the conclusion of its answer, the State prayed for judgment in its favor and dismissal of Blitzkie's petition. Approximately 11 months later, the State filed a motion to dismiss, claiming that the State's conduct alleged in Blitzkie's petition constituted discretionary functions exempted from actionable conduct under the State Tort Claims Act. See § 81-8,219(1)(a). In its motion to dismiss, the State also claimed the court lacked jurisdiction, because "All acts or omissions alleged by plaintiff occurred in Lancaster County, Nebraska and any action thereon must be brought only in said Lancaster County . . . ." Although the parties appeared for argument on

the State's motion to dismiss, the district court treated the State's motion to dismiss as a motion for summary judgment, granted summary judgment, namely, the State's conduct was discretionary conduct "within the specific exemption of the scope of the Tort Claims Act," and dismissed Blitzkie's petition, notwithstanding the court's departure from civil procedure governing disposition by summary judgment, which afforded Blitzkie 10 days in which to respond to or counter the State's evidence for a summary judgment. See Neb. Rev. Stat. § 25-1332 (Reissue 1985). Blitzkie appealed from that summary judgment and dismissal of his action. In *Blitzkie v. State*, 216 Neb. 105, 107, 342 N.W.2d 5, 6 (1983), we reversed the dismissal of Blitzkie's action and stated: "However, it is apparent that one against whom a motion for summary judgment is invoked must be given at least 10 days from filing the same to respond with counteraffidavits or depositions. Neb. Rev. Stat. § 25-1332 (Reissue 1979). This opportunity was not afforded the plaintiff."

While Blitzkie's case was pending after remand, we decided *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984), a case brought under the State Tort Claims Act for the State's negligent conduct virtually identical to that alleged by Blitzkie. The *Wickersham* opinion was issued on August 3, 1984.

As reflected in *Wickersham v. State, supra*, Wickersham lived and ranched in Sioux County. The offices of the Nebraska Department of Agriculture and the State Veterinarian were located in Lancaster County. As the result of Neb. Rev. Stat. § 54-701 (Reissue 1984), the State had " 'the duties of protecting the health of livestock in Nebraska, of determining and employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals . . . .' " 218 Neb. at 177, 354 N.W.2d at 137. Among its duties for official eradication of livestock disease, the State was required to undertake blood tests of cattle exposed to brucellosis, a highly contagious disease, and contact owners of exposed herds for further testing. The State detected brucellosis in the herd from which Wickersham had purchased his cattle and knew about Wickersham's purchase. Months

later, the State tested Wickersham's cattle and ascertained that his cattle were infected with brucellosis. Wickersham filed suit in Lancaster County, alleging the State's negligence in failure to notify him about the brucellosis situation and promptly inspect his herd. The State obtained a summary judgment that Lancaster County was not the proper venue for the proceedings. The State contended that venue of Wickersham's suit was somewhere outside Lancaster County, because any harm " 'could only manifest itself in Sioux County.' " 218 Neb. at 183, 354 N.W.2d at 140. In *Wickersham v. State, supra*, we examined § 81-8,214:

> The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act. Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County.

Holding that the proper venue for Wickersham's action was Lancaster County, we stated in *Wickersham*:

> "Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised." *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 759, 340 N.W.2d 431, 433 (1983). Clearly, under § 81-8,214 the district court has subject matter jurisdiction to hear, determine, and render judgment concerning any tort claim defined in the State Tort Claims Act. . . .
>
> . . . .
>
> The question presented in Wickersham's case is, Where did the act or omission occur? More simply, Where's the venue? The answer to the question lies in the definition of the word *occur*. . . . In reference to the State Tort Claims Act, § 81-8,214, "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur. Occur does not include the results of the act or omission, but only the taking place,

> happening, or coming to pass. . . .
>
> . . . In the final analysis, all people responsible for decisions and action regarding Wickersham's problem were in Lancaster County. Consequently, the correct venue of Wickersham's action is Lancaster County.

(Emphasis in original.) 218 Neb. at 183-85, 354 N.W.2d at 140-41.

Thus, *Wickersham* emphasized the distinction between jurisdiction and venue and acknowledged the criterion for determining proper venue of litigation under the State Tort Claims Act, namely, the place where the State's tortious act or omission occurred or took place. See § 81-8,214. *Wickersham* rejected the State's misconception that venue for litigation of a tort claim against the State is determined by the situs of damage to a claimant. As we observed in *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), misconduct and damage are related as cause and effect.

