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REPORTS OF CASES

DECIDED BETWEEN

JUNE 24, 1988 and SEPTEMBER 29, 1988

IN THE

Supreme Court of Nebraska

VOLUME CCXXIX

TRINA SOLLARS

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By Trina Sollars, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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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
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		Jeffre Cheuvront	Lincoln
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		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
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		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack Lindner	Lincoln
		Gale Pokorny	Lincoln
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		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
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 85-478: **Jennings State Bank v. Woodring.** Bankruptcy stay lifted. Stipulations allowed; judgment of the district court vacated; cause remanded for further proceedings.

No. 86-975: **Dana Larson Roubal v. First National Bank.** Stipulation allowed; appeal dismissed.

No. 86-1067: **City of Lincoln v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

No. 87-020: **Irwin v. Scotts Bluff County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 87-042: **Archbishop Bergan Mercy Hospital v. Department of Health.** Stipulation to dismiss appeal sustained; appeal dismissed.

No. 87-083: **Miller v. Millers Mutual Ins. Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-189: **City Bank & Trust Co. v. Krivohlavek.** Stipulation allowed; appeal dismissed.

No. 87-200: **Olsberg Excavating Co. v. Forke Bros.** Stipulation allowed; cause reversed and remanded to district court for further proceedings.

No. 87-606: **Federal Land Bank of Omaha v. Hawkins.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-692: **Sherman County Bank v. Sillivan.** Motion of appellee Farm Credit Bank for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-743: **State v. Abram.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-789: **Lee Sapp Leasing v. Colan.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-809: **Federal Land Bank v. Kurkowski.** Appeal dismissed. See Rule 7A(2).

No. 87-890: **Moudry v. Wozab.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-908: **State v. Kunkel.** Affirmed. See Rule 7A(1).

No. 87-911: **State v. Rein.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-919: **Tiedje v. Tiedje.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 87-920: **Nielsen v. Christen.** Stipulation allowed; appeal dismissed.

No. 87-927: **Marvin v. Grand Lodge IOOF of Nebraska.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2). Application for attorney fees denied.

No. 87-928: **Marvin v. Grand Lodge IOOF of Nebraska.** Motion of appellee for summary affirmance sustained; judgment affirmed; see rule 7B(2). Application for attorney fees denied.

No. 87-1040: **State v. Sullivan.** By order of the court, judgment of district court vacated; proceedings remanded to district court for entry of plea by appellant.

No. 87-1078: **Provident Federal Savings Bank v. Buckley.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-1084: **State v. Wobken.** Affirmed. See Rule 7A(1).

No. 87-1092: **Abboud v. Michals.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-1094: **State v. Murray.** Affirmed. See Rule 7A(1).

No. 87-1100: **In re Interest of Timm.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-1132: **State v. Conatella.** On confession of error, judgment vacated and cause remanded.

No. 87-1134: **State v. Schlothauer.** Motion of appellant to dismiss appeal as moot sustained; appeal dismissed.

No. 87-1145: **State ex rel. Rose v. Beermann.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-005: **Irwin v. Adams County Mental Health Board.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-042: **Chorowicz v. Square D Company.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-044: **In re Interest of McKeen.** Motion and joinder to remand appeal for further proceedings sustained.

No. 88-046: **Stengel v. Markus.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-065: **Gregory v. Davis.** Stipulation allowed; appeal dismissed with prejudice.

No. 88-071: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-072: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-073: **Scow v. Dworak.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2). Motion of appellee for attorney fees overruled.

No. 88-076: **Moore v. Moore.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-077: **Renshaw v. Jensen.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-088: **State v. Thornton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-091: **State v. Leslie.** Stipulation allowed; appeal dismissed without prejudice.

No. 88-092: **State v. Markley.** Affirmed. See Rule 7A(1).

No. 88-093: **State v. Triplett.** Affirmed. See Rule 7A(1).

No. 88-094: **State v. Triplett.** Affirmed. See Rule 7A(1).

No. 88-096: **State v. Helmstadter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-110: **Wyskowski v. Kavan.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-120: **State v. Saunders.** Court finds appeal wholly

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

No. 88-122: **State v. Smith.** Affirmed. See Rule 7A(1).

No. 88-124: **Gorham v. Vitek.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-129: **Production Credit Assn. v. Schmidt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-131: **State v. Darling.** Affirmed. See Rule 7A(1).

No. 88-155: **Crete State Bank v. Kraus.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-171: **Jansen v. Deterding.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-173: **State v. Prothman.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-174: **State v. Prothman.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-188: **State v. Tinlin.** Affirmed. See Rule 7A(1).

No. 88-196: **State v. William.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-198: **First National Bank & Trust Co. v. Yates.** Motion of appellee Metropolitan Life for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-202: **State v. Davlin.** Affirmed. See Rule 7A(1).

No. 88-206: **Travelers Ins. Co. v. Baltensperger.** Affirmed. See Rule 7A(1).

No. 88-209: **State v. Ivey.** Affirmed. See Rule 7A(1).

No. 88-219: **Adams Bank & Trust of Ogallala v. Huffman.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-220: **State v. Pollard.** Affirmed. See Rule 7A(1).

No. 88-224: **Arcadia State Bank v. Franzen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-226: **State v. Eggleston.** Affirmed. See Rule 7A(1).

No. 88-232: **State v. Herchenbach.** Affirmed. See Rule 7A(1).

No. 88-235: **State v. Castro.** Affirmed. See Rule 7A(1).

No. 88-239: **State v. Wilson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-240: **State v. Washington.** Affirmed. See Rule 7A(1).

No. 88-242: **State v. Hottovy.** Affirmed. See Rule 7A(1).

No. 88-243: **State v. Douthit.** Affirmed. See Rule 7A(1).

No. 88-247: **State v. Oknewski.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-248: **State v. King.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-249: **State v. Booth.** Affirmed. See Rule 7A(1).

No. 88-252: **Deutz-Allis Credit Corp. v. C.F. Mason & Son.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-259: **State v. McDermott.** Affirmed. See Rule 7A(1).

No. 88-262: **Mettenbrink v. Schroeder.** Motion of appellees Mary Thompson, Wilma Belangie, Joseph Emery, and Kelly Emery for summary dismissal sustained. See Rule 7B(1). Motion of appellee FirsTier Bank Nebraska for summary affirmance sustained. See Rule 7B(2).

No. 88-264: **State v. Fletcher.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-273: **Thomas v. Doug Hiner Properties.** Stipulation allowed; appeal dismissed.

No. 88-275: **State v. King.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-279: **State v. Lieberman.** Affirmed. See Rule 7A(1).

No. 88-281: **Eary v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-284: **State v. Lampkins.** Affirmed. See Rule 7A(1).

No. 88-288: **Federal Land Bank of Omaha v. Franzen.** Motion of appellee Federal Land Bank for summary dismissal overruled. Affirmed. See Rule 7A(1).

No. 88-289: **State v. Karasek.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-290: **State v. Lewis.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-294: **Archer v. Clarke.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-298: **State v. Young.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-311: **State v. Dixon.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 88-316: **State v. Dewispelare.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-326: **State v. Svoboda.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-329: **State v. Benson.** Motion of appellant for appointment of counsel overruled. Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-331: **State v. Behring.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-334: **Hiway 20 Terminal, Inc. v. Abild, Inc.** By order of the court, appeal dismissed.

No. 88-336: **State v. Waters.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 88-346: **State v. Evans.** Affirmed. See Rule 7A(1).

No. 88-347: **State v. Allen.** Affirmed. See Rule 7A(1).

No. 88-348: **State v. Allen.** Affirmed. See Rule 7A(1).

No. 88-354: **State v. Franklin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-356: **State v. Merica.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-365: **State v. Pasco.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-373: **State v. Woodruff.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-377: **State v. Keever.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-378: **State v. Keever.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-389: **Groves v. K & K Distributing Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-402: **State v. Derby.** By order of the court, appeal dismissed as moot.

No. 88-403: **State v. McGuire.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-404: **State v. Diaz.** Affirmed. See Rule 7A(1).

No. 88-409: **Travelers Ins. Co. v. Nelson.** Affirmed. See Rule 7A(1).

No. 88-411: **Thompson v. Beef Nebraska, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-413: **Zwygart v. Parks.** Stipulation allowed; appeal

dismissed; each party to pay own costs.

No. 88-418: **State v. Dove.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-429: **American Honda Motor Co. v. State.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-440: **Penne v. Penne.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-449: **State v. Shabazz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-453: **Krueger v. Krueger.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-459: **State v. Hickman.** Affirmed. See Rule 7A(1).

No. 88-462: **Weber v. Johnson.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-464: **Federal Land Bank v. Erickson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-467: **In re Estate of Abbott.** Stipulation allowed; appeal dismissed.

No. 88-470: **State v. McDonald.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see rule 3B.

No. 88-477: **Hernandez v. Stewart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-479: **Nuttelman v. Julch.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-485: **State v. Jusino.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-486: **State v. Logan.** Appeal dismissed. See Rule 7A(2).

No. 88-488: **State v. Maxwell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-490: **Neumann v. Neumann.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-494: **Weber v. Weber.** Stipulation allowed; appeal dismissed.

No. 88-500: **Lancey v. Lancey.** Stipulation to remand case for further proceedings sustained.

No. 88-502: **Country v. Department of Corrections.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-507: **Prudential Insurance Co. v. Klute Land & Cattle Co.** Appeal dismissed. See Rule 7A(2).

No. 88-521: **State v. Edwards.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-522: **State v. Green.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-526: **State v. Franklin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-529: **State v. Pearson.** Stipulation allowed; appeal dismissed.

No. 88-533: **Commercial Federal Savings and Loan Assn. v. Hitt.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

Nos. 88-535, 88-536: **Stanko v. Stanko.** Appeal dismissed. See Rule 7A(2).

No. 88-542: **Calloway v. Nelson & Harding.** Appeal dismissed as out of time. See Rule 7A(2).

No. 88-543: **Loza v. Nelson & Harding.** Appeal dismissed as out of time. See Rule 7A(2).

No. 88-548: **State v. Scott.** Affirmed. See Rule 7A(1).

No. 88-565: **Adams v. John.** Affirmed. See Rule 7A(1).

No. 88-571: **State ex rel. Arrendondo v. Damian.** Appeal dismissed; see Rule 7A(2).

No. 88-573: **Lacy v. Lacy.** Stipulation allowed; appeal dismissed.

No. 88-588: **Benzel v. Gunter.** Appeal dismissed. See Rule 7A(2).

No. 88-599: **Kitt v. Dahm.** Affirmed. See Rule 7A(1).

No. 88-626: **F&S Sausage Co. v. City of Cozad.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-669: **Cronin v. Cronin.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

KATHLEEN WATSON, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, GERALD WATSON, APPELLANT, V. LEE F. MCNAMARA, M.D., APPELLEE.

424 N.W.2d 611

Filed June 24, 1988. No. 86-151.

Medical Malpractice: Jury Instructions. In a medical malpractice action where the plaintiff's evidence establishes a prima facie case of negligence against a physician for failure to use methods of diagnosis or treatment in accordance with the standard of care, it is prejudicial error to give the jury an instruction from which the jury may infer that such evidence, standing alone, does not establish that the physician made or gave improper diagnosis or treatment.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for a new trial.

Joseph B. Muller and Ronald J. Palagi for appellant.

William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

PER CURIAM.

This is a medical malpractice action against the defendant, Lee F. McNamara, M.D. The plaintiff, Kathleen Watson, was born October 4, 1979, by cesarean section, from a breech position. In her fourth amended petition the plaintiff claimed severe and permanent injuries and asked for damages including assigned medical and hospital costs. There was conflicting expert testimony which estimated gestational age from a low of 33 weeks to a high of 35 weeks, a term pregnancy being approximately 40 weeks. At trial, the plaintiff alleged, inter

alia, that McNamara was negligent in failing to determine the fetal age, resulting in the premature birth of the plaintiff. The jury found for the defendant, and the plaintiff appeals.

In this appeal the plaintiff argues the following: (1) Certain jury instructions were erroneous; (2) discussion of the liability insurance "crisis" by the jury was prejudicial; (3) defendant's attorneys abused the discovery process; and (4) the verdict is not supported by the evidence, and plaintiff was entitled to a directed verdict or judgment notwithstanding the verdict.

Plaintiff asserts instruction No. 10 was prejudicially erroneous. We agree, and reverse. Instruction No. 10 states:

> An Obstetrician-Gynecologist is not bound to use any particular method of diagnosis or treatment, and if, among Obstetrician-Gynecologists of ordinary skill and learning, more than one method of diagnosis or treatment is recognized as proper, it is not negligence for an Obstetrician-Gynecologist to adopt any of such methods. The fact that some other method of diagnosis or treatment existed, or the fact that some other specialist testified in this case that he might or would have used or advised another of a different method, does not, standing alone, establish that the defendant made or gave improper diagnosis or treatment; nor would it be an act of negligence or impropriety for the defendant not to have adopted another method.

The plaintiff's evidence of negligence was concentrated on the testimony of physicians that the defendant failed to use various methods of determining fetal age that were available to him and that such failure, given the exigencies of his patient's situation, constituted a breach of the standard of care. These physicians further testified that the defendant performed a nonemergency cesarean section in contravention of the standard of care. If believed, this testimony certainly established a prima facie case of negligence for the plaintiff.

Certainly a physician is not liable for malpractice in choosing one of two or more recognized methods of diagnosis or treatment, so long as the method chosen conforms with the standard of care. We believe, however, that instruction No. 10 permitted the jury to infer that the plaintiff's experts'

testimony, even if believed, did not establish negligence and was not enough to establish the plaintiff's case. The giving of instruction No. 10 was prejudicial to the plaintiff and grounds for reversal.

The use of this type of instruction on these or similar facts was directly considered and rejected in *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978). We see no reason to deviate from that decision.

Plaintiff also contends instructions Nos. 8, 9, 10, 11, 12, and 13, regarding the standard of care applicable to physicians, unduly emphasized the limitations on the physician's liability and misled the jury. After the standard of care was given in instruction No. 7, it was repeated in one form or another in the instructions that followed, no less than five times. These instructions also recited an exhaustive litany of physician immunities. We have said that it is not reversible error for the trial court to repeat a proposition of law in the instructions in proper connection with facts or other principles involved or if it does not appear that the effect was to confuse or mislead the jury. *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976). It is also true that each of these instructions, save No. 10, standing alone, correctly stated the law. *Id.* These maxims notwithstanding, we believe that the applicable standard is that where instructions, considered in toto, so repetitiously cover a point of law or its application as to grossly overstate its effect on one side to the explicit detriment of the other side, it is error. *Samuelson v. Freeman*, 75 Wash. 2d 894, 454 P.2d 406 (1969). In the instant case, it may well be doubted whether it was necessary to give such extensive instruction in order to properly apprise the jury of the standard of care applicable to physicians. Because it is unlikely that such instructions will be used again on retrial, we decline to consider whether they so overemphasized the defendant's case as to deny the plaintiff a fair trial.

Similarly, it is unnecessary to consider the plaintiff's second and third assignments, as any such conduct is unlikely to be repeated. As to the last assignment of error, the record discloses a sharp dispute of fact, and, therefore, refusal to grant a directed verdict of liability was proper. The judgment is

reversed and the cause remanded for new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., not participating.

WILLIAM R. SCHATZ ET AL., APPELLANTS, V. LEONARD A. VIDLAK ET AL., APPELLEES.

424 N.W.2d 613

Filed June 24, 1988. No. 86-516.

1. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.
2. **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.
3. **Summary Judgment.** Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
4. **Summary Judgment: Intent.** Cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment.
5. **Fraud: Liability.** A party may be liable when the representation was false when made, and the party knew that it was false or made it recklessly and without knowledge of its truth or falsity.

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

Vance E. Leininger, of Leininger, Grant, Rogers & Maul, for appellants.

Richard T. Seckman, of Karel & Seckman, for appellees Emil E. Herms and Randy Novak.

No appearance for appellees Vidlak.

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

BURKHARD, D.J.

This action was commenced by William R. Schatz and Delores A. Schatz, husband and wife, and Roland E. Schatz for damages arising out of their purchase of a retail liquor business, known as "Southern XV Liquors," located in David City, Nebraska. Defendants Leonard A. Vidlak and Lorraine E. Vidlak were the owners of the liquor business and the real estate on which it was located. Defendant Randy Novak was a real estate broker who had the listing for the liquor business and the real estate, and defendant Emil E. Herms was a salesman affiliated with Novak.

The plaintiffs in their petition allege that on June 2, 1981, a purchase agreement was entered into between the plaintiffs and the Vidlaks wherein the plaintiffs agreed to purchase the land and retail liquor business from the Vidlaks for $135,000, excluding the inventory, which plaintiffs would pay cash for at the time of closing.

The plaintiffs further allege that during the course of the negotiations in May and June of 1981, the defendants, for the purpose of inducing the plaintiffs to purchase said property, repeatedly made numerous representations regarding the condition of the building which housed the business and the financial condition of the business. Plaintiffs in their brief refer to only four of the alleged misrepresentations, to wit: (1) that the plumbing facilities in the building were in good condition; (2) that the septic tank and septic system servicing the building were in good condition; (3) that defendants Vidlak had realized a "net taken in 1980" from the operation of the business in the sum of $42,900; and (4) that a purchaser on terms being offered would be able to pay off the debt being carried back in "three to five" years from the operation of the business and associated property. Plaintiffs allege that the representations were false and were so known by the defendants; or were made by them, or one or more of them, without knowing either the truth or falsity thereof while falsely assuming knowledge thereof. Plaintiffs further allege that they relied on the representations when they entered into the purchase agreement to buy the real estate and the liquor business.

Plaintiffs also claim that after operating the business for

about 1 year, it became apparent that the net profit realized by the Vidlaks had been grossly overstated and misrepresented to the plaintiffs and that it would be impossible for any operator to generate sufficient net profits to yield a reasonable living income and to make the payments required by the purchase agreement. In addition, the plaintiffs claim that in May of 1984, they learned for the first time that the septic system serving the building was virtually inoperable because the Vidlaks, in fixing the system, had broken open a drain field junction to permit sewage from the facilities in the building to drain into an open pit, none of which was disclosed to the plaintiffs or was readily discernible by inspection of the premises. Plaintiffs claim the entire system had to be replaced.

Defendants Vidlak admit in their answer that they were the owners and operators of the Southern XV Liquors business and that they entered into a listing agreement with defendant Novak for the sale of the business. Except for admitting the identity of the parties, the Vidlaks generally deny the balance of the plaintiffs' petition.

Defendants Herms and Novak admit in their answer Herms' affiliation with Novak; those facts that relate "to the business and real estate listing with defendants"; and that the purchase agreement was entered into between William and Delores Schatz, purchasers, and the Vidlaks as sellers. By way of affirmative defense, Herms and Novak allege that Novak is a real estate broker licensed to do business in the State of Nebraska, and Herms is a licensed real estate salesman for the State of Nebraska; that on or about March 11, 1981, they entered into a real estate listing contract with defendant Leonard Vidlak; that during the entire period leading up to the execution of the purchase agreement herein, they acted as agents for defendants Vidlak, and this agency relationship was revealed to the plaintiffs; and that each and every representation made by them was within the scope of the agency relationship and was within the authorization of their principal, defendants Vidlak.

Defendants Herms and Novak filed a motion for summary judgment on August 22, 1985. Hearing was held thereon, and the court sustained the motion on February 18, 1986.

Plaintiffs' motion to set aside the court order of February 18 and to grant the plaintiffs a rehearing and a new trial was filed on February 27, 1986, and was overruled by the court on June 3. The plaintiffs perfected their appeal to this court from the order of June 3, 1986. In their assignments of error, plaintiffs allege that the trial court erred in determining that there were no issues of material fact between the plaintiffs and defendants Herms and Novak; in determining that defendants Herms and Novak were entitled to judgment as a matter of law; and in sustaining the motion for summary judgment of defendants Herms and Novak.

Herms, in his deposition, testified that he obtained certain financial figures on the Southern XV business from Jack Eberly, the accountant for the Vidlaks. Herms prepared a handwritten document (herein called document 1) based on his conversation with Eberly, and the document showed, among other figures for the business, "Gross taken in 1980 = $195,000, net taken in 1980 = $42,900." Herms claims he showed the document to Leonard Vidlak, who stated he never saw the document until after this lawsuit was filed. In fact, Vidlak stated that he never saw any document given to the plaintiffs by Herms before Herms gave it to them. Vidlak did, however, authorize Eberly to give financial information to Herms regarding 1980 business and told Herms that whatever information he (Herms) got from Eberly, Herms could pass on to the prospective purchaser. Herms stated that he sent the document to William Schatz.

Herms also prepared another document (herein called document 2) based on information he stated he obtained from Leonard Vidlak. He wrote down the information and then had it typed up. The document was dated May 12, 1981, and was addressed, "Dear Bill." It includes an itemization of various items involved in the sale, as well as certain other financial figures, including gross 1980 sales of $195,000 and gross profits of $42,900. Herms believes he gave a copy of document 2 to William Schatz on May 12, 1981. Document 1 had been delivered to William Schatz before May 12, 1981.

Delores and William Schatz, in their separate answers to interrogatories propounded by defendants Vidlak, state that

Herms, during the spring of 1981, in their presence, made the representation that defendants Vidlak realized a "net taken in 1980" of $42,900 from the operation of the business. Roland Schatz, in his answers to interrogatories propounded by the Vidlaks, stated that the same representation was made to him by Herms on June 2, 1981, via a long-distance telephone call. The plaintiffs, in response to interrogatories of defendants Novak and Herms, claim that Herms stated orally and represented in written form that the "net taken in 1980" from the business was $42,900.

It seems clear that prior to the signing of the purchase agreement on June 2, 1981, Herms and, apparently, the plaintiffs had in their possession documents 1 and 2, one of which was obviously in error as to whether or not the $42,900 figure was gross profit or net profit. It is also obvious that there is a difference in the terms. "Gross profits" are the excess of price received over the price paid for goods before deductions are made for the cost of operation. *Hill v. City of Richmond*, 181 Va. 744, 26 S.E.2d 48 (1943). In a sense, they are really not profits at all, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. "Net profits" are gains made from sales after deducting the value of labor, materials, rents, and all expenses, together with the interest of the capital employed. *Coates v. Lake View Oil & Refining Co.*, 20 Cal. App. 2d 113, 66 P.2d 463 (1937).

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1985). In reviewing a summary judgment, this court must take the view of the evidence most favorable to the parties against whom the motion is directed and give those parties the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986).

From the plaintiffs' point of view, Herms, even up to June 2, 1981, the date the purchase agreement was signed, represented to the plaintiffs that the net profit was $42,900, even though one of the documents he prepared showed such figure to be the gross profit. It is obvious that if the gross profit were $42,900, the net profit would have to be considerably less. The motive and intent of Herms in giving the plaintiffs the net profit figure are questions of fact that must be determined by a court or a jury. Cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment. *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982).

Put another way, there is a genuine issue of material fact as to whether or not the statement by Herms that the net profit was $42,900 was in fact a misrepresentation and, if so, whether it was made by Herms with fraudulent intent. Motive, intent, and credibility are issues of fact to be resolved by a judge or jury. A party may be liable when the representation was false when made, and the party knew that it was false or made it recklessly and without knowledge of its truth or falsity. *Gitschel v. Sauer*, 212 Neb. 454, 323 N.W.2d 93 (1982).

Since there is a genuine issue of fact as to the net profit statement, it is not necessary to consider the other alleged misrepresentations referred to in plaintiffs' brief. The judgment of the district court in sustaining the motion for summary judgment of defendants Herms and Novak is reversed, and this matter is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DWIGHT W. STONE, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

424 N.W.2d 617

Filed June 24, 1988. Nos. 86-524, 87-748.

Administrative Law: Appeal and Error. In a proceeding in error appealing a decision of the Omaha Personnel Board, the task of the Nebraska Supreme Court is, as is that of the district court, to determine whether the board acted within its jurisdiction and whether there was sufficient evidence as a matter of law to support its decision. The evidence is sufficient as a matter of law if the board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Thomas J. Young, of Young, LaPuzza & Stoehr, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Michael A. Goldberg for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

FAHRNBRUCH, J.

Dwight W. Stone, a plumbing inspector for 8 1/2 years with the City of Omaha, appeals his two suspensions and later discharge for cause from that employment.

The Douglas County District Court dismissed Stone's petitions in error after finding that the Omaha Personnel Board's decisions upholding the suspensions and discharge were based upon competent evidence and were not contrary to law. We affirm the district court in each case.

The first suspension and later suspension and discharge cases were consolidated for argument and decision in this court. In the first case, Stone appeals a 5-day suspension for gross insubordination. In the second, he appeals a 15-day suspension and termination from employment for gross insubordination and use of indecent, vulgar language, which was found to be disruptive to the business operations of his employer, the planning department of the City of Omaha. Both cases revolve around Stone's refusal to install and use a two-way radio in his

private vehicle.

Stone assigns the same error in each case: (1) The trial court erred in determining that there was competent evidence in the record to support a finding that Stone was guilty of gross insubordination; and (2) the trial court erred in determining that a "Memorandum of Understanding" between the city and union was a valid agreement.

> Because this is a proceeding in error, the task of this court is, as was that of the district court, to determine whether the [Omaha Personnel Board] "acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision." . . . [T]he evidence is sufficient as a matter of law if the board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

Trolson v. Board of Ed. of Sch. Dist. of Blair, post p. 37, 424 N.W.2d 881 (1988); *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988).

In February of 1984, the City of Omaha purchased two-way radios for use by plumbing inspectors in their private vehicles while they were on the job. Appellant's union filed a petition with the Nebraska Commission of Industrial Relations seeking a ruling on the financial liability inherent in the installation of the radios. The CIR ordered the parties to bargain with respect to that issue. Negotiations between the city and the union resulted in a "Memorandum of Understanding." Under this agreement, the city assumed full liability in the event an inspector's radio was damaged, lost, or stolen. Further, the city agreed to pay up to $100 toward the repair of damage to an inspector's vehicle caused by the theft or attempted theft of the radio equipment. This memorandum was not submitted to the Omaha City Council, which Stone claims was required for the agreement to become binding. The city adduced evidence that city council action was not required. There is also a conflict in the evidence as to whether the agreement was submitted to union membership for approval. Ed Cox, president of Stone's union, testified that the agreement was presented to the union membership at its January 1985 meeting. All of the members voted in favor of the agreement except for Stone, according to

Cox. When asked if the union's agreement with the city had been submitted to the union members, Stone stated, "I never seen one."

In October of 1984, Stone was issued a 5-day suspension for refusal to allow the installation of a two-way radio in his vehicle. This suspension was withdrawn by the city after Stone agreed to follow all departmental policies and procedures in the future, including use of the grievance procedure set forth in his union's contract with the city. This agreement was reduced to writing in letter form, dated November 28, 1984. It was signed by Stone and transmitted to Omaha's planning director.

Thereafter, Stone used the radio only sporadically. He also kept the radio at night rather than checking it out in the morning and returning it after work to a designated area, according to established written procedure. Stone admittedly was aware of this procedural requirement. On February 25, 1985, Stone was notified, in writing, that he would be suspended for 5 days. The reasons given for his suspension were (1) failure to use the radio; (2) refusal to properly install the radio in his vehicle; (3) failure to abide by the check-in and check-out procedure; and (4) failure to abide by his commitment of November 28, 1984.

Stone's appeal of the suspension to the City of Omaha Personnel Board was denied, and his petition in error to the district court was dismissed after hearing. He appealed to this court, but the story does not end there.

On the advice of his attorney, Stone installed the radio in his personal vehicle himself and began using it consistently. In January of 1986, Stone's vehicle became unusable, requiring the purchase of a new one. Stone rented vehicles until he purchased a new pickup on March 27, 1986, and he was not required to use a radio in the rented vehicles. In his mileage report dated April 28, 1986, Stone indicated that he had used a rented car, even though he had been driving the new pickup since March 27.

Stone's supervisor, Phil Lynch, testified that he told Stone 10 or 12 times to have the two-way radio installed in his pickup. Finally, on April 18, 1986, Stone was advised by Lynch, in writing, to have a two-way radio installed in the new pickup by

April 24 or give a reason why it could not be installed. On April 28, 1986, when Lynch returned from vacation, he confronted Stone with his failure to install the radio. A heated discussion ensued, culminating with Stone's telling Lynch: "You can stick that radio in your ass or anybody else's ass. . . . I'm not putting that son of a bitch in my car. . . . If you don't look out, I'm going to punch you in the nose." Stone was suspended and then discharged as a result of this incident.

Stone claimed he wanted to wait to have the radio installed until the pickup was licensed. Neb. Rev. Stat. § 60-320(3)(b) (Reissue 1984) required Stone to have the pickup licensed by April 11, 1986. Stone claims that he was not treated in the same manner as other inspectors who had purchased new vehicles. He also claims that the "Memorandum of Understanding" was no longer in effect at the time of his discharge. Stone's union president testified the agreement was still in effect. Stone's appeal to the Omaha Personnel Board was again denied, and his petition in error to the district court was also dismissed, after hearing.

Stone first assigns as error the district court's finding that there was sufficient evidence of his insubordination. The record simply does not support Stone's contention. Stone was ordered to have the radio installed in his private vehicle, to use the radio during his work hours, and to comply with check-in and check-out procedures. Stone's refusal to follow these orders is sufficient evidence of gross insubordination to support the 5-day suspension. As to his 15-day suspension and termination, Stone argues that he never received a direct order to install and use the radio in his new pickup. This contention is without substance.

Lynch testified that he and Stone discussed installation of the radio in Stone's pickup 10 or 12 times. Stone admits Lynch had asked about the radio many times. Stone knew the radio needed to be installed; he simply failed to have it done.

Assuming, arguendo, that none of Lynch's oral statements were "orders," Stone was given a written directive on April 18, 1986, to have the radio installed in his vehicle within 6 days or give a reason why it could not be installed. Clearly, this memorandum was a direct order. Lynch confronted Stone with

his failure to comply with that order. Rather than explain himself, Stone became vulgar and abusive and reiterated his refusal to install the radio. There is sufficient evidence in the record to support Stone's 15-day suspension and termination for gross insubordination and for the use of indecent, vulgar language.

Stone's next assignment of error is the district court's finding in each case that the memorandum of understanding between the City of Omaha and the union was a valid agreement. In the first case, the district court explicitly found the agreement valid. Its validity is implicit in the court's decision in the second case.

In its order dated July 19, 1984, the CIR directed that installation of the radios in inspectors' vehicles cease until an agreement between the union and the City of Omaha was reached on the issue of liability. The union and the City of Omaha did reach an agreement. Stone contends that the memorandum of understanding, which is the written embodiment of that agreement, is invalid because it was not submitted to the Omaha City Council for approval.

Stone claims that the Omaha home rule charter requires direct approval by the city council of all agreements between the city and a union. Only a portion of Omaha's home rule charter is in evidence. That portion makes no reference to the type of labor dispute involved here. Kent Whinnery, counsel for the City of Omaha, testified that under a city ordinance it was within his authority to approve this agreement, which he did, because it was a settlement of litigation filed with the CIR which did not entail expending more than $2,500. Nothing in the record disputes that testimony. As previously stated, except for Stone, union members present at a meeting approved the agreement. Therefore, the district court was correct in finding that the memorandum of understanding between the city and the union was valid.

The decision of the district court dismissing Stone's petition in error in each of these cases was correct and is affirmed.

AFFIRMED.

WELLS FARGO AG CREDIT CORP., A CALIFORNIA CORPORATION, APPELLEE, V. NEAL BATTERMAN AND CLARICE BATTERMAN, APPELLANTS.

424 N.W.2d 870

Filed June 24, 1988. No. 86-528.

1. **Appeal and Error.** The Supreme Court will not consider an assignment of error unless the claimed error is assigned and discussed in the appellant's brief.
2. **Corporations: Actions: Parties.** A shareholder may not bring an action in his own name to recover for wrongs done to the corporation. Such cause of action belongs to the corporation and not the shareholder. A shareholder's right to sue on behalf of a corporation is derivative in nature and can be brought only in a representative capacity for the corporation.
3. _____: _____: _____. Generally, an action to enforce a corporation's right or obtain redress for injuries to the corporation cannot be maintained in a shareholder's name. Injury in such instances may be the basis for a corporation's cause of action and does not give a shareholder the individual right or cause of action for injury to the corporation.
4. _____: _____: _____. Although all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.
5. **Corporations: Actions: Parties: Guaranty.** By itself, a shareholder's status as a guarantor for the debt of the corporation in which the shareholder owns stock does not entitle the shareholder to maintain an action against a third party for injury to the corporation.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Thomas E. Johnson and Thomas O. Ashby, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

SHANAHAN, J.

Neal and Clarice Batterman appeal from the summary judgment granted by the district court for Morrill County to Wells Fargo Ag Credit Corp.

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).

Stodola v. Grunwald Mechanical Contractors, 228 Neb. 301, 303, 422 N.W.2d 341, 343 (1988). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 1985).

Neal and Clarice have farmed in Morrill County for over 40 years on their "home place," a parcel consisting of 3,680 acres. In 1979, Neal and Clarice incorporated their farming operations as Batterman & Sons, Ltd., for which Neal and Clarice were the only officers and shareholders. Neal and Clarice then transferred 2,000 acres of the "home place" to Batterman & Sons, Ltd., and, as individuals, retained the remaining 1,680 acres. Also in 1979, Robert and Garold Batterman, partners in a farming operation, entered an installment land contract to purchase the Cedar Creek Ranch. To make the downpayment on the Cedar Creek Ranch and for initial operating funds, Robert and Garold borrowed from the Northwestern State Bank and gave the bank their promissory notes, which were cosigned by Neal Batterman.

Robert and Garold, as a partnership, and Batterman & Sons, Ltd., conducted separate farming operations. When income from the Cedar Creek Ranch was insufficient to pay an installment on the land contract and the partnership notes to Northwestern State Bank, Robert and Garold obtained additional loans from that bank, but only after Neal Batterman gave his guaranty in connection with the additional financing from Northwestern State Bank. When the financial condition of the Cedar Creek operations deteriorated and the Batterman

brothers did not pay the notes to the bank, Northwestern State Bank declared a default on the loans to Robert and Garold, but later extended the time for payment when Batterman & Sons, Ltd., gave the bank a mortgage to secure payment of the partnership's indebtedness. Robert and Garold tried unsuccessfully to find a purchaser for the Cedar Creek Ranch.

In the meantime, the Bridgeport State Bank, which had been providing some financing for Neal and Clarice, withheld any further financing to the couple. Another installment on the contract for purchase of the Cedar Creek Ranch came due. Northwestern State Bank commenced foreclosure on the corporate mortgage of the "home place." The combined corporate and partnership debt regarding Battermans was $2.6 million.

After contact by Robert Batterman early in 1982, Wells Fargo agreed to provide funds for the partnership and corporate operations of the Battermans by a complex financing scheme which included various forms of loans, the last of which was due in the fall of 1983. The loan and credit documents were signed by Neal Batterman, as president of Batterman & Sons, Ltd., and by Robert and Garold Batterman. The loan documents designated Batterman & Sons, Ltd., Robert Batterman, and Garold Batterman as the "borrowers," and Wells Fargo as the lender. Neal and Clarice signed a guaranty, personally guaranteeing payment of the borrowers' debt to Wells Fargo. With the exception of their guaranty, Neal and Clarice did not sign any of the documents for the financing, although Neal and Clarice gave Wells Fargo a mortgage on their land contained in the "home place," apparently in conjunction with their guaranty.