On November 2, 1984, approximately 3 months after *Wickersham*, Blitzkie requested that the proceedings be transferred to Lancaster County "in accordance with § 24-324," which in part provides:

> [T]he rules of pleading and practice in regard to other civil actions in the district court shall be observed in all actions by or against the state, as far as applicable except as otherwise herein provided; *Provided*, that when an action has been commenced in a county other than as specified herein, the court in which the action has been commenced shall have jurisdiction over such action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in the county in which the action should or might have been commenced as herein provided. The court in the county to which the action is transferred, in its discretion, may order the plaintiff to pay to the defendant all reasonable expenses, including attorney fees of the defendant or defendants, incurred because of the improper venue or in proceedings to transfer such action.

Neb. Rev. Stat. § 24-324 (Reissue 1985).

Without stating its reason, the district court, on July 31,

1985, overruled Blitzkie's motion to transfer the proceedings to Lancaster County. At that point, Blitzkie's suit had been on file for at least 4 years, and the State had not objected to venue in Boyd County but had objected only to subject matter jurisdiction by the court. On October 23, 1985, through the same attorney who had been acting as the State's attorney since the inception of Blitzkie's lawsuit, the State filed a motion for summary judgment to dismiss Blitzkie's action for "lack of jurisdiction." To support its request for summary judgment, the State alleged: "The acts or omissions complained of by Plaintiff all occurred in Lancaster County, Nebraska, and any action thereon must be brought in said County, this Court therefore has no *jurisdiction* of the subject matter of this action." (Emphasis supplied.) The State further alleged that, based on "[t]he pleadings, all filings herein, the Defendant's answers to supplemental interrogatories, [and] the Defendant's responses to requests for admissions," there was "no genuine issue as to any material facts with regard to the *jurisdiction* of the court." (Emphasis supplied.) In granting summary judgment, the district court stated:

> I find that there is no genuine issue of material fact in this case insofar as jurisdiction is concerned, and that the facts in this case show that *this court does not have jurisdiction of the case*, and the defendant is entitled to a summary judgment dismissing the petition of the plaintiff.

(Emphasis supplied.) The court thereupon dismissed Blitzkie's petition with prejudice; hence, the present appeal.

We note a statute in addition to § 24-324 for transfer of an action, namely, Neb. Rev. Stat. § 25-403.01 (Cum. Supp. 1986) concerning a change of venue in transitory tort actions, and still another statute for transfer of a civil action for "the convenience of the parties and witnesses or in the interest of justice," Neb. Rev. Stat. § 25-410 (Reissue 1985).

Also noteworthy is § 81-8,216, which provides:

> In all suits brought under this act, the district courts shall follow the rules of civil procedure applicable to private litigants, and costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant. Judgments shall be subject to appeal

to the Supreme Court in the same manner as other judgments of the district court.

Blitzkie claims that the district court erred in (1) entering a summary judgment that the district court lacked jurisdiction regarding the tort claim; (2) finding that the State had not waived an objection to venue in Boyd County; and (3) refusing to transfer the proceedings to Lancaster County.

The State argues that "venue requirements are jurisdictional and cannot be waived." Brief for Appellee at 13. To support its position that the district court for Boyd County lacked jurisdiction as the result of improper venue, the State relies on *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), in which this court held that the State's objection to jurisdiction on account of improper venue should have been sustained and Catania's action dismissed. In *Catania*, the court said:

> It is true that in O'Hara v. Davis, 109 Neb. 615, 192 N.W. 215 (1923), we said: "The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived." . . .
>
> . . . .
>
> In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the requirements of the act must be followed strictly and the petition filed in the District Court for the county in which the alleged wrongful act or omission took place. In the absence of specific legislative authority, neither the state nor one of its agencies may waive those jurisdictional requirements.
>
> It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case or other suitable action. [Citation omitted.]

204 Neb. at 312, 315-16, 282 N.W.2d at 32-33.

Subject to certain exempted claims, the State Tort Claims Act provides for the State's liability for its torts the same as a private person may be liable for torts. § 81-8,215; *Cortes v. State*, 191 Neb. 795, 218 N.W.2d 214 (1974).

Section 81-8,214 of the State Tort Claims Act provides:

> The district court, sitting without a jury, shall have

> exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act. Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County.

As is self-evident, § 81-8,214 contains two sentences. The first sentence in that statute provides: "The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act." The foregoing statutory excerpt relates to jurisdiction, the power to litigate tort claims against the State, which is conferred on the district courts of the State of Nebraska. See *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984). The second sentence of § 81-8,214 states: "Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County." This second sentence of § 81-8,214 indicates the place of venue, the site for litigation of the tort claim against the State. Thus, § 81-8,214 pertains to jurisdiction and venue, which are distinctly different aspects of tort litigation against the State. Although we have pointed out the distinction between "jurisdiction" and "venue," see *Wickersham v. State, supra*, the State fails to recognize such distinction of those terms and concepts fundamental to litigation.

The distinction between jurisdiction and venue concerning a tort claim against the State was recognized in *Hyde v. Buckalew*, 393 N.W.2d 800 (Iowa 1986), which involved a claim against the State under the Iowa Tort Claims Act. The motor vehicle negligence action was commenced in a county other than the place of the accident or the plaintiff's residence. The State filed answers without raising any issue of jurisdiction or venue. Later, however, the State filed a motion to dismiss the claim, basing its motion on the trial court's alleged lack of jurisdiction in view of the Iowa Tort Claims Act (Iowa Code § 25A.4 (1983)), which provided in pertinent part:

> "The district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred, or where the act or omission occurred outside of Iowa and the plaintiff is a nonresident, the Polk county district court has exclusive jurisdiction to hear, determine, and render judgment on any suit or claim as defined in this chapter. However, the laws and rules of civil procedure of this state on change of place of trial apply to such suits."

393 N.W.2d at 801.

In *Hyde*, the district court granted the State's motion to dismiss for lack of jurisdiction, but on appeal the Iowa Supreme Court, recognizing the difference between jurisdiction and venue, reversed the dismissal, ordered reinstatement of the action, and stated:

> The first question we must answer is whether the portion of this statute relied on by the State—the language identifying locations where district courts may hear state tort claims—circumscribes the jurisdiction of the district court or is merely a venue provision which the state may waive. The district court granted the State's motion to dismiss without addressing the difference between jurisdiction and venue. . . . We deem the distinction between jurisdiction and venue crucial to a correct disposition of the motion to dismiss. We conclude the issue characterized by the State as a matter of subject matter jurisdiction is really a question of venue which the State waived by filing its answer before protesting that defendants had chosen the wrong forum.
>
> Iowa Code chapter 25A, the Iowa Tort Claims Act, grants only a limited waiver of sovereign immunity, and the State may be sued in tort only to the extent provided in that chapter. [Citations omitted.] The issue whether the legislature intended to waive its sovereign immunity with respect to a particular type of claim is a matter of jurisdiction, the power of the court to hear and adjudicate a particular class of cases, and the State may raise that issue by motion to dismiss at any stage of the proceeding. [Citations omitted.]

> Venue, on the other hand, is ordinarily not jurisdictional but refers to the place where the cause sued upon should be tried. [Citation omitted.] Iowa Rule of Civil Procedure 175(a) specifically provides in part: "An action brought in the wrong county may be prosecuted there until termination, unless a defendant, before answer, moves for its change to the proper county." [Citations omitted.]
>
> For two reasons we believe the language of section 25A.4 concerning the location of the court which should "hear, determine and render judgment on any suit or claim" limits venue but not jurisdiction of the district court.
>
> Section 25A.4 explicitly provides in its second sentence: "However, the laws and rules of civil procedure of this state on change of place of trial apply to such suits." One rule of civil procedure concerning change of place of trial which that sentence incorporates by reference is the above-quoted portion of rule 175(a) which in essence requires a defendant "before answer" to move for a change of venue to the proper county, the objection otherwise being waived. We construe section 25A.4 to give Iowa district courts . . . exclusive jurisdiction over state tort claims, but we treat the place of trial as a matter of venue governed by section 25A.4 and by other "laws and rules of civil procedure," including rule 175(a).

393 N.W.2d at 801-02.

In *Ringling Bros.-Barnum & Bailey Com. Sh., Inc. v. State*, 295 So. 2d 314 (Fla. App. 1974), the claimant commenced suit in a county other than that specified for an action against a state official, but the court, holding that the action could be transferred to the proper county or venue specified by statute, made the following observations and comments:

> It is imperative that we first draw a clear line of demarcation between venue and jurisdiction. Courts as well as text writers have from time to time used the terms interchangeably, thereby adding to an already existing state of confusion. [Citations omitted.]
>
> Venue refers to the geographical area, that is, the

> county or district, wherein a cause may be heard or tried. It concerns the privilege of being accountable to a court in a particular location. [Citations omitted.] Venue is not the same as jurisdiction. [Citations omitted.] The privilege of a defendant to be sued in a particular locality does not involve the question of jurisdiction. [Citation omitted.] The question as to whether the State, its agencies, boards and other subentities may be sued at the seat of government or at the place of its official headquarters is a question of venue and is not one of jurisdiction over the subject matter of the litigation. [Citations omitted.]