By the end of 1982, it became obvious that the loans from Wells Fargo would not be repaid on schedule. In April 1983, a new credit agreement was reached between Wells Fargo, as lender, and Batterman & Sons, Ltd., Robert Batterman, and Garold Batterman, as borrowers. This agreement contained four separate loans which were due on December 31, 1983. The agreement also required that the borrowers list the "home place" and Cedar Creek Ranch for sale.

When Wells Fargo demanded payment early in 1984, the

borrowers were unable to pay their notes. A foreclosure suit had been filed concerning the land contract for the Cedar Creek Ranch. In September 1984, Batterman & Sons., Ltd., petitioned for relief under chapter 11 of the U.S. Bankruptcy Code. Robert Batterman filed for bankruptcy in February 1986.

Wells Fargo commenced this action against Neal and Clarice Batterman, based on their individual and personal guaranties concerning the unrepaid financing from Wells Fargo. In response to Wells Fargo's petition, Neal and Clarice Batterman counterclaimed, alleging that Wells Fargo had obligated itself to provide financing for 5 years but had breached its agreement by failing to provide financing for the agreed 5-year period, and requested damages for themselves. Wells Fargo moved for summary judgment on the Battermans' counterclaim and dismissed its petition after the district court granted summary judgment to Wells Fargo.

Neal and Clarice Batterman contend that the district court erred in "failing to specify or articulate the reasons" for summary judgment and in granting summary judgment.

Neb. Rev. Stat. § 25-1127 (Reissue 1985) provides:

> Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

Regarding the absence of specific findings by the district court, Battermans' claim of error is without merit. First, the record does not show that Battermans requested such specificity from the district court. Second, in their brief, Battermans do not discuss or describe the prejudice which may have resulted from the absence of any specific finding by the district court. The Supreme Court will not consider an assignment of error unless the claimed error is assigned and discussed in the appellant's brief. *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987); *Fee v. Fee*, 223 Neb. 128, 388

N.W.2d 122 (1986); Neb. Rev. Stat. § 25-1919 (Reissue 1985); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

Next, Neal and Clarice Batterman claim that the district court incorrectly granted summary judgment to Wells Fargo.

On appeal, Neal and Clarice Batterman suggest that they may recover damages as third-party beneficiaries to the agreements between Wells Fargo and Batterman & Sons, Ltd. A third-party beneficiary claim was not raised by the pleadings. "The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried." *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985). Hence, we do not consider the merit of a third-party beneficiary claim by Neal and Clarice Batterman.

Among its contentions, Wells Fargo argues that Neal and Clarice Batterman lack standing to maintain the cause of action (breach of the financing agreement) asserted in their counterclaim.

Although Neal and Clarice Batterman counterclaimed for damages on account of an alleged breach by Wells Fargo in its obligation to keep the financing or credit arrangements effective for a period of 5 years, the financial arrangements involved in this case related to Wells Fargo and its borrowers, Batterman & Sons, Ltd., a corporation, and the Batterman brothers, Robert and Garold, as individuals or partners. Neal and Clarice have no legal interest in the partnership comprised of their sons. Concerning the financial or credit arrangements between Wells Fargo and Batterman & Sons, Ltd., the only interest of Neal and Clarice is that of shareholders in the corporate borrower, Batterman & Sons, Ltd.

> A stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the stockholders. The right of a stockholder to sue is derivative in its nature and can be brought only in a representative capacity for the corporation. . . .
>
> . . . .
>
> The general rule is that actions to enforce corporate

> rights or to redress injuries to the corporation cannot be maintained by a stockholder in his own name. The injury in such instances is to the corporation and it does not give an individual right of action to a stockholder.

Ruplinger v. Ruplinger, 154 Neb. 394, 396-97, 48 N.W.2d 73, 75 (1951). See, also, *Henderson v. Joplin*, 191 Neb. 827, 217 N.W.2d 920 (1974); *E.K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954); 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 36 (rev. perm. ed. 1983).

Although all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation. 1 W. Fletcher, *supra*; 12B W. Fletcher, Cyclopedia of the Law of Private Corporations § 5910 (rev. perm. ed. 1984). See, also, *Ruplinger v. Ruplinger, supra* (three stockholders); *Henderson v. Joplin, supra* (two stockholders); *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983). There are exceptions to the rule precluding actions by shareholders, as individuals, where the cause of action belongs to the corporation, such as a situation where a shareholder's loss is separate and distinct from that of other shareholders of the corporation or where there may be a special duty owed by a wrongdoer to a shareholder. See, *E.K. Buck Retail Stores v. Harkert, supra*; 1 W. Fletcher, *supra*. However, Battermans' counterclaim contains no allegations which exempt their claim from operation of the general rule that a shareholder may not bring an action individually to obtain relief or redress for injury to the corporation in which the shareholder owns stock. See *Ruplinger v. Ruplinger, supra*. In essence, Neal and Clarice sought to maintain an action for Wells Fargo's breach of contract with Batterman & Sons, Ltd. By itself, a shareholder's status as a guarantor for the debt of the corporation in which the shareholder owns stock does not entitle the shareholder to maintain an action against a third party for injury to the corporation. See, *Continental Ill. Nat. Bank & Trust Co. v. Stanley*, 585 F. Supp. 1385 (N.D. Ill. 1984); *Continental Group, Inc. v. Justice*, 536 F. Supp. 658 (D. Del. 1982); *Arctic Contractors, Inc. v. State*, 573 P.2d 1385 (Alaska 1978); *Siderius, Inc. v. Sriberg*, 16 Mass. App. 962, 452 N.E.2d

259 (1983).

Consequently, Neal and Clarice Batterman, as individuals and shareholders of Batterman & Sons, Ltd., lacked a legal interest standing to assert a claim against Wells Fargo for an alleged breach of the financing agreement between Wells Fargo and Batterman & Sons, Ltd. As a matter of law, Neal and Clarice Batterman were not entitled to maintain an action against Wells Fargo for its alleged breach of the financing agreement with Batterman & Sons, Ltd. Therefore, the district court correctly granted summary judgment to Wells Fargo on Battermans' counterclaim.

AFFIRMED.

KEARNEY CENTRE INVESTMENTS, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLEE, V. H. DALE THOMAS AND H. PETER WATSON, APPELLANTS.

424 N.W.2d 620

Filed June 24, 1988. No. 86-594.

1. **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.
2. **Contracts.** In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.
3. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

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

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

NORTON, D.J.

This appeal is the result of a decision rendered by the district court for Hall County in a case involving an action at law to collect damages for the breach of a lease. It was alleged that the defendants were guarantors of the lease. Trial was to the court. Following the conclusion of the trial, the district court found that the plaintiff should be awarded damages against the defendants in the sum of $38,750.41, together with prejudgment interest, and interest thereafter at the highest legal rate. We affirm.

In early 1980, Heritage Investments II was the owner of property being developed as a shopping center at 3708-12 North 2d Avenue in Kearney, Nebraska. In February of that year, Randy VanWinkle, on the behalf of Heritage, entered into negotiations with the defendant H. Dale Thomas to lease bays 5, 6, and 7 of that development property from Heritage. At that time, Thomas, his wife, and H. Peter Watson were the sole shareholders of Lin-Dale Corporation, a fabrics business, which operated retail businesses under the name of World of Fabric.

Following the negotiations between VanWinkle and Thomas, lease forms were prepared. While there is some confusion and a dispute in the evidence, it would appear that at least two copies of a proposed lease were forwarded to the defendants for their consideration. Eventually, at least one completed form was returned to VanWinkle. The pleadings disclose that three petitions were filed. The original petition has attached thereto a copy of a signed lease between Heritage and World of Fabric, dated March 27, 1980. This lease is not fully notarized. The tenant's signature appears as "World of Fabric by H. Peter Watson." The evidence discloses Watson was the president of Lin-Dale Corporation at that time. Attached to this lease is a guaranty dated March 27, 1980, and signed by H. Peter Watson and H. Dale Thomas, the defendants-appellants.

This guaranty has no name inserted in the blank provided for the name of the lessee. It does, however, identify the property in question, the lease term, and the amount of the rentals. That guaranty also contains the following specific language:

> The undersigned do hereby expressly guarantee to the Lessor, its successors and assigns, the prompt payment by the Lessee of the rent and the faithful performance by the Lessee of each and all of the terms, covenants and conditions of said lease required to be performed by Lessee.
>
> . . . .
>
> The obligations of the undersigned hereunder shall be joint and several.

Prior to trial an amended petition was filed. Attached to that petition was a copy of the same lease as it appeared as an attachment to the original petition, except that in this instance the lease was signed by H. Peter Watson as president of Lin-Dale Corporation and his signature was notarized under date of March 21, 1980. The date of the lease is shown as March 27, 1980. This lease has attached to it a signed guaranty form identical in all respects to the one attached to the original petition, with the exception that this guaranty form is dated March 21, 1980. The originals of this lease and guaranty were offered and received in evidence.

Subsequent to trial a second amended petition was filed. Attached to this petition was a copy of the lease and guaranty as attached to the original petition.

After the execution of the lease forms, Lin-Dale Corporation, doing business as World of Fabric, opened a retail outlet in the premises leased. In August of 1981, through an instrument entitled assignment and assumption agreement, Heritage assigned to Kearney Centre Investments, Ltd., the plaintiff-appellee in this case, all of Heritage's "right, title and interest, as Lessor, under each of those certain leases identified in Schedule 'A' hereto attached . . . pertaining to a portion of certain premises . . . which premises are legally described in Schedule 'B' hereto attached . . . ." Schedule A refers to a lease, among others, with World of Fabric, the term of which coincides with the lease introduced into evidence. The

assignment and assumption agreement was introduced and received into evidence.

In June of 1984 the lessee defaulted in the payment of rent, and this suit followed. During the course of the trial there was a sharp dispute in the evidence surrounding the execution of the lease and guaranty, the effect of the guaranty, and whether the plaintiff was the real party in interest. Following entry of judgment the defendants appealed, assigning four errors, to wit:

(1) The court erred in not finding that the guaranty was void because it was an incomplete document.

(2) The court erred in finding that the defendants-appellants received consideration for the execution of the guaranty.

(3) The court erred in finding that the plaintiff-appellee was the real party in interest.

(4) The court erred in failing to sustain the defendants-appellants' motion to dismiss at the close of plaintiff-appellee's case.

Defendants had filed an answer to the amended petition and an amended answer to the original petition. In their answer the defendants admitted that a lease agreement was entered into between Heritage and Lin-Dale Corporation, doing business as World of Fabric. They alleged in their amended answer that this occurred on March 7, 1980. They denied the execution of the guaranty agreement on March 27, 1980.

During the course of the trial Randy VanWinkle testified that he prepared both the lease and guaranty and that these were forwarded by mail to the defendants in the latter part of February 1980. In response he received back a lease form with some changes noted. Corrections were made and a proposed revised lease was delivered personally to Thomas, who was then in Colorado Springs, Colorado. VanWinkle further testified that the revised lease had attached to it the guaranty form and that he received the lease back from the defendants about the end of March 1980, together with a deposit check dated March 21, 1980. He noted that the guaranty had been signed but that the lease itself had not been executed. On March 28, 1980, he returned the lease to the defendants for their signature. Prior to returning the lease he inserted the date of March 27, 1980,

which he testified was the date of his acceptance. When this lease was returned to him it was signed by Watson as president of Lin-Dale Corporation with the notarial clause completed under date of March 21, 1980. VanWinkle also testified that he would not have leased the premises to Lin-Dale without a written guaranty from Watson and Thomas.

The defendants acknowledged the execution of the lease, but denied that the guaranty was attached at that time. They further alleged that it was received sometime later as a separate instrument with the request that it be signed by them to assist Heritage in securing permanent financing for the development project and that they received no consideration for the execution of that separate instrument. The evidence discloses that at one point prior to trial Watson denied ever having executed the guaranty, alleging that his signature was a forgery. He later recanted during trial and admitted the execution of the guaranty, but continued to deny that it was a portion of the lease that was executed.

During cross-examination of defendant Thomas, the plaintiff introduced in rebuttal the amended answer of the defendants. In that amended answer the defendant Thomas admitted that he executed the guaranty on March 21, 1980. In further rebuttal VanWinkle testified that permanent financing for Heritage had been arranged sometime prior to the lease transaction with the defendants.

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. *Kubista v. Jordan*, 228 Neb. 244, 422 N.W.2d 78 (1988).

In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983).

The defendants' first assignment of error is that the guaranty was void because it was an incomplete document. The evidence is in dispute over the execution of the guaranty. However, there is sufficient evidence for the trial court to have found that this instrument was physically attached to the lease between Heritage and Lin-Dale Corporation at the time that it was executed by the lessee. As such, it became a part of the lease. The fact that the name of the lessee did not appear in the body of the guaranty is of no material consequence. By reading both documents as one instrument, there could be no question that the guaranty was given by Watson and Thomas to guarantee the performance of Lin-Dale Corporation, doing business as World of Fabric. Moreover, there is sufficient evidence for the trial court to have found that the lease and guaranty were executed in the course of the same transaction, and at the same time. The first assignment of error is without merit.

The defendants' second assignment of error is that Watson and Thomas received no (separate) consideration for the execution of the guaranty. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). The consideration received in this instance was the acceptance of Lin-Dale Corporation as a lessee. Without the guaranty, VanWinkle testified that the lease would not have been accepted. Thus, there was a definite benefit to the promisors. The second assignment of error has no merit.

The third assignment of error is apparently based upon the fact that two separate lease forms were identified at trial, and, in view of the conflict over the time of execution of the lease and guaranty, together with the fact that the assignment and assumption agreement does not identify which forms were assigned, an effective transfer of Heritage's rights to the plaintiff could not have occurred. This contention was answered in part by the defendants themselves when they admitted the existence of the lease with Lin-Dale Corporation. From all of the evidence and the findings of the trial court it can be inferred that the trial judge concluded that the guaranty was physically attached to that lease at the time of assignment, and

if the lease was then assigned, so was the guaranty.

The defendants further complain that the assignment is made to "Kearney Centre Investors, Ltd.," and that the plaintiff appears as "Kearney Centre Investments, Ltd." This issue was neither raised by the pleadings nor discussed at time of trial. There can be no error on the part of the trial court if an issue has not been presented and a decision rendered thereon. This complaint has no merit and will not be discussed further.

The plaintiff is the real party in interest, and defendants' third assignment of error is without merit.

Finally, for their fourth assignment of error, the defendants allege error on the failure of the trial court to sustain their motion to dismiss at the close of the plaintiff's case. An examination of the pertinent evidence, and the inferences which could be reasonably drawn therefrom, shows that the plaintiff had established a prima facie case at that point. The trial court was correct in overruling defendants' motion.

The findings and judgment of the trial court are affirmed.

AFFIRMED.

WALTER D. MONIE, APPELLEE, V. STATE PERSONNEL BOARD ET AL., APPELLANTS.

424 N.W.2d 874

Filed June 24, 1988. No. 86-638.

1. **Administrative Law: Termination of Employment: Appeal and Error.** The scope of review of the State Personnel Board in an appeal from an order of an agency head terminating employment is to decide whether the decision to terminate was made in good faith and for cause, and to assure that the agency head followed proper procedures under state personnel and agency rules and regulations and relevant statutes.
2. **Administrative Law: Appeal and Error.** The review in the Supreme Court of the judgment of the district court in an appeal from the State Personnel Board is de novo on the record.

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

Robert M. Spire, Attorney General, and Charles E. Lowe for appellants.

Ray Simon, of Tietjen, Simon & Boyle, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

BOSLAUGH, J.

This is an appeal from the order of the district court reversing the order of the Nebraska State Personnel Board, which affirmed the order of the director of the Department of Correctional Services terminating the employment of the plaintiff, Walter D. Monie, and reinstating the plaintiff to his employment with backpay. The appellants are the State Personnel Board; the Department of Personnel, State of Nebraska; the Department of Correctional Services; and Frank O. Gunter, Director, Department of Correctional Services, State of Nebraska.

The plaintiff, Monie, was employed as a Facility Service Technician III at the Omaha Correctional Center (OCC). Previously, Monie had been employed as a building contractor in McCook, Nebraska. Apparently, his duties at OCC related primarily to construction and maintenance work.

On August 23, 1985, Monie and his crew of residents from OCC were involved in doing cement work. Throughout the record, the prisoners or inmates at OCC are referred to as residents. Monie told Patrick Baber, one of the residents and a member of his crew, to carry some 12-foot-long 2 by 4s to another area. The resident picked up the lumber, which swung around and came in contact with Monie's chin, cutting it and causing it to bleed. Monie testified that the resident did it like it was on purpose. However, a carpenter supervisor, Jon Mitchell, who witnessed the incident, testified that he did not believe the resident was trying to hit Monie, but that it was an accident. Painting supervisor Richard Jorgensen testified that he did not actually see the lumber hit Monie, but he did state in an incident report he filed that the incident occurred while the resident was carrying the wood out of the building, that the area is congested, and that it is a tight squeeze to get any material in or

out of the building. The parties have stipulated that Monie's chin was cut or scratched and that it bled. Mitchell testified that Monie pushed and kicked the resident and said, "You son-of-a-bitch, you tried to hit me on purpose." The resident continued toward the door with the 2 by 4s, dropped the 2 by 4s, and turned to Monie and said, "If you ever lay a hand on me again, I'll have to bust you in the mouth." Monie walked up to the resident, put his stomach against the resident, and began pushing him with his stomach and saying, "Go ahead and hit me." He continued to shove the resident with his stomach for several minutes. The resident kept repeating, "If you lay a hand on me, I'm going to." Monie then walked over to a cooler, which was approximately 4 to 5 feet away, filled a glass with Kool-Aid from the cooler, and threw it on the resident. He refilled the glass and threw another glass of Kool-Aid on the resident, and then repeated this a third time. Mitchell testified that the resident acted very carefully not to shove or hit Monie in any way and that the resident kept his hands directly down by his sides.

Monie told the resident that he was taking him to the lieutenant's office and proceeded to try and get hold of the resident. Jorgensen intervened and told Monie two or three times to go to the lieutenant's office by himself.

As a result of the incident with Baber on August 23, Monie was suspended pending completion of an investigation. A statement of charges was served on August 26, and a hearing was had on August 27. Following the hearing the superintendent of OCC recommended that Monie be discharged. The recommendation was approved by the director on August 28, and in a letter dated September 5 Monie was notified that he was terminated.

Monie then filed a grievance. A hearing was held on September 30, and the committee recommended that the termination be upheld. This was approved by the director on October 7. Monie then appealed to the State Personnel Board.

A hearing was held before a hearing officer on December 3, 1985, who on January 13, 1986, recommended that Monie be reinstated with backpay to the date of suspension. The personnel board voted 3 to 1 to not concur in the findings and

conclusions of the hearing officer, and affirmed the order of the agency head, the director. On February 12 Monie filed a petition on appeal in the district court under Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984).

Our standard of review of the district court's decision is de novo on the record made before the personnel board. *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988); *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). Therefore, we make independent findings of fact without reference to those made by the agency whose action is being reviewed, *Meier v. State, supra*, and *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986), and reach our decision independent of all dispositions that have gone before. *Department of Health v. Columbia West Corp., supra*. Where the evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency or hearing officer observed the witnesses and accepted one version of the facts rather than another. *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

A central issue in the case now seems to be a claim by Monie that he was suffering from the effects of an exposure to tear gas on the day preceding the incident with Baber and, therefore, should not be held responsible for his conduct.

The record shows that on August 22, 1985, Monie took part in a training exercise of OCC's emergency REACT team, which is designed to respond to institutional disturbances. The training exercise involved the use of chemical agents, including two types of tear gas. During the exercise Monie was exposed to tear gas at a time when he was not wearing his gas mask. Monie testified that he washed his eyes with water because he could hardly see, and then started to walk around in an attempt to clear his mind and get the agent out of his system. He made no complaint to the training officer about his exposure to the gas. At the end of the training exercise he returned to the institution, but did not attempt to wash off the agent. Instead, he went home and took a shower, and described himself as feeling very lousy and sick in the head, as if he was on "a cheap drunk."

That evening Monie received a phone call indicating that

there was a problem with one of the air-handling units at OCC. Because he was the maintenance person on duty, he went to OCC to check on the problem. At that time he was still feeling very ill and disoriented, but felt it was his duty to go. He began working on the problem, which required a key for entry into the necessary panel. Jim From, an engineer at OCC, received a phone call from Monie that evening indicating that he did not have the correct key. From testified that Monie should have had the correct key on his own keyring. From told him to go get From's set of keys because he knew the correct key would be on there. Monie got From's keyring, climbed up a ladder to the panel, but again could not find the correct key. He called From back and told him he did not have the correct key on From's keyring either. From replied that the correct key had to be on it because he had used it himself earlier that afternoon. Monie testified that he made three or four trips up the ladder before he discovered the correct key was on From's keyring. The correct key was also on his own keyring. Monie felt it was unusual that he had not been able to locate the correct key, and felt that something was wrong.

He returned home and tried to go to sleep, but could not do so because he was coughing severely. The next morning he still felt like he was on "a cheap drunk," but did not call in sick. He decided that since it was a Friday, and because he had work that needed to be done, he would go in and then recuperate over the weekend. The incident with Baber occurred that morning.

Monie testified that he remembered being hit in the chin, but that the next thing he remembered was trying to get the resident to follow him to the lieutenant's office. He does not recall kicking, shoving, or throwing Kool-Aid on the resident. Monie was suspended without pay pending an investigation.

That evening Monie continued to cough and have difficulty breathing. The next day, Saturday, August 24, Monie contacted William Stump, the training officer, and told him he was having problems with his breathing. He asked Stump whether anyone else on the REACT squad had experienced or mentioned such a difficulty. Stump replied that he had not heard of any other problems and advised Monie to see his doctor. Monie then went to Methodist Hospital and described his exposure to the gas. He

was told that his lungs were inflamed, as was the lining to the air ducts going down to the lungs, and that the inflammation was due to exposure to the gas. He received medication and was told to see his own doctor on Monday if his problems continued.

On Monday morning, August 26, 1985, Monie attended a preinvestigation meeting at OCC. It was at this time that he first heard the allegations of kicking, shoving, and Kool-Aid throwing. He then became aware of his memory loss, because he had no recollection of those actions. Monie was informed that his actions were in direct violation of Neb. Admin. Code tit. 273, ch. 16, §§ 001.01 and 001.14 (1983), which allow disciplinary action to be taken for "[v]iolation of, or failure to comply with, State constitution or statute; an executive order; published rules, regulations, policies or procedures of the employing agency or the State of Nebraska Personnel System" and for "[i]nsubordinate acts or language which seriously distract from the respect due the senior authority of a senior person or severely hamper the agency's ability to control, manage or function."

In addition he was charged with violation of the Department of Correctional Services administrative regulation No. 112.31, which, in part, prohibits the use of profanity or abusive language while giving orders to inmates, and prohibits corporal punishment or unreasonable force when dealing with an inmate, and with violation of OCC operational memorandum No. 116.1.0006, defining corporal punishment as

> [a]ny striking, pushing or shoving of an individual for the purpose of causing pain and/or discomfort; the improper use of chemical agents or instruments of restraint; violence of any nature; the use of profane or abusive language or any measure which, by commission or omission, may be injurious to an individual.

After this meeting Monie visited his physician, Dr. Dean K. Wampler, who put him on a different medication. During this visit Monie did not mention the incident with the resident to Dr. Wampler.

A hearing was held the following day, Tuesday, August 27, 1985. Monie had been advised by a letter dated the previous day that he would be given an opportunity to present mitigating

evidence on his own behalf at the hearing. At the end of the hearing Monie was asked by Karen Shortridge, superintendent of OCC, whether he had anything he would like to add. Monie responded that he would choose to get off the REACT team because he felt it had affected him. Monie did not mention any specific effects of the gas, and no other discussion was had regarding the matter.

Following this hearing, Shortridge recommended to Frank Gunter, the director of the Department of Correctional Services, that Monie's employment be terminated. She based her recommendation on the seriousness of the incident and on the fact that Monie had a history of problems with his temper while employed at OCC. That history included a situation in which Monie shoved and yelled at a resident, and a situation in which Monie became upset while pouring concrete and threw a shovel head and shovel handle, narrowly missing bystanders. Both of these incidents occurred approximately 2 months prior to the incident at issue. As a result of these incidents, Monie received counseling from Roger Grant, building superintendent, and was given instruction regarding alternative methods of venting his feelings and dealing with residents by means other than physical force. Shortridge also based her recommendation of termination on her concern that Monie's continued employment would create a situation of potential liability on the part of OCC. That recommendation was approved by Gunter on August 28, 1985. Shortridge then realized that she had failed to inform Monie that he could submit a statement of mitigation to be attached to her letter of recommendation to the director, and informed Monie that he had 2 days to submit any such evidence.

In the meantime Monie had discussed the incident with Dr. Wampler, who agreed to do some checking on whether Monie's conduct could have any connection with his exposure to the gas. In a letter to Shortridge dated August 30, 1985, Dr. Wampler stated:

> On the visit of August 29th he [Monie] related to me the incident of Friday, August 23rd, when he allegedly mistreated an inmate. He relates to me the fact that he has little recollection of the incidence [sic], and what he does

> remember, does not fit the description of other witnesses. This, of course, you all know.
>
> My concern is that Mr. Monie may well have been mentally impaired on Friday, the 23rd, because of his acute respiratory illness related to the tear gas exposure. The chemicals used in tear gas obviously cause a rather severe irritation of the respiratory mucous membranes which is how they work. However, Mr. Monie had a severe reaction to the irritation setting up the asthmatic and bronchospastic problems. Although it is impossible to document at this time, it is quite probable that Mr. Monie could have been suffering from not enough oxygen supply to the brain on the 23rd, 24th, and 25th to cause an element of confusion and disorientation.
>
> Please consider this in your actions regarding Mr. Monie, and if you have any questions regarding this situation, please feel free to call.

Shortridge testified that upon receiving this letter, she asked William Stump, the training officer, to obtain reports from the chemical company on whether the gas could affect a person in such a way. She also called the Omaha Police Department "to see if there could be anything more that I should be aware of." The record does not indicate what response she received from the Omaha Police Department. In a report by Stump dated September 5, 1985, he indicated that he had, on September 3 and 5, contacted Smith & Wesson, the manufacturer of the chemical agents used during the REACT exercise, and advised it of the allegations made by Monie regarding their effect. The product manager's office of Smith & Wesson advised Stump that no side effects that would alter behavior or impair judgment had ever been noted or proven and that it would send Stump some governmental investigative reports on any side effects of the agents.

On September 4, 1985, before receiving that additional information, Shortridge again recommended to Gunter that Monie's employment be terminated. She testified that she had again recommended termination because Monie had not seen a doctor prior to the incident with the resident, because Monie appeared coherent, and because of the information she had

received regarding the effect of the gases. Following approval of the termination by Gunter, Monie was informed in a letter dated September 5, 1985, that his employment had been terminated.

In addition to the foregoing evidence, the personnel board received into evidence an unsworn affidavit from Dr. Wampler, which was not dated, but was prepared at some time after the termination. In that letter Dr. Wampler stated:

> Because of my concerns about Mr. Monie's tear gas exposure and severe ill effects, I did more research into the toxic effects of tear gas preparations in general. The compounds of specific concern were chloracetophenone, orthochlorobenzalmdnitrile [sic], and trichloronitromethane. The specific texts with the most information include "Clinical Toxicology of Commercial Products", authors being Gosselin, Hodge, Smith, and Gleason and also the "Handbook of Emergency Toxicology, Fourth Edition" (1980 by Sidney and K).
>
> These texts describe rather vague and toxic effects of these compounds, mainly because severe reactions are rather unusual. However, these compounds are known to cause rather severe pulmonary toxic side effects with severe irritation, bronchospasm, and other toxic effects resembling chlorine gas. These effects include pulmonary edema, bronchial congestion, bronchitis, asphyxia, cyanosis, and in the most extreme case, of course, death.
>
> In treating Mr. Monie it has been my firm opinion since my discussion with him on August 29 that his problems with temper control and behavior on August 23 directly relate to the toxic side effects of the chemicals he was exposed to as well as their medical effects on his system. I believe his pulmonary side effects and congestion were bad enough to impair oxygen transport and, therefore, a condition of hypoxia or inadequate oxygen supply to the brain and other tissues. This would produce a state of essential involuntary toxication which would impair judgment and control.

After considering the evidence, the hearing officer prepared a recommended decision for the State Personnel Board in which he recommended that Monie be reinstated with full

backpay. He based his decision on the fact that he felt the affidavit of Dr. Wampler should carry considerable weight, and for the reason that the agency terminated Monie's employment without conducting a thorough investigation. The personnel board disagreed, and affirmed Monie's termination.

The scope of review of the personnel board is to decide whether the decision to terminate was made in good faith and for cause, and to assure that the agency head followed proper procedures under state personnel and/or agency rules and regulations, labor agreements, or relevant statutes. Neb. Admin. Code. tit. 273, ch. 17, § 008.03M (1983).

With the exception of Dr. Wampler's opinion, all of the evidence in regard to Monie's intoxication from exposure to the tear gas comes from Monie. None of the other personnel who were exposed to the gas experienced such a reaction, and what little evidence there is suggests that such a reaction would be rare and highly unlikely. The persons who observed Monie on August 23 said that he appeared to be normal.

A significant factor in this case is Monie's history of temper outbursts and his inability to control his temper despite previous warnings and counseling.

In her letter of September 12, 1985, to the director, in commenting on Monie's allegation that his termination was inconsistent with similar incidents at OCC, the superintendent stated: "In Mr. Monie's case, the incident was preceded by weeks of harassment by his inmate crew which Mr. Monie failed to handle. Also, Mr. Monie has a documented history of temper problems, including a previous incident (see formal counseling report of June 25, 1985)."

From our de novo review of the record we conclude that the decision to terminate the employment of the plaintiff was made in good faith and for cause and that the agency head followed proper procedures under the relevant state personnel and agency rules and regulations and statutes.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment dismissing the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

RICHARD L. TROLSON, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF BLAIR, COUNTY OF WASHINGTON, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

424 N.W.2d 881

Filed June 24, 1988. No. 86-668.

1. **Schools and School Districts: Appeal and Error.** In a proceeding in error appealing the decision of a board of education, the task of the Nebraska Supreme Court is, as is that of the district court, to determine whether the board acted within its jurisdiction and whether there was sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** The evidence is sufficient as a matter of law if a board of education could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Schools and School Districts: Teacher Contracts: Evidence.** In order to support the amendment of a permanent certified teacher's contract as the result of a reduction in force, the evidence produced at the hearing must establish (1) a change in circumstances necessitating a reduction in force, (2) that the change in circumstances specifically relates to the teacher to be affected, and (3) that there are no vacancies on the staff for which the teacher to be affected is qualified.
4. _____: _____: _____. In order to support the amendment of a permanent certified teacher's contract on the basis of a reduction in force, the evidence produced at the hearing must establish the contents of the reduction in force policy.

Appeal from the District Court for Washington County: ROBERT E. OTTE, Judge. Reversed and remanded with direction.

Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Gregory P. Drew for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

CAPORALE, J.

Plaintiff in error, Richard L. Trolson, appeals from the judgment of the district court affirming the decision of the defendant in error, the Board of Education of the School District of Blair, to amend Trolson's teaching contract from full time to half time as the result of a reduction in force. Trolson assigns as error, among others, to the district court, its finding

that the board's decision is supported by the evidence. That assignment being meritorious, we, without reaching the other claims of error, reverse the judgment of the district court and remand with direction.

Neb. Rev. Stat. §§ 79-12,107 and 79-12,112 (Reissue 1987) require that the contract of a "permanent certificated" teacher be deemed continuing and be renewed and remain in full force and effect unless amended or terminated in accordance with certain statutory procedures. Section 79-12,112 permits the amendment of such a teacher's contract for a variety of reasons, including "reduction in force as set forth in sections 79-1254.05 to 79-1254.08." Neb. Rev. Stat. § 79-1254.05 (Reissue 1987) requires that every board of education adopt a reduction in force policy, and further provides that no such policy "shall allow the reduction of a permanent or tenured employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform . . . ."

Neb. Rev. Stat. § 79-1254.02 (Reissue 1987) provides that upon request, a teacher who has been notified of an impending contract amendment as the result of a reduction in force shall be entitled to a hearing. Neb. Rev. Stat. § 79-12,115 (Reissue 1987) specifies the procedure to be used at the hearing, and provides: "(3) A majority of the members of the school board shall render its decision to amend . . . a certificated employee's contract, based solely upon the evidence produced at the hearing . . . ."

Additionally, Neb. Rev. Stat. § 79-1254.06 (Reissue 1987) provides that before a reduction in force shall occur, the board must "present competent evidence demonstrating that a change in circumstances has occurred necessitating" a reduction. Moreover, any "alleged change in circumstances must be specifically related to the teacher" to be affected as the result of the reduction in force, and the board, "based upon evidence produced at the hearing required by sections 79-12,107 to 79-12,121, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform."

Thus, the Legislature has attenuated a school board's

discretion to pare its staff in the face of reduced needs and has imposed specified procedures for achieving a reduction in force.

Because this is a proceeding in error, the task of this court is, as was that of the district court, to determine whether the board "acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision." *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 394, 417 N.W.2d 779, 784 (1988); *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988). We have said that the evidence is sufficient as a matter of law if the board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, supra*; *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). See, also, *Stone v. City of Omaha, ante* p. 10, 424 N.W.2d 617 (1988).

The record shows that Trolson was certified to teach kindergarten through 12th grade, and was "endorsed" as being qualified to teach art only. Trolson had been with the school district for 10 years as a full-time art teacher and was thus employed by the board for the 1985-86 contract year. Trolson also coached eighth grade girls' basketball.

On March 21, 1986, Trolson received a letter from the secretary of the board notifying him that his teaching contract "may be amended from 1.0 to .5 full time equivalency at the end of the 1985-86 school year, the reason being a change in circumstances that necessitate [sic] a reduction in force in the secondary Art Department." By letter dated March 27, 1986, Trolson made a request to school superintendent Gerald L. Otte for a hearing before the board and made certain other requests which, in view of the disposition we reach, are not relevant.

By letter dated April 2, 1986, Superintendent Otte responded that a hearing would be held on April 8, 1986. He further wrote that "[i]t is not our intent nor do we desire to conduct this hearing based on your professional performance. The decision to reduce your position from 1.0 to .5 full time equivalency is based on the following reasons: class size, length of service, and contribution to the activities program."

At the hearing, there was testimony that the enrollment in art courses had suffered a steady decline despite the increase in the number of students. Introduced into evidence was a letter written by Superintendent Otte to Patricia Shafer, one of Trolson's representatives, which set forth the following regarding student enrollment in art classes:

> The major reason for this action is a decline in enrollment in the Blair Jr.-Sr. High Art Department. The information below is taken from the Secondary Annual Report to the North Central Association of Colleges and Schools and illustrates the reduction in Art enrollment.

Year	Total School Enrollment for Grades 7-12	Total Number of Students in the 7-12 Art Program	Total Sections Offered	F.T.E.
1973-74	948	186	38	1.5
1980-81	856	217	55	2.0
1981-82	842	190	54	2.0
1982-83	817	202	48	2.0
1983-84	853	164	48	2.0
1984-85	874	171	43	2.0
1985-86	877	137	38	2.0
*1986-87	900	149	34	

> *The 1986-87 figure is not from the North Central report but is based on student enrollments for next year and total number of students projected (900).