295 So. 2d at 315. It continued:

> Jurisdiction is basically an expression of sovereign power; and a judgment or decree rendered without power and jurisdiction of the parties and subject matter is void. Florida's venue statutes do not confer territorial jurisdiction, but presupposes [sic] that the court has jurisdiction of the subject matter of the action as well as of the parties. Neither consent, acquiescence nor waiver can confer jurisdiction as the subject matter which is not within the power of the court to adjudicate. On the other hand venue may be changed by consent, acquiescence or waiver. Incorrect venue may be waived by the failure of a defendant to make a timely objection or by stipulation, agreement or consent.

295 So. 2d at 316.

In *Ringling Bros.-Barnum & Bailey Com. Sh., Inc. v. State, supra*, the court concluded that the statutory requirement that state officials be sued in the county of their residence may be waived by the state and venue placed in any other county with a court having subject matter jurisdiction. See, also, *Gay v. Ogilvie*, 47 So. 2d 525 (Fla. 1950) (the question whether a state agency must be sued in the county where the seat of government is located or may be sued in another county is a question of venue and not of jurisdiction over subject matter of the litigation). See, further, *Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439 (8th Cir. 1984) (under federal Tort Claims Act, the statute specifying venue as the place where the plaintiff resided or where tortious conduct occurred is not a jurisdictional

statute but a venue statute).

As the result of § 81-8,214, the district court for Boyd County had subject matter jurisdiction over Blitzkie's tort claim against the State. However, in accordance with § 81-8,214 and *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984), the proper venue for Blitzkie's tort action was Lancaster County, the place where the State's "act or omission complained of occurred."

Because "jurisdiction" and "venue" are not synonymous and interchangeable functions in litigation, any language in *Catania v. The University of Nebraska,* 204 Neb. 304, 282 N.W.2d 27 (1979), indicating that jurisdiction and venue are synonymous and interchangeable is expressly disapproved. Insofar as *Catania, supra,* stands for the proposition that venue is a jurisdictional aspect of litigation under the State Tort Claims Act, *Catania* is overruled.

Regarding denial of a change of venue and transfer of Blitzkie's action to Lancaster County, the State argues that the district court's refusal to transfer is correct on account of *Miller v. State*, 208 Neb. 170, 302 N.W.2d 692 (1981), a suit against the State for negligently constructing a highway. In *Miller*, the plaintiff's decedent was injured when his automobile was struck by an oncoming truck, which had dropped off the highway's improperly constructed surface in Wheeler County and veered into the path of Miller's automobile. The action was filed in Lancaster County, and "the action was dismissed because it had not been filed in Wheeler County, the county where the accident occurred." 208 Neb. at 171, 302 N.W.2d at 693. In *Miller*, this court stated:

> The plaintiff requested that in the event the trial court determined the action could not be brought in Lancaster County, the action be transferred to Wheeler County. This request was properly denied. The statutory provisions authorizing the transfer of an action where the venue was improper are not applicable to suits under the state Tort Claims Act. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979).

208 Neb. at 172, 302 N.W.2d at 694.

In evaluating the district court's refusal to transfer Blitzkie's action to Lancaster County, we cannot disregard the

unequivocal and clear mandate of § 81-8,216, namely: "*In all suits brought under [the State Tort Claims Act], the district courts shall follow the rules of civil procedure applicable to private litigants*. . . ." (Emphasis supplied.)

In *Pointer v. State*, 219 Neb. 315, 363 N.W.2d 164 (1985), we considered the State's waiver of the service of summons on the Attorney General, as required by § 81-8,212 of the State Tort Claims Act. Pointer caused summons to be served on the Secretary of State of Nebraska. Notwithstanding the erroneous service of summons, Pointer's suit continued with various forms of pleading and other procedural activity. Two days after the statutorily prescribed deadline for filing a petition under the State Tort Claims Act, the State filed a motion to dismiss, raising the issue of lack of jurisdiction due to the improper service of summons. Although the State Tort Claims Act specifically designated the person on whom service of summons must be made, in *Pointer* we stated:

> "*If the state has consented to be sued*, a failure to serve process in an action against it is immaterial if the attorney general appears voluntarily . . . ." [Emphasis in original.] 81A C.J.S. *States* § 321 at 1007 (1977).
>
> . . . .
>
> . . . [W]here the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. [Emphasis in original.]