Superintendent Otte also testified that it might be necessary in the future for some art courses to be taught by teachers in other departments, some of whom might have less seniority than Trolson.

The record reveals that "F.T.E." means full-time equivalency but fails to state how that equivalency is computed nor what it measures. Neither does the record tell us why it would require the time of only one and one-half teachers to instruct 38 sections containing 186 students during the 1973-74 school year but require the full time of two teachers to instruct the same number of sections containing only 137 students during the 1985-86 school year.

Superintendent Otte's letter to Shafer further advised:

> In regard to length of service, of the two 7-12 Art teachers, Mr. Trolson will have ten years of service at the end of the current year and Mr. VanCleave will have been with the district as Art teacher for twelve years.
>
> Also, both teachers have secondary coaching assignments. However, Mr. Trolson coaches 8th grade Girls Basketball and Mr. Vancleave coaches both Varsity boys football and Varsity Boys track.

The evidence at the hearing developed that there were two other art teachers in the system. While Superintendent Otte did not formally compare Trolson's qualifications with those of the other two teachers, he did testify that the first of these, who teaches art in grades 4 through 6, had 16 years' experience; and the second, who teaches kindergarten through grade 6, had a total, not including interruptions, of 12 years' experience. In addition, she holds a master's degree, is on the "Commissioner's State Advisory for [the] Gifted," serves on the local committee for the gifted, had taught summer courses, and is endorsed as being qualified to teach two subjects.

Trolson himself testified he was aware of no vacancies on the staff which he was qualified to perform and that there were no positions filled by probationary employees which he was qualified to perform.

At the conclusion of the evidence the board unanimously voted to amend Trolson's contract to .5 full-time equivalency for the following stated reasons:

> That the actual enrollment of the 7-12 Art Program has declined significantly in the five years since 1980-81.
>
> That there are no other vacancies on the staff for which Richard Trolson is qualified by endorsement or professional training to perform.
>
> That no probationary employee is retained to render a service for which Richard Trolson is qualified by reason of certification and endorsement to perform or where certification is not applicable by reason of college credits in the teaching area.

Whether there is sufficient evidence to support the board's decision depends upon whether, as required by §§ 79-1254.06 and 79-12,115, the evidence produced at the hearing establishes

(1) a change in circumstances necessitating a reduction in force, (2) that the change in circumstances specifically relates to the teacher to be affected, in this case Trolson, and (3) that there are no vacancies on the staff for which the teacher to be affected is qualified. *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988).

Trolson argues it does not, because even if the evidence produced at the hearing establishes the requisite change in circumstances and the lack of vacancies for which he is qualified, the board did not introduce its reduction in force policy in evidence, without which it cannot be determined that the change in circumstances specifically relates to him. That is, it cannot be determined whether the selection was to be made on the basis of seniority, participation in other activities, a combination of those considerations, or on some other undisclosed basis. Neither can it be determined how seniority is to be computed; that is, whether interrupted service is to be counted the same as continuous service.

We must conclude that Trolson is correct, for even if we assume the policy could be proved in some fashion other than the simple method of identifying it as an exhibit and placing it in evidence, a matter we need not and do not decide, the fact remains that no one articulated its contents. The record tells us only the factors considered in selecting Trolson's contract as the one to be amended; there is nothing to show that the factors were used in accordance with whatever the policy may be. Thus, the evidence does not meet the requirement that the evidence produced at the hearing establish that, among other things, the change in circumstances necessitating a reduction in force specifically relate to Trolson.

Accordingly, the judgment of the district court is reversed and the cause remanded with the direction that the district court vacate the decision of the board.

REVERSED AND REMANDED WITH DIRECTION.

WELLS FARGO ALARM SERVICES, A DIVISION OF BAKER PROTECTIVE SERVICES, INC., APPELLEE AND CROSS-APPELLANT, V. NOX-CRETE CHEMICALS, INC., APPELLANT AND CROSS-APPELLEE.

424 N.W.2d 885

Filed June 24, 1988. No. 86-702.

1. **Appeal and Error.** In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. Rather, the court presumes that the trial judge resolved any controverted facts in favor of the successful party. This court will also consider the evidence and the permissible inferences therefrom most favorably to the successful party. Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong.
2. **Breach of Contract: Damages.** In a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed.
3. **Damages: Proof.** Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
4. **Claims: Prejudgment Interest.** Where the amount of loss, the subject of litigation, cannot be computed without opinion or discretion, the claim is unliquidated, and prejudgment interest is not recoverable.
5. **Evidence: Appeal and Error.** The trial court's ruling considering the acceptance or rejection of evidence will not be reversed unless there is shown to be an abuse of discretion.

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

Tamra L. Wilson, of Erickson & Sederstrom, P.C., for appellant.

Robert L. Lepp and Michael S. Mostek, of McGill, Koley, Parsonage & Lanphier, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

NORTON, D.J.

This appeal arises out of an action to recover damages for breach of contract and conversion of property tried to the Douglas County District Court without a jury. The district court found in favor of the plaintiff and awarded judgment, together with prejudgment interest from and after September

30, 1983. We affirm.

The facts disclose that the defendant, Nox-Crete Chemicals, Inc., hereinafter referred to as Nox-Crete, contracted with the plaintiff, Wells Fargo Alarm Services, a division of Baker Protective Services, Inc., hereinafter Wells Fargo, for fire and burglar alarm protection services under two separate written agreements dated January 7 and January 20, 1981. Each agreement was for a term of 5 years and required the payment of a prescribed sum annually, payable in advance, for the services to be provided by Wells Fargo. Each agreement also provided that Wells Fargo

> shall have the right to increase or decrease the annual service charge provided above at any time . . . after the expiration of one year . . . upon giving Subscriber written notice 60 days in advance of the effective date of such increase or decrease. If Subscriber is unwilling to pay such increased charge, Subscriber may terminate the then unexpired term of this Agreement by notifying Wells Fargo in writing 30 days prior to the otherwise effective date of the increase . . . .

On October 29, 1982, Wells Fargo forwarded notice to its customers of an impending rate increase for services to be performed in 1983, effective January 1, 1983. By letter dated April 7, 1983, Nox-Crete notified Wells Fargo that it was terminating the agreements because of the recent price increase. On April 12, 1983, Wells Fargo acknowledged receipt of the notice and stated that it would hold Nox-Crete liable for all sums due under the unexpired terms of the agreements.

The agreements between the parties also provided that upon termination, Wells Fargo was authorized to remove all components of the systems. On May 17, 1983, when Wells Fargo attempted to remove such equipment, Nox-Crete refused to allow it to do so. Thereafter, Wells Fargo filed suit, setting forth four causes of action, the first and third thereof being for damages for breach of the agreements, and the second and fourth for the return of or damages for the conversion of the personal property of Wells Fargo, together with prejudgment interest from and after May 17, 1983. Nox-Crete answered and cross-claimed for a setoff of fees prepaid to Wells Fargo.

Following trial the district court found that Wells Fargo was entitled to the benefit of each agreement; that Nox-Crete had terminated the agreements outside of the timeframe provided and had converted the personal property of Wells Fargo to its own use; and that Wells Fargo should recover damages for each breach and each conversion, together with prejudgment interest from and after September 30, 1983. Defendant's counterclaim for setoff was dismissed. This appeal followed.

The defendant sets forth seven assignments of error by the trial court, which can be more concisely stated as follows: (1) The trial court erred in denying the defendant's motion to dismiss made for the reason that the plaintiff had failed to bear its burden of proof of breach and certainty of damages; (2) the judgment of the trial court is contrary to the law and the evidence; (3) the damages awarded by the trial court for the breach of the agreements are excessive, are not supported by the evidence, and are not based upon reasonably certain proof of damages actually sustained; (4) the trial court erred in dismissing defendant's counterclaim and setoff; (5) the trial court erred in awarding prejudgment interest on all of the plaintiff's causes of action; and (6) the trial court erred in excluding defendant's testimony that the service contracts would have been terminated upon the next price increase for services under the contract.

Plaintiff cross-appealed, assigning as error the following issues: (1) The trial court erred in finding the date of conversion to be September 30, 1983; (2) the trial court erred in failing to award interest on plaintiff's conversion claims from and after May 17, 1983; and (3) the trial court's failure to award interest from and after May 17, 1983, is contrary to the law and the evidence.

In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. Rather, the court presumes that the trial judge resolved any controverted facts in favor of the successful party. This court will also consider the evidence and the permissible inferences therefrom most favorably to the successful party. Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set

aside unless clearly wrong. *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 419 N.W.2d 518 (1988). See, also, *Kubista v. Jordan*, 228 Neb. 244, 422 N.W.2d 78 (1988).

In a contract case the proper measure of damages is an amount which will compensate the injured person for loss which fulfillment of the contract would have prevented or breach of it has entailed. See, *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987); *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980); Restatement of Contracts § 329 (1932).

Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

Where the amount of a loss, the subject of litigation, cannot be computed without opinion or discretion, the claim is unliquidated, and prejudgment interest is not recoverable. *Peterson v. North American Plant Breeders, supra.*

The trial court's ruling considering the acceptance or rejection of evidence will not be reversed unless there is shown to be an abuse of discretion. *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985).

In reviewing the evidence of this case it becomes apparent that the agreements of January 1981 were preceded by two other agreements between the parties for the same services. The latter agreements commenced in September of 1976. All four agreements were received in evidence. Pursuant to all of the agreements, Nox-Crete had made payments to Wells Fargo for services to be provided, the last of which was made in full in October of 1982 for the period from October 1, 1982, through September 30, 1983. It takes little effort to compute the amount of time from the date of the end of the prepayments to the end of the agreements. The evidence would show without dispute the amount of annual charges. Applying this annual charge to the unpaid term involves only a mathematical calculation. It is also equally apparent that Nox-Crete attempted to terminate the agreements and refused to surrender the property upon demand. While there was some conflicting evidence over the

reason for the late notice to terminate, the fact remains that Nox-Crete did not comply with the provisions of the 1981 agreements in notifying Wells Fargo of its intent to terminate. No effective notice having been given, it could be inferred that but for the actions of Nox-Crete, Wells Fargo could have expected the agreements and their benefits to continue for the remainder of the terms thereof.

In considering the amount of damages in breach of contract cases, the trier of fact, in applying the general rule on damages, must also bear in mind that generally speaking the losses sustained by reason of the breach or the gains prevented are both actual and consequential damages. Of necessity this requires consideration of the concepts of mitigation on the part of the nondefaulting party and savings realized through the breach. Nox-Crete attempted to show that Wells Fargo would realize savings through termination of the agreements, but the fact of the matter is that the evidence does not support this conclusion. Moreover, there was no way for Wells Fargo to mitigate short of retrieving its property and disposing of it through other channels. The refusal of Nox-Crete to permit Wells Fargo to remove this equipment frustrated any possible mitigation. There is no merit in the first three assignments of error.

With respect to defendant's counterclaim and setoff, it is noted that Nox-Crete was in effect given credit for the prepayments made to September 30, 1983. Therefore, a dismissal of that setoff was proper, and the fourth assignment of error has no merit.

Prejudgment interest is proper if the amount of the loss can be computed without opinion or discretion. One cannot seriously question the fact that the remaining unpaid term of the agreements could be computed without speculation or that the property converted had a value which was readily discernible. Therefore, the fifth assignment of error has no merit.

The offer by Nox-Crete of testimony that the agreements would have been terminated upon the next price increase for service under the agreements, set forth as assignment of error No. 6, likewise has no merit. Such evidence is speculative and

not founded upon facts in evidence.

Having disposed of the defendant's assignments of error, we move to the assignments set forth by the plaintiff in its cross-appeal. Basically, all of these assignments could be generally stated as follows: that the evidence disclosed that the breach and conversion occurred on May 17, 1983; that the trial court determined the actual date of breach and conversion to be September 30, 1983; that the law provides that prejudgment interest shall run from the date of the loss if the loss is readily determinable; and that the failure of the trial court to award interest from May 17, 1983, was in error.

This case was tried June 12 and 13, 1986. Following the last prepayments made by Nox-Crete in 1982, no further payments were made, nor was the property of Wells Fargo returned to it. While the evidence may show that on May 17, 1983, Nox-Crete refused to permit Wells Fargo to remove its personal property and evidenced an intent to terminate the agreements, the actual breach could not have occurred until September 30, 1983, the end of the term covered by the prepayments made by Nox-Crete. Presumably, Nox-Crete had the right to the use of Wells Fargo's equipment until that time. To have granted prejudgment interest from May 17 would have in effect afforded to Wells Fargo in this case recovery of excessive interest and would have constituted error on the part of the trial court. Plaintiff's assignments of error have no merit.

The trial court's findings and judgment were correct and are affirmed.

AFFIRMED.

NINA M. PASCALE, APPELLEE AND CROSS-APPELLANT, V. ALAN R. PASCALE, APPELLANT AND CROSS-APPELLEE.

424 N.W.2d 890

Filed June 24, 1988. No. 86-734.

1. **Modification of Decree: Appeal and Error.** In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the district court with regard to whether a change in circumstances has occurred which justified the modification of the original decree.
2. **Property Division: Fraud.** Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions, in the absence of fraud or gross inequity.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and dismissed.

Timothy J. Pugh, of Boland, Mullin & Walsh, for appellant.

Sally Millett Rau for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

OTTE, D.J.

The facts are not in dispute. The marriage of Nina M. and Alan R. Pascale was dissolved on October 28, 1985, pursuant to the terms of a property settlement agreement. Both parties were represented by counsel. It appears the parties contemplated a 50-50 division of their property. The relevant portion of the property settlement agreement was the agreement by the parties that they would file joint federal and state income tax returns for 1985, with the further agreement that the respondent would be solely entitled to any tax refund and be solely obligated for any tax liability.

Pursuant to the terms of the agreement, each party received shares of common stock of Hershey Foods Corporation. The problem arose in November 1985, when the petitioner sold her shares of Hershey stock, triggering a capital gains tax liability, and thereby increasing the parties' tax liabilities in the sum of $26,672, all of which the respondent was obligated to pay as a

result of the property agreement. Respondent filed an application to modify the decree, the statutory 6-month waiting period having expired. The Douglas County District Court ordered the petitioner to pay $7,974.50 for the use and benefit of the respondent in paying the additional tax resulting from the sale of the stock. The respondent filed this appeal, and the petitioner filed a cross-appeal. We reverse and dismiss.

It is the duty of this court to review de novo the determination of the district court with regard to whether a change in circumstances has occurred which justified modification of the original decree. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983). The change must be a change not within the reasonable contemplation of the parties. *Albers v. Albers, supra.*

It can hardly be said that the immediate sale of the property received in settlement was not within the reasonable contemplation of the parties. In reviewing the record, it is obvious that the respondent knew the tax consequences relating to all of the financial dealings of the parties. The settlement agreement allowed respondent $10,723 to be used for any tax liability as a result of the joint filing. The respondent regularly prepared the parties' income tax returns and furnished, for the most part, all of the figures upon which the settlement agreement was based. The joint tax liability of the parties would have been $21,934 had the petitioner not sold her stock in 1985. Respondent's responses to interrogatories shows a total federal tax withholding from his 1985 salary of $29,950.96 and he, therefore, was anticipating a federal tax refund of roughly $8,000. In spite of that, he insisted upon an additional credit in the settlement agreement of $10,723 for estimated additional tax liability. Assuming that credit was attributed one-half to each, the respondent expected a windfall of approximately $13,000 as a result of his agreement to pay the tax deficiency or keep the refund. It really appears as if the respondent spent so much time figuring out how to obtain an advantageous tax position that he neglected to consider the consequences of a sale of the stock. It cannot be said that the respondent should not have reasonably contemplated a sale of the stock by the petitioner and the resulting tax consequences; he thought of

everything else. It is interesting to note that respondent's employer withheld in excess of $10,000 more from his 1985 payroll checks than was withheld in 1984, even though his salary increase was only $5,250. It might further be noted that the respondent gave to the petitioner the shares of stock with the lowest basis, which could only have resulted in a higher capital gain to her if she sold anytime after January 1, 1986. While, as respondent argues, the total difference in the basis of the various shares held by the parties was only about $500, that just further shows the meticulous manner in which the respondent treated his financial affairs. Certainly, the respondent could have insisted in the agreement that the shares not be sold during the year in which he voluntarily assumed the tax obligations of the parties.

The decree in this case involved a property settlement agreement. It was not a division of property by the court, but only the consent by the court to the entry of a decree pursuant to the agreement of the parties upon a finding that such agreement was not unconscionable. The court has consistently held that where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions, in the absence of fraud or gross inequity. *Colson v. Colson*, 215 Neb. 452, 339 N.W.2d 280 (1983); *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975). There is no evidence of fraud on the part of the petitioner, and neither can it be said that the ultimate result in this case was grossly inequitable.

The judgment of the district court is reversed. The application of the respondent is dismissed and the clerk of the court directed to return to the petitioner the $7,974.50 paid by her into court. No attorney fees are awarded for services in this court.

REVERSED AND DISMISSED.

DAVID HAUMONT, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

424 N.W.2d 892

Filed June 24, 1988. No. 86-1096.

1. **Appeal and Error.** In the absence of an assignment of error, the judgment will be affirmed, unless the court notes plain error on the record.
2. **Workers' Compensation.** The Workers' Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Richard Scott for appellant.

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

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

WHITE, J.

This appeal arises out of a tort action filed by appellant, David Haumont, against his employer, the City of Lincoln. The district court for Lancaster County sustained the City of Lincoln's demurrer to the petition, based on a finding that the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,110 (Reissue 1984 & Cum. Supp. 1986), was Haumont's exclusive remedy. We hold that the district court's order was correct and affirm its decision.

Haumont's petition alleges that on January 15, 1985, while working as a public service officer for the Lincoln Police Department, he injured his lower back by lifting a parking meter coin container weighing 675 pounds. Haumont sued his employer, the City of Lincoln, for negligent design of the coin container.

Initially, we note that appellant's brief fails to set out any assignments of error. In the absence of an assignment of error, the judgment will be affirmed, unless the court notes plain error on the record. *McCombs v. Prenosil*, 226 Neb. 839, 415 N.W.2d 453 (1987).

In our review of the record for plain error, we note that appellant alleges that he was an employee of the City of Lincoln and was injured while carrying out his duties on the job.

This court has previously held that the Workers' Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment. *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985).

The district court correctly sustained appellee's demurrer and properly dismissed the cause of action.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY L. HAYES, APPELLANT.
424 N.W.2d 624

Filed June 24, 1988. No. 87-835.

1. **Confessions: Evidence.** To be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight.
2. **Motions to Suppress: Confessions: Proof.** The State bears the burden of proof in a suppression hearing to show by a preponderance of the evidence that an accused's statements were voluntarily made.
3. **Police Officers and Sheriffs: Confessions: Appeal and Error.** Whether an officer has made a promise for an accused's statement is a question of fact to be determined by the trial court.
4. **Motions to Suppress: Appeal and Error.** In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

CAPORALE, J.

Following a bench trial, defendant, Jeffrey L. Hayes, was adjudged guilty of first degree assault in violation of Neb. Rev. Stat. § 28-308 (Reissue 1985), which prohibits the intentional or knowing causing of "serious bodily injury" to another. Following the imposition of the sentence, Hayes perfected this appeal. His sole assignment of error rests on the trial court's failure to suppress his "oral and written statements." Finding the assignment to be without merit, we affirm.

Hayes, who was 19 years old at the time of the crime, is the father of the then 4-month-old child victim. He was living with the child's mother and, because he was unemployed, cared for the child while the mother worked.

On March 17, 1987, Hayes was alone with the child, during which time she suffered first- to third-degree burns on the right side of her body from the ear down to the upper thigh. The injuries, which were potentially fatal, will cause the child to be permanently disfigured.

In the course of the investigation which began at the hospital to which the child had been taken, Omaha Police Officer Bobby Polk asked Hayes and the child's mother to accompany him to the Omaha police station for questioning. Hayes there waived his *Miranda* rights and agreed to talk with police.

Hayes originally told the investigating officers that he did not intentionally burn the victim but that she was accidentally burned while he was giving her a bath. He claimed to have picked up the child by placing both of his hands under her armpits, after which he lowered her feetfirst into the water. After this recitation, the officers told Hayes that they had seen the child and that his description of placing her in the water feetfirst could not be true. The record supports a finding that one officer also told Hayes that the treating physician had said he "needed to know exactly what happened to the child, how the burns occurred," that the physician "suspected that they

were water burns, but he wasn't completely sure whether they were or not. . . . He knew they weren't fire burns, but he didn't know if they were grease or some other type of fluid that was used," and that he said he would like to be contacted if such information were developed. At this point the officers could see an expression of concern come upon Hayes' face.

Polk testified that Hayes then began to talk about the problems he was having with the mother's parents, specifically that her parents wanted to take the child away from them. Hayes then admitted he burned the infant by holding her under the faucet and turning on the water. The officers requested that defendant give a tape-recorded statement, but Hayes refused because he did not want the mother's parents to ever hear such a statement. He agreed, however, to give a written statement.

In that statement Hayes, who is a high school dropout with below normal writing and reading skills, wrote:

> I turn on Both knobs and the water came on Hot. I didn't mean to do it attenily [sic] . . . while the water was running both knobs was equally hot water just came out I let the water come - Down on her just for a quit [sic] second If we can't have our little girl they shore can't either.

The statement also recited that Hayes had been thinking about his problems and referred to his concern with the desire of the mother's family to take the child.

At trial, Hayes testified that he ran the bath water in the tub, left the room, and upon returning later, placed the child in the water. Because the water was cool, he turned on the hot water. Although the child was not touched by the running water, she began to cry and "jump around." He then took the child out of the water, wrapped her in a wet towel, and called for a neighbor and for help.

Hayes argues the incriminating oral and written statements he made should have been suppressed because they were induced by the investigator's statement that the treating physician needed to know what happened in order to properly treat the child, and were thus not made freely and voluntarily.

In his brief Hayes reminds us that according to *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961), a confession obtained when a defendant's will has been

overborne and his self-determination critically impaired offends due process. In the oral argument made on his behalf we were further reminded that *Rogers v. Richmond*, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961), holds that the test of the voluntariness of a confession rests not upon its probable truth or falsity but on whether the state's behavior through its officers was such as to overturn the defendant's will to resist. There is no question but that to be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). Neither is there any question but that the State bears the burden of proof in a suppression hearing to show by a preponderance of the evidence that an accused's statements were voluntarily made. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986). However, whether an officer has made a promise for an accused's statement is a question of fact to be determined by the trial court, a decision which will not be set aside unless clearly wrong. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Dixon, supra.* Moreover, in determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Holman, post* p. 57, 424 N.W.2d 627 (1988); *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988); *State v. Dixon, supra.*

Thus, the inquiry resolves itself into determining whether informing Hayes that the treating physician needed to know what happened so that he might properly treat the child constituted such an inducement to confess that Hayes' statements were thereby rendered involuntary.

This is not a situation such as was presented in *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965), wherein a murder confession obtained from the defendant, who had been arrested along with his wife, was held to have been made involuntarily because defendant was misled into thinking his attorney no longer represented him. Defendant also claimed he

had been told that if he did not confess, his wife would be charged; his wife was in fact released upon the making of defendant's confession. Rather, the present situation is more akin to that presented in *State v. Bowersmith*, 224 Neb. 6, 395 N.W.2d 527 (1986), in which we held the evidence supported the trial court's finding that the admissions of sexual assaults on a child were made voluntarily. The defendant in that case complained the confession was the result of the investigator's observation, in response to defendant's expressed concern for the effect the allegations would have on his wife, that if his wife truly cared about defendant, she would understand and " 'they'd work it out.' " *Id.* at 10, 395 N.W.2d at 530. Similarly, in *State v. Dixon, supra*, we held the trial court did not err in finding that an officer's suggestion to the defendant therein that those who told the truth were dealt with less harshly than those who lied did not constitute an improper inducement for defendant's statement.

In this case the import of the investigator's comments to the defendant were that the treating physician needed to know the type of burns involved, not necessarily how or under what circumstances they were inflicted. Hayes could have confirmed that the injuries were water burns without going into the details of how they came about and what he thought as the child was being scalded. Under that set of facts, we cannot say the trial court's conclusion that Hayes' statements were made voluntarily and freely is clearly wrong.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. HOLMAN, APPELLANT.
424 N.W.2d 627

Filed June 24, 1988. No. 87-915.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of the trial court's ruling on a motion to suppress, the Nebraska Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.

2. **Statutes.** It is a simple rule of statutory construction that terms which are not specifically defined are to be taken in the sense in which they are understood in common language.
3. **Search Warrants: Words and Phrases.** Nighttime darkness is not commonly understood to be daytime. For the purposes of determining whether a search complied with the terms of a daytime search warrant, "daytime" extends from dawn to darkness.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and James H. Spears for appellee.

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

FAHRNBRUCH, J.

The question dispositive of this appeal is whether it is permissible for law enforcement officers to serve a "daytime" warrant after dark. We hold that it is not.

The defendant, David E. Holman, after a bench trial, was found guilty of theft by receiving stolen property valued at more than $300 but less than $1,000. He appeals his conviction, citing as error the overruling of his motion to suppress evidence. We vacate Holman's sentence, reverse his conviction, and remand the cause for a new trial.

On March 31, 1987, at 4:20 p.m., the Douglas County Court issued a warrant permitting the search of Holman's residence for stolen Hummel figurines. By its terms the warrant was to be served during "daytime" hours.

Police officers arrived at Holman's home at approximately 8 p.m. on March 31 to execute the warrant. The evidence is undisputed that it was dark outside at that time. A search was conducted, during which officers seized and took possession of 10 Hummel figurines.

Holman was subsequently charged with theft. He moved to suppress the evidence seized during the search of his home.

Holman claimed the warrant was not executed during the daytime, as its terms required. The trial court overruled the motion to suppress, citing Fed. R. Crim. P. 41. This rule defines "daytime" to mean the hours between 6 a.m. and 10 p.m. It applies only to federal cases unless the rule is duly enacted or adopted by a state. The rule has not been enacted into law in Nebraska. We decline to adopt the rule.

In determining the correctness of the trial court's ruling on a motion to suppress, the Nebraska Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988); *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988).

Neb. Rev. Stat. § 29-814.04 (Reissue 1985) provides that a search warrant "shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that it should not be so restricted . . . ." In Holman's case, the restriction was not lifted. The Nebraska Legislature has chosen not to define the word "daytime." It is a simple rule of statutory construction that terms which are not specifically defined are to be taken in the sense in which they are understood in common language. Neb. Rev. Stat. § 29-109 (Reissue 1985). Nighttime darkness is not commonly understood to be daytime. We hold that for the purposes of determining whether a search complied with the terms of a daytime search warrant, "daytime" extends from dawn to darkness. The warrant was not properly served, and the evidence seized should have been suppressed. The trial court's failure to suppress the evidence was clearly wrong.

One of the police officers involved testified that he obtained the search warrant at approximately 4:20 p.m. The parties stipulated that the sun set on March 31, 1987, at 6:47 p.m. Obviously, the police officers had ample time to serve the search warrant before nightfall. Under department policy, which apparently was adopted without legal advice, the officers believed they had until 10 p.m. to serve the daytime warrant. A police department has no authority to adopt or promulgate rules of criminal procedure. That is the function of the Legislature and the courts. Holman's sentence is vacated,

conviction reversed, and the cause remanded for a new trial.
REVERSED AND REMANDED FOR A NEW TRIAL.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, DOING BUSINESS AS THE MALL SHOPPING CENTER, APPELLEE, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLANT.

425 N.W.2d 320

Filed July 1, 1988. No. 86-403.

1. **Taxation: Valuation.** A taxpayer is entitled to have its property in a county 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.
2. **Taxation: Valuation: Words and Phrases.** Actual value has been held many times to mean exactly the same as market value or fair market value.
3. **Constitutional Law: Taxation: Valuation.** Neb. Const. art. VIII, § 1, provides in relevant part that except for motor vehicles, taxes shall be levied by valuation uniformly and proportionately upon all tangible property.
4. **Taxation: Valuation: Appeal and Error.** An appeal from a county board of equalization is tried by the district court de novo as in equity and considered by this court de novo on the record made in the district court.
5. **Taxation: Valuation: Proof: Appeal and Error.** To successfully overturn a county board of equalization decision on the basis of lack of equalization, a taxpayer must prove that the assessed 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.
6. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and that it has acted upon sufficient evidence to justify its action. This presumption remains until there is sufficient evidence to the contrary. At that point the reasonableness of the valuation becomes a question of fact.
7. **Taxation: Valuation: Proof.** The burden of showing the valuation to be unreasonable rests upon the taxpayer.
8. **Taxation: Valuation: Evidence.** It is proper in tax equalization cases to rely upon sales-assessment ratio studies if they are based upon arm's-length transactions.

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

Douglas J. Peterson, Deputy Lincoln County Attorney, for appellant.

Norman H. Wright, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

FAHRNBRUCH, J.

The Lincoln County District Court reduced the 1984 assessment on plaintiff-appellee's commercial property from nearly 100 to 45 percent of actual value, thereby equalizing it with agricultural land assessments. The defendant, Lincoln County Board of Equalization (The Board), appealed. We affirm.

The plaintiff-appellee, Equitable Life Assurance Society of the United States, doing business as The Mall Shopping Center (The Mall), owned and operated a retail shopping mall in North Platte, Lincoln County, Nebraska, at all times relevant herein. The Lincoln County assessor found the actual and assessed value of The Mall's property for 1984 ad valorem tax purposes to be $5,940,340. The Mall appealed to The Board. One of the reasons cited for the appeal was that the assessment on The Mall's real estate was not equalized with other real property in the county, particularly agricultural land.

The Board found that The Mall's property was valued the same as similar property in the county and affirmed the assessor's assessment. The Mall appealed to the Lincoln County District Court, listing a number of reasons why its assessment should be reduced, including the lack of equalization with agricultural land.

There was, and continues to be, no dispute as to the actual value of The Mall's property per se. The appellee's appraiser fixed the fair market value of The Mall's property as of January 1, 1984, at $6 million, compared to the assessor's fair market value of $5,940,340.

A taxpayer is entitled to have its property in a county 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. See, *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987); *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344

N.W.2d 620 (1984). "Actual value" has been held many times to mean exactly the same as "market value" or "fair market value." *Kearney Convention Center, supra*; *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983).

In The Mall case, the principal issue tried in the district court was the level of uniformity of assessments between commercial and agricultural properties. Basically, The Board's appeal to this court claims that The Mall's evidence regarding uniformity of assessments between commercial and agricultural lands is insufficient to afford The Mall any relief.

In apparent recognition of the reality that governmental costs not shared by one group of taxpayers must necessarily be shifted to and be borne by the remaining taxpayers, Neb. Const. art. VIII, § 1, provides in relevant part, as it did at the pertinent time, that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property."

From a review of equalization cases decided by this court, it becomes abundantly clear that where it becomes necessary to lower the assessed value of a large commercial property to equalize it with agricultural land, it is the homeowner and the owner of smaller commercial property who bear a disproportionate tax. As will be seen later in this opinion, the cost of appealing a disproportionate assessment is prohibitive for the homeowner and owner of smaller commercial property. They will continue to suffer until the inequity is addressed by county boards of equalization or the Legislature.

An appeal from a county board of equalization is tried by the district court de novo as in equity and considered by this court de novo on the record made in the district court. See, *Spencer Holiday House v. County Bd. of Equal.*, 220 Neb. 607, 371 N.W.2d 286 (1985); *Kearney Convention Center v. Board of Equal., supra*. We are therefore obligated to weigh the evidence.

To successfully overturn a county board of equalization decision on the basis of lack of equalization, a taxpayer must prove that the assessed 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. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and that it has acted upon sufficient evidence to justify its action. This presumption remains until there is sufficient evidence to the contrary. At that point the reasonableness of the valuation becomes a question of fact. The burden of showing the valuation to be unreasonable rests upon the taxpayer. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988); *Fremont Plaza v. Dodge County Bd. of Equal., supra*; *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987).

To prove nonuniform and disproportionate treatment, The Mall relies upon two sales-assessment ratio studies. The first study was prepared by The Mall's own experts, who testified at trial. The second study was developed by the State Tax Commissioner, pursuant to Neb. Rev. Stat. § 77-508.01 (Reissue 1986).

Since at least 1966, this court has held that it is proper in equalization cases to rely upon sales-assessment ratio studies if they are based upon arm's-length transactions. See, *County of Kimball v. State Board of Equalization & Assessment*, 180 Neb. 482, 143 N.W.2d 893 (1966); *County of Loup v. State Board of Equalization & Assessment*, 180 Neb. 478, 143 N.W.2d 890 (1966); *Gordman Properties, supra*; *Fremont Plaza, supra*; *Chief Indus., supra*.

Kearney Convention Center v. Board of Equal., 216 Neb. 292, 344 N.W.2d 620 (1984), predictably held on a stipulated record that it is constitutionally impermissible to tax commercial property at 100 percent of its actual value while agricultural property was being taxed at 44 percent of its actual value. In so holding, *Kearney Convention Center* reiterated that while it is permissible to reasonably classify property for tax purposes and to use different methods to arrive at the assessed values for each class of property, the results obtained by such varying methods must correlate to each other in such a manner that taxation of all the classes shall be uniform and proportionate and not exceed actual value. This constitutional principle was recently explained once again in *Banner County*

v. State Bd. of Equal., 226 Neb. 236, 411 N.W.2d 35 (1987), during the course of analyzing a partial amendment to Neb. Const. art. VIII, § 1, adopted after the pertinent time in this case.

In The Mall case, statements from Lincoln County Assessor Bernadine Meyer's deposition which were received in evidence show that the Nebraska Agricultural Land Valuation Manual was utilized for valuing agricultural property in Lincoln County. The Lincoln County abstract for 1984 assessments was also entered into evidence.

The Mall introduced its sales-assessment ratio study through the testimony of its appraiser, William Fisher, and Dr. Gary Hoeltke, an officer and researcher with Selection Research, Inc., of Lincoln, Nebraska. Fisher collected data on agricultural sales in Lincoln County from April of 1983 through approximately September of 1984. He reviewed the data to find sale transactions evidencing fair market value sales. Fifty-three sales were determined to be at arm's length and representative of the varying soil types and agricultural properties in Lincoln County. This data was given to Dr. Hoeltke, who analyzed it and concluded that Lincoln County agricultural land was assessed at between 37 and 47 percent of fair market value for 1984.

Dennis Donner, manager of the technical services section of the Nebraska Department of Revenue, was called by The Mall to testify. He testified that he is responsible for the preparation of the department's own sales-assessment ratio study. He said that the Nebraska Agricultural Land Manual prepared by the department was used to value agricultural land statewide. He further testified that the Department of Revenue's Lincoln County sales-assessment ratio study, based upon 21 sales, showed that agricultural land was assessed at 39.94 percent of its sale price. The 21 sales were selected by the Lincoln County assessor. Donner declared that the 21-sale sampling "is very adequate to say that the non-sold properties would be valued in the same relationship to the sold properties and that the non-sold properties would sell approximately at the same range as the sold properties."

The Board presented testimony of Dr. James Scott, an expert

statistician, and Frank Frost, an appraiser and former Nebraska Department of Revenue employee.

Dr. Scott disagreed with the analytical methods used by Dr. Hoeltke and opined that Dr. Hoeltke's conclusions were not statistically reliable. Dr. Scott also questioned the data used to make the Department of Revenue's sales-assessment ratio. He believed that the data did not satisfy foundational assumptions necessary for inferential statistics and that it was inappropriate to make any inferences from such data.

Dr. Scott indicated that the only statistically reliable way to obtain data for a sales-assessment ratio would be to perform appraisals on at least 10 properties within Lincoln County. Two or three appraisals of each property would be needed to assure accuracy. Dr. Scott admitted that these appraisals would cost between $500 and $1,000 each.

Frost generally testified that purchasers of land in Lincoln County already owned other farm tracts. The sales samples utilized in The Mall's and state's ratio studies were not sales of large tracts, the average sale parcel being 419 acres. Frost concluded that the average Lincoln County farm was 1,400 to 1,600 acres. In his opinion this difference resulted in a false indication of value because higher prices could be obtained for smaller parcels. On cross-examination Frost admitted that large farms are commonly sold in smaller parcels to obtain the maximum total sales price.

In its argument before this court, The Board admitted that its experts could not find any sales of large farms in Lincoln County during 1983 and 1984. The record is devoid as to the last time a 1,400- to 1,600-acre farm was sold as a unit.

The Board presented no sales-assessment ratio studies to support its experts' theories. The district court found that The Board had breached its duty to equalize and had systematically valued agricultural land at 45 percent of its actual value for 1984 while assessing The Mall's property at nearly 100 percent of actual value. We agree. The court properly reduced The Mall's property's assessed value to $2,673,153.

The Board's arguments in support of its first assignment of error, that the *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), decision is not

controlling, are not persuasive. The Board correctly points out that in the *Kearney* case, the evidence was stipulated; that there was no evidence rebutting the taxpayer's position; that the statistical reliability of the sales-assessment ratio study was not challenged; and that there was no issue as to whether the sizes of the parcels of land sold were representative of sales in Kearney County.

The Board's arguments that the rulings in *Kearney* are not controlling miss the target. The rules of law set forth in *Kearney* that the Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property and that a taxpayer is entitled to have its property in a county 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 *are* controlling in this case.

The Board also contends that *Kearney* is not controlling because there the evidence was stipulated, while in this case, The Board introduced evidence to rebut The Mall's evidence. That contention is totally destroyed in *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 312, 405 N.W.2d 555, 561 (1987), where we held:

> The county presented evidence to rebut the independent studies undertaken by the taxpayer's experts, but did not satisfactorily refute the appraiser's testimony. The county attacked the statistical reliability of the taxpayer's study; yet, the results of those studies were consistent with the results obtained in the appraiser's independent studies and the state's study.

Just as in *Fremont Plaza*, the county board of equalization's evidence in this case does not satisfactorily refute the sales-assessment ratio or the nonuniform and disproportionate assessment established by The Mall.

The Mall's case is significantly similar to the *Fremont Plaza* case. The litigants in both cases utilized the testimony of the same expert witnesses. The county board of equalization in each case attacked the statistical reliability of the taxpayer's sales-assessment ratio study. In both cases, the ratio studies were consistent with the studies of the state Department of

Revenue studies, which were based upon data supplied by the respective county assessors. In both cases, the taxpayers' and the Department of Revenue's studies concluded that assessed values of the taxpayers' commercial properties were systematically assessed at a nonuniform and disproportionate rate when compared with agricultural land. In both cases, this resulted in discriminatory, unjust, and unfair assessments of the taxpayers' properties.

In *Fremont Plaza*, based upon the evidence, we approved the methodology used by the taxpayer's experts and Nebraska's revenue department in determining a sales-assessment ratio of commercial and agricultural property. We also found, based upon the evidence, that the studies produced statistically reliable results. The same is true here; the evidence shows the methodology used by The Mall's experts and the Nebraska Department of Revenue produced statistically reliable results.

After reviewing all of The Board's assignments of error, we find that none of them have merit.

Based upon a de novo review of the record, the judgment of the trial court is affirmed.

AFFIRMED.

L. ALFORD, APPELLANT, V. JOHN L. NEAL ET AL., APPELLEES.
425 N.W.2d 325

Filed July 1, 1988. No. 86-614.

1. **Replevin: Judgments: Appeal and Error.** In a replevin action tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Trial: Witnesses: Evidence.** Where a party testifies clearly and unequivocally to a fact which is within his or her own knowledge, such testimony may be considered as a judicial admission.
3. **Motor Vehicles: Sales: Certificate of Title.** As between the buyer and seller of a motor vehicle, the certificate of title is prima facie evidence, but is not conclusive proof of ownership under the Nebraska certificate of title act.

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

James E. Schneider and Allen L. Fugate, of Schneider, Fugate & Griffin, P.C., for appellant.

Donald W. Pederson, of Murphy, Pederson, Piccolo & Pederson, for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

WHITE, J.

This is a replevin action brought by the plaintiff-appellant, L. Alford, against the defendants-appellees, John L., Wilma A., James W., and Bonnie L. Neal, to recover possession of certain personal property purchased at a public auction. The case was tried to the court without a jury. Alford appeals from an order of the district court finding that the plaintiff failed to prove ownership of the property and that he was not entitled to possession of the same.

In January of 1982 John and Wilma Neal and the North Platte State Bank entered into a voluntary liquidation agreement whereby the Neals agreed to hold a public auction sale of their personal property, consisting primarily of farm equipment and livestock, and to list their real estate for sale at a mutually agreed price. On February 17, 1982, the plaintiff, Alford, purchased part of the real estate owned by the Neals. A public auction of the Neals' personal property was conducted on February 18, 1982. By agreement, John and Wilma Neal were precluded from bidding at the auction; however, their son, James Neal, was allowed to bid. Alford testified that just prior to the auction he had a conversation with James Neal and Wilma Neal, at which time he informed the two that he had $150,000 available to purchase enough equipment and livestock to operate the farm which he had purchased the day before. According to Alford, the parties all agreed that Wilma Neal would continue to keep the books and James Neal would do the farming. James Neal was to bid at the sale, and Wilma Neal was to keep a tabulation of the amount of the bids. It was not

disclosed at the auction that James Neal was bidding as an agent. The total amount of the successful bids made by James Neal was $234,488. Included in the purchase were a number of motor vehicles, as defined in Neb. Rev. Stat. § 60-301(1) (Reissue 1984). Alford agreed to pay the amount despite the fact that it was considerably more than the original $150,000 figure.

On a counter check drawn on First National Bank and Trust Company of North Platte, Alford filled in the date, the payee auction company, and the amount of $234,488. Upon Alford's direction, James Neal signed the counter check. The next day Alford and James Neal went to the First National Bank and Trust Company and opened an account upon which the counter check could be drawn. The title of the account was Neal Farms, Inc. The account number was later added to the counter check by a representative of the auction company. Alford deposited $240,000 into the new account by drawing a check on his personal account. Alford testified that he did not intend to make a gift of the $240,000 to the Neals. The payee on the check was Neal Farms, Inc., and the check was endorsed "Neal Farms Inc. by James W. Neal." On the front of the check Alford wrote "Items Purchased @ Sale." The auction company then made a check payable to John Neal and the North Platte State Bank jointly in an amount representing the proceeds from the sale less the auction fee. John Neal endorsed the check, which was presumably applied to reduce his debt with North Platte State Bank. After the sale Alford attempted to help the Neals obtain a loan to buy back the real estate and personal property which he had purchased from them. Attempts to obtain such financing were unsuccessful.

From the time of the auction until the filing of this lawsuit, none of the titles to the motor vehicles in question were transferred from John Neal to Alford. These titles, however, had been previously assigned to the North Platte State Bank. Alford filed this action in May of 1984, after he learned that John Neal had encumbered some of the property.

The defense introduced documentary evidence which indicated that the parties treated the property as belonging to the Neals, but encumbered in the amount of Alford's

investment. Neals' 1982 tax records show that they claimed deductions for depreciation of many of the items involved in the sale. Alford admitted that he had seen the Neals' 1982 tax return in connection with his attempts to obtain financing for the Neals. Exhibit 29 is part of a loan application prepared by Alford on behalf of John and Wilma Neal. A section entitled "Financial Statement as of August, 1983" lists the Neals' assets as 320 acres of land and a leasehold, together valued at $675,000; farm machinery and equipment valued at $375,650; and other personal property, including growing crops and feed, valued at $268,000. A breakdown of the farm equipment lists most, if not all, of the items purchased at the sale. Alford is purported to have a lien on the real estate in the amount of $600,000. No lien by Alford is asserted on the chattels and crops. Exhibit 38 is another financial statement prepared by Alford for the Neals. The statement listed machinery and equipment valued at $205,000 as of September 1982. Once again, many of the items listed were the same as those purchased at the auction. No mention is made of any lien against the personal property.

Other evidence tending to show that Alford was a creditor of the Neals was also presented. Alford never requested any of the proceeds from the sales of hogs after the auction. The parties did not transfer title to the motor vehicles, as required by Neb. Rev. Stat. § 60-104 (Reissue 1984).

The plaintiff introduced documentary evidence which tended to show that he had indeed purchased the items and that no loan of any sort was intended. A sales slip was received indicating the items purchased by James Neal at the auction, the total amount of which was $234,488. Copies of the counter checks used in the transaction were also received. As previously stated, on the check payable to Neal Farms, Inc., Alford wrote "Items Purchased @ Sale." Exhibit 1 is a request for loan information filled out by Alford in which he describes the transaction as a purchase. This exhibit was not received into evidence and will therefore not be considered.

Testimony of the defendants also supports the plaintiff's claim that no loan was intended. On cross-examination, John Neal testified as follows:

Q Now, is it your contention, sir, that a sum of money was borrowed from Mr. Alford to use to purchase that equipment at the sale and the chattels that were purchased, as reflected by Exhibit 18?

A We didn't borrow any money from him.

Q Okay. That means you, your wife, your son and your daughter-in-law; is that correct?

A That's correct.

Also on cross-examination, James Neal testified as follows:

Q All right. Now, sir, did you personally enter into a loan agreement with Mr. Alford, to loan you $240,000.00?

A No, I did not.

Q Are you indebted in any way — do you consider yourself, in any way, personally indebted to Mr. Alford for this $240,000.00?

A No, I do not.

Both John and James Neal admitted that Alford furnished the money to purchase the subject personal property. John Neal testified as follows:

Q Now, did you ever deny, sir, that Mr. Alford furnished the money that was used to purchase the chattels that were purchased on the day of the sale . . . ?

. . . .

A No, I don't deny it.

James Neal testified as follows:

Q And who provided that $240,000.00?

A I believe Mr. Alford did.

. . . .

Q Now, did you ever take the position, under oath, that you don't know whether or not Mr. Alford put up the money for the purchase of the equipment at the sale?

A Well, I know he put up the money.

Alford's 11 assignments of error center around the contention that the district court erred in failing to find that he was the owner of the property and entitled to possession. For the reasons stated hereafter, we agree with the plaintiff-appellant and reverse.

The district court stated the reasoning for its judgment as follows:

> The Court finds, based on the evidence adduced at trial, that all of the actions of the plaintiff were inimical to a claim of ownership. He helped prepare documents which listed the property in question as that of the defendant. On Exhibit 29 which also listed the equipment as that of the defendant, the plaintiff was listed as only claiming a lien on real estate and not upon chattels or crops. There is further evidence that the plaintiff knew the defendants were claiming the depreciation upon the property on their income tax statements and no protest was lodged. The plaintiff allowed some of the purchased property to be sold without protest. The plaintiff did not comply with Section 60-105 R.R.S. 1943 by taking the title to any of the motor vehicles or endorsing any lien upon the title to any motor vehicles purchased. No security agreements were executed nor were any security agreements or documents filed with the County Clerk in McPherson County on any of the property. Absolutely no action was taken for a period of more than two years by the plaintiff to exercise any control over the property in question.
>
> There is no question in the Court's mind that the defendants are indebted to the plaintiff for the sum of $240,000.00. However, there is also no question in the Court's mind that the plaintiff has failed to prove ownership or a special ownership or interest in the property in question and that he is entitled to possession of those items.

In a replevin action tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

Because the defendants did not contest the fact that it was Alford's money which was used to purchase the livestock and equipment, we believe the only issue left to be resolved by the trial court was whether the transaction was intended as a loan or a purchase with a promise to resell.

If the items were purchased by James Neal with Alford's money for John Neal, as the defendants contend, then the

Neals are indebted to Alford in the amount of $240,000. The difficulty with this position is apparent. First of all, John Neal was himself precluded from bidding by agreement with the bank. Bidding through an undisclosed agent would have been a breach of that agreement and also in contravention of the common-law rule that the owner of the property, at whose instance the sale is held, may not bid, either directly or indirectly, unless notice is given that such option is reserved in the seller. See 7 Am. Jur. 2d *Auctions and Auctioneers* § 19 (1980). See, also, Neb. U.C.C. § 2-328(4) (Reissue 1980). Furthermore, this position is inconsistent with the defendants' own testimony that the transaction was not intended as a loan.

If, on the other hand, the transaction was intended as a purchase with a promise to resell, then title passed to Alford at the time of contracting. Neb. U.C.C. § 2-401(3)(b) (Reissue 1980). Under this scenario James Neal acted as a purchasing agent for Alford, and after the purchase the parties entered into a bailment agreement, or, at the very least, their actions gave rise to a constructive bailment, which was breached when John Neal encumbered the property. Alford, as bailor, was then entitled to bring an action in replevin because the Neals, as bailees, impugned Alford's title to the property by claiming ownership of the property. *Jones et ux. v. Stiffler, Appellant*, 137 Pa. Super. 133, 8 A.2d 455 (1939).

The trial court's judgment "that the defendants are indebted to the plaintiff for the sum of $240,000.00" is contradicted by James Neal's and John Neal's testimony to the contrary. The effect of such an admission was discussed in *Southwestern Truck Sales & Rental Co. v. Johnson*, 165 Neb. 407, 417, 85 N.W.2d 705, 711 (1957):

> [W]here a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where, as here, the parties so testifying made no effort to retract, qualify, or otherwise explain the positive force of their own evidence. [Citations omitted.]

See, also, *Sacco v. Gau*, 188 Neb. 808, 199 N.W.2d 605 (1972). We believe that the Neals' testimony was unequivocal in nature

and therefore constituted a judicial admission conclusive as against them. See *Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc.*, 193 Neb. 781, 229 N.W.2d 192 (1975). The evidence introduced by the defendants that tended to show something other than a purchase by Alford was intended was therefore incompetent and should not have been considered by the trial court. We can come to no other conclusion but that Alford purchased the items at the auction. The trial court's conclusion to the contrary was clearly wrong.

The defendants' testimony, together with the plaintiff's evidence, was sufficient to prove ownership in Alford with respect to those items that were not motor vehicles. Because proof of ownership of the motor vehicles involves the certificate of title act, this matter must be considered separately.

Neb. Rev. Stat. § 60-105(1) (Reissue 1984) of the Nebraska certificate of title act states:

> No person . . . acquiring a motor vehicle . . . shall acquire any right, title, claim, or interest in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title or a manufacturer's or importer's certificate duly executed in accordance with the provisions of this act, and with such assignments thereon as may be necessary to show title in the purchaser thereof or an instrument in writing required by section 60-1417 . . . . No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . sold or disposed of, or mortgaged or encumbered, unless there is compliance with this section.

At the same time, § 2-401 states: "(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods . . . (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting."

Recently, in *Worley v. Schaefer*, 228 Neb. 484, 486, 423 N.W.2d 748, 749 (1988), we said:

> In *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 732, 420 N.W.2d 273, 276 (1988), this court for the first time acknowledged that "the provisions of Neb.

> U.C.C. art. 2 (Reissue 1980) governing sales are applicable to the sale of a motor vehicle." Until *Dugdale*, cases involving motor vehicle sales disputes were resolved solely by application of the relevant, and sometimes not so relevant, provisions of the Nebraska certificate of title act. [Citations omitted.] Thus, by recognizing that motor vehicles are "goods" within the definition provided by Neb. U.C.C. art. 2 (Reissue 1980), *Dugdale* set the stage for future cases which necessarily involve competing and conflicting clauses and provisions of the Uniform Commercial Code and the title act.

We are here once again confronted with such a situation.

We have previously been called upon to construe § 60-105 in motor vehicle replevin and conversion actions. See, e.g., *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976); *First Nat. Bank v. Provident Finance Co.*, 176 Neb. 45, 125 N.W.2d 78 (1963); *Snyder v. Lincoln*, 156 Neb. 190, 55 N.W.2d 614 (1952). Of all such cases considered, none have involved an action to determine the question of ownership as between the buyer and seller of a motor vehicle. As such, this is a case of first impression in Nebraska.

Though not on point, the existing case law is somewhat helpful. A common principle intertwined throughout the above cited cases was painstakingly demonstrated in *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co., supra*, wherein we said: "Under the Nebraska Certificate of Title act, sections 60-102 to 60-117, R.R.S. 1943, a certificate of title is the exclusive method provided by statute for the transfer of title to an automobile, *but it is not conclusive of ownership.*" (Emphasis supplied.) (Syllabus of the court.) *First Nat. Bank & Trust* involved the rights to a stolen motor vehicle as between the true owner and a subsequent bona fide purchaser. On these facts we observed that "[t]o hold that a certificate of title procured by theft, forgery, fraud, or misrepresentation is conclusive [of ownership] would defeat the very purpose of the legislation." *Id.* at 599, 244 N.W.2d at 213.

This principle was discussed in a more broad sense by Professor Grant Gilmore in a chapter of his treatise on security interests in personal property devoted to perfection of security

interests under the various types of certificate of title acts.

> Many of the certificate of title acts provide that no interest of any kind in a vehicle subject to the act shall be recognized unless evidenced by possession of, or notation on, a certificate. [Citing the Ohio certificate of title act upon which the Nebraska certificate of title act is based.] The converse of this proposition is, of course, that anyone who has the certificate, or whose lien is noted on it, is in an impregnable position against all competing claimants who have not brought themselves within the protection of the act. Both the "no interest without a certificate" provision and the converse that "he who has a certificate has everything" are attempts to provide simple, mechanical solutions to obscure and difficult problems. Statutes of frauds and the parol evidence rule furnish convenient historical analogies. Difficult problems are not so easily banished; the fate of such statutory "solutions" is, in the first instance, to provoke an inordinate amount of litigation and, ultimately, to be construed, for all practical purposes, out of existence.
>
> Neither the statutory provision nor its converse could be literally applied without leading to something like chaos. So far as "no interest without a certificate" goes, it has been, is and no doubt will continue to be a fact of life—the title acts to the contrary notwithstanding—that people acquire interests in cars which the law ought to protect (unless the law is an ass) even though the interests are not properly evidenced by or on certificates. So far as "he who has a certificate has everything" goes, that would serve in many situations, if literally applied, to reverse the whole elaborate structure of priorities which, implicit in pre-Code law, becomes explicit under Article 9 of the Code.
>
> Thirty or forty years of litigation under the title acts have brought the process of statutory disembowelment well along. The volume of litigation still continues heavy; reading the current crop of title cases is one of the less attractive chores that must be performed by anyone unwise enough to undertake the preparation of a book

> like this. But the consensus that gradually begins to emerge from the cases is the one that an astute observer would have predicted from the beginning: no interest will be recognized which is not evidenced by a certificate unless, on principles of law, equity and natural justice, it ought to be recognized even without the certificate; he who has the certificate has everything unless sound reasons of policy compel his subordination.

1 G. Gilmore, Security Interests in Personal Property § 20.1 at 554-55 (1965).

Courts in other jurisdictions governed by invalidating provisions such as § 60-105 have considered the effect of such a statute in the situation we have here. The majority of these courts have recognized that the principle discussed in *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976), and in Professor Gilmore's text applies equally as well where one party to a motor vehicle purchase agreement is in breach. Such courts have held that, as between the buyer and seller, nondelivery of the certificate of title does not prevent change of ownership. *Sandhorst v. Mauk's Transfer, Inc.*, 252 N.W.2d 393 (Iowa 1977); *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. App. 1972); *Bunch v. Signal Oil and Gas Company*, 505 P.2d 41 (Colo. App. 1972); *Johnson v. Safeco Insurance Company*, 464 S.W.2d 164 (Tex. Civ. App. 1971).

Based upon all of these precedents, we hold that, as between the buyer and seller of a motor vehicle, the certificate of title is prima facie evidence, but is not conclusive proof of ownership under the Nebraska certificate of title act. To say otherwise would unjustly enrich those unscrupulous sellers inclined to withhold certificates of title after successfully procuring the amount of the purchase price from an unwitting buyer. Surely our Legislature never intended such a result.

As construed, § 60-105 does not conflict with § 2-401, but leaves a void which § 2-401 fills; that is, in the situation where a seller wrongfully refuses delivery of the certificate, when does title pass? Section 2-401 will answer this question in light of the particular circumstances of the sales transaction. On the facts of this case, title passed at the time of contracting because

delivery was to be made without moving the goods.

We hold that Alford was the owner of the disputed personal property, including the motor vehicles, and was entitled to possession of the same. The cause is reversed and remanded with directions to enter an order accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

MYRNA CLIFFORD AND DENNIS CLIFFORD, APPELLANTS, V. HARCHELROAD CHEVROLET, INC., APPELLEE.

425 N.W.2d 331

Filed July 1, 1988. No. 86-807.

1. **Workers' Compensation.** The findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
2. **Workers' Compensation: Wages: Words and Phrases.** Wages shall mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. In continuous employments, if immediately prior to the accident the rate of wages was fixed by the output of the employee, his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding 6 months as he worked for the same employer, except as provided by the provisions of Neb. Rev. Stat. §§ 48-121 and 48-122 (Reissue 1984). Neb. Rev. Stat. § 48-126 (Reissue 1984).

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Royce E. Norman, of Kelley, Scritsmier, Moore & Byrne, P.C., for appellants.

David W. Pederson and Terrance O. Waite, of Murphy, Pederson, Piccolo & Pederson, for appellee.

BOSLAUGH, WHITE, and GRANT, JJ., and SPRAGUE and THOMPSON, D. JJ.

PER CURIAM.

This is an appeal in a proceeding under the Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,110 (Reissue 1984 & Cum. Supp. 1986).

On June 17, 1985, William Clifford, Jr., who was employed by the defendant, Harchelroad Chevrolet, Inc., as a salesman, was killed in an automobile accident which arose out of and in the course of his employment by the defendant. This action was brought by his widow, Myrna Clifford, and his son, Dennis Clifford, to recover the compensation due them as a result of the death of William Clifford, Jr.

The decedent, William Clifford, Jr., began employment with the defendant in 1978 as a commission salesman of new and used motor vehicles, farm machinery, and farm equipment. His compensation was based on output, or a percentage of sales made, and he was paid commissions earned on a monthly basis at the end of each month. The record shows that the decedent earned $7,944 in commissions in 1981, $8,378 in 1982, and $8,734 in 1983.

In late May 1984, the decedent became ill, and over the course of the remaining months of 1984, he was subjected to testing and treatment which resulted in numerous hospitalizations and time off from his employment. The decedent's illness prevented him from working the latter part of May 1984, as well as most of June and July. He earned and was paid the following commissions in 1984:

	Earned	Paid	
January	$ 688.70	$ 708.60	(includes some Dec. 1983 commissions)
February	$1,169.58	None	
March	$ 849.10	$ 741.03	
April	$1,049.60	$1,277.65	
May	$ 628.00	$1,677.60	
June	$ 345.00	None	
July	$ 85.50	$ 430.50	
August	$ 533.00	$ 533.00	
September	$ 657.15	None	

October	$ 351.00	$ 675.15
November	None	$ 333.00
December	None	None
Total	$6,356.63	$6,376.53

In December of 1984, the decedent underwent surgery and did not return to work until June of 1985. On June 14, 1985, the decedent spoke with the president and owner of the defendant about resuming employment. He returned to work on June 15, 1985, in the same position and on the same basis of compensation as before. He was furnished a pickup truck to drive, and on Monday, June 17, 1985, while in the course of his employment, was killed in an accident. No commissions were earned by the decedent in 1985, and no sales had been made by him just prior to his death.

After the hearing before a single judge, the plaintiffs recovered an award based on a finding that the decedent's average weekly wage had been $161.19. Upon rehearing before a three-judge panel, two judges found that his average weekly wage had been $123.23. The third judge found that his average weekly wage had been $162.47.

The plaintiffs have appealed to this court. There is no cross-appeal, and the defendant urges that the judgment of the compensation court be affirmed.

Prior to the rehearing, the parties entered into a stipulation of facts, thus leaving for resolution only the issue of the decedent's average weekly wage. The sole issue presented for determination in this court is the decedent's average weekly wage, which is, essentially, a question of fact.

> The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact

by the court do not support the order or award. § 48-185 (Reissue 1984).

Subsection (2) of § 48-122 (Reissue 1984), relating to compensation to dependents of deceased employees, provides:

> (2) When death results from injuries suffered in employment, if immediately prior to the accident the rate of wages was fixed by the day or hour, *or by the output of the employee*, the weekly wages shall be taken to be computed upon the basis of a work week of a minimum of five days, if the wages are paid by the day, or upon the basis of a work week of a minimum of forty hours, if the wages are paid by the hour, *or upon the basis of a work week of a minimum of five days or forty hours, whichever results in the higher weekly wage, if the wages are based on the output of the employee.*

(Emphasis supplied.)

Section 48-126 (Reissue 1984) defines "wages" and prescribes the methods for calculating an average weekly wage:

> Wherever in this act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or *by the output of the employee*, his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and *using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer, except as provided by the provisions of sections 48-121 and 48-122.*

(Emphasis supplied.)

The problem in this case is the determination of the period of time which is appropriate for calculating the decedent's average weekly wage.

Section 48-126 provides that the average weekly wage shall be determined from the decedent's earnings during "as much of the preceding six months as he worked for the same employer." Since the decedent died on June 17, 1985, the preceding 6 months is the period from December 17, 1984, to June 17, 1985.

In this case, the decedent had surgery in December of 1984 and did not work between December of 1984 and June 15, 1985. For that reason, neither the single judge nor the three-judge panel used the period of time from December 1984 to June 1985 to calculate the amount of compensation due the plaintiffs. While not identifying the manner in which he reached the finding of $161.19 per week, the single judge appears to have based his finding on the decedent's earnings during 1981 to 1983 plus 9 months of 1984, a period of 45 months, or 195 weeks. The decedent's earnings for that period totaled $31,433, which, when divided by 195, averaged $161.19 per week.

On rehearing, the three-judge court used the 6-month period preceding December 1984 but excluded 10 weeks during that period when the decedent did not work. One judge used the period from May through October 1984.

The finding of the majority of the three-judge panel was as follows:

> The stipulation of the parties recites in the last sentence of paragraph X that the decedent did not work between December, 1984 and June 15, 1985. The Court has therefore considered the wages earned by the decedent for the six month period preceding December of 1984 and the Court has determined that the plaintiff earned $1,971.65 for the months of June, 1984 through November, 1984. There were, however, periods of time during that six month span that the decedent did not work for his employer. After examining exhibit 1 and exhibit 3, the Court has determined that 10 weeks of that six month period should be excluded. Those ten weeks comprise the period from and including June 3 to and including July 27; from and including August 6 to and including August 14; September 6; and November 1 to and including November 5. The Court has then divided the decedent's earnings figure by the sixteen weeks the decedent actually worked resulting in an average weekly wage of $123.23.

The finding of the majority of the three-judge panel is based on the language of the statute and is supported by the record. The employment was continuous, and the calculation was based on the earnings of the decedent during that part of the

preceding 6-month period in which the decedent worked for the defendant.

We conclude that the judgment should be affirmed.

AFFIRMED.

PAUL EMPFIELD, APPELLEE, V. JO-LENE EMPFIELD, APPELLANT.
425 N.W.2d 334

Filed July 1, 1988. No. 86-895.

1. **Modification of Decree: Child Support.** Modification of child support is an issue entrusted to the discretion of the trial court.
2. _____: _____. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

Roy A. Sheaff and John F. Sheaff, of Sheaff Law Offices, for appellant.

Mary Morgan Cote, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

THOMPSON, D.J.

The marriage of the respondent-appellant, Jo-Lene Empfield, and petitioner-appellee, Paul Empfield, was dissolved on September 21, 1979, by the district court for Hall County. Pursuant to the property settlement agreement approved by the court, custody of the parties' three children, Chad Empfield, born February 2, 1970, and twins, Anthony Empfield and Adam Empfield, born January 18, 1976, was awarded to the respondent, and the petitioner agreed to pay $125 per month per child.

On May 16, 1983, petitioner filed a motion to change custody of Chad from the respondent to the petitioner. The

respondent filed a motion on May 31, 1983, that if custody of Chad was changed, support be increased for the twins. A hearing was held on May 31, 1983, and on June 9, the decree was modified, changing custody of Chad to the petitioner and requiring the petitioner to pay $125 per month per child for the twins. The respondent was not required to pay any support for Chad.

On September 15, 1983, petitioner filed an application to modify, due to respondent's moving to Lincoln and allegedly earning a higher salary. The petitioner requested that the child support he was paying be reduced and that the respondent pay child support for Chad. Petitioner alleged increased costs would be incurred for future visitations with the twins. On September 19, 1983, respondent filed an application to set forth certain visitation rights, to reimburse respondent for medical insurance claims received but not remitted to medical creditors, and for other matters not affecting custody or support of the children.

On January 11, 1984, a stipulation was entered by the parties that child custody, support, and visitation should remain as ordered by the court, and settling other matters. An order was entered on the same date ordering the parties to perform as agreed.

On October 7, 1985, the respondent filed an application to modify, alleging a substantial change of circumstances and requesting an increase in support for the twins.

On November 7, 1985, the petitioner filed an application to modify, requesting 3 months' visitation with the twins with the requirement that the respondent furnish transportation.

A second application to modify was filed by the petitioner on May 30, 1986, requesting that respondent pay support for Chad and requesting a decrease of the support for the twins during the 3 months' visitation, if granted.

The matter came on for trial on September 2, 1986.

The evidence adduced at trial showed that at the time of the 1983 hearing, the respondent's take-home pay was approximately $800 per month, and at the time of the hearing in 1986, it was approximately $900.

At the time of the 1986 hearing, petitioner testified that his

take-home pay was about $1,900 and that this was down somewhat from 1983.

Respondent's testimony centered on increased living costs and the depletion of funds she had received by inheritance. The district court made a journal entry on October 6, 1986, denying respondent's application to increase support and denying petitioner's application to require respondent to pay support for Chad and to reduce support for the twins. The petitioner's application to modify was granted in part, granting 1 month's visitation with the twins and requiring the parties to split the transportation costs of petitioner's visitation with the twins.

Respondent filed this appeal.

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

Modification of an award of child support is not justified unless the applicant proves that a material change of circumstances has occurred since the entry of the decree or a previous modification. *Dobbins v. Dobbins, supra.*

After review of the record, we are of the opinion that the evidence is not sufficient to warrant modification of child support. Respondent failed to prove that a material change of circumstances had taken place that warranted an increased award.

We further note that the petitioner filed an application on September 15, 1983, alleging increased costs for future visitations of the twins and that a stipulation was entered that did not provide for increased costs of visitation. An order was entered approving the stipulation.

By the same standard, no material change of circumstances was shown to justify the requirement that respondent split the transportation costs, and this change should not have been ordered by the district court. We modify the journal entry by the district court by deleting that portion requiring respondent to split transportation costs.

Respondent is allowed $500 for the services of her attorney in this court.

We affirm as modified.

AFFIRMED AS MODIFIED.

ROBERT B. KRAMER ET AL., APPELLANTS, V. MID-WESTERN DEVELOPMENT, INC., APPELLEE.

425 N.W.2d 336

Filed July 1, 1988. No. 86-984.

Appeal and Error. Where a law action is tried to the court without a jury, the findings of fact of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

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

Robert G. Simmons, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellants.

Deborah R. Gilg, of Gilg Law Office, P.C., for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

FAHRNBRUCH, J.

The question in this bench-tried law action is whether the plaintiff realtors are entitled to a commission upon the sale of the Stagecoach Inn motel in Ogallala, Nebraska. The trial court found that they were not. Plaintiffs appealed. We affirm.

Stephen W. Brener of New York was the realtor selected by the defendant-appellee, Mid-Western Development, Inc., to sell its property. Robert B. Kramer, a realtor employed by Winterer Realty, Inc., of Scottsbluff, Nebraska, acted as Brener's cobroker.

Where a law action is tried to the court without a jury, the findings of fact of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Russell v. Board of Regents*, 228 Neb. 518, 423 N.W.2d 126 (1988); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d

424 (1988); *Kubista v. Jordan,* 228 Neb. 244, 422 N.W.2d 78 (1988).

On February 26, 1982, Mid-Western entered into a 90-day written listing agreement whereby Brener was to sell the Stagecoach Inn. The listing provided automatic 90-day renewals unless Mid-Western notified Brener of its intention to terminate the listing agreement. The agreement also provided that if Mid-Western sold the property to a buyer who was introduced by Brener to the defendant within 24 months after the termination of the period of exclusivity, then the commission would be deemed earned, due, and payable.

Dr. Ernest Schabauer, for some period of time prior to the times relevant to this lawsuit, purchased business properties for investment purposes. He had utilized the services of several realtors, including Kramer. Dr. Schabauer first learned that the Stagecoach Inn was for sale in 1980 from the manager of a motel he owned in Kimball, Nebraska. At that time, in a brief conversation, Dr. Schabauer told his wife, Marilyn, he was not interested in the motel.

In the fall of 1981, Kramer told Marilyn Schabauer that the Stagecoach Inn was for sale. Mrs. Schabauer told Kramer that her husband was not interested. Kramer later contacted Mrs. Schabauer about the inn and told her he planned to call the owners about a possible listing. She again told Kramer that the Schabauers were not interested.

In March of 1982, Winterer Realty, through Kramer, entered into an oral agreement with Brener, which authorized Kramer to act as a cobroker in selling the property. We note that Neb. Rev. Stat. § 36-107 (Reissue 1984), requiring that contracts for the sale of property between the landowner and a real estate agent or broker must be in writing, does not apply to contracts between an agent and subagent. See *Reasoner v. Yates,* 90 Neb. 757, 134 N.W. 651 (1912). None of the Mid-Western shareholders were made aware of the cobrokerage arrangement until after the inn had been sold.

Sometime in March of 1982, Kramer contacted Mrs. Schabauer by telephone and, again, advised her that the Stagecoach Inn was for sale. He later mailed information on the property addressed to Dr. and Mrs. Schabauer. The letter

within the envelope was directed to Mrs. Schabauer, who looked only at an enclosed profit and loss statement. Dr. Schabauer saw the Kramer envelope and instructed his wife to throw it away. Dr. Schabauer testified that his previous dealings with Kramer had been unsatisfactory. He testified that he did not know the contents of the envelope or that it related to the Stagecoach Inn. Dr. Schabauer said he was simply not interested in any property Kramer had to offer.

In the latter part of 1982, Mid-Western decided to terminate its listing agreement with Brener, effective November 30, 1982. A letter to that effect was mailed to Brener in early November 1982. About that same time, Dr. Schabauer contacted Ralph Deputy, Stagecoach Inn's manager, to determine whether the inn was still for sale. He was referred to Frank Kersenbrock, president of Mid-Western's board of directors.