219 Neb. at 317-18, 363 N.W.2d at 166.

"Where the court has general jurisdiction of the subject matter, the right of a defendant to be sued in a particular county or district is a mere personal privilege which he may waive." 92 C.J.S. *Venue* § 77 at 774 (1955). See, also, *id.*, § 124 at 820: "Venue statutes are generally regarded as conferring a personal privilege which may be waived by the defendant." In *Peitz v. Hausman*, 198 Neb. 344, 252 N.W.2d 628 (1977), an automobile negligence case, this court held that the question of improper venue in a transitory action is waived unless raised in

the answer or by an earlier timely objection before answer. See, also, *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961). See, further, *Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439 (8th Cir. 1984) (government may waive venue specified in the federal Tort Claims Act).

Before answering and in its answer, the State did not object or question that Boyd County was the proper venue for Blitzkie's tort action. Only after its answer did the State raise any question about maintaining the action in Boyd County, a question directed not toward venue but to the district court's "lack of jurisdiction." If the State's allegations in its motion for summary judgment are accepted at face value as true, the State became involved in a great deal of litigious activity in Blitzkie's case, namely, pleadings, answers and supplemental answers to interrogatories, and answers to requests for admission. In any event, the State waived an objection to Boyd County venue, a waiver which would have been the situation if the State were a "private litigant" under the circumstances.

As part of the civil procedure applicable to suits brought under the State Tort Claims Act, a district court is authorized, under appropriate circumstances, to change the venue of the proceedings or otherwise transfer the site for trial. See § 81-8,216. Therefore, the statement in *Miller v. State*, 208 Neb. 170, 172, 302 N.W.2d 692, 694 (1981), "The statutory provisions authorizing the transfer of an action where the venue was improper are not applicable to suits under the state Tort Claims Act" is expressly disapproved. Insofar as *Miller, supra*, holds that an action brought under the State Tort Claims Act but commenced in an improper venue cannot be transferred in accordance with statutory provisions properly applicable to a change of venue or transfer of action, *Miller* is overruled.

In the absence of an abuse of discretion by the trial court, the Supreme Court will uphold the trial court's ruling on a request for a change of venue. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973); *Satterfield v. Watland*, 180 Neb. 386, 143 N.W.2d 124 (1966). Section 24-324 pertains to a change of venue or transfer of an action on the "timely motion by a defendant." But Blitzkie is a plaintiff. Therefore, Blitzkie could

not obtain a change of venue or transfer of proceedings pursuant to § 24-324. Blitzkie's status as a plaintiff was probably the reason that the district court denied Blitzkie's motion. We find no abuse of discretion in denying Blitzkie's motion to transfer the proceedings to Lancaster County.

Nevertheless, because the State waived any question about venue specified by § 81-8,214, proceedings may be maintained in the district court for Boyd County.

Consequently, the district court's judgment denying Blitzkie's motion for transfer to Lancaster County is affirmed, but the judgment of the district court, namely, dismissal on account of lack of jurisdiction, is reversed, and this matter is remanded to the district court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BRODKEY, J., Retired, dissenting.

I must respectfully dissent from the opinion of the majority of the court, as set out above, for the following reasons.

This case arose as a cause of action brought under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), which provides, among other things:

> The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act. Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County.

§ 81-8,214.

The majority opinion seeks to overrule *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), and *Miller v. State*, 208 Neb. 170, 302 N.W.2d 692 (1981), both cases having been well-established precedents in our jurisdiction.

Neb. Const. art. V, § 22, empowers the Legislature to provide by law in what manner and in what courts suits shall be brought. I am of the opinion that the Legislature, acting pursuant to this power, enacted the State Tort Claims Act in

language which, when reasonably construed, requires proper venue as a necessary prerequisite or as a condition precedent to jurisdiction.

I am in agreement with the opinion of the court in *Catania, supra*, which interpreted the State Tort Claims Act and held that venue is a jurisdictional requirement under that act.

The majority opinion in this case appears to take the position that the State is to be treated as a private litigant under the State Tort Claims Act, and has thus waived venue. This finding, I believe, is directly contrary to well-established authority in our jurisdiction. In *Catania, supra*, this court stated:

> In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the requirements of the act must be followed strictly and the petition filed in the District Court for the county in which the alleged wrongful act or omission took place. In the absence of specific legislative authority, neither the state nor one of its agencies may waive those *jurisdictional* requirements.