Dr. Schabauer had inspected the inn once or twice prior to November 30, 1982. During December of 1982, serious negotiations between Dr. Schabauer and Mid-Western took place. They culminated in the sale of the inn on December 28, 1982, to Dr. Schabauer. Mrs. Schabauer took no part in these negotiations, nor was she a party to the sales contract. The deed lists only Dr. Schabauer as grantee.

In February of 1983, Kramer learned that the Stagecoach Inn had been sold to Dr. Schabauer and demanded a commission from Mid-Western. When his demand was refused, the plaintiffs commenced this action, claiming that Kramer had satisfied the requirement of the listing agreement by introducing Dr. Schabauer to the defendant.

The trial court found that Kramer's telephone contact with Mrs. Schabauer, together with the mailing of information on the property, did not constitute introduction of Dr. Schabauer to Mid-Western. The court further found that at no time, personally, by telephone, or by correspondence, was Kramer in contact with Dr. Schabauer. The trial court held that the plaintiffs failed to meet their burden of proof.

The record reflects the plaintiffs' failure to meet their burden of proving that Dr. Schabauer was "introduced" to Mid-Western through Kramer's efforts. The findings of fact by the trial court in that regard are not clearly wrong.

Plaintiffs also claim that Mrs. Schabauer, at all relevant times herein, acted as the agent of Dr. Schabauer and that through his agent, Dr. Schabauer was "introduced" to Mid-Western. The trial court found that claim to have no merit. We agree. The trial court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. WELLS, APPELLANT.
425 N.W.2d 338

Filed July 1, 1988. No. 87-674.

1. **Rules of Evidence.** Evidence is probative if it tends in any degree to alter the probability of a material fact; if the evidence offered could show that a material fact is slightly more probable than it would appear without the evidence, it is relevant.
2. **Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling is not to be disturbed on appeal absent an abuse of that discretion.
3. **Criminal Law: Constitutional Law: Trial: Evidence: Miranda Rights.** It is an abuse of discretion to admit testimony regarding a criminal defendant's constitutionally protected silence when the record contains no evidence establishing that the silence did not occur following the giving of the *Miranda* warnings following an arrest.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

CAPORALE, J.

A jury found defendant, James A. Wells, guilty of first degree sexual assault, a violation of Neb. Rev. Stat.

§ 28-319(1)(a) (Reissue 1985); he was so adjudged and thereafter sentenced. In this appeal he asserts the district court erred in (1) receiving certain evidence and (2) permitting the prosecutor to inquire into and comment upon his silence during the investigation of the crime. We reverse and remand for a new trial.

FACTS

On June 5, 1986, following separation from her husband, the victim, R.L., and her 14-year-old daughter took up residence in a downtown Omaha apartment building. R.L.'s was a second-floor apartment overlooking the roof of an adjoining one-story portion of the structure, this roof being about 18 inches below the level of the living room window to her apartment. Elevators in the building cannot be activated without a security code, and the stairwells above the lobby level are locked from the direction of entry.

On the second night of her residence at the apartment building, the victim was awakened by the phone at 1 o'clock in the morning. Once awake, she noticed that her daughter was not in the apartment. Moments later, a man tried to enter her apartment through the open living room window; he was apparently startled to find R.L. awake, asked for her daughter, and immediately exited.

R.L. began to search for her daughter, starting with the neighboring apartment of one Ron Cichowski, whom R.L. had met when she moved into the apartment building. Cichowski's apartment was also on the second floor, directly across the roof from R.L.'s living room. R.L. found her daughter in Cichowski's bathroom; the daughter was drunk and lost consciousness shortly thereafter. Also found in the bathroom with her daughter was the defendant. At this time, R.L. recognized defendant as the person who moments earlier had attempted to enter her apartment.

After taking the daughter to her apartment and putting the daughter in bed, R.L. returned to Cichowski's apartment to talk to him about her daughter's intoxication. Defendant was still in Cichowski's apartment at this time but, according to R.L., kept his back to her and left shortly after she returned. Two days later, at R.L.'s instance, the daughter was made a

ward of the state and resided in various care facilities thereafter through the time of trial.

Cecil Walker, a friend of Cichowski's, had been present in Cichowski's apartment the night and morning the victim's daughter was found in Cichowski's bathroom. Walker testified that the daughter went to Cichowski's apartment sometime after 8 or 9 p.m. and drank beer with Walker, Cichowski, and defendant, who had arrived about an hour after the daughter. Walker also testified that the defendant remained in the apartment throughout approximately 1 1/2 hours of the victim's discussion of the drinking incident with Cichowski, although the victim did not speak to defendant directly during this period. Walker also testified that later that morning, he found defendant on the fire escape above Cichowski's bedroom window. The victim subsequently encountered defendant for a brief period, but the two did not speak.

The day following the attempted entry into the victim's apartment, she and a friend secured the living room window with boards. However, the building manager removed the boards from the living room window on June 10, assuring R.L. that although the window lacked working locks, it was impossible for anyone to gain entry as long as the window was closed because "there were only handles on the inside . . . ."

On July 26, 1986, the victim rose a few moments after hearing a noise at approximately 2:20 a.m. and turned on the bathroom light. After she examined the living room window and noted that the outer casement window and the inner screen were both secure, she returned to bed. The victim was awakened later that morning and found that "there was a man on top of me and he didn't have any clothes on. I was sleeping on my back and when I woke up he was probably — I don't know — a few inches away from my face." The bathroom light shone dimly into the victim's bedroom; as soon as she awoke, the man ordered her to roll over on her stomach, and she complied. The victim was wearing a nightgown, underwear, and knee socks. Her underwear had been cut in two in the crotch area, apparently before she awoke. The man ordered the victim to remove her nightgown, and after she complied, he raped her.

After "five or ten minutes," the rapist withdrew, ordered the victim to remain on her stomach, and dressed. At one point the victim turned her head enough to see the man putting on blue jeans. She testified:

> He saw me looking at him and he told me to get on my stomach and to keep my head down. I was asking him not to hurt me. He was pacing in my bedroom and he wasn't talking and he asked me if I had a phone. I told him that I did. He asked where it was and I told him it was in the living room, and he said, "You are going to call the police when I leave," and I told him that I wouldn't call the police; that he could take the phone with him. He said that he didn't want my phone, and he said, "You're going to call the police," and then he said, "If you do that, you're going to hurt me so I am going to have to hurt you." I told him that I wasn't going to hurt him. I was crying and I just said that I couldn't because I didn't know who he was. He stayed in the bedroom for a while walking around and then he told me to roll over on my side, which was facing the bedroom window, and when I did that, I heard him exit my bedroom door and leave through the living room window, run across the roof and I heard him jump. When he jumped, the minute he jumped I heard what I felt was a motorcycle start up. . . . It took off.

The victim immediately put her nightgown back on and went to a friend's apartment on an upper floor at the building, and police officers were summoned. Upon investigation, it was discovered that the screen in the victim's living room window had been cut from the frame on two sides.

An examination of the victim conducted at 6:55 that same morning revealed the presence of sperm cells in the fluid samples taken from her.

The victim described the rapist as white, of small to medium build, about 5 feet 6 inches tall, with shoulder-length "blondish-brown" hair. The victim also thought the rapist must be someone who knew her, because few people knew which of her windows was not secured with boards, and because she felt she had heard the rapist's voice before, although in court she was unable to positively identify defendant as her attacker.

Suspicion first focused on defendant's brother, Robert Wells, whom the victim had met briefly and whom she thought had a voice rather like the rapist's. However, 4 days after the rape, R.L. was unable to identify Robert Wells' voice as being that of the rapist. About a week after the rape, the victim considered the possibility that defendant had raped her; however, although she discussed this possibility with the investigating police officers, she at that time discounted the thought because

> even though Jim and Bob are basically the same build and have the same length of hair and the same color of hair, I felt, because of the way [defendant] had looked [at the victim on the day of a previous chance encounter], if he had raped me, I felt he would have hurt me physically.

A forensic serologist with the Nebraska State Patrol crime laboratory testified that in approximately 80 percent of cases, it is possible to determine a person's blood type by analyzing saliva, semen, or vaginal fluid. It is also possible to determine which of 10 different isomers of the enzyme phosphoglucomutase (PGM) is present in samples of blood, seminal fluid, and vaginal fluid. The serologist further testified that analysis of semen stains found on the victim's bedsheet and nightclothes indicated that the rapist had type B blood and a type of PGM known as PGM 2+2+. The victim's blood type is O, and she has PGM 1. Analysis of a sample of defendant's blood indicated that he has type B blood and PGM 2+2+; analysis of a sample of his saliva confirmed these findings and, in addition, indicated that defendant is a "secretor," that is, one whose blood type and PGM status can be determined by examination of body fluids other than blood, particularly semen, vaginal fluid, and saliva.

According to the serologist, secretors make up 77 percent of the white male population, type B blood is found in 11 percent of the white male population, and PGM 2+2+ is found in 3 percent of the white male population. The likelihood of finding a white male who is a secretor with type B blood and PGM 2+2+ is approximately 1 chance in 1,000.

Cross-examination revealed that analysis of samples taken from defendant's brother indicated that the brother, too, is a secretor with type B blood and PGM 2+2+; the test results

were identical for the defendant and his brother. The serologist also testified that one pubic hair taken from the victim's bedsheet matched known samples of both defendant's pubic hair and that of his brother.

Spermatozoa were found in the semen stains taken from the victim's bedsheet and nightclothes. A urologist testified that he had performed a vasectomy on defendant's brother on October 12, 1983; there were no complications; and following this surgery, two separate sample analyses indicated that there were no spermatozoa in the brother's semen. The urologist's most recent analysis of a semen sample from the brother was made on January 11, 1984. Following a vasectomy, spontaneous reconnection of the vas, leading to a renewed ability to ejaculate spermatozoa, occurs in less than 1 percent of cases in which no other complications are noted; the urologist had encountered no such case in his 10 years of practice.

Following these discoveries, attention shifted to defendant. On November 5, 1986, defendant was arrested on outstanding traffic warrants and briefly held in the Omaha jail. The record does not disclose whether defendant received *Miranda* warnings at this time; Omaha Police Detective Michael Hoch testified only that on November 5, 1986, he "advis[ed] [defendant] that he was going to be placed in custody because of outstanding traffic warrants." The prosecutor, during an in camera conference, stated that "there were no Miranda Rights given that day and that is clear from the reports and from my discussions with Officer Hoch. He didn't advise him of his Miranda Rights." However, no testimony to this effect was adduced.

On November 12, 1986, Hoch met with defendant at his place of employment and requested a saliva sample, which defendant provided. While defendant was not placed under arrest at this time, he was arrested again on December 17, 1986, and charged with the crime giving rise to this appeal.

At trial, the prosecutor, over defendant's strenuous objections, engaged Hoch in the following dialogue: "Q Officer Hoch, on November 5, 1986, did you attempt to talk to [defendant] concerning the sexual assault of [R.L.]? . . . [Hoch] Yes."

Upon cross-examination, defendant's attorney adduced the following testimony from Hoch regarding defendant's November 5, 1986, arrest on outstanding traffic warrants:

> Q And when [defendant] was down at Central [police headquarters] did you question him regarding any . . . matters [other than the outstanding traffic warrants on which he originally had been arrested]?
>
> [Hoch] No.
>
> Q Did you on that day request from [defendant] any substances from his body?
>
> [Hoch] Yes.
>
> Q Did he volunteer these things to you?
>
> [Hoch] Yes.
>
> Q Did he have to do that?
>
> [Hoch] No.
>
> Q Was he cooperative in giving these things? Was there any big hassle to get these things from him?
>
> [Hoch] No.
>
> Q I think you got some blood and hair from him that day, is that correct?
>
> [Hoch] Yes.

And further, regarding the saliva sample taken on November 12, 1986: "Q Again, did he have to give you that? [Hoch] No. Q He voluntarily and cooperatively gave it to you? [Hoch] Yes."

Following close of the State's case, defendant moved for dismissal of the charge, arguing that the State had failed to establish a prima facie case. The district court overruled the motion. Defendant then took the stand and testified that he spent the evening of July 25, 1986, in the company of a friend and coworker named Marlin, returning to his brother's house in Carter Lake, Iowa, around 2:30 on the morning of July 26, 1986, whereupon he went to bed and slept until 10 or 11 that morning. Defendant also testified that he had never had a vasectomy and was, as far as he knew, fertile as of the time of trial; that he had been the person R.L. had seen crawl through her living room window on June 6, 1986; and that he had been the person Walker had seen later that morning on the fire escape outside Cichowski's apartment.

Upon cross-examination, the State's attorney adduced the

following testimony from defendant, once again over defendant's strenuous objection:

> Q And did Officer Hoch attempt to talk to you on November 5, 1986, about the rape of [R.L.] when you were taken in on the traffic warrants?
>
> . . . .
>
> [Defendant] Yeah.
>
> Q . . . And did you talk to him on November 5, 1986, about the rape of [R.L.]?
>
> [Defendant] No.

Defendant again moved for a dismissal at the close of all the evidence; the motion was again overruled. In his closing argument to the jury, the prosecutor stated:

> And finally, in credibility the Judge says you can look at someone's prior conduct to see if it is consistent with their testimony at trial. . . . [O]n November the 5th you were told by Officer Hoch and from this defendant, too, that Officer Hoch tried to interview him and the defendant told you on November 5th that there wasn't any interview; that he did not talk to Officer Hoch about the incident, and that prior conduct you can take and access as to his credibility on the stand when he looked at you and said, "I didn't rape her."
>
> . . . .
>
> . . . He says Robert is a fleeing, fleeing rapist. Robert consented to search on August 1st and Hoch was there and talked to him, gave him an interview on July 31st, he gave him blood one day and gave him hair the next and we don't know why he left, ladies and gentlemen. There is a warrant out for child abandonment but that has nothing to do with this case. Presumably he might know why he left but he didn't tell us. [R.L.] said he had a dope problem. I don't know why he left but I do know that he did a little bit more in terms of cooperation than that guy did (indicating toward the defendant) because when Mr. Wells was asked by Officer Hoch on November 5th, it was away too late, it should have been done earlier, to talk about it. There wasn't any talk about it.

No instructions were given by the trial court limiting the

jury's use of the evidence regarding defendant's refusal to discuss R.L.'s rape with Hoch.

EVIDENCE CONCERNING DAUGHTER

Defendant first assigns the receipt of evidence, over his objection, regarding the victim's 14-year-old daughter. In this connection defendant argues, inter alia:

> We respectfully submit to this Court that the evidence regarding the Defendant finding [the daughter] in the bathroom of Ron Cichowski's apartment, the evidence of [R.L.] returning to Cichowski's apartment after putting [the daughter] to bed, and the evidence regarding [the daughter] being made a ward of the State and being placed in Richard Young Hospital and Boys Town, all entered over Defendant's objections on relevancy grounds, do not tend to make the existence of any fact that is of consequence to the determination of the action more probable as is required by Neb.Rev.Stat. §27-401 (Reissue 1985). Thus, being not relevant it is "not admissible". Neb. Rev. Stat. §27-402 (Reissue 1985).

Brief for Appellant at 17. Initially, we note that defendant's characterization of the evidence is not accurate; nothing in the record before this court suggests that *defendant* found the victim's daughter in Cichowski's bathroom. Rather, the uncontroverted record is that the victim found both her very drunk daughter and defendant in Cichowski's bathroom.

Evidence Admissible

Neb. Rev. Stat. § 27-401 (Reissue 1985) defines "relevant evidence" as "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."

Recently, in *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988), this court considered and rejected an argument virtually identical to the one now made by defendant, noting:

> The argument is not that the evidence fails to address a material issue . . . 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. . . .
>
> . . . It is enough if the evidence offered could show that a material fact is slightly more probable than it would appear without that evidence. . . .
>
> . . . As we have said, § 27-401 requires only that the degree of probativeness be something more than nothing.

228 Neb. at 188-89, 422 N.W.2d at 55. The victim's testimony regarding her encounter with defendant on the night of June 6, 1986, is probative regarding the credibility of her statement, following the rape, that she had found her attacker's voice familiar; the victim's testimony clearly went to the material issue of identity. Similarly, testimony to the effect that the daughter did not reside, after June 9, 1986, in the apartment in which the rape took place went at least to the question of opportunity, making this "material fact [appear] slightly more probable than it would appear without that evidence." *State v. Oliva, supra* at 189, 422 N.W.2d at 55. Clearly, the testimony concerning which defendant complains was relevant to issues material to his prosecution and satisfied the requirements of § 27-401. Although there may have been some way to tell the story of that evening without mentioning the role played by the victim's daughter, we will not dwell on that mere possibility here, the admission or exclusion of evidence being a matter within the discretion of the trial court and one not to be disturbed on appeal absent an abuse of discretion. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

Evidence Not Unfairly Prejudicial

Defendant next asserts that the victim's testimony was, in any event, unfairly prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1985), and therefore should not have been admitted. The only discussion contained in defendant's brief concerning this second branch of his first assignment of error is the following conclusionary sentence:

> Finally, if this Court finds these incidents relevant in some way to this case, the evidence should be excluded by *Neb.Rev.Stat.* §27-403 in that relevant evidence can be excluded if it's [sic] probative value is substantially

> outweighed by "the danger of unfair prejudice, confusion of the issues . . ." §27-403 (Reissue 1985).

Brief for Appellant at 17. Defendant does not tell us how admission of evidence regarding the victim's daughter might have unfairly prejudiced his case, nor how it might have contributed to confusion of the issues; defendant's bald and conclusionary assertion does not rise to the level of "discussion" contemplated by the rule that this court will not consider assignments of error which are not discussed in the brief. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987). We nonetheless elect to consider the matter in the interest of completeness.

Under § 27-403, relevant evidence is to be excluded if, among other things, there is a danger of unfair prejudice. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). In the context of § 27-403, "unfair prejudice" means a tendency to suggest a decision on an improper basis. *State v. Wilson, supra.*

While it is true that the circumstances of the discovery of defendant closeted in a bathroom with a drunk 14-year-old girl may raise inferential questions regarding impermissible issues, such as the defendant's character for sexual criminality or his motives in that particular situation, no attempt was made at trial to adduce evidence concerning any liberties the defendant may have taken then or at any other time with the young girl, nor with any person other than the victim. Upon review of the evidence adduced at trial, it is clear that the victim's daughter played only an extra's bit part in this unfortunate drama, mention of her largely being confined to the necessary explanation of the victim's first encounter with defendant. Under these circumstances, it cannot be said that admitting the evidence was unfairly prejudicial such as to constitute an abuse of the trial court's discretion. Defendant's first assignment of error is therefore without merit.

EVIDENCE CONCERNING SILENCE

Defendant next claims as error the district court's receipt, over his objection, of evidence "regarding his pre-arrest silence." Once again, we must note that defendant's characterization of the evidence is not accurate; it is clear that his refusal to discuss R.L.'s rape with Hoch did not occur prior

to an arrest but, rather, occurred when he was under arrest on outstanding traffic warrants.

As this court recently noted in *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988) (*Lofquest II*), prosecutory references to a defendant's silence, which possibly includes a period of time after the *Miranda* warnings were given, violate the principles of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), which holds that U.S. Const. amend. XIV prohibits prosecutors from using post-*Miranda* silence to impeach an exculpatory story told for the first time at trial. Furthermore, although, theoretically, violation of a defendant's *Doyle* rights at trial may be harmless error if the record demonstrates the absence of harm beyond a reasonable doubt, *Lofquest II, supra*, this court has also stated that violations of the principles of *Doyle* are rarely harmless error in cases where it becomes the word of a defendant against the word of a key prosecution witness, and the matter of the defendant's credibility is so significant that prosecutory error attacking that credibility cannot be harmless beyond a reasonable doubt. *Lofquest II, supra*.

In *Lofquest II*, as in defendant's case,

> there were no eyewitnesses to the attack on the victim. This was certainly a case where the defendant's credibility as a witness played a major role in the jury's evaluation of the veracity of his story. The prosecutor's comments during trial and in closing could not be said to constitute an inconsequential passing remark regarding appellant's silence. The jury was allowed to consider these comments fully, after a defense objection which was overruled, and obviously no curative instruction was given. (See *Greer v. Miller*, ____ U.S. ____, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987), where a single question, an immediate objection, and two curative instructions did not constitute a *Doyle* violation, and such attempted *Doyle* violation was harmless beyond a reasonable doubt.)
>
> Federal circuit court cases have noted, "Because the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." . . . For the above-stated reasons, we hold that

> the *Doyle* violations in this case were so egregious and prejudicial that they were not harmless beyond a reasonable doubt, and a reversal is required.

(Citations omitted.) 227 Neb. at 571, 418 N.W.2d at 597-98.

As this court observed in *State v. Lofquest*, 223 Neb. 87, 89, 388 N.W.2d 115, 117 (1986) (*Lofquest I*):

> If the defendant was advised of his rights immediately upon arrest and the prosecutor's remarks refer to his postarrest, post-*Miranda* silence, then *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), governs, and defendant's due process rights under the 14th amendment may have been violated by the prosecutor's actions. If the defendant was not immediately advised of his *Miranda* rights upon arrest and the prosecutor's remarks refer to postarrest, pre-*Miranda* silence, then defendant's due process rights may not have been violated. *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), requires a showing of the time the *Miranda* warnings were administered, since questioning a defendant about his postarrest, pre-*Miranda* silence is not unconstitutional. Finally, if the prosecutor's comments refer to the defendant's *prearrest* silence, then *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), is applicable.

(Emphasis in original.) The State argues that defendant's reference to his silence as "prearrest" in his brief is somehow conclusive of the issue. This cannot be, and is not, the case. Review of a criminal conviction in a jury trial is not de novo in this court, and this court is bound by the facts as found by the jury, based upon the evidence adduced at trial. As we have noted many times, 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. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

Furthermore, although it may be argued that the cases cited above are distinguishable in that defendant, when he declined to discuss R.L.'s rape with Hoch, was under arrest on outstanding traffic warrants rather than in connection with the

crime which he declined to discuss, we find no authority, nor does the State direct us to any, which supports its implicit proposition that the State must observe constitutional provisions when questioning a suspect under arrest about the crime for which he has been arrested, but may disregard those same constitutional protections when putting to the suspect questions about other crimes. In fact, the U.S. Supreme Court has recently determined otherwise. *Arizona v. Roberson*, 56 U.S.L.W. 4590 (U.S. June 15, 1988) (No. 87-354), held that when a suspect is in custody for a crime in connection with which he has expressed a desire to remain silent, the police may not initiate interrogation concerning a different crime. In sum, a prosecutor may not refer to a criminal defendant's postarrest, post-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982); *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Moreover, any ambiguity regarding precisely when the defendant declined to talk to the police impermissibly taints evidence of the defendant's silence. *Lofquest I*; *Lofquest II*.

As noted earlier, the admission or exclusion of evidence is a matter within the discretion of the trial court and one which will not be disturbed on appeal absent an abuse of discretion. It is, however, an abuse of discretion to admit testimony regarding a criminal defendant's constitutionally protected silence when the record contains no evidence establishing that the silence did not occur following the giving of the *Miranda* warnings following an arrest, *Lofquest II*, error which we cannot say to have been harmless beyond a reasonable doubt, particularly in view of the fact the pubic hair samples and serology tests do not distinguish between defendant and his brother, on whom suspicion originally focused. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). The record therefore sustains defendant's second assignment of error.

DECISION

Accordingly, we have no alternative but to reverse defendant's conviction and remand the cause for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

In view of the scientific evidence concerning the defendant's blood type, I believe the error concerning testimony regarding the defendant's silence was harmless beyond a reasonable doubt.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. CLARK, APPELLANT.
425 N.W.2d 347

Filed July 1, 1988. No. 87-802.

1. **Implied Consent: Blood, Breath, and Urine Tests.** An arrested motorist refuses to submit to a chemical test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986) to determine the motorist's blood-alcohol level when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test.
2. _____: _____. Anything less than an unqualified, unequivocal assent to an arresting officer's request to submit to a chemical test constitutes a motorist's refusal to submit to a chemical test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986).
3. _____: _____. In a criminal prosecution for refusal to submit to a breath test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986), a defendant's physical inability to perform the breath test may excuse conduct which would otherwise be construed or treated as a refusal to submit to such test.
4. _____: _____. Notwithstanding an arrested motorist's expressed consent or agreement to take a breath test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986), the motorist's subsequent conduct may be the basis for an inference that the motorist has withdrawn or revoked the previous consent to such test or has feigned consent to the test and, therefore, has refused to submit to the statutorily authorized breath test.
5. _____: _____. Whether a motorist's physical inability prevents performance of a breath test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986) is a question of fact.
6. _____: _____. In reference to Neb. Rev. Stat. § 39-669.09 (Reissue 1984), an arrested motorist's right to designate a blood or urine test exists only when the arresting officer has directed that the chemical test be performed on a sample of the motorist's blood or urine.
7. _____: _____. If an arrested motorist has refused a chemical test to determine the motorist's blood-alcohol level in accordance with Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986), the motorist has no right to a physician's evaluation of the motorist's condition or chemical tests in addition to that directed by the law enforcement officer.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

Richard H. Hoch, of Hoch & Steinheider, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

SHANAHAN, J.

After a bench trial, the county court for Nemaha County found Terry L. Clark guilty of refusing to submit to a blood-alcohol test authorized by Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1986). On appeal, the district court affirmed Clark's conviction and sentence. We affirm.

In a bench trial of a criminal case and in determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The finding of a defendant's guilt must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support such finding. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987).

Under Neb. Rev. Stat. § 24-541.06(1) (Reissue 1985), concerning appeals from the county court, the district court conducts a review for error in the county court record. *State v. Moore, supra.* See, also, *State v. Daniels*, 224 Neb. 264, 397 N.W.2d 631 (1986) (district court as an intermediate court of appeals).

Late in the evening of January 30, 1987, Police Officer Jerry M. Railsback, while on patrol in Auburn, Nebraska, observed two tandem westbound cars approaching his eastbound cruiser. The second approaching car was closely following the first and had its "bright" headlamps on. When the driver of the second vehicle failed to dim his car's headlamps, Officer Railsback turned around his cruiser and overtook and stopped the second, or trailing, vehicle of the pair of westbound

automobiles. Officer Railsback then approached the stopped vehicle and asked the driver to produce an operator's license and vehicle registration. At that point, Railsback smelled the strong odor of alcohol emanating from the driver, Clark, 17 years of age, and asked Clark if he had been drinking. With Clark was Rick Shaw, 18 years of age. When Clark denied drinking, Railsback asked Clark to step out of the car and perform some field sobriety tests. Although Clark did successfully recite the "English alphabet," Clark could not walk heel-to-toe in a straight line. Officer Railsback requested Clark to join him in the cruiser, where Railsback administered a preliminary breath test through an "Alco-Sensor." Clark failed that preliminary test, was placed under arrest for drunk driving, and was transported by Railsback to the police station.

At the police station, an officer read the "Implied Consent Form" to Clark, who signed that form for a chemical test to determine his blood-alcohol level and agreed to take a breath test on an Intoxilyzer Model 4011AS. Officer James Kattes, a certified operator of the Intoxilyzer, administered the breath test to Clark. Officer Kattes asked Clark to blow into the Intoxilyzer and explained that the machine's green light would be activated and remain activated, so long as the person who was being tested blows sufficient breath into the tube leading to the testing chamber of the Intoxilyzer. Officer Kattes described Clark's contact with the Intoxilyzer:

> I asked Mr. Clark to blow into the intoxilizer; I showed him a green light on the machine that will light up when there's air passing through the tube. If there's not enough air passing through the tube the light will go out; I also explained that to Mr. Clark. Mr. Clark's first attempt he didn't blow hard enough into the machine; he blew for a short time and the light went back out; I told him he had to blow harder, and he never did. It appeared that he was putting his tongue over the end of the tube. So, I advised Mr. Clark that I was gonna give him another chance on the intoxilizer, and if he refused this time, or didn't give a sufficient sample, he would be written for a refusal and charged with the same.

Officer Kattes reset the Intoxilyzer for a test of Clark's breath

and "again instructed Terry to blow through the machine; he again lit the light one time and that was it, he quit blowing again." After resetting the Intoxilyzer for a second time, Officer Kattes informed Clark that

> this [was] his last chance, that he was going to have to give a good sample. Told him to blow into the machine, which he began to do; I encouraged him during the time he was blowing into the machine by saying, "keep blowing, keep blowing", continued to say that until all of a sudden he quit blowing and said, that's enough . . . .

In his three contacts with the Intoxilyzer, Clark never supplied a sufficient sample of his breath for a test or, as described by Officer Railsback, "[I]t wasn't an adequate sample, the green light come [sic] on and then it went off, and he didn't blow hard enough . . . ."

The police issued a citation which included the charge that Clark refused to submit to the breath test to determine Clark's blood-alcohol level. The officers denied using any "profane" or vulgar language in conjunction with their direction that Clark submit to the Intoxilyzer test.

The complaint alleged that Clark refused to submit to a breath test in response to a proper direction by a law enforcement officer requesting such test. Section 39-669.08(4) provides in part:

> Any person arrested as provided in this section may, upon the direction of a law enforcement officer, be required to submit to a chemical test of his or her blood, breath, or urine for a determination of the alcohol content. Any person who refuses to submit to a chemical blood, breath, or urine test required pursuant to this section shall be subject to the administrative revocation procedures of the Director of Motor Vehicles provided in sections 39-669.07 to 39-669.09 and 39-669.14 to 39-669.18 and shall be guilty of a crime and, upon conviction thereof, shall be punished as [set forth in subsections (a) through (c)].

Clark testified that, during his attempts to breathe into the Intoxilyzer, the officers "were telling me to quit fucking with the machine, that I was fucking with the machine, and to keep blowin' keep blowin' . . . . That I was fucking with the machine

. . . tellin' me I was fuckin' with the machine still . . . quit fuckin' with the [Intoxilyzer]." Clark also testified that he believed the officers were trying to "get" him and that he "was scared" throughout the attempted Intoxilyzer tests.

After the police placed Clark in a cell at the county jail, Clark's father was reached by telephone and informed about bail for Clark's release. Cindy and Steve Cole, Clark's sister and brother-in-law, arrived at the sheriff's office. Although Clark had never requested a blood or urine test, because he believed the type of test was a matter within the police officer's discretion, the Coles asked that Clark be given a blood test at a local hospital, a test to be given at Coles' expense. The police refused Coles' request to allow a blood test on Clark.

The county court for Nemaha County found Clark guilty of refusing to submit to a chemical test authorized and required by § 39-669.08. The district court affirmed Clark's conviction and sentence.

Clark claims his conviction must be set aside, because (1) Clark's conduct did not constitute a refusal to take the Intoxilyzer breath test authorized by § 39-669.08, (2) police refusal to allow a blood test on Clark prevents conviction for refusal to submit to the Intoxilyzer test, and (3) evidence is insufficient to sustain Clark's conviction.

Neb. Rev. Stat. § 39-669.09 (Reissue 1984) provides:

> The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08 may direct whether the test shall be of blood, breath, or urine; *Provided*, that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine. The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence. Upon the request of the person tested, the results of the test taken at the direction of the

law enforcement officer shall be made available to him.

Clark asserts that he agreed to take the Intoxilyzer breath test and contends in his brief at 12 that the officers' "profanity and abusiveness . . . [led] to an unconducive testing atmosphere" and that the "extreme harassment by the officers during the testing" prevented completion of the Intoxilyzer test. Brief for Appellant at 14. Paraphrased, Clark's contention is that the officers used "continual profanity" or vulgarity in their language which rendered Clark breathless or so intimidated that he was unable to provide a sample of his breath to complete the breath test.

An arrested motorist refuses to submit to a chemical test authorized by § 39-669.08 to determine the motorist's blood-alcohol level when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test. See, *State v. Medina*, 227 Neb. 736, 419 N.W.2d 864 (1988); *State v. Richter*, 225 Neb. 871, 408 N.W.2d 324 (1987). Cf., *Clontz v. Jensen*, 227 Neb. 191, 416 N.W.2d 577 (1987) (administrative revocation of operator's license; implied consent law); *Jamros v. Jensen*, 221 Neb. 426, 377 N.W.2d 119 (1985). Anything less than an unqualified, unequivocal assent to an arresting officer's request to submit to a chemical test constitutes a motorist's refusal to submit to a chemical test authorized by § 39-669.08. See, *State v. Medina, supra*; *Clontz v. Jensen, supra*.

In the context of a civil proceeding arising out of an administrative revocation of a motorist's license as the result of refusal to submit to a chemical test under § 39-669.08 (Reissue 1984), this court, in *Jamros v. Jensen, supra*, recognized that an arrested motorist's physical inability to perform a breath test may excuse conduct which might otherwise be construed or treated as a refusal to submit to a breath test under the implied consent law. In *State v. Morse*, 211 Neb. 448, 451, 318 N.W.2d 893, 895 (1982), this court observed: "It is arguable that a true physical disability to take a breath test without an opportunity to submit to another form of test would be due process

violation." Therefore, we hold that, in a criminal prosecution for refusal to submit to a breath test authorized by § 39-669.08 (Cum. Supp. 1986), a defendant's physical inability to perform the breath test may excuse conduct which would otherwise be construed or treated as a refusal to submit to such test.

However, notwithstanding an arrested motorist's expressed consent or agreement to take a breath test authorized by § 39-669.08, the motorist's subsequent conduct may be the basis for an inference that the motorist has withdrawn or revoked the previous consent to such test or has feigned consent to the test and, therefore, has refused to submit to the statutorily authorized breath test. See, *Ontiveros v. Arizona Dept. of Transp.*, 151 Ariz. 542, 729 P.2d 346 (1986); *People v. Schuberth*, 115 Ill. App. 3d 302, 450 N.E.2d 459 (1983); *Com., Dept. of Transp., Bur. of Traffic v. Hanes*, 49 Pa. Commw. 407, 411 A.2d 571 (1980); *Matter of Di Girolamo v Melton*, 60 A.D.2d 960, 401 N.Y.S.2d 893 (1978).

Whether a motorist's physical inability prevents performance of a breath test authorized by § 39-669.08 is a question of fact. *State v. Morse, supra.*

In reference to § 39-669.09, we have held that an arrested motorist's right to designate a blood or urine test exists only when the arresting officer has directed that the chemical test be performed on a sample of the motorist's blood or urine. *State v. Thomas*, 223 Neb. 759, 393 N.W.2d 711 (1986); *State v. Morse, supra.*

Clark claims that, contrary to § 39-669.09, he was denied the right to an evaluation by a physician of his selection and a blood test. Whether § 39-669.09 extends such right to one from whom a breath test is requested, we need not decide. A key phrase in § 39-669.09 is "the person tested," which necessitates the conclusion that a chemical test must have been administered concerning the arrested motorist before such motorist has the right to medical evaluation and chemical tests. Without some chemical test administered at the direction of a law enforcement officer, there can be no "additional test" regarding an arrested motorist, as provided by § 39-669.09. Therefore, we hold that, if an arrested motorist has refused a chemical test to determine the motorist's blood-alcohol level in accordance with

§ 39-669.08(4), the motorist has no right to a physician's evaluation of the motorist's condition or chemical tests in addition to that directed by the law enforcement officer. See *McKinnon v. State*, 709 S.W.2d 805 (Tex. App. 1986) (Texas statute substantially similar to § 39-669.09 did not provide for an alternate test, but an additional test; when defendant did not submit to a chemical test, there was no right to an independent analysis by a physician of defendant's choice).

While Clark claims that his inability to complete the breath test was the result of the officers' use of a four-letter word in its various forms as a verb or gerund, the county court, as the trier of fact, determined whether Clark was physically unable to perform the breath test or whether the incomplete breath test resulted from Clark's actual refusal to submit to and complete that test. Coarse conduct, such as that attributed by Clark to the officers, is a questionable police tactic under the circumstances. Even if the testimony about the officers' offensive and vulgar language were accepted as true, the effect of such language in relation to the incomplete breath test presented a question of fact concerning the cause of the uncompleted test and was a question resolved against Clark when the court found that Clark refused to submit to the breath test.

Because Clark's refusal disqualified him as a "person tested" within the purview of § 39-669.09, the officers properly refused the request that a blood test be performed on Clark.

There is sufficient evidence to sustain the county court's findings of fact and Clark's guilt, namely, that Clark refused to submit to the breath test authorized by § 39-669.08.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN LADEHOFF, APPELLANT.
425 N.W.2d 352

Filed July 1, 1988. No. 87-824.

1. **Criminal Law: Probation and Parole.** If a court is to revoke probation for a violation occurring within the probationary period, it is sufficient if procedure to that end was instituted within the probationary period or within a reasonable time thereafter.
2. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Donn K. Bieber, of Otradovsky, Bieber & Westadt, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

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

PER CURIAM.

The defendant has appealed from a judgment of the district court for Colfax County sentencing him to 1 year in the Colfax County jail, following the revocation of his probation. The defendant pled guilty to third degree sexual assault of his 4-year-old niece. Under the provisions of Neb. Rev. Stat. § 28-320(3) (Reissue 1985), this is a Class I misdemeanor. On March 18, 1985, defendant was sentenced to a 2-year term of probation, to include a 30-day period of incarceration. This sentence was to be served consecutively to the jail sentence which was already being served by the defendant for other, unrelated offenses.

The defendant would like to have us consider that the 2 years' probation began to run as of March 18, 1985, the date it was imposed. However, we reiterate that the present sentence was to run consecutively to a sentence then being served. The defendant has brought no record before us to establish when that latter sentence terminated so as to permit the sentence of probation to begin. Defendant must bear the burden of proving

the errors he has alleged. He has not done so.

The State conceded that defendant was incarcerated until August 15, 1985, for the prior offense, and then from August 16 to September 7, 1985, for the sexual assault. He then continued with his term of probation. On November 25, 1986, the State moved to revoke the defendant's probation, as he had punched his sister-in-law. The defendant admitted the assault, and on December 15, 1986, the court found defendant to be in violation of his probation.

At that time, the court could have revoked defendant's probation and imposed upon him "such new sentence as might have been imposed originally for the crime of which he was convicted." Neb. Rev. Stat. § 29-2268(1) (Reissue 1985). The court chose not to do so. Instead, the court proceeded under § 29-2268(2), which provides that under the circumstances presented here, if the court

> is of the opinion that revocation of probation is not appropriate, the court may order that:
>
> . . . .
>
> (c) The probationer be required to conform to one or more additional conditions of probation which may be imposed . . . and
>
> (d) The probationer's term of probation be extended, *subject to the provisions of section 29-2263*.

(Emphasis supplied.) Neb. Rev. Stat. § 29-2263 (Reissue 1985) authorizes a sentence of probation for up to 5 years upon conviction of a felony or second offense misdemeanor and 2 years upon conviction of a first offense misdemeanor.

Therefore, the court, on February 2, 1987, ordered the defendant's probation extended for an additional period of 6 months and the defendant to seek counseling.

On July 13, 1987, the State again moved to revoke the defendant's probation, as he had failed to complete counseling. The defendant admitted the allegation on August 17, 1987, and the court then revoked defendant's probation and on September 8, 1987, sentenced him to 1 year in the Colfax County jail, with credit given for time already served.

As is apparent from the facts recited above, defendant's 2-year term of probation began to run on August 16, 1985, and

would expire on August 15, 1987, if this was a first offense. The maximum term over which a sentence of probation may run for a misdemeanor is 2 years, unless it is a second offense misdemeanor. § 29-2263. Defendant argues that he was neither charged with a second offense nor does the record support such a finding. Therefore, he assigns as error that: (1) the court was without jurisdiction to sentence him on September 8, 1987, since more than 2 years had passed since the original probation order of March 18, 1985; (2) the court's sentence was invalid since the court made no finding that the misdemeanor was a second offense misdemeanor; and (3) the sentence was excessive.

Assuming, without deciding, that defendant is correct in his argument that under the state of the record he could not have been sentenced for a second offense misdemeanor, defendant is entitled to no relief on this appeal. If, as defendant insists, the court was without authority to extend his probation beyond the original 2-year period, then that portion of the February 2, 1987, order was admittedly invalid. However, the fact remains that July 13, 1987, the date on which the State filed its motion charging the defendant with violating his probation and seeking to have it revoked, was within the original, valid, 2-year sentence of probation.

The fact that it was not until August 17, 1987, that defendant admitted the allegation, and September 8 that the court revoked the probation, is of no moment. The revocation related back to the date the motion was filed. If a court is to revoke probation for a violation occurring within the probationary period, it is sufficient if procedure to that end was instituted within the probationary period or within a reasonable time thereafter. The fact that hearing was delayed is not ordinarily a material fact. *State v. Holiday*, 182 Neb. 229, 153 N.W.2d 855 (1967). The court was then authorized to impose such new sentence as might have been imposed originally for the crime of third degree sexual assault, viz, a maximum of 1 year's imprisonment.

This disposes of defendant's first two assignments of error. His last claim of error is that the sentence was excessive. We have said repeatedly that a sentence within the limits prescribed

by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. Considering the defendant's prior record, the seriousness of the offense which he committed, and the fact that defendant was given credit for jail time spent while serving his probation, there is no abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

LEA ANN LAIRD, BY JOHN LAIRD, HER NEXT FRIEND AND FATHER, APPELLANT, V. LARRY B. KOSTMAN, APPELLEE.

425 N.W.2d 607

Filed July 8, 1988. No. 86-418.

1. **Negligence: Liability: Words and Phrases.** The doctrine of last clear chance means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care.
2. **Negligence: Evidence.** In order to recover under the doctrine of last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the party against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident.
3. **Negligence: Evidence: Pleadings.** In order to submit the doctrine of last clear chance to the jury, there must be competent evidence to sustain each of the elements, and the issue must have been raised by the pleadings.
4. **Negligence.** Last clear chance is applicable only to excuse the contributory negligence of the plaintiff.
5. _____. The doctrine of last clear chance has no application unless the person claiming its benefit puts himself in the position of admitting that immediately

before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care.

6. _____. A person who is himself negligent may not recover under the doctrine of last clear chance where his negligence is active and continuing to the very time of the accident.

7. _____. Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action.

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

Claude E. Berreckman, of Berreckman & Berreckman, P.C., for appellant.

Frank E. Piccolo, of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

BOSLAUGH, J.

This action was commenced by John Laird, as father and next friend of the plaintiff, Lea Ann Laird, to recover damages for the injuries she sustained in an automobile-bicycle collision in Cozad, Nebraska, on August 7, 1982. The defendant, Larry B. Kostman, was driving his automobile at the time it collided with a bicycle operated by the plaintiff. As a result of the collision the plaintiff sustained severe injuries to her left leg.

The accident happened at about 6:40 p.m. in the 300 block of East 8th Street. The street runs east and west and is paved with asphalt and concrete. The street is approximately 50 feet wide, with parking lanes 11 1/2 feet wide adjacent to each curb and 27 feet for traffic lanes.

It was a clear, warm, sunny day, and the street was dry.

The plaintiff, who was almost 12 years of age at the time of the accident, was going to Food Town, a grocery store, on an errand for her mother. She was riding her sister's 12-speed boy's bicycle. Although the bicycle had a bar at the top, she was tall enough so that she had no difficulty straddling the bar with her feet on the ground.

The plaintiff had been babysitting two children that day, Jillian Houston, who was 3 years old, and Cody Houston, who

was 6. The Houston children accompanied the plaintiff to the store, Jillian riding on a rack at the rear of the bicycle behind the seat.

The plaintiff rode the bicycle from her home, approximately a block and a half from the scene of the accident, and stopped on the sidewalk along the north side of 8th Street when she reached the driveway at 310 East 8th Street. There was a white Ford van headed west and parked at the curb on the north side of 8th Street, just east of the driveway. The plaintiff testified that she "walked" the bicycle down the driveway and into 8th Street in front of the van until she reached a point where she could see around the van to the east.

On direct examination the plaintiff testified the bicycle was not moving at the time of the impact, "Just, you know, just starting out, like getting one foot on the pedal, you know, just so I could start going," and the bicycle was stopped with "probably just the front wheel and a little bit more in front of the van so that I could see out around the van . . . ."

On cross-examination the plaintiff testified that "maybe 2 feet" of the bicycle was "sticking out" into the street from the van and that she leaned forward, "probably . . . right over the brakes" on the handlebar, when she looked to the east and the west for approaching traffic. She also said that "[m]ost of my body" was standing out in front of the van and only the back wheel, seat, and "[m]aybe the pedals" were protected by the van.

The plaintiff said that she looked to the east and saw no traffic approaching, looked to the west and saw no traffic approaching, and then looked to the east again and "[s]tarted to go across the street" when she saw and heard the defendant's automobile coming toward her. She said, "I threw Jill — turned around and threw Jill off, backing up the bike at the same time and it was a 12-speed bike, so, the brakes locked and I threw Jill off and then that's when he hit the bike and my leg."

The front bumper and front of the hood struck the plaintiff and her bicycle, throwing the plaintiff to the west and north where she landed in the street.

According to a police sergeant who was called to the scene of the accident, the defendant's automobile was stopped in the

westbound lane of the street with the front of the automobile "part-way through the driveway." The right front wheel was 31 feet from the corner of the driveway, and the right rear wheel was approximately 18 feet from the same point. The skid marks behind the defendant's automobile were 21 feet long.

The plaintiff testified that she saw the defendant turn onto 8th Street from Avenue D, an intersection that is more than 200 feet east of the point of impact.

The defendant testified that he turned onto 8th Street from Avenue Newell, approximately three to four blocks east of Avenue D, the first intersection east of the scene of the accident. The defendant stopped at a flashing red light at Avenue C, the first intersection east of Avenue D. The defendant then proceeded on west to Avenue D at 15 miles per hour. At the intersection of Avenue D the defendant increased his speed to approximately 20 miles per hour. According to the defendant, visibility was excellent and he could see clearly all the way to the stoplights downtown, a distance of two or three more blocks. The sun at that time was about at the level of the tops of the buildings downtown, but did not interfere with the defendant's vision because the street was partially shaded by trees along the street. As he approached the scene of the accident, he saw the white Ford van parked in front of 310 East 8th Street. The defendant testified that he saw a "hint of a light coming off the top of [his] window" and, as he reached up to pull the visor down, he saw the bicycle "right in front of me." He estimated he might have had a tenth of a second's reaction time to "hit" his brakes. The bicycle came out of the driveway at 310 East 8th Street on the other side of the parked van. The defendant applied his brakes and felt a surge forward, and then the impact occurred.

The defendant testified that his automobile stopped right in front of the driveway and that when he first saw the bicycle he could see "the whole thing," but did not see the little girl riding on the back of the bicycle.

The plaintiff testified that after the accident the defendant kept repeating and exclaiming, "Oh, my god, I couldn't see her, the sun was in my eyes." The police officer testified that the defendant said he was unable to see anyone and everything,

because of the sun, until about a second or so before the accident. On cross-examination the defendant was asked if he had told the police officer that "you couldn't see a thing because of the sun." The defendant answered, "Somewhat, yes, at that time." The defendant testified that he could not see anything because of the sun, "Just for a split second," and as he was reaching for the visor, "I caught something coming from the right side of the car and I hit the brakes instantaneously." When he saw the plaintiff, she was moving out into the street. He estimated that he traveled "[m]aybe 3 feet" while the sun was a factor and that it all happened really suddenly.

Delbert Wirtjes was a passenger in the defendant's automobile at the time of the accident. Wirtjes testified by deposition that the "[f]irst thing I felt was the brakes, and then I seen her coming over the hood of the car and falling right down by my door." Wirtjes did not see the plaintiff before the accident, and stated: "She just come out of nowhere or as, because, I didn't see her either, just like that it happened, she just came out of nowhere."

According to Wirtjes, the defendant's car stopped 6 to 10 feet south of a parked vehicle, and there was room so "I think another car could have got between us."

The case was submitted to the jury on issues of negligence, contributory negligence, and comparative negligence. The plaintiff requested an instruction on last clear chance, NJI 3.23, which was refused. The jury returned a verdict for the defendant.

The plaintiff has appealed and has assigned as error the refusal to instruct on last clear chance. There are a number of reasons why we believe it was not error for the trial court to refuse to instruct on the doctrine of last clear chance.

In *Kruger v. Omaha & C. B. Street R. Co.*, 80 Neb. 490, 495, 114 N.W. 571, 573 (1908), this court stated:

> The doctrine of the "last clear chance" simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care.

In *Whitehouse v. Thompson*, 150 Neb. 370, 372-73, 34 N.W.2d 385, 386 (1948), we set out the requirements necessary in order to invoke the doctrine of last clear chance:

> In order to recover under the doctrine of the last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident.

In order to submit the doctrine to the jury there must be competent evidence to sustain each of the foregoing elements, *Bush v. James*, 152 Neb. 189, 40 N.W.2d 667 (1950), and the issue must have been raised by the pleadings, *Kubo v. Fish*, 152 Neb. 74, 40 N.W.2d 270 (1949).

Last clear chance is applicable only to excuse the contributory negligence of the plaintiff. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

The doctrine has no application unless the person claiming its benefit puts himself in the position of admitting that immediately before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care. *Carter v. Zdan*, 151 Neb. 185, 36 N.W.2d 781 (1949).

A person who is himself negligent may not recover under the doctrine of last clear chance where his negligence is active and continuing to the very time of the accident. *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984).

There is also a time factor. As we said in *Bush v. James, supra*

at 196-97, 40 N.W.2d at 672-73:

> As stated in 38 Am. Jur., Negligence, § 219, p. 905: "The doctrine is not applicable where the emergency is so sudden that there is no time to avert the accident. Succinctly stated, the last clear chance must be a clear one."
>
> We have said in Ellis v. Union P. R. R. Co., *supra*: " 'Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action.' Diehm v. Dargaczewski, 135 Neb. 251, 280 N.W. 898; Moses v. Mitchell, 139 Neb. 606, 298 N.W. 338."
>
> " 'In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the "last clear chance" doctrine.' Johnston v. Delano, 100 Neb. 192, 158 N.W. 1034." Nielsen v. Yellow Cab & Baggage Co., 130 Neb. 457, 265 N.W. 420. See, also, Moses v. Mitchell, 139 Neb. 606, 298 N.W. 338.

The amended petition did not plead the doctrine and did not plead facts which would raise the doctrine as an issue. Although the facts alleged might be said to allege the plaintiff was in a position of peril, there is nothing pleaded to allege that her situation was a result of her own negligence. The plaintiff's position is that she was free of negligence.

The plaintiff testified that she saw the defendant's automobile when it was at the intersection of Avenue D, more than 200 feet east of the point of impact. Although she testified that as she attempted to move the bicycle backward, the brakes locked, presumably preventing further backward motion, there was nothing alleged or proven to show that the plaintiff was prevented from turning the front wheel of the bicycle to the right and moving the bicycle to the west and then toward the curb to a position of safety.

Under the plaintiff's evidence, only approximately 2 feet of the bicycle extended into the street beyond the parked van. Thus, under her theory of the facts, she was not in a position of peril from which she could not escape by the exercise of ordinary care. Stated differently, her failure to move the bicycle

out of the path of the defendant's automobile was negligence which was active and a contributing factor to the accident.

All of the evidence suggests that the accident happened rather suddenly. While there was sufficient evidence of negligence on the part of the defendant to submit the case to the jury, it is a very close question as to whether the defendant, in fact, had a last *clear* chance to avoid the collision.

From our review of the record, and for the reasons stated, the trial court properly refused to submit the doctrine of last clear chance to the jury.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., concurs in the result.

VAL DEAN WATMORE, APPELLANT, V. WILLIAM FORD ET AL., APPELLEES.

425 N.W.2d 612

Filed July 8, 1988. No. 86-454.

1. **Pleadings.** In the absence of a reply, generally, the allegations contained in an answer must be considered to be denied by the plaintiff.
2. **Damages: Pleadings: Proof.** One who seeks to avoid the legal effect of a release of a cause of action for damages has the burden of pleading and proving the facts which entitle such party to relief.
3. **Contracts: Words and Phrases.** A release is a contract or a species of contract.
4. **Contracts: Intent.** A release will be construed so as to effectuate the intention of the parties as gathered from the instrument taken as a whole.
5. _____: _____. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.
6. **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 that the moving party is entitled to judgment as a matter of law.

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

Carole McMahon-Boies, of Pepperl, Melcher & McMahon-Boies Law Offices, P.C., for appellant.

Robert M. Spire, Attorney General, Charles E. Lowe, and Steven D. Burns for appellees.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and CHEUVRONT, D.J., and COLWELL, D.J., Retired.

HASTINGS, C.J.

This is an appeal from the order of the district court which entered judgment in favor of the defendants, following defendants' motion for summary judgment. The trial court found that there were no genuine issues of material fact and that defendants were entitled to judgment as a matter of law. Plaintiff's petition was ordered dismissed. Plaintiff has appealed.

The defendants, William Ford, Arlyss Brown, and Linda Proskovec, were, respectively, the acting director of the Nebraska Department of Public Institutions (DPI), general counsel of DPI, and director of administrative services of DPI. Plaintiff had been an administrative employee of DPI whose immediate superior was defendant Proskovec.

Plaintiff's amended petition alleged that he had been employed by DPI between October 27, 1969, and December 9, 1982; that beginning in September of 1982, the defendants began an investigation of plaintiff's performance of the duties of his office, which culminated in charges being levied against plaintiff, resulting in his termination from employment on December 9, 1982; that the State Personnel Board, on October 27, 1983, found that plaintiff's termination had been improper and ordered his rehiring; that as a result of the period of termination, plaintiff had suffered damages in a variety of ways; that defendants' conduct amounted to deliberate, malicious, and intentional interference with plaintiff's contract of employment with the State of Nebraska; and that plaintiff had suffered damages in the nature of lost medical benefits, lost vacation time, lost pay raises, other expenses, and general damages consisting of physical and emotional distress, humiliation, and embarrassment.

In their separate, but similar, answers, the principal affirmative defense raised by defendants is that plaintiff, for a good and valuable consideration, had previously executed a release document releasing the State of Nebraska and its employees and agents from any and all liability arising out of the matters alleged in the amended petition and that plaintiff therefore is barred and precluded from pursuing his action against the defendants.

No reply of the plaintiff appears in the record.

In ruling favorably for the defendants, the district court found that plaintiff had in fact executed the release as alleged, which precluded him from pursuing this action.

The plaintiff assigns as error the granting of the summary judgment on the basis of a release for which he did not receive adequate compensation to justify the release of these defendants and, further, because it was clear from the circumstances surrounding the execution of the release, that plaintiff was receiving only backpay and therefore did not intend to release all causes of action against individuals acting outside the scope of their employment with the State of Nebraska.

The following facts are found in the record, concerning which there is no dispute. Plaintiff did, on February 7, 1984, file a miscellaneous claim with the State Claims Board, seeking recovery of $32,352.38 from the State of Nebraska for backpay and benefits alleged to be due for the period from December 24, 1982, through December 2, 1983, resulting from his improper termination. The claim was itemized to include health and medical benefits, life insurance benefits, and pay lost, including normal raises. A settlement was reached in the amount of $30,825.06. Plaintiff signed a release on May 3, 1984, in consideration of that amount, in which it is stated in part:

> I do hereby and forever fully release the State of Nebraska, its officers and employees, both individually and collectively from any and all claims which I may have against the State of Nebraska, or any of its officers or agents, by reason of the events and occurences [sic] of, on or about Dec. 9 & 5, 1982 & 83, in Lancaster County, Nebraska, more fully described in my Claim for Injury or

> Damage of the State of Nebraska, State Claims Board, Claim No. M.C. 085; that this release shall be binding upon myself, my heirs, executors, administrators and assigns and is complete as to any and all claims of every nature whatsoever, arising in connection with the events pertaining to said claim, and that it releases fully and finally damages and injuries both known and unknown.

Plaintiff was then paid by state warrant in the amount of $24,469.82, representing the consideration stated in the release less social security tax and state retirement.

The record further discloses undisputed facts as contained in the affidavits of the defendants. Essentially, defendant Brown recites that her office was assigned the responsibility of investigation of certain complaints that had been made against the plaintiff; that she or her office interviewed more than 32 witnesses; that the plaintiff chose not to respond to the information gathered in the investigation that was disclosed to him; and that all of the investigations, interviews, conversations, and recommendations made by Brown were done as a part of her duties and in her capacity as general counsel for DPI.

Defendant Proskovec's affidavit reveals that she did provide information relevant to the investigation; that upon being asked by the acting director of DPI for her recommendation, based on the information contained in the investigation, she did recommend termination of the plaintiff's employment; and that all of her actions were undertaken in her capacity as an employee of the state and as the plaintiff's supervisor.

William Ford, in his affidavit, stated that after a review of the investigation and two unsuccessful attempts to have the plaintiff respond to the allegations contained in the various statements in the investigation, and upon recommendation of Brown and his own review of the findings of the investigation, he did terminate plaintiff's employment with the state because it was his belief that the allegations made against plaintiff were significant to the degree that Watmore's continued employment would have a negative effect on the operations of the department. This action was taken in the course of the performance of Ford's duties as acting director of DPI.

The evidence submitted by the plaintiff at the hearing on the motion for summary judgment was concerned exclusively with his opinions as to whether the defendants had lied, should have known better, or terminated him out of malice. Additionally, he introduced portions of the testimony before the personnel board which later reinstated him.

At no point in the record has the plaintiff denied the execution of the release and the receipt of payment on that release, other than through his failure to file a reply to defendants' answers. In the absence of a reply, the allegations contained in an answer must be considered to be denied by the plaintiff. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986). However, the release exists, the defendant signed it, and he received payment in full. There is no dispute in the record as to those facts. One who seeks to avoid the legal effect of a release of a cause of action for damages has the burden of pleading and proving the facts which entitle such party to relief. *Nicholson v. Braddock*, 201 Neb. 531, 270 N.W.2d 314 (1978). Plaintiff here did not do so.

In his reply brief, Watmore states:

> The release does not fail on the basis of inadequate compensation. However the coverage of the release must be determined to decide whether it was intended to extend to employees acting outside the scope of their employment in taking actions against the plaintiff in the months of September, October, November and December of 1982.

Reply brief for Appellant at 3.

A release is a contract or a species of contract. "The general rules governing the construction of contracts are applicable in the construction of written releases; a release will be construed so as to effectuate the intention of the parties as gathered from the instrument taken as a whole." 76 C.J.S. *Release* § 38 at 669 (1952).

It is the law that the intent of the parties must be gathered from the contents of the document alone if the language used in the documents is unambiguous. *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987).

" 'When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties

are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.'. . ." *Dockendorf v. Orner*, 206 Neb. 456, 460, 293 N.W.2d 395, 397 (1980). Thus, the proper meaning of the release, if unambiguous, presents a question of law, with regard to which this court is obligated to reach an independent conclusion. *Washington Heights Co., supra.*

The release is broad, clear, and unambiguous; not special or restrictive. Watmore executed the release in full settlement of his claim, with the advice of counsel. The release was executed in connection with a claim, both of which were filed in the Office of Risk Management of the State of Nebraska. On its face, the release was intended to be a complete settlement and release of any dispute between an employee and his employer and its employees and agents with regard to his termination. The release did not reserve a claim against the defendants, but contained language indicative of an intention to release them, as it included "agents," "employees," and "officers" of the state. The release also discharged Watmore's rights "as to any and all claims of every nature whatsoever, arising in connection with the events pertaining to said claim," thus covering miscellaneous as well as tort claims. The termination date, December 9, 1982, was specifically set out. This matter cannot somehow be separated as independent from the matter of the present litigation, see *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987), as the defendants and their actions were precisely those contemplated in the release.

Watmore's case bears resemblance to a recent Missouri case, *Schmalz v. Hardy Salt Co.*, 739 S.W.2d 765 (Mo. App. 1987), where an employee signed a release which contained the following language discharging

> "the Hardy Salt Company (Employer) its officers, directors, employees and agents, successors and assigns, of and from any and all manner of action and actions, causes and causes of action, debts, sums of money, obligations, liabilities, claims and demands whatsoever made, to be made, or which might have been made as a consequence of his employment by the Employer, or arising out of the termination of the employment relationship, or arising out of any acts committed or

> omitted during or after the existence of the employment relationship . . . ."

(Emphasis omitted.) *Id.* at 767. The plaintiff had consulted an attorney before signing the release. In consideration of the release, defendant Hardy Salt Company agreed to continue plaintiff on the payroll for at least another 6 weeks and to pay him 1 month's severance pay ($4,583.33) upon termination. The plaintiff was an experienced businessman and held the position of financial vice president of Hardy Salt. He sought to recover from his employer for, inter alia, tortious interference with his contract of employment. The court found all the counts in plaintiff's petition to be factually based upon conduct connected with plaintiff's employment or termination. With respect to the plaintiff's various causes of action, the court ruled:

> All arise under contract or tort at common law as a consequence of his employment or from termination of that employment or from acts committed or omitted during or after the existence of that employment relationship. All such claims have been released. There is no material fact in dispute and defendants were entitled to judgment as a matter of law.

Id. at 768.

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 that the moving party is entitled to judgment as a matter of law. *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

ROBERT F. BOHAC, APPELLEE, V. LYNN E. BOHAC, APPELLANT.
425 N.W.2d 616

Filed July 8, 1988. No. 86-534.

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

Michael McCormack and Thomas J. Donnelly, of McCormack, Cooney, Mooney & Hillman, for appellant.

Dan D. Stoller for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

PER CURIAM.

This is a dissolution of marriage action in which the respondent-appellant wife, Lynn E. Bohac, assigns as error the action of the trial court "in dividing the property of the parties by failing to take into consideration the loans made by the Appellant's father to the parties during the marriage, thus creating an inequitable division of property."

We have reviewed the trial court's action de novo on the record, and we determine that the trial court did not abuse its discretion in the division of the marital property. Accordingly, the decree of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. SHERROD, APPELLANT.
425 N.W.2d 616

Filed July 8, 1988. No. 87-438.

1. **Sexual Assault: Evidence: Other Acts.** Sexual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy.
2. **Criminal Law: Evidence: Other Acts.** If a distinctive pattern or procedure similar to the charged crime is found in the separate crime or crimes, the separate act or acts may have probative value in determining the guilt of the defendant.

3. _____: _____: _____. A prior act or acts or subsequent activity need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value.
4. **Criminal Law: Trial: Pleas: Evidence: Proof.** It is elementary that a plea of not guilty places in issue every relevant fact to prove the State's case, and until and unless the trial court, in the exercise of its discretion, determines that further evidence is irrelevant, the State is entitled to attempt to prove its case.
5. **Prior Convictions: Right to Counsel: Proof: Records.** The transcript of a judgment used to prove a prior conviction must show that at the time it was a counseled conviction, i.e., that defendant either was represented by counsel or waived such right. A transcript which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction.
6. **Judgments: Prior Convictions: Proof.** In enhancement proceedings the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance.
7. **Prior Convictions: Right to Counsel: Presumptions: Proof.** Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. However, if the record affirmatively shows a conviction, together with evidence that defendant either intelligently and voluntarily waived counsel or was represented by counsel at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—we will presume a counseled conviction which will satisfy the State's burden of proof until and unless the defendant establishes proof to the contrary.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

HASTINGS, C.J.

The defendant was convicted by a jury of first degree sexual assault and, after having been found to be a habitual criminal under the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1985), was sentenced to a term of imprisonment of 35 years. On appeal to this court, the defendant assigns as error: (1) The trial court allowed evidence of a prior sexual assault by the

defendant; (2) the trial court gave an erroneous instruction; and (3) the trial court found two prior felony convictions of the defendant on insufficient evidence.

In May of 1986, the 17-year-old female victim, the prosecutrix, was waiting for a friend in a parking lot in Omaha when she met the defendant, age 34. The two visited and exchanged telephone numbers. From that time on, defendant would call the prosecutrix at least three times a day. He told her he was 27 years old. On June 7, 1986, while the victim was walking in her neighborhood, the defendant drove up and told her he wanted to talk to her. The prosecutrix got in the defendant's car, and, after stops at a liquor store, at the home of the defendant's brother, at his sister's apartment, and then at a McDonald's, the defendant drove to Hummel Park, where he sexually assaulted the victim, according to her testimony. She said she attempted to fight back, but he threatened to beat her and said that he had a gun under the seat and that "he hadn't had a woman in a long time" because he had been in the penitentiary.

The State also called as a witness another alleged victim of the defendant's sexual proclivities, a 16-year-old female. According to her testimony, the defendant had met her in March of 1986 as she was leaving a grocery store. A few days later, as she was walking home, the defendant again approached her in his car, and this time the alleged victim gave defendant her telephone number. After this the defendant telephoned her four to five times a day. Finally, on March 14, 1986, she agreed to meet the defendant when she got off the bus after school. She got in his car. The defendant drove to a liquor store and then to Carter Lake. She then insisted that she had to go home. Instead, the defendant drove her to Hummel Park, and, although she attempted to resist him, after telling her he had a gun in the glove compartment, he raped her. Afterward, the defendant told her that "he did it because he hadn't been with a woman in a long time."

The defendant offered evidence which contradicted the testimony of the prosecutrix in this case and also offered alibi testimony. However, with or without the testimony of the alleged victim witness, the testimony of the prosecutrix was

sufficient, if believed, to have found defendant guilty of the offense beyond a reasonable doubt. The jury obviously believed her testimony.

However, it is the testimony of the alleged victim witness which the defendant claims was erroneously admitted. He cites Neb. Rev. Stat. § 27-404 (Reissue 1985), which provides in part:

> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The instructions given by the court at the close of all of the evidence included instruction No. 12, which read:

> Evidence was received in this case relative to an alleged similar act allegedly committed by defendant in connection with an event in which the witness, [the 16-year-old] was involved. Such evidence was received only and for the limited purpose of showing plan, motive, preparation and identity of the accused. You must not, therefore, consider such evidence for any other purpose.

The contention of the defendant as to the admissibility of the prior sexual act is adequately addressed by our opinion in *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984). In that case, in a prosecution for attempted sexual assault, the testimony of three other intended female victims as to prior acts in which the defendant had attempted to pick them up, which testimony related to defendant's method of operation, the nickname he used, and the identity of his automobile, was admitted into evidence. We affirmed the action of the trial court, citing with approval the following language from *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984):

> " '[S]exual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third

parties.' "

Baker, supra at 212, 352 N.W.2d at 897. We went on to say: "In *Plymate* we approved the reception of a description of an interview wherein the defendant admitted some 300 or more sexual assaults on children and described in detail the seduction of the children." *Id.*

If a distinctive pattern or procedure similar to the charged crime is found in the separate crime or crimes, the separate act or acts may have probative value in determining the guilt of the defendant. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

The prior act or acts or subsequent activity need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). Such was the case here.

The defendant claims error in giving instruction No. 12 because identity and motive were not placed in issue at trial. However, a plea of not guilty challenges all elements of the crime.

> "It is elementary that a plea of not guilty places in issue every relevant fact to prove the State's case, and until and unless the trial court, in the exercise of its discretion, determines that further evidence on a point is irrelevant, the State is entitled to attempt to prove its case."

Ellis, supra at 391, 303 N.W.2d at 749. The identity of the perpetrator is clearly an issue that the State must prove. Also, although it need not be proved, motive is strong circumstantial evidence against a defendant.

As to plan, defendant argues that evidence of a prior act must be signaturelike. This is not necessarily true. As stated in *Ellis, supra* at 391, 303 N.W.2d at 749: "This court does not require that the prior or subsequent activity be identical to the act charged to be admissible."

To be evidence of preparation, the jury need only find that the prior assault was simply a "trial run" in preparation for later similar attacks, not necessarily pointed to this victim.

Furthermore, contrary to defendant's argument, instruction

No. 12 did not require the jury to find that the prior act must establish each and every one of the four elements. Perhaps a more correct instruction would have been to the effect that the evidence could be used to establish any issue at trial other than the defendant's criminal propensities. Even with the more limited instruction, however, the jury found the defendant guilty. The defendant has not shown how he was prejudiced by the instruction.

Finally, we consider whether the evidence of the two prior convictions was sufficient to establish defendant's status as a habitual criminal. In order for the defendant to be so categorized, it is necessary for the State to prove that such defendant has been twice before convicted of a felony, sentenced, and committed to prison. § 29-2221. Duly authenticated copies of the former judgments and commitments shall be competent and prima facie evidence of such former judgments and commitments. Neb. Rev. Stat. § 29-2222 (Reissue 1985).

Introduced in evidence at the enhancement proceedings were two exhibits, each entitled "Judgment and Sentence," in two different cases in the district court for Douglas County, both duly authenticated, which recited in substance that defendant was present in court with named counsel, that he was informed by the court of the verdicts of the juries finding him guilty of forcible rape in the one instance and first degree sexual assault in the other, and that he was sentenced to terms of imprisonment in the Nebraska Penal and Correctional Complex.

Although defendant did not object to the reception into evidence of the two prior judgments and sentences, he did argue that the two exhibits should show that defendant was represented at the time of the prior *convictions*, not at the time of sentencing. Defendant did not claim or demonstrate that his convictions were uncounseled.

It is true that in *State v. Ziemba*, 216 Neb. 612, 619, 346 N.W.2d 208, 214 (1984), we stated:

> The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right

> to counsel. . . . A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction.

We have also said that the burden of proof in this regard remains with the State. As stated in *State v. Smith*, 213 Neb. 446, 449, 329 N.W.2d 564, 566 (1983), regarding absence of counsel:

> However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois, supra.* Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. *Burgett v. Texas, supra*; *State v. Tweedy, supra.*

However, the record here is not silent. It indicates that on each prior occasion, defendant was present with counsel, was informed of the prior verdict of guilt, and then stated that he had no reason to state why sentence should not be imposed. The question with which we are presented is whether, under these circumstances and on this record, we can presume that counsel was present at the time of conviction.

We have no problem indulging in this presumption and do so hold that the State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled. *State v. Goff*, 418 N.W.2d 169 (Minn. 1988); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF C.A.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.A. AND W.A., APPELLANTS. IN RE INTEREST OF V.S.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.A. AND W.A., APPELLANTS.

425 N.W.2d 621

Filed July 8, 1988. Nos. 87-684, 87-685.

1. **Abandonment: Words and Phrases.** Willful abandonment has been defined as intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection.
2. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child.

Appeal from the County Court for Morrill County: G. GLENN CAMERER, Judge. Affirmed.

James M. Mathis, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant L.A.

Randall L. Lippstreu, of Harris & Lippstreu, for appellant W.A.

Leonard G. Tabor, Special Prosecutor, for appellee.

Richard H. Jensen, guardian ad litem.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

WOLF, D.J.