(Emphasis supplied.) 204 Neb. at 315, 282 N.W.2d at 33. See, also, *Pointer v. State,* 219 Neb. 315, 363 N.W.2d 164 (1985).

I note that the majority opinion cites the Iowa Tort Claims Act, Iowa Code § 25A.4 (1983), as a model for us. On the other hand, the Nebraska State Tort Claims Act differs significantly from the Iowa statute, because the latter is much more general, expressly providing for alternative venue, whereas the Nebraska State Tort Claims Act prescribes only one proper venue. Admittedly, venue is not jurisdictional according to the law of Iowa, nor is venue jurisdictional under the federal Tort Claims Act, which is also an instructive model. But the fact remains that we are called upon to interpret the Nebraska State Tort Claims Act. If we were to read into our act more than the Legislature expressly provided, we are perilously close to engaging in judicial legislation. Similarly, the Florida case of *Ringling Bros.-Barnum & Bailey Com. Sh., Inc. v. State*, 295 So. 2d 314, 315 (Fla. App. 1974), is cited by the majority as authority for the proposition that "[v]enue is not the same as jurisdiction." However, there is no Florida counterpart to the Nebraska State Tort Claims Act. I believe that the line of authority which is spelled out in the cases cited above, to wit,

Miller, *Catania*, and also *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984), reflects an entirely different policy than those contained in both Florida and Iowa.

After a thorough review of the legislative history of the State Tort Claims Act, § 81-8,214, and a careful reading of *Miller*, *Catania*, *Wickersham*, and *Pointer*, decided by this court, I must express regret that I am unable to join in the majority opinion. It may be that the public policy of the State of Nebraska should be changed so that its State Tort Claims Act may be brought into line with the Iowa Tort Claims Act, or other similar state acts, but this is a matter I believe should clearly be done by the Legislature, upon whose shoulders Neb. Const. art. V, § 22, cited above, has placed the responsibility. In view of the considerations and distinctions articulated in the legislative and judicial authorities cited herein, I submit that the judgment of the district court appealed from should be affirmed.

CAPORALE, J., joins in this dissent.

RAYMOND GUENTHER, JR., APPELLANT, V. JACQUELIN ALLGIRE AND PAT ALLGIRE, APPELLEES.

422 N.W.2d 782

Filed May 6, 1988. No. 86-176.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. A summary judgment is properly granted 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. _____. On a motion for summary judgment, the question is whether there is a genuine issue as to any material fact, and not how the issue is to be decided.
4. **Licensee: Words and Phrases.** A social guest is a mere licensee.
5. **Licensee: Negligence.** An owner or occupant of a premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him as a licensee of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is

required to exercise ordinary care.

6. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequence.
7. _____: _____: _____. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
8. **Licensee.** The duty of an occupant of property to a licensee is identical to the duty of the owner.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard J. Dinsmore of Dowd, Fahey & Dinsmore, for appellant.

Michael F. Kinney of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

FAHRNBRUCH, J.

This is a personal injury action in which the Sarpy County District Court sustained the defendants' motion for summary judgment and dismissed the case. Plaintiff, Raymond Guenther, Jr., appeals.

Guenther claims he was injured as a result of a fire originating in the basement family room of a home owned by defendant Jacquelin Allgire, in Papillion, Nebraska. Ms. Allgire was working away from the home at the time of the fire. Evidence at the summary judgment hearing revealed that at all times relevant herein, plaintiff was sleeping in a bedroom adjacent to the family room. He went to the Allgire home with one of Jacquelin Allgire's sons, who is not otherwise involved in this case. Plaintiff had Ms. Allgire's permission to be in the home.

Defendant Pat Allgire, another son of Ms. Allgire, was of

legal age, dependent upon his mother, and a high school student at the time of the fire. He, together with two other students, skipped a morning class and went to the Allgire home, which was located across the street from his school. Another student joined the threesome at the home. The four students smoked cigarettes in the family room and watched television. There is some evidence that one or more of them may have smoked marijuana.

The evidence is undisputed that the fire started in the area of a couch and that the defendant Pat Allgire never sat on that couch. It was stipulated that the fire was started as a result of a discarded cigarette or other smoking material. It was further stipulated that all four students were smoking in the family room, but that it is unknown which of the four discarded the cigarette or smoking material that resulted in the fire.

The plaintiff assigns two errors on appeal: (1) The trial court erred in granting defendants' motion for summary judgment, and (2) the trial court erred in failing to rule on an evidentiary objection that was taken under advisement. The assignments of error will be discussed in inverse order.

Regarding his second assignment of error, the plaintiff claims the trial court failed to rule upon the defendants' objection to a written statement of defendant Pat Allgire. Plaintiff is fearful the statement is not in evidence. The statement was already in evidence when the defendants made their objection. No further ruling was required. The statement had been received as a part of Pat Allgire's deposition. Plaintiff's second assignment of error is without merit.

With respect to plaintiff's first assignment of error, summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987); *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986). A summary judgment is properly granted 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. *Lowry*

v. State Farm Mut. Auto. Ins. Co., ante p. 171, 421 N.W.2d 775 (1988); *Hoffman v. Reinke Mfg. Co.,* 227 Neb. 66, 416 N.W.2d 216 (1987); *Moseman v. L & P Investment Co.,* 226 Neb. 677, 414 N.W.2d 254 (1987).

On a motion for summary judgment, the question is whether there is a genuine issue as to any material fact, and not how the issue is to be decided. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *aff'd after remand* 216 Neb. 575, 344 N.W.2d 649 (1984), *cert. denied* 469 U.S. 854, 105 S. Ct. 179, 83 L. Ed. 2d 113 (1984); *Bender v. James*, 212 Neb. 77, 321 N.W.2d 436 (1982).

In the present case, before determining if there is a genuine issue of any material fact, it is necessary to resolve what, if any, duty of care the defendants owed to the plaintiff. Plaintiff pleads in his petition, and the evidence reflects, that he was a social guest in Ms. Allgire's home at the time he was allegedly injured. A social guest is a mere licensee. *Casey v. Addison*, 190 Neb. 634, 211 N.W.2d 410 (1973). See, also, *Moseman v. L & P Investment Co., supra.*

As owner of the residence where the plaintiff is alleged to have been injured, Ms. Allgire's status was that of a licensor. Her duty to the plaintiff, a licensee, was limited. The duty of Ms. Allgire was only to refrain from injuring plaintiff in his status as a licensee by willful or wanton negligence or designed injury, or to warn him as a licensee of a hidden danger or peril *known* to the owner but unknown or unobservable by the licensee, who is required to exercise ordinary care. *Moseman v. L & P Investment Co., supra.* In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987).

To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security

and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. *Id.*, quoting from *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

The plaintiff alleged that Ms. Allgire was negligent (1) in allowing her minor child to be at the premises during a time when he would not be properly supervised and (2) in allowing her son to use the premises as a gathering point for himself and other individuals to smoke marijuana, when she knew or should have known that to do so could cause injury to other persons lawfully upon the premises.

In regard to the plaintiff's first allegation of negligence against Ms. Allgire, the evidence is undisputed that when the fire occurred, Pat Allgire was 19 years old and therefore an adult. The evidence is also undisputed that before she was notified of the fire, Ms. Allgire had no actual knowledge that Pat Allgire had skipped school and returned home with friends to smoke on the day of the fire. When Ms. Allgire left for work the morning of the fire, her son Pat had already left for school. The evidence discloses that Pat Allgire had skipped school in the past; however, that was sometime before the fire. In her deposition Ms. Allgire testified also that her son's skipping of school was not a problem around the time of the fire because he attended school so he would be eligible to play football.

The plaintiff, as a basis for making the allegations of negligence against Ms. Allgire, apparently relies primarily upon a statement given by Pat Allgire. The statement was made orally to a law clerk of the plaintiff's lawyer. The clerk testified he memorialized the statement in longhand on paper which he gave to Pat Allgire. Pat Allgire took the paper with him and, sometime later, struck through some of the language and by interlineation added language before signing the statement and returning it to the plaintiff's lawyer. As corrected, the statement in relevant part reads:

> On March 27, 1981, I went to school at approximately 7:30 a.m., around 9:35 a.m. or 9:40 a.m. I returned home with ~~several~~ (*three or four*) friends, we used my home as a

> gathering spot because it is close to school and also because my mom leaves to go to work around 9:00 a.m. or 9:30 a.m., she doesn't mind us coming over to the house. (*But she does during school*)
>
> . . . As I stated before we used my home as a place to hang around during school hours. (*sometimes*)
>
> . . . Raymond Guenther, was sleeping in the downstairs . . . .
>
> My friends and I went downstairs to the family room where there is a couch with a built in table in the middle and other furniture. We smoked and talked—*watched T.V.* (*whatever*), we later had several bowls of pot out [of] the bongs that we ~~keep~~ kept in the basement. Although my mother (does not approve) of my use of pot she ~~prefers that I do it in the house, she knows about the gatherings that we have at the house while she is at work.~~

(Emphasized words were added by Pat Allgire.)