This is an appeal from orders of the county court for Morrill County sitting as a juvenile court terminating the parental rights of the father and mother of the two minor children. The cases were separately docketed in the juvenile court but consolidated here for the purpose of hearing on appeal.

The juvenile proceedings were initiated June 13, 1984, with petitions alleging the children to be persons under Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 1982). After hearing on August 1, 1984, the court determined the children to be within § 43-247(3) and placed the children in the care, custody, and control of the Nebraska Department of Social Services.

Initially, the children were placed in the home of their maternal grandparents. In October of 1984, the children were placed in an area foster home. A Child Protective Services worker arranged schedules of visitation between the parents and the children, but in November of 1984 both parents moved away without any communication to the service worker. The parents returned to Nebraska from Texas in February of 1985. Immediately, the service worker set up visitation between parents and children, but between February 8 and September 6, 1985, the parents only appeared for one visit, and on that occasion the father was arrested for causing a disturbance.

In 1986, visitations were prearranged for the second Monday of each month, and the mother did not show for visits in April, May, June, or July. In the meantime, the father was charged in district court in February of 1986 with attempted incest, a Class IV felony, and third degree sexual assault, a Class I misdemeanor. The offenses were alleged to have occurred in June and May, respectively, of 1984. The victim of both assaults was his daughter.

The father pleaded guilty to the charges and was sentenced in July 1986 as a mentally disordered sex offender, for terms of 3 years on the first count and 1 year on the second count, to be served concurrently. Upon his release by the Department of Correctional Services, the father was committed to the Hastings Regional Center by the Morrill County Mental Health Board, and was still committed at the time of the termination hearing.

Motions to terminate the parental rights of both parents were filed April 14, 1987, and a hearing was held on July 1, 1987. After hearing, the juvenile court found it in the best interests of the children to terminate parental rights and specifically found that the parents had abandoned the children for 6 months or more, that the parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and that there are reasonable grounds to believe that such conditions will continue for a prolonged, indeterminate period.

The evidence at trial was compelling that the mother is mentally incapable of providing an adequate home for the children. The degree of filth in the home and her utter dependency upon others negate her ability to discharge parental

responsibilities.

A psychologist diagnosed the mother's problems in two parts, borderline intellectual ability and dependent personality disorder. The psychologist testified that her mental disorders would make it extremely difficult for her to discharge normal parental duties and obligations without extreme intervention. Explaining further, the psychologist testified that in order for the children to be without danger and exist in a situation in which there was a very low likelihood of neglect, the mother would essentially need to have someone acting in a parental role for her. The witness testified that the mother would need to have somebody who could provide her not only with training, but also with ongoing supervision on a day-to-day basis, such as a live-in person. The expert further testified that the mother's mental condition will continue for a prolonged and indeterminate period. He stated the personality disorder is by definition a long-term pervasive and relatively unchanging diagnosis.

The psychologist testified that the father was mentally ill and dangerous. His mental illness was diagnosed as a schizophrenic reaction, paranoid or undifferentiated type, and a mixed personality disorder including antisocial, dependent, and passive-aggressive traits. He testified that the father's mental illness would make it impossible for him to discharge parental responsibilities and that the prognosis for substantial change was very poor.

Although both parents have attempted to raise issues as to whether, in fact, there was an abandonment under the statutory language, reciting the few contacts made by the parents since the placement in foster care, they have each, by their own individual actions, shown an abandonment of any desire to maintain parental control and contact.

In *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 765, 408 N.W.2d 272, 276 (1987), we stated that willful abandonment has been defined as " ' "an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection . . . ." ' "

Each parent could make a valid argument that but for the mental disorders the parents would not abandon or cease to protect the children, but such argument would simply supply the cause and effect which compels this court to agree with the trial court. The evidence is overwhelming that both parents suffer from mental illness or deficiencies which prevent each of them from discharging basic parental responsibilities and that the parental rights were properly terminated.

Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child. *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983).

When first placed in foster care, the two children, then ages 6 and 7, showed the lack of training and the effects of parental neglect. They were not toilet trained. They ate their meals with their fingers, being untrained in the use of table utensils. The boy was too nervous to sit at the table during meals and would sometimes kick or spit on other children at school. After the first year in the foster home, all these problems were solved, and both children behaved and acted as normal children. It is in the best interests of the children to terminate parental rights when the father and mother do not and cannot perform basic parental responsibilities.

The suggestion has been made by the mother that although she alone cannot care for the children, the court could establish a guardianship for the children, place the children in acceptable foster care, and still preserve the parental ties and love which are natural between the parent and children.

This proposal suggests that the natural relationship should be fostered and maintained even if the parent cannot assume the role of parent. The objective of the State is securing the best interests of the child, and this includes providing the child a safe home with parents capable of fulfilling the parental role. The parental role, as referred to in Neb. Rev. Stat. § 43-292(5) (Reissue 1984), includes ability to discharge parental responsibilities. Although termination of parental rights may sometimes appear cruel or harsh, experience has shown that

failure to terminate parental rights in appropriate cases simply punishes the child for the uncorrectable deficiencies of the parents, thereby extending the same problems and conditions into successive generations.

As we said in *In re Interest of R.H., T.H., and J.H.*, 219 Neb. 904, 907, 367 N.W.2d 145, 147 (1985):

> The law is not unmindful of a mother's love, of the crippling effects of a history of child abuse and alcoholic parents, and of the grinding effects of an inferior education and habitual poverty, but the law is also not so cruel that punishment for these apparently unchangeable conditions should be imposed on the children. If the only way to break the chain is termination, the law and this court will not flinch.

The judgment of termination of parental rights is affirmed.

AFFIRMED.

JAMES H. MONAHAN, APPELLANT AND CROSS-APPELLEE, V. SCHOOL DISTRICT NO. 1 OF DOUGLAS COUNTY, NEBRASKA, ALSO KNOWN AS OMAHA PUBLIC SCHOOLS, APPELLEE AND CROSS-APPELLANT.

425 N.W.2d 624

Filed July 8, 1988. No. 87-890.

1. **Appeal and Error.** In dealing with a question of law on appeal, this court has an obligation to reach a conclusion independent from the conclusion reached by the trial court.
2. **Statutes.** We do not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Words should be given their ordinary meaning.
3. **Statutes: Words and Phrases.** The age of 21 years is reached upon a person's 21st birthday, and, therefore, the terms "to age twenty-one years," "under the age of twenty-one years," "not to exceed twenty-one years of age," and "children who do not exceed twenty-one years of age" exclude any persons who have reached their 21st birthday.
4. **Statutes: Legislature.** The construction of a statute by those whose duty it is to enforce the statute, in which construction the Legislature has, by its continued noninterference for a number of years, acquiesced, will be approved unless, as

thus construed, it contravenes some provision of the Constitution or is clearly wrong.

5. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the construction of its statutes by the executive departments of the state.
6. **Constitutional Law.** The Nebraska Constitution, as amended, must be read as a whole.
7. _____. A constitutional amendment becomes an integral part of the Constitution and must be harmonized with all provisions.
8. **Appeal and Error.** Ordinarily, this court will dispose of a case on appeal on the theory on which it was presented in the lower court.

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

William L. Monahan for appellant.

Barbara E. Person and John P. Heil, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and Robert M. Spire, Attorney General, and Harold I. Mosher for appellee.

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

HASTINGS, C.J.

Plaintiff-appellant, James H. Monahan, filed this special education action with the State Department of Education, pursuant to Neb. Admin. Code tit. 92, ch. 55 (1985), contending his son Daniel J. Monahan is entitled to remain in special education programs conducted by the defendant-appellee school district until his 22d birthday. An education department hearing officer dismissed the petition, Daniel having reached the age of 21 years. The district court for Douglas County, following an appeal under Neb. Rev. Stat. § 43-666 (Reissue 1984) (recodified at Neb. Rev. Stat. § 79-3354 (Supp. 1987)), affirmed, but permitted Daniel to stay in school pending the resolution of this appeal filed by James Monahan. The school district has cross-appealed.

Plaintiff assigns as error: (1) The judgment of the district court was not sustained by the evidence and was contrary to law; (2) the court erred in not finding that 20 U.S.C. § 1412(2)(B) (1982), Neb. Rev. Stat. § 43-646 (Reissue 1984) (recodified at Neb. Rev. Stat. § 79-3315 (Supp. 1987)), and Neb. Const. art. VII, § 1, require that handicapped students

remain in school district special education programs until their 22d birthday; and (3) the court erred in failing to find that a part of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), requires that school districts using federal funds for the education of persons over 21 years of age provide education for handicapped persons over 21 years of age.

The school district claims on cross-appeal that the district court erred in failing to rule that the automatic stay under 20 U.S.C. § 1415(e)(3) (1982), § 43-666(3), or Neb. Admin. Code tit. 92, ch. 55, § 010 (1985), was inapplicable and did not require the school district to maintain Daniel's educational placement beyond his 21st birthday regardless of the appeal.

Because the facts are not in dispute and we are faced only with a question of law, we have an obligation to reach a conclusion independent from the conclusion reached by the trial court. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

The facts necessary to understand the problem are set out in the narration which follows. Daniel Monahan, born February 16, 1966, is multihandicapped. He attends Spring Lake School, operated by the defendant school district.

This action began as a special education hearing brought pursuant to § 1415 (1982 & Supp. IV 1986), Neb. Rev. Stat. § 43-661 (Cum. Supp. 1986) (recodified at Neb. Rev. Stat. § 79-3349 (Supp. 1987)), and Neb. Admin. Code tit. 92, ch. 55 (1985), before the Nebraska Department of Education. James Monahan brought this action on behalf of his son Daniel against the school district, alleging that Daniel should be entitled to receive a free appropriate public education until he reaches his 22d birthday. The petition was dated February 4, 1987, 12 days before Daniel's 21st birthday.

On March 10, 1987, a hearing was held before hearing officer W. Russell Bowie. He found no authority for the district to provide special education programs beyond a student's 21st birthday, citing § 1412(2)(B), § 43-646 ("to age twenty-one"), Neb. Const. art. VII, § 11 ("under the age of twenty-one years"), and Neb. Admin. Code tit. 92, ch. 51, § 011.02B4 (1983) ("until the student's twenty-first birthday"). The order also relied upon two Nebraska statutes which have since been

repealed: Neb. Rev. Stat. § 43-601 (Reissue 1984) (repealed April 8, 1987) ("not to exceed twenty-one years of age") and Neb. Rev. Stat. § 43-629 (Reissue 1984) (repealed April 8, 1987) ("children who do not exceed twenty-one years of age").

On September 11, 1987, the district court issued a memorandum order in which it affirmed the findings of the hearing officer and dismissed the petition. The plaintiff filed an amended motion for a new trial, to which the court responded by allowing Daniel to remain in school pending the outcome of this litigation. The court did not rule on the plaintiff's contentions under § 794 of the Rehabilitation Act of 1973, and refused to hear arguments on the statute.

In Nebraska, the school district's duty to provide special education programs to handicapped students arises under Neb. Rev. Stat. § 43-641 (Cum. Supp. 1986) (recodified as amended at Neb. Rev. Stat. § 79-3320 (Supp. 1987)), which provides in pertinent part: "It shall be the duty of the board of education of every school district to provide or contract for special education programs and transportation for all resident children who would benefit from such programs." The term "children" is defined in § 43-646, which provides in relevant part: "This act shall apply to any children *from* the date of diagnosis or the date of notification of the resident school district *to age twenty-one*." (Emphasis supplied.)

We have explained the correlation between federal and state law in the area of special education.

> The laws governing the educational rights of the handicapped are found in both federal and state law. The Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C. §§ 1401 et seq. (1976), represents the federal body of law, and the care and education of handicapped children is provided for in Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978) on the state level. The Act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting these funds the state implicitly agrees to meet certain criteria and requirements.

Adams Central School Dist. v. Deist, 214 Neb. 307, 314, 334

N.W.2d 775, 780 (1983), *cert. denied* 464 U.S. 893, 104 S. Ct. 239, 78 L. Ed. 2d 230.

Appellant makes much of the language of § 1412(2)(B) regarding qualification for federal assistance under the education of the handicapped act. Under the statute, the state must demonstrate that it has developed a plan assuring

> a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children *between the ages of three and twenty-one* within the State not later than September 1, 1980, *except that, with respect to handicapped children* aged three to five and *aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State* . . . .

(Emphasis supplied.)

The word "inclusive" tends to require that students be educated until they reach their 22d birthday. Yet this language is immediately followed by a provision deferring a decision on age restrictions to the states. This is made clear in 34 C.F.R. § 300.122 (1987). The requirement that free appropriate education be made available to all handicapped children age 3 through 21, § 300.122(a),

> does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

§ 300.122(c).

An additional indication of the state's right to decide against providing educational services to handicapped students beyond their 21st birthdays appears at 34 C.F.R. § 300.300(b)(5) (1987):

> A State is not required to make a free appropriate public education available to a handicapped child in one of these

age groups [3, 4, 5, 18, 19, 20, or 21] if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nonhandicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

Because the code section of title 20 contains an immediate disclaimer, it is clear that the Nebraska statute in question is not in violation of a federal law or provision of the federal Constitution.

We are thus faced with the matter of determining the meaning of the phrase "to age twenty-one" within the meaning of § 43-646. "[W]e do not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Lawson v. Ford Motor Co.*, 225 Neb. 725, 727, 408 N.W.2d 256, 258 (1987). Words used should be given their ordinary meaning.

The word "to" should be read as "until." Random House defines "to" in part as follows: "(5) (used for expressing a point of limit in time) before; until: [i.e.] We work from nine to five." The Random House Dictionary of the English Language, College Edition 1380 (1968).

Legislative history shows that § 43-646 was amended in 1976 to change the upper age limit from 18 to 21. 1976 Neb. Laws, L.B. 761.

Furthermore, Neb. Const. art. VII, § 1, does not use the term "inclusive" but, rather, states "between . . . five and twenty-one." "Between" defines the space or time which separates two events, just as " 'between the ages of fourteen and sixteen years' " excludes a youth who is 16 years and 11 months of age. *Hobson, etc., v. Postal Tel., etc., Co.*, 161 Tenn. 419, 420, 32 S.W.2d 1046 (1930).

Regulatory implementation of § 43-646 has been adopted by the State Board of Education and approved by the Attorney General and the Governor of the State of Nebraska. A provision of the Nebraska Administrative Code implementing the legislation of § 43-646 provides: "Reimbursement authorized under this Chapter shall be limited to those

handicapped children *from age five to twenty-one. . . .* Effective July 1, 1981, a school district is eligible for reimbursement for a student's special education *until the student's twenty-first birthday.*" (Emphasis supplied.) § 011.02B. It is clear that the age of 21 is reached upon a person's 21st birthday; therefore, the statutory and regulatory provisions of Nebraska law which authorize or authorized free public education for children "to age twenty-one" years, "under the age of twenty-one years," "not to exceed twenty-one years," and to "children who do not exceed twenty-one years of age" exclude such children who have reached their 21st birthday.

If there be any doubt, we are guided by the familiar rule that the construction of a statute by those whose duty it is to enforce the statute, in which construction the Legislature has, by its continued noninterference for a number of years, acquiesced, will be approved unless, as thus construed, it contravenes some provision of the Constitution or is clearly wrong. *International Brotherhood of Electrical Workers v. City of Hastings*, 179 Neb. 455, 138 N.W.2d 822 (1965). The Legislature is presumed to know the construction of its statutes by the executive departments of the state. *Bankers Life Ins. Co. v. Laughlin*, 160 Neb. 480, 70 N.W.2d 474 (1955).

Nor is § 43-646 in violation of the state Constitution. Neb. Const. art. VII, § 1, provides: "The Legislature shall provide for the free instruction in the common schools of this state of all persons *between the ages of five and twenty-one years.*" (Emphasis supplied.)

The Nebraska Constitution was amended in 1976 to provide:

> [T]he Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children *under the age of twenty-one years* who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.

(Emphasis supplied.) Neb. Const. art. VII, § 11.

The education in question is to be provided until the child

attains the age of 21, i.e., up to or until the 21st birthday is reached. The Nebraska Constitution, as amended, must be read as a whole. *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). A constitutional amendment becomes an integral part of the Constitution and must be harmonized with all provisions. *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937). Neb. Const. art. VII, §§ 1 and 11, are in harmony because they both impose the age limit of the 21st birthday on the provision of special education services to handicapped students.

The hearing officer additionally relied upon two Nebraska statutes which have since been repealed. Section 43-601 partially provided: "not to exceed twenty-one years of age." Section 43-629 partially provided: "children who do not exceed twenty-one years of age." These statutes reinforced the meaning of "to age twenty-one."

Such an interpretation is entirely consistent with an earlier statement of this court in *Adams Central School Dist. v. Deist*, 214 Neb. 307, 334 N.W.2d 775 (1983). We stated at 325, 334 N.W.2d at 786:

> Turning to the issue of compensatory education, we find no support for the findings of the hearing officer in the relevant law. The [Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976)], by its clear and unambiguous language, limits eligibility to children ages 3 to 21. § 1412(2)(B). There is no authority under this statutory scheme by which the hearing officer could grant free appropriate public educational benefits to David beyond his 21st birthday.

Appellant relies upon the case of *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986), where we held that the phrase "fourteen years of age or younger" designated persons whose age is less than, or under, 14 years, and also persons who have reached and passed their 14th birthday but have not reached their 15th birthday. This construction resulted in the victims in the case falling within the statute for sexual assault of a child. However, we noted that the phrase "less than fourteen years of age" or "under fourteen years of age" was absent from the statute in general. If "less than" or "under" would have

appeared in the statute, the protection of the statute apparently would have terminated when a child reached the 14th birthday. This case is actually authority for the proposition that "to age twenty-one" does not extend free public education into and throughout the year immediately following a person's 21st birthday, as it may also be construed as "less than" or "under."

This construction is not inconsistent with the holding in *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987), where we ruled that one is "within the age of twenty years" until he or she becomes 21. "Within" is more encompassing than "to." Statutory age limits employ various prepositional phrases, each of which may result in a different meaning according to the purpose behind the statute. In *Lawson*, the phrase was so construed to allow Lawson to bring a products liability suit. On the day he filed the action, his age of 22 years and 227 days fell inside the 2-year period from the time he ceased being "within the age of twenty years."

The district court refused to hear arguments upon the motion for a new trial on § 794 of the Rehabilitation Act of 1973, as it was not properly before the hearing officer or the district court. It had not been raised at the administrative hearing or in the plaintiff's petition. Ordinarily, we will dispose of a case on appeal on the theory on which it was presented in the lower court. *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988). Therefore, we find it unnecessary to deal with plaintiff's third assignment of error.

On cross-appeal, the district alleges that the stay is inapplicable. The stay provision is contained at § 1415(e)(3) and its state counterpart, § 43-666(3). The implementing state regulation is § 010. The procedural safeguard provides: "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." § 1415(e)(3).

However, inasmuch as we affirm the action of the district court in determining that there was no authority for the school district to provide special education programs for handicapped children beyond a student's 21st birthday, that issue, under the

circumstances of this case, becomes moot.

Not considering the school district's cross-appeal, we otherwise affirm the judgment of the district court.

AFFIRMED.

GOLDEN FIVE, INC., DOING BUSINESS AS GOLDEN YEARS NURSING HOME, ET AL., APPELLANTS, V. DEPARTMENT OF SOCIAL SERVICES, STATE OF NEBRASKA, ET AL., APPELLEES.

425 N.W.2d 865

Filed July 15, 1988.

Nos. 86-493, 86-494, 86-495, 86-496, 86-497, 86-498, 86-499, 86-502.

1. **Administrative Law: Appeal and Error.** The appropriate standard of review for the Supreme Court in an appeal from an administrative agency's decision is found in Neb. Rev. Stat. § 84-918 (Reissue 1981), which prescribes a review of an agency's decision de novo on the record without the limitation imposed on the district court under Neb. Rev. Stat. § 84-917(6)(e) and (f) (Cum. Supp. 1984).
2. **Constitutional Law: Courts: Actions.** A suit in the federal courts by private parties seeking to receive moneys which must be paid from public funds in a state treasury is barred by the 11th amendment to the U.S. Constitution. Such an action must be brought in the state courts.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Richard P. Nelson and Susan L. Bowman, of Peterson Nelson Johanns Morris & Holdeman, for appellants.

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 orders of the district court for Lancaster County in eight cases which had been consolidated for hearing. The order in each case affirmed the decision of the Director of Social Services, Gina C. Dunning, under the

standards of Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984). Plaintiffs are: Golden Five, Inc., doing business as Golden Years Nursing Home, No. 86-493; Tabitha, Inc., doing business as Tabitha Home, No. 86-494; Village Manor, Inc., doing business as Village Manor Nursing Home, No. 86-495; The Ev. Lutheran Good Samaritan Society, doing business as Good Samaritan Center-Wymore, No. 86-496; Village of Coleridge, doing business as Parkview Haven Nursing Home, No. 86-497; Elms Health Care Center, Inc., doing business as Elms Health Care Center, No. 86-498; The Ev. Lutheran Good Samaritan Society, doing business as Good Samaritan Center-Superior, No. 86-499; and Martin Luther Home Society, Inc., doing business as Martin Luther Home, No. 86-502. Defendants in each case are the Department of Social Services, State of Nebraska (hereinafter Department), and Gina Dunning, director of the Department of Social Services (hereinafter director).

The appeals to this court were also consolidated for purposes of briefing and oral argument, since all of the cases involve the same issues.

Defendant Gina Dunning was sued in her official capacity as director of the Department of Social Services. Plaintiffs are operators of medical care facilities which have participated in a medicaid reimbursement program with the State of Nebraska. In general, the medicaid program is a joint venture between the federal government and participating states. In order to participate in the program, a state must submit a satisfactory state plan which meets the standard of the Boren Amendment, codified at 42 U.S.C. § 1396a(a)(13)(A) (Supp. III 1985).

In 1965, with the enactment of Neb. Rev. Stat. § 68-1018 (Reissue 1986), Nebraska became a participant in the medicaid program. Defendant Department of Social Services is the state agency responsible for administering the Nebraska medicaid program. Included in the medical services provided by this program are services provided to eligible recipients by medicaid-certified "intermediate care facilities" and "skilled nursing facilities." The Nebraska plan was implemented by regulations which are codified at Neb. Admin. Code tit. 471, ch. 12, § 12-011 (1982 & 1984), effective August 1, 1982, and

January 1, 1984.

As set out in § 1396a(a), a state plan for medical assistance must:

> (13) provide—
>
> (A) for payment . . . of the hospital, skilled nursing facility, and intermediate care facility services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) which the State finds, and makes assurances satisfactory to the Secretary [of Health and Human Services of the U.S. government], are reasonable and adequate to meet the costs which must be incurred by *efficiently and economically* operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality . . . .

(Emphasis supplied.)

In order to ensure that the facilities in Nebraska would be "efficiently and economically" operated, the Department issued regulations providing that facilities whose adjusted allowable costs were less than or equal to those of the 65th percentile of all those reporting would be fully reimbursed for care provided to eligible recipients. This was determined as follows. The Department received a report of costs from each facility and, following its regulations, adjusted the allowable costs per medicaid patient day, as calculated by the Department, subtracting any cost not allowed from the costs submitted by the facility. Thereafter, the adjusted allowable costs per medicaid patient day were compared to costs of similar facilities in Nebraska and then ranked from least expensive to most expensive. Facilities ranking in the 65th percentile or lower were fully reimbursed for all allowable costs. Those facilities ranking above the 65th percentile were reimbursed at the same rate as those at the 65th percentile. Thus, an efficient and economical facility was defined by the State as a facility which could maintain its costs within a certain

percentile. In practice, the Department fully reimbursed facilities up to the 82d percentile.

In 1982, the Nebraska Legislature enacted Neb. Rev. Stat. § 68-720 (Cum. Supp. 1982), to be effective July 1, 1982. Section 68-720 provided in part:

> For fiscal year 1982-83, no payments shall be made by the Department of Public Welfare to any vendor for services provided to public assistance recipients, if such payments would result in a payment in excess of the fee allowed on April 1, 1982, increased by three and seventy-five hundredths per cent.

After the enactment of § 68-720, the Department, in August of 1982, amended its plan for reimbursement to these facilities by effectuating the statutory provision. The new plan, effective July 1, 1982, provided that reimbursement to a facility for medicaid services for fiscal year 1982-83 would be limited to the reimbursement allowed to that facility on April 1, 1982, plus 3.75 percent. This cap was later extended by the legislative amendment of § 68-720 (Supp. 1983) to a second fiscal year, 1983-84.

On September 22, 1982, the federal Health Care Financing Administration's regional office approved the amended plan, to be effective August 1, 1982. The regional office apparently did not protest the 3.75-percent limitation. However, on February 15, 1984, the regional office disapproved the extension of the limitation for the fiscal year 1983-84.

In 1982, the Nebraska Health Care Association, of which six of the plaintiffs are members, filed an action in the U.S. District Court for the District of Nebraska, contending, among other things, that § 68-720 (Cum. Supp. 1982 & Supp. 1983) was unconstitutional under the supremacy clause of the U.S. Constitution. Plaintiffs contended that the 3.75-percent cap set forth in § 68-720 was in conflict with the requirements of § 1396a(a)(13)(A), and therefore was an unconstitutional limitation.

As previously stated, § 1396a(a)(13)(A) requires that a state plan must provide for payment of the hospital, skilled nursing facility, and intermediate care facility services provided through the use of rates which the state finds, and makes assurances

satisfactory to the Secretary of Health and Human Services, are "reasonable and adequate" to meet the costs which must be incurred by "efficiently and economically" operated facilities.

The U.S. District Court, by an order which became final on October 10, 1984, held that § 68-720 was unconstitutional and permanently enjoined defendants from implementing the 3.75-percent limitation on increased costs. The court determined that the limitation could prevent plaintiffs from being reasonably and adequately reimbursed for costs incurred.

The Department appealed this decision to the U.S. Court of Appeals for the Eighth Circuit. See *Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291 (8th Cir. 1985). The court of appeals upheld, on a somewhat different basis, the judgment of the district court enjoining enforcement by the State of its plan as to fiscal year 1982-83, but held that as to fiscal year 1983-84, the case was not ripe for judicial determination.

The Department is responsible for monitoring and reconciling medicaid reimbursement payment to the facilities. As summarized in appellants' brief, the procedure provides: (1) Each provider submits a cost report at the end of its fiscal year (Neb. Admin. Code tit. 471, ch. 12, § 12-011.09 (1982)); (2) each cost report is reviewed by desk audit, and a prospective rate for the next calendar year is established (Neb. Admin. Code tit. 471, ch. 12, § 12-011.10 (1982)); (3) when a field audit is performed, all reported costs are subject to adjustment and, in the case of an allowable cost adjustment, a new prospective rate is calculated and the provider notified (Neb. Admin. Code tit. 471, ch. 12, § 12-011.11 (1982)); and (4) the provider is also notified of the settlement amount resulting from the rate, and demand is made for payment (§ 12-011.11).

The record shows that the auditing section of the Department sent out audit adjustment letters to the appellant facilities on the following dates: Martin Luther Home, June 22, 1984; Good Samaritan Center-Wymore, July 9, 1984; Elms Health Care Center, June 1, 1984; Good Samaritan Center-Superior, July 9, 1984; Parkview Haven Nursing Home, June 1, 1984; Village Manor Nursing Home, June 22, 1984; Tabitha Home, May 1, 1984; and Golden Years Nursing Home, May 1, 1984. These adjustment letters each submitted to the

various operators a "Summary of Adjustments." The summaries showed adjustments in such items of expenses as "Administration," "Dietary," "Plant Related," "Interest," and "Depreciation." By agreement of the parties, the amounts of these adjustments are agreed to be mathematically accurate and are not the subject of this appeal.

It was from the computation summaries and decisions contained in these audit adjustment letters that each of the appellants appealed to the director. The Nebraska Department of Social Services manual, at Neb. Admin. Code tit. 471, ch. 12, § 12-011.13 (1982), provided for an administrative appeal as follows:

> Final administrative decision or inaction in the allowable cost determination process is subject to administrative appeal. The provider may request an appeal in writing from the Director of the Department *within 90 days* of the decision or inaction. The request for an appeal must include identification of the specific adjustments or determinations being appealed and basis and/or explanation of each item.

(Emphasis supplied.)

After administrative appeal hearings were held, the director issued a "Finding and Order" to each of the appellants. The director found, in each case, that

> the instant appeal is the only appeal of record relating to the application of the 3.75% limitation to the rates of the appellant facility which appeal was, obviously, filed outside of the prescribed timely [administrative] appeal period of ninety (90) days from the effective date of the last application in a rate computation, specifically, January 1, 1984.

The director also found in her findings and orders that in the recalculation of the allowable medicaid reimbursement rates, the Department's audit section made rate adjustments, due to unallowable costs, to rates which already reflected the 3.75-percent limitation. Thus, the Department found that "there was no actual further application of said 3.75% limitation in the recalculation of rates."

With regard to retroactive relief for the appellants, the

director found that

> the use of the 3.75% limitation in the original calculation of the rates had become administratively final in its use as to this facility since no appeal was taken within the timely appeal period from its original imposition effective August 1, 1982, and its most recent applicable rate period which commenced with rates effective January 1, 1984, with said timely appeal period being ninety (90) days from the date of administrative action pursuant to 471 NAC 12-011.13 . . . .

(The language in the finding and order in the appeal of Golden Five, Inc., was slightly different, but substantively the same.) According to the director, the last date to timely appeal is the effective date of the last application in a rate computation, January 1, 1984, plus 90 days. The director affirmed the actions of the audit section and found that no further adjustments were required.

The appellants then appealed to the district court for Lancaster County pursuant to § 84-917. All eight cases were consolidated for hearing. The district court found that "the decision of the Director of Social Services of the State of Nebraska is proper under the standards of Neb. Rev. Stat. §84-917 (6) (1984 Cum. Supp.)," and affirmed.

On appeal to this court, appellants assert the following assignments of error: (1) The district court erred in finding that appellants should have timely appealed the application of the 3.75-percent limitation in the initial 1982, 1983, and 1984 rate computations under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981 & Cum. Supp. 1984); (2) the district court erred in determining that appellants did not file notice of appeal within 90 days of an appealable agency action; (3) the district court erred in determining that the auditors did not apply the 3.75-percent limitation during the 1984 cost determination process; (4) the district court erred in affirming the decision of the director when she applied, to the appeals of the cost determination process, a statute and regulations which had been declared unconstitutional by a court of competent jurisdiction; (5) the district court erred in affirming the decision of the director when she enforced a

statute and regulations after she had been enjoined from doing so by a court of competent jurisdiction; and (6) the district court erred in allowing the director to review the auditors' actions under the rules and regulations in effect during the time for which the cost reports were filed.

The applicable standard of our review in this case has been set out in *Haeffner v. State*, 220 Neb. 560, 566, 371 N.W.2d 658, 662 (1985), where we stated: "[T]he appropriate standard of review for the Supreme Court is found in § 84-918, which prescribes a review of an agency's decision de novo on the record without the limitations imposed on the district court under § 84-917(6)(e) and (f)."

We determine that the assigned errors have no merit. On our review we find, as did the director, that the original application of the 3.75-percent limitation set out in § 68-720 was to rate periods beginning August 1, 1982, and January 1, 1984; that those ratesettings were not appealed in the Nebraska administrative process; and that such rates became final for the purpose of any retroactive relief. We affirm the order of the district court.

Appellants first assign as error that the district court erred in finding that appellants should have timely appealed the application of the 3.75-percent limitation in the initial 1982, 1983, and 1984 rate computations, under the Administrative Procedures Act. Appellants argue that it would have been futile to file administrative appeals in 1982, 1983, and 1984 because the Department, as an administrative body, has no power to declare an act of the Legislature unconstitutional. There is no question that this is a judicial power reserved to the courts. *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

While it is true that the Department has no power to declare a statute unconstitutional, this concept is not dispositive of this issue. Appellants sought more than to have § 68-720 declared unconstitutional. They also sought retroactive monetary relief with regard to the 3.75-percent limitation. Retroactive monetary relief was something the federal courts had no power to grant. If appellants wanted something more than an injunction to be applied in the future, they were required to

exercise their rights timely under state administrative procedures. The constitutionality of § 68-720 could have been raised on appeal from the actions of the Department. At the least, an administrative appeal must be filed in order to preserve any right to potential retroactive money relief. Appellants chose to contest the constitutionality of the Nebraska statute in federal court. This achieved the result of protection from any future application of the 3.75-percent limitation by the Department, but it did not preserve a remedy which can only be awarded by a state agency or court, insofar as retroactive relief is sought.

In *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), an action for injunctive and declaratory relief was brought against Illinois officials who were administering federal-state aid programs. The trial court entered judgment against the state officials and ordered the officials to retroactively release and remit benefits withheld from the plaintiffs. The U.S. Supreme Court reversed, quoting with approval from *Ford Co. v. Dept. of Treasury*, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945): " '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' " 415 U.S. at 663.

The Supreme Court, in *Edelman*, went on to say at 663, "Thus the rule has evolved that a suit [in the federal courts] by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Such an action must be brought in the state courts. In *Edelman*, the Supreme Court also stated that it approved the observation in *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), to the effect:

> "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. . . ."

Edelman, 415 U.S. at 665. See, also, *Green v. Mansour*, 474

U.S. 64, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

After appellants obtained the declaration of unconstitutionality in the federal court system, they then returned to the administrative agency for retroactive monetary relief. We hold that since appellants did not file an appeal under the Administrative Procedures Act within the required time, they are barred from recovering retroactive monetary relief.

Appellants next assign as error that the district court erred in determining that appellants did not file a notice of appeal within 90 days of an appealable agency action. Appellants' position is that since each of them filed notices of administrative appeal within 90 days of the audit letters of the Department received by appellants in May, June, and July of 1984, as set out above, those filings constituted an administrative appeal with respect to the 3.75-percent limitation. We agree with the finding of the director (approved by the district court) that the 3.75-percent limitation was originally applied effective August 1, 1982, pursuant to § 68-720, and was continued forward in effect for subsequent rate periods, the most recent rate period having commenced January 1, 1984. We also so find.

The director went on to find that "the use of the 3.75% limitation in the original calculation of the rates had become administratively final . . . since no appeal was taken within the timely appeal period from its original imposition . . . ." We agree with such findings, and so hold.

Our examination of the record shows that, effective August 1, 1982, and January 1, 1984, the regulations provided that the rate permitted could not exceed 3.75 percent of the April 1, 1982, rate.

Appellants' third assignment of error alleges that the district court erred in determining that the auditors did not apply the 3.75-percent limitation during the 1984 cost determination process. In support of this contention, appellants cite a portion of Neb. Admin. Code tit. 471, ch. 12, § 12-011.13 (1982), which provides that "*Final administrative decision* or inaction in the allowable cost determination process is subject to administrative appeal." (Emphasis supplied.) Using this

regulatory language, appellants argue that "[t]he action of the Department in calculating a new reimbursement rate by the use of the rate determination formula after adjustment of the cost components by an audit is a part of the cost determination process and is subject to appeal." Brief for appellants at 28. They argue that since these adjustments are a part of the cost determination process, the dates on which they are performed should constitute a continuing application of the 3.75-percent limitation, and that, therefore, should begin the 90-day interval in which an appeal can be taken. This is contrary to what the Department and the district court held, that the 90-day interval began when the 3.75-percent limitation was first applied in August of 1982 and January of 1984.