Even if all the language in Pat Allgire's alleged oral statement is taken as true, there is nothing to indicate that Ms. Allgire acted with willful or wanton negligence. She did not have *actual knowledge* that a danger existed, and, therefore, she could not have intentionally failed to act to prevent any harm which could reasonably result from the danger. There certainly was no designed injury on Ms. Allgire's part in this case. Furthermore, there was no hidden danger or peril *known* to Ms. Allgire, but unobservable by the plaintiff.

Although it was an automobile bailee-bailor case, the nature of the duty and the rationale of *Stocker v. Cataldi*, 483 N.E.2d 461 (Ind. App. 1985), *reh'g denied* 489 N.E.2d 144 (Ind. App. 1986), have substantial similarities to the case under consideration. In *Stocker*, even though a minor child pled guilty to driving while intoxicated after being involved in an accident with his mother's car, the Indiana appellate court held that the mother was not liable for her son's negligence. There was no liability even though the mother was aware of her son's past dealings and use of marijuana.

Indiana has no family purpose doctrine, and the mere fact of a family relationship does not impose vicarious liability. Vicarious liability attaches in the permissive use of an

automobile by a family member only where a master-servant or agency relationship is established. Under Indiana law, a bailor who gives a dangerous article to a bailee, knowing that it will be used in a way which endangers others, is chargeable with negligence; however, the bailor must have actual knowledge of the bailee's incompetence. "Evidence that the bailor 'could have' or 'should have' known of the bailee's incompetence is not sufficient." 483 N.E.2d at 463. The Stockers made no allegations and presented no evidence from which it could be inferred that the mother had actual knowledge of her son's intoxication *on the day in question*. Thus, the Indiana court found that a summary judgment in favor of the mother was appropriate.

In this case, as in the *Stocker* case, there were no allegations made and no evidence presented from which it could be inferred that Ms. Allgire had actual knowledge of her son's actions on the day of the fire, even though she may have known that he had skipped school in the past and that he may have previously used marijuana. Therefore, the summary judgment in favor of Ms. Allgire was appropriately sustained.

The plaintiff alleges that Pat Allgire was negligent (1) in not properly disposing of ignited materials, when he knew or should have known that the failure to do so could result in harm or injury to other persons lawfully upon the premises, and (2) in smoking a controlled substance which affects proper judgment, when the defendant knew or in the exercise of reasonable care should have known that to do such activity could result in harm or injury to other persons lawfully upon the premises.

The duty of an occupant of property to a licensee is identical to the duty of the owner. *Moseman v. L & P Investment Co.*, 226 Neb. 677, 414 N.W.2d 254 (1987). For Pat Allgire to be liable in this case, the plaintiff is required to prove either (1) that Pat Allgire by willful or wanton negligence proximately caused injury to the plaintiff, or (2) that Pat Allgire failed to warn the plaintiff of a hidden danger or peril known to him but which was unknown or unobservable by the plaintiff in the exercise of ordinary care.

In Pat Allgire's case, the following facts are stipulated or admitted: that Pat Allgire, while skipping school, hosted and

was present with his friends at a marijuana party in the basement of his mother's home; that Pat Allgire provided smoking instruments (bongs) to smoke marijuana, which is an illegal drug; that Pat Allgire and one or more of his friends smoked "several bowls of pot"; that a fire started in the area of a couch as a result of a discarded cigarette or other smoking material; and that during all relevant times, the plaintiff was asleep in a room nearby.

Because he hosted the party in his own home, supplied the smoking instruments, and smoked marijuana, a jury could reasonably infer that Pat Allgire supplied the illegal drug for the party. From his admitted prior use of marijuana, and the facts of this case, a jury could infer Pat Allgire knew the hidden dangers of smoking marijuana. It is common knowledge that this illegal drug, when smoked, is mind-altering, reduces inhibitions and judgment, and interferes with a person's ability to take precautions for the safety of other people. It is also common knowledge that improperly discarded smoldering smoking materials start fires.

It is a question of fact for the jury whether, on the day of the alleged fire, Pat Allgire, as an occupant of the property, breached his duty to the plaintiff, who was a licensee.

The trial court's summary judgment favorable to the defendant Jacquelin Allgire is affirmed. The trial court's summary judgment in favor of the defendant Pat Allgire is reversed and that portion of the cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.