This contention by appellants is incorrect. The director found in her finding and order that "in the recalculation of the allowable Medicaid reimbursement rates, the Audit Section only made rate adjustments due to unallowable costs which adjustments were made to rates which already reflected the 3.75% limitation. Thus, there was no actual *further* application of said 3.75% limitation in the recalculation of rates." (Emphasis supplied.) We agree. The Department auditors, in field-auditing these facilities, took no action concerning whether a 3.75-percent limitation should be imposed. The auditors simply adjusted allowable costs and then determined correct rates that should have been paid. Any application of the 3.75-percent limitation was done previously, at the time of initial prospective ratesetting. The setting of a 3.75-percent limitation is not an ongoing administrative act. While it may take the passing of time for the decision to manifest itself, this does not alter the fact that the decision has been made. Nor does it alter the fact that the decision became administratively final and, thus, appealable.

We hold that application of the 3.75-percent limitation became a final administrative action for purposes of appeal under Neb. Admin. Code tit. 471, ch. 12, § 12-011.13 (1982), when it was initially applied on August 1, 1982, and January 1, 1984, rather than at the time when the audit division of the Department finished calculating reimbursement rates. Thus, for purposes of appeal to the Department, and subsequently to

the state district court, the appellants are found to have administratively appealed outside the 90-day appeal limit.

Since no appeal was timely taken within the state judicial system, the appellants seek reimbursement based on the federal injunction. No remedy of retroactive money damages is so available.

For their fourth assignment of error, appellants assert that the district court erred in affirming the decision of the director when she applied, to the appeals of the cost determination process, a statute and regulations which had been declared unconstitutional by a court of competent jurisdiction. The declaration of unconstitutionality came after the director had established the rates, and the director properly applied the statutes until their unconstitutionality was decided.

Referring this court to the landmark U.S. Supreme Court decision in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), appellants point out that the federal court, consistent with the 11th amendment, may enjoin state officials to conform their future conduct to the requirements of federal law. Appellants argue that the action of the director in issuing the findings and orders was an act of "future conduct" which had been properly enjoined by the federal court. For the same reasons provided in our discussion of the second assignment of error, this argument is without merit. Inherent in this argument is the notion that the cost determination process constitutes a new application of the 3.75-percent limitation. We have held that it is not. The issue of the 3.75-percent limitation was not properly before the director.

The points raised in appellants' other specific assignments of error have been discussed above, and in view of our de novo review, will not be further discussed herein.

We affirm the order of the district court.

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE, V. KAISER AGRICULTURAL CHEMICAL COMPANY, A SUBSIDIARY OF KAISER ALUMINUM & AGRICULTURAL CHEMICAL CORPORATION, A CORPORATION, APPELLANT.

425 N.W.2d 872

Filed July 15, 1988. No. 86-526.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Workers' Compensation: Liability: Contracts.** When an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer.
4. **Contracts: Words and Phrases.** An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.
5. **Pleadings: Appeal and Error.** The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
6. **Negligence.** The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
7. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.
8. _____: _____: _____. In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between original conduct and the injury.
9. **Negligence.** The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
10. **Negligence: Trial.** Determination of causation is, ordinarily, a matter for the

trier of fact.

11. **Negligence.** To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

C.L. Robinson, of Fitzgerald & Brown, for appellant.

Jay M. Nadlman for appellee.

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

SHANAHAN, J.

UNION PACIFIC-KAISER AGREEMENT

From 1976 and pursuant to its agreement with Kaiser Agricultural Chemical Company, the Union Pacific Railroad Company supplied tracks and service to Kaiser's chemical facility. The trackage agreement, drafted by Union Pacific, included the following provision:

> Section 9. LIABILITY.
>
> . . . .
>
> The Industry [Kaiser] agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes and agents, and to the person or property of any other person or corporation, while on or about the Track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne equally by the parties at fault.

NATURE OF APPEAL

Based on its agreement with Kaiser, Union Pacific sued Kaiser on account of the railroad's settlement of claims which arose out of a train-vehicle collision in which one of Kaiser's customers sustained property damage and a Kaiser employee sustained bodily injury.

In its amended petition, Union Pacific claimed that injuries

to Kaiser's employee and property damage to Kaiser's customer were "caused by negligent acts or omissions" of Kaiser, specifically alleged Kaiser's "negligent" conduct, such as failure to provide precautionary measures to avoid or prevent the accident, and asserted that Kaiser "knew, or should have known, in the exercise of ordinary care" that its conduct created an unreasonable risk of harm to Kaiser's employee who was hurt in the accident. Union Pacific's petition concluded with a prayer for indemnification of $95,000.

Kaiser answered, denied it was negligent, and alleged that any damages from the accident were caused by Union Pacific's active negligence in contrast with Kaiser's negligence, which was passive only.

Each party moved for summary judgment to dispose of the liability question under their agreement. Finding that Union Pacific was "entitled to contribution" pursuant to the agreement with Kaiser, the district court granted summary judgment to the railroad, overruled Kaiser's motion for summary judgment, and, in a subsequent bench trial, determined that the settlements achieved by Union Pacific were reasonable and in good faith. Because Union Pacific had "admitted some negligence" regarding the accident, the district court concluded that Union Pacific was "entitled to indemnification of 50 percent of the settlements rather than for full indemnity" and awarded a $47,500 judgment to the railroad.

Kaiser contends that Neb. Rev. Stat. § 48-148 (Reissue 1984) of the Nebraska Workers' Compensation Act immunizes Kaiser from liability outside the compensation act concerning an injury to a Kaiser employee, and, therefore, Kaiser is not liable to Union Pacific under the indemnity agreement for rail service. Kaiser also contends that there is no negligence on its part which renders Kaiser liable for indemnification under the agreement with Union Pacific. Finally, Kaiser claims that the settlements by Union Pacific were not reasonable and in good faith. Union Pacific contends the issue of negligence is irrelevant to recovery under the indemnity agreement with Kaiser.

A summary judgment is properly granted when the

pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Wibbels v. Unick, post* p. 184, 426 N.W.2d 244 (1988); *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. See *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988).

THE ACCIDENT

Trucks at Kaiser were loaded through doorways or docks on the east side of its building. Two sets of parallel Union Pacific tracks ran through the loading area for a distance of 225 feet along Kaiser's building. The west, or closest, rail of the track used to spot railroad cars at Kaiser's loading docks was 5 feet from Kaiser's building. For a number of years, in loading at Kaiser, drivers had been parking their trucks across the Union Pacific tracks.

On the morning of March 26, 1981, Walter Cunningham, a driver for Corbet, Inc., drove his semi, which included a 42-foot flatbed trailer, to the loading area at Kaiser, where a Kaiser employee told Cunningham to park the semi across the two sets of tracks adjacent to Kaiser's building. Cunningham backed the semi up to one of the doorway-loading docks near the northeast corner of Kaiser's building and parked his rig with approximately 20 feet of the trailer's length across the railroad tracks. To load bags of fertilizer on the trailer, Cunningham and Kaiser's loading crew, including Gerald Blomenkamp, used a conveyor belt to move bags from the building's interior to the semi for stacking on the trailer. Around 12:15 p.m., while Kaiser's employees were on their lunch break, Cunningham sat in the semi's cab, waiting to resume loading the bagged fertilizer. An empty boxcar was standing 10 feet south of the Corbet semi. At this time, but unbeknown to Cunningham, the crew of a Union Pacific switch engine was entering Kaiser's premises from the south to remove empty boxcars at Kaiser. As

the switch engine coupled onto the boxcar near the semi, the boxcar was pushed or "bumped" into the Corbet rig, moving the trailer an "inch and a half." Afterward, as Cunningham related: "[T]he brakeman come on back and said we're sorry about that, poor communications with his walkie-talkie or two-way. . . ."

About that time, which was around 12:30 p.m., the Kaiser loading crew returned from lunch. A Union Pacific crewman told David Moyer, leadman for the Kaiser crew, that the boxcar had collided or bumped into the semi. After the Union Pacific crewman, Cunningham, and Moyer had determined there was no damage to the semi, the switch engine and its crew left with the boxcar which had collided with the trailer. The semi remained in its loading position and location at Kaiser's dock. Moyer knew that the switch engine would return later that day, because he had told the engine crew where to spot cars after the empty was removed. The switch engine's engineer did not realize that the boxcar had struck the trailer. None of the train crew informed the engineer about the collision. Kaiser had no safety rules governing trucks parked on Union Pacific's tracks or any warning procedure for "trains in the vicinity," but did have a "general practice" of maintaining a 30-foot interval between a spotted car and a truck at the loading dock.

About 12:45 p.m., the same Union Pacific train crew which was involved in the collision half an hour earlier returned on a switch engine pushing a string of railroad cars for Kaiser. Approach of the train went unnoticed by Cunningham and Kaiser's loading crew on the flatbed trailer until the first boxcar, being shoved at 15 miles per hour—an "unusually fast" speed—was 20 feet from the semi. The record does not disclose the speed at which cars are usually moved on the track beside Kaiser's building for spotting at the loading docks. Cunningham remained on the trailer as the boxcar neared. Of Kaiser's employees, all except Blomenkamp were able to scramble from the trailer. In his attempt to leave the trailer, Blomenkamp became pinned between the conveyor and the side of the trailer and was in that position when the boxcar struck the trailer. The collision caused extensive damage to Corbet's trailer and serious bodily injury to Blomenkamp.

William E. Harrings, engine foreman for spotting cars at Kaiser, was riding "on the point" at the northeast corner of the boxcar approaching the parked semi. When the boxcar was about four car lengths from the semi, Harrings swung down from the side ladder's still step and walked beside the moving boxcar. Harrings failed to warn those on the trailer while the train was approaching. According to Harrings, who was using a hand-held radio or walkie-talkie, "I tried to get him [the engineer] to stop, we didn't stop." Harrings never utilized any hand signal to the engineer. Roger Bergantzel, a switchman who had been riding the point on the lead boxcar at the time of the first collision, was also on the ground beside the moving cars and acknowledged that hand signals could have been used, but were not, to communicate with the engineer.

As the result of the collision, Blomenkamp received benefits paid pursuant to the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984).

In answers to Kaiser's interrogatories about the railroad's negligence in the second collision at Kaiser, Union Pacific admitted that, under the circumstances existing at the time of the accident, the railroad's "operating rules" required a train's movement to be such that the train could be stopped to avoid striking any obstruction. Union Pacific then acknowledged that Harrings and the engineer of the switch engine were fired as a consequence of their violating railroad rules applicable at the time of the second collision at Kaiser.

On the foregoing facts, the district court found that Kaiser was contractually obligated to contribute to the settlements obtained by Union Pacific on the Corbet and Blomenkamp claims. Subsequently, at a trial to determine the amount of Kaiser's contribution, the parties adduced evidence bearing upon reasonableness and good faith concerning amounts paid by Union Pacific in settlement of the claims connected with the collision at Kaiser. The court entered judgment for Union Pacific, requiring that Kaiser contribute and reimburse $47,500 to Union Pacific on account of the settled claims.

WORKERS' COMPENSATION ACT AND KAISER'S LIABILITY FOR INDEMNIFICATION OR CONTRIBUTION

In claiming immunity from liability for indemnification or contribution pertaining to Union Pacific's settlement of Blomenkamp's personal injury claim, Kaiser directs our attention to the Nebraska Workers' Compensation Act and then points out that this court, in *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976), left undecided the question whether an employer may contractually waive an employer's exclusive liability existing as the result of the Workers' Compensation Act. Kaiser contends an employer cannot waive the exclusive liability provision found in § 48-148 of the Nebraska Workers' Compensation Act, which provides:

> If any employee, or his dependents in case of death, of any employer subject to the provisions of sections 48-109 to 48-147 files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the court under said sections, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

Section 48-118 of the Nebraska Workers' Compensation Act provides an employer's subrogation interest in a recovery from a third-party tort-feasor concerning a claim for injury or death of an employee of the subrogated employer.

As construed by Kaiser, § 48-148 releases an employer from "all claims or demands at law" arising from an employee's injury. Therefore, Kaiser argues, it cannot be held liable to Union Pacific for indemnification or contribution on account of the settlement with Blomenkamp, Kaiser's employee.

In *Vangreen v. Interstate Machinery & Supply Co., supra*, Vangreen sued Interstate to recover for bodily injury sustained when Vangreen injured his hand while installing glass in a building. In view of its subrogation interest under the Workers' Compensation Act, Vangreen's employer was a party to the action. Interstate settled with Vangreen and filed a "cross-claim" against Vangreen's employer, seeking indemnification or contribution on the ground that the employer's negligence was the proximate cause of Vangreen's

damages. Holding that Interstate's action was barred as a result of the Workers' Compensation Act, this court stated in *Vangreen*:

> The great majority of the various jurisdictions dealing with the question have held that a third person tort-feasor, who is liable for injuries to, or for the death of, a workman, is not entitled to recover contribution from the workman's employer, notwithstanding the latter's negligence concurred in causing the injury or death, where the employer, the employee, and the injury or death are covered by the provisions of a workmen's compensation act. The decisions are based on two theories. First, that an employer covered by a compensation act does not have a common liability with a third party tort-feasor which is a necessary requisite to securing contribution. Second, that compensation acts must be construed as specifically limiting the liability of the employer, not only to the employee, but as to third persons as well. This proposition has, in some circumstances, been applied to the theory of indemnity as well as that of contribution.

197 Neb. at 31, 246 N.W.2d at 653-54.

In considering whether Interstate was entitled to indemnity, the *Vangreen* court stated:

> Interstate does not urge a right to recover under an express or implied contract of indemnity but seeks recovery on the theory that PPG is a joint tort-feasor. Under such circumstances, is the exclusive-remedy provision contained in the Nebraska statutes circumvented? The statute, § 48-148, R.R.S. 1943, provides that a workmen's compensation action "shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury." Section 48-118 . . . awards to the employer subrogation rights against third parties. It is evident that the exclusive-remedy provision is not confined to the injured party but is designed to cover all claims "arising from such injury." Interstate's cross-claim is based on negligence and necessarily arises from the injury. The statute is not limited to claims for damages and it will not avail to assert that this is a claim for indemnity

rather than damages.

> The majority rule holds that, when the relation between the parties involves "no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes, such as indemnity, since what governs is not the delictual or contractual form of the remedy but the question: is the claim 'on account of' the injury, or on account of a separate obligation running from the employer to the third party?"

197 Neb. at 32-33, 246 N.W.2d at 654 (quoting 2A A. Larson, The Law of Workmen's Compensation § 76.44 (1975)).

Unlike the situation in *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976), the case before us involves an action based on an agreement for indemnification or contribution for a loss sustained by Union Pacific as a result of "any act or omission" of Kaiser, including a loss from the joint or concurring negligence of Union Pacific and Kaiser.

The exclusive liability provision of workers' compensation acts, such as the provision contained in § 48-148 of the Nebraska Workers' Compensation Act, is discussed in 2A A. Larson, The Law of Workmen's Compensation § 76.42 at 14-734 (1988): "The clearest exception to the exclusive-liability clause is the third party's right to enforce an express contract in which the employer agrees to indemnify the third party for the very kind of loss that the third party has been made to pay to the employee."

As Larson explains:

> [T]he immunity conferred is only against actions for damages on account of the employee's injury; a third party's action for indemnity is not exactly for "damages" but for reimbursement, and it is not "on account of" the employee's injury, but on account of breach of an independent duty owed by the employer to the third party.

2A A. Larson, *supra*, § 76.41 at 14-733 and 14-734.

Accordingly, the vast majority of jurisdictions have adopted the rule that, as a consequence of an agreement for

indemnification or contribution, an employer within the purview of a workers' compensation act may be liable to a third party concerning injuries to the employer's employee; for example, see, *Barsness v. General Diesel & Equipment*, 422 N.W.2d 819 (N.D. 1988) (majority rule: An express contract of indemnification is an exception to the workers' compensation act's exclusive remedy rule); *Ramos v. Browning Ferris Industries*, 103 N.J. 177, 510 A.2d 1152 (1986) (New Jersey's workers' compensation act did not preclude an employer from assuming a contractual duty to indemnify a third party); *Espaniola v. Cawdrey Mars Joint Venture*, ____ Haw. ____, 707 P.2d 365 (1985) (an employer covered by the workers' compensation law may be liable to a third party for a loss indemnified by an agreement with the employer); *Manson-Osberg Company v. State*, 552 P.2d 654 (Alaska 1976).

We find nothing in the Nebraska Workers' Compensation Act, by express provision or implication, and nothing in the public policy of the State of Nebraska, which prevents an employer's contractual obligation to indemnify a third party concerning a loss sustained through the third party's payments to the indemnitor's employee. Therefore, we now hold that when an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer. The Union Pacific-Kaiser agreement contains no specific provision or language which excludes, exempts, or exonerates Kaiser from liability for indemnification or contribution as a contractual duty. We decline to rewrite the agreement between Union Pacific and Kaiser and insert a contractual provision precluding Kaiser's liability for indemnification or contribution concerning Union Pacific's settlement with Kaiser's employee, Blomenkamp. Kaiser's claim that the Nebraska Workers' Compensation Act provides exclusive liability and, therefore, immunizes Kaiser from Union Pacific's action to enforce the agreement for indemnification or contribution is without

merit.

LIABILITY UNDER THE INDEMNITY AGREEMENT

Terms of Agreement

Kaiser contends that its liability for indemnification or contribution exists only when Kaiser has negligently caused the loss covered in its agreement with Union Pacific. Liability for any loss, Kaiser argues, must be ascertained by application of principles governing liability for common-law negligence.

Union Pacific counters that "Kaiser has failed to recognize that Union Pacific's claim for relief was grounded on contract, not common law negligence. The doctrine of proximate cause, and the theory that an independent actor breaks the chain of causation, are irrelevant to a contractual action for relief." Brief for appellee at 7.

An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts. *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974); *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939).

> A court is not free to speculate about terms absent from a written contract. [Citation omitted.] Where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. [Citations omitted.] On the other hand, a court will construe uncertain, indefinite, or ambiguous terms in a written contract. [Citations omitted.] In *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 498, 334 N.W.2d 463, 465 (1983), we stated that "absence of articulation accounts for ambiguity" and held that where a questioned clause in a written contract may be fairly interpreted in more than one way, there is ambiguity to be resolved by a court as a matter of law. When contractual language is ambiguous, a court will construe such language against the party preparing the contract . . . . [Citations omitted.]

Craig v. Hastings State Bank, 221 Neb. 746, 750, 380 N.W.2d 618, 621 (1986).

In the Union Pacific-Kaiser agreement prepared by the

railroad, the obligation for complete indemnification is expressed in the terms "any act or omission," while the obligation for partial indemnification or contribution is couched in language utilized in aspects of common-law negligence, namely, "joint or concurring negligence of the parties."

To activate the indemnity clause in the Union Pacific-Kaiser agreement, what is the nature of the omission required to render Kaiser liable for indemnification? Intentional omission? Negligent omission? Or any type of omission for any reason? *Omission* means "apathy toward or neglect of duty . . . something neglected or left undone." Webster's Third New International Dictionary, Unabridged 1574 (1981). As a verb, *neglect* means "to fail to attend to sufficiently or properly: not give proper attention or care to . . . to carelessly omit doing (something that should be done) either altogether or almost altogether: leave undone or unattended to through carelessness or by intention . . . ." *Id.* at 1513. Consequently, an omission usually or generally involves a careless failure to perform some duty. Whatever duty is enjoined on Kaiser under the indemnity agreement, there is no standard specified in the agreement whereby one may determine the type of omission and occurrence of that omission which subject Kaiser to liability for indemnification or contribution. Concerning a document, *construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). *Omission*, as used in the indemnity clause of the Union Pacific-Kaiser agreement, is an uncertain, indefinite, or ambiguous term fairly interpreted in more than one way. To resolve such ambiguity arising from *omission* in the indemnity agreement in question, we construe *omission* to mean a neglect to perform what is required by the common law pertaining to negligence or, simply, a negligent failure regarding a duty. To warrant partial indemnification or contribution, the Union Pacific-Kaiser agreement expressly refers to negligence as the determinant, leaving no uncertainty or ambiguity concerning the applicable standard to determine whether the railroad is entitled to a

recovery under the agreement. While Union Pacific tells us that its claim against Kaiser depends on contract law only, that is not what Union Pacific informed the trial court, when the railroad alleged that its losses were "caused by the negligent acts or omissions" of Kaiser, meticulously described Kaiser's "negligent" conduct, and condemned such conduct, since Kaiser "knew, or should have known, in the exercise of ordinary care" that Kaiser's condemned conduct created an unreasonable risk of harm to Blomenkamp, Kaiser's employee who was hurt in the accident. Speaking in euphemistic terms, we believe Union Pacific's theory on appeal is incongruous with its theory asserted at trial. "The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried." *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985). Consequently, our construction of the indemnification clause or provision in the Union Pacific-Kaiser agreement is neither strained nor unreasonable. Union Pacific obviously used the same construction as we have regarding *omission*, because the railroad pleaded actionable negligence as the premise for indemnification from Kaiser. Although Union Pacific has tried to sidetrack us into disposing of this case on contractual provisions alone, the real question concerns Kaiser's conduct and negligence which make the indemnity provisions operative under the trackage agreement.

Negligence

We stated in *Holden v. Urban, supra* at 474-75, 398 N.W.2d at 701:

> For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. [Citations omitted.]
>
> " '[D]uty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .

"A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).

Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): " 'Foresight, not retrospect, is the standard of diligence. . . .' " (Citing and quoting from *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966).)

As noted in 4 F. Harper, F. James & O. Gray, The Law of Torts § 20.5 at 138 (2d ed. 1986):

> The view currently prevailing in this country [limits] the scope of the duty to do or refrain from doing a given act to (1) those persons that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent.

" 'The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.' " *Saporta v. State*, 220 Neb. 142, 149, 368 N.W.2d 783, 787 (1985). See, also, *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988).

" ' "The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, [produces the injury,] and without which the result would not have occurred. . . ." ' " *Zeller v. County of Howard*, 227 Neb. 667, 672, 419 N.W.2d 654, 658 (1988) (quoting *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975)).

As expressed in Prosser and Keeton on the Law of Torts, *Proximate Cause* § 42 at 274 (5th ed. 1984): "It is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the

defendant under a duty to protect the plaintiff against the event which did in fact occur?"

Concerning proximate causation, we have held:

> " 'There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that "without which the injury would not have occurred," commonly known as the "but for" rule. . . .
>
> " 'The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> " 'The third requirement is that there be no efficient intervening cause.' "

Zeller, supra at 672, 419 N.W.2d at 658 (quoting *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975)).

> Many courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of the defendant's act. These words frequently appear to have been given no more definite meaning than "proximate" itself. Strictly speaking, all consequences are "natural" which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. "Probable," if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser and Keeton, *supra*, § 43 at 282.

In *Zeller v. County of Howard, supra*, we also stated: "In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between original conduct and the injury. [Citations

omitted.]" 227 Neb. at 673, 419 N.W.2d at 658. See, also, *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

> " ' " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury "there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." ' " ' "
> *Shelton v. Board of Regents*, [211 Neb. 820, 320 N.W.2d 748 (1982)] (quoting from *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957)). See, also, *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953).

Zeller v. County of Howard, supra at 673-74, 419 N.W.2d at 658.

> If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences; otherwise he will generally not be, provided, of course, that the intervening force is a cause of the injury.

4 F. Harper, *supra*, § 20.5 at 152.

"Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). See, also, *Zeller v. County of Howard, supra*.

To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances. *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988).

When the foregoing principles of negligence law are applied in the present case, several questions arise.

What bearing did the first collision have on the conduct of the parties? In view of the first collision, and given the same people and the same setting of the semi still parked across the track, did Kaiser act reasonably, believing that Union Pacific could handle it and would stop short of a second collision within minutes of the first collision? Under the circumstances,

was a second collision so bizarre and improbable to the point of being nothing but the most remote possibility? Was recurrence of a collision unlikely in a degree defying foreseeability? On the other hand, was the first collision a dress rehearsal for the second? As a result of the first collision, should Kaiser have reasonably anticipated a second collision? If so, what precautionary measures would have been reasonably required to prevent the second collision? Still other questions lurk in the record. At the time of the second collision, the switch engine was pushing cars at a speed of 15 miles per hour, which translates into 22 feet per second, just before impact. At that "unusually fast" speed, if Kaiser were negligent in omitting precautions against the second accident, would Kaiser's precautions, which probably would have been formulated on the basis of the usual speed of cars being spotted, have made any difference at all? Would the train's "unusually fast" speed have frustrated reasonable precautionary measures by Kaiser? The Union Pacific fired the engineer of the switch engine, acknowledging the engineer did not have the train under control to avoid striking an obstruction. If the engine was backing toward the loading dock and pushing cars, the engineer would have been seated on the west side of the engine and may have had an obstructed view of the area ahead of the boxcars and may not have had visual contact with members of the train crew on the ground. The engine foreman and switchman, located on the ground at the east side of the moving train, had only malfunctioning walkie-talkies, preventing effective radio contact with the engineer. Hand signals were not used and, even if used, as far as the record indicates, probably would not have been observed by the engineer seated on the west side of the switch engine. In that setting, if Kaiser had attempted to warn the train crew, could the warning have been communicated to the engineer in time to stop the train moving at an "unusually fast" speed? Was the engineer incommunicado in the cab, oblivious to what lay ahead of the moving train?

Those are some of the genuine issues of material fact presented and, consequently, factual questions raised by the record which we have reviewed. We conclude that the district court was incorrect in granting a summary judgment to Union

Pacific, and reverse the Union Pacific's summary judgment.

JUDGMENT FOR CONTRIBUTION

Because there are issues of fact to be determined for resolution of the question whether Kaiser was negligent, a judgment necessarily based on Kaiser's negligence is premature. Therefore, since we have reversed the district court's judgment on the issue of negligence, we must also reverse the district court's judgment requiring Kaiser's contribution toward Union Pacific's settlement of the claims arising out of the collision in question.

DENIAL OF SUMMARY JUDGMENT TO KAISER

Kaiser complains that the district court denied Kaiser's motion for summary judgment. In view of the principles governing negligence claims and the issues of fact which we have discussed regarding the summary judgment for Union Pacific, we need say no more than the district court was correct in denying summary judgment to Kaiser. Moreover, with reversal of the judgment for contribution, the trial court's action in denying a summary judgment to Kaiser presents no appealable order. See *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983) (overruling a motion for summary judgment is not a final, appealable order).

For the reasons given, we reverse the district court's summary judgment granted to Union Pacific and reverse the district court's judgment requiring Kaiser's contribution to Union Pacific on account of the railroad's settlements. This matter is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

R.D.B., INC., DOING BUSINESS AS TRADE WINDS MARINA, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

425 N.W.2d 884

Filed July 15, 1988. No. 86-683.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Where a party appeals a decision of the Liquor Control Commission to the district court pursuant to Neb. Rev. Stat. § 53-1,116(5) (Cum. Supp. 1986), that court may not disturb the decision of the commission unless it was arbitrary and unreasonable.
2. _____: _____: _____. The standard of review in the Supreme Court for appeals from the Liquor Control Commission is de novo on the record.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellant.

Duane A. Burns, of Mayer & Burns, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

WHITE, J.

On January 2, 1986, the Nebraska Liquor Control Commission sent notice to R.D.B., Inc., doing business as Trade Winds Marina (Trade Winds), of an amended citation filed against Trade Winds before the commission. The amended citation charged "[t]hat the licensee did, on or about July 4, 1985, permit a minor under the age of 19 years of age, to sell or dispense alcoholic liquor, in and for said licensed premises, in violation of Section 53-180.02." The licensee entered a plea of guilty and the commission canceled Trade Winds' license.

Trade Winds moved for a rehearing pursuant to Neb. Rev. Stat. § 53-1,116(3) (Cum. Supp. 1986), which the commission granted. The commission conducted an evidentiary hearing for the purpose of determining whether revocation was the proper penalty under the circumstances. The state called three witnesses who testified primarily about incidents, unrelated to the offense charged, involving Ray Boehler, the owner of Trade Winds. It was the state's contention that Boehler's actions

showed that he was unfit to sell liquor. Boehler testified on his own behalf and called an additional witness to testify as to his character and ability to run the business. The commission again determined that Trade Winds' license should be canceled.

On June 16, 1986, Trade Winds appealed the decision to the district court for Lancaster County. See § 53-1,116(5). The case was "heard and tried" on the record of the commission. See § 53-1,116(8). The district court determined that the order of the commission was arbitrary and unreasonable and modified the order to a 60-day suspension. The commission appeals to this court.

The facts, as contained in the record of the commission, are as follows. Trade Winds Marina is located on the bank of the Sherman Reservoir, which is near Loup City, Nebraska. The marina sells groceries, bait and tackle, and beer; has a snack bar; and rents boats. There are facilities for boat storage and for overnight campers. In addition to the marina, Boehler manages a nearby trailer court with 102 trailers. Boehler has invested approximately $300,000 in the business.

On July 4, 1985, Donald Littrell, an investigator for the commission, was conducting an investigation of Trade Winds. Littrell entered the marina and purchased some food items, along with a beer. It was later determined that the clerk who sold the beer to Littrell was a minor, 18 years of age.

Other than Littrell's testimony, the state's evidence focused largely upon Boehler's drinking habits and his conduct in the course of operating the business. Witnesses testified, inter alia, that there had been other occasions when minors employed by Boehler sold beer and that Boehler had been observed in an intoxicated condition in locations around the premises. Boehler denied that his drinking has caused him problems in operating his business. Harlan Hunt, a resident of the Sherman Reservoir area since 1969, testified that he has never observed Boehler to be intoxicated and that to the best of his knowledge Boehler operates his business in a responsible manner.

In this appeal, the commission's sole assignment of error is that the district court erred in finding that, in revoking Trade Winds' retail beer license, the commission acted arbitrarily and unreasonably.

We must first address the scope and standard of review applicable in the district court and in the Supreme Court. The district court's order states that the "standard of appeal" is set forth in Neb. Rev. Stat. § 84-917(6) (Reissue 1987), a part of the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987). Subsection 7 of § 84-917, however, provides, "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal." Because this case involves an order of the commission canceling appellee's beer license, § 53-1,116(5)(a) is a provision of law which "prescribe[s] the method of appeal" in this case. Therefore, under § 84-917(7), it is § 53-1,116(8) and not § 84-917(6) which governs the standard of review in the district court. See *Harrigfeld v. Nebraska Liquor Control Commission*, 203 Neb. 741, 280 N.W.2d 61 (1979) (court recognizes that an appeal from a commission order, if not governed by § 53-1,116, is governed by § 84-917).

We note here that the district court's review for appeals from the Liquor Control Commission has been the subject of some confusion in our previous cases. *McChesney v. City of No. Platte*, 216 Neb. 416, 343 N.W.2d 925 (1984), was a case where McChesney, the appellee, was initially denied a liquor license by the commission. The district court reversed, and the commission appealed to this court. We noted at 420, 343 N.W.2d at 928, that "[n]either this court nor the district court is entitled to review the record de novo . . . . Rather, on appellate review we determine only whether the findings of the commission are supported by substantial evidence or whether they were arbitrary or capricious. Neb. Rev. Stat. § 84-917 (Reissue 1981)." Because *McChesney* involved a denial of application, the appeal to the district court should have been governed by § 53-1,116(5) and not § 84-917. *McChesney* was later cited in *Richards v. Neb. Liq. Control Comm.*, 221 Neb. 542, 378 N.W.2d 667 (1985), also an application case, for the proposition that review in this court is limited to a determination of whether the commission's findings were supported by substantial evidence or were arbitrary or capricious. To the extent that these decisions improperly relied on the Administrative Procedure Act for the standard of review

which is governed by § 53-1,116, they are overruled.

Having determined that the appeal to the district court is governed by § 53-1,116, we must now determine what the scope of review is under this section. The phraseology currently utilized in § 53-1,116(8) is the result of 1984 and 1986 legislative amendments. Relevant to this discussion is the 1984 amendment. Before the 1984 amendment, § 53-1,116(8) (Reissue 1978) provided, "The appeal, provided for or referred to in . . . this section, shall be heard and tried de novo in the district court in the manner provided for the trial of suits in equity. Additional testimony may be introduced at the hearing on appeal." Subsection (8) currently provides in relevant part, "All appeals provided for or referred to in . . . this section shall be heard and tried by the court without a jury on the record of the commission." Thus, in addition to disallowing additional testimony to be adduced on appeal to the district court, the Legislature removed the language which explicitly conferred de novo review in the district court. It would appear that by removing this language, the Legislature was attempting to effectuate some type of error proceeding. As currently stated, however, § 53-1,116(8) does not indicate whether the appeal is to be heard and tried for error on the record or de novo on the record. This ambiguity necessitates reference to the legislative history.

Senator Hefner, who was among those introducing the bill, recited the statement of intent of the amendment before the Legislature as follows:

> The purpose of the third provision of this bill is to make the appeal process to district court on decisions, rules and orders of the Commission the same as most of the other state agencies. The appeals for most of the state agencies are tried on the record of the agencies. The Nebraska Liquor Control Act allows for additional, for additional testimony to be introduced in an appeal. LB 947 requires an appeal to be tried on the record of the Commission. This will result in a less complicated and therefore a less expensive appeal process. So it would mean that it would cost the state less. It would also bring us in compliance with the Administrative Appeals Act.

Floor Debate, L.B. 947, Miscellaneous Subjects Committee, 88th Leg., 2d Sess. 7123 (Jan. 24, 1984). At the committee hearing on the bill, Terry Schaaf, assistant attorney general and counsel to the Nebraska Liquor Control Commission, testified concerning the amendment: "I think what we're doing there is simply making it consistent with the Administrative Procedures Act, so that the appeals from the decisions of the Nebraska Liquor Control Commission will be the same as they are for any other administrative agency." Miscellaneous Subjects Committee Hearing, L.B. 947, 88th Leg., 2d Sess. 35 (Jan. 19, 1984).

To be consistent with § 84-917(6) of the Administrative Procedure Act, § 53-1,116(8) would have to be construed as providing review for error on the record in the district court.

Even before the 1984 amendment, this court restricted the review in district court by requiring that the commission decision be upheld unless it was "arbitrary and unreasonable." *Allen v. Nebraska Liquor Control Commission*, 179 Neb. 767, 140 N.W.2d 413 (1966); *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983). The apparent incongruity between the review announced in these cases and the review provided in § 53-1,116(8) was challenged by the plaintiff in *T & N P Co., Inc. v. Nebraska Liquor Control Commission*, 189 Neb. 708, 204 N.W.2d 809 (1973). We said that § 53-1,116 "refers to the procedure on the trial of the appeal rather than the determination of the appeal" in upholding the "arbitrary and unreasonable" standard. *Id.* at 711, 204 N.W.2d at 811.

Given the case law interpreting § 53-1,116 prior to the 1984 amendment, together with the current language used in § 53-1,116, it would be difficult to assert that the review in the district court could be anything but for error on the record. We hold that for appeals pursuant to § 53-1,116(5), the district court may not disturb the decision of the commission unless it was arbitrary and unreasonable. In this case the district court cited the wrong statute but applied the correct standard of review.

Nothing in the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 et seq. (Reissue 1984, Cum. Supp. 1986 & Supp.

1987), prescribes what the standard of review is in this court. A similar situation arose in *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984), involving the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 et seq. (Reissue 1984). The act set forth the standard of review for the district court but was silent on the Supreme Court's review. In *Zalkins* we said at 291, 348 N.W.2d at 848, that "since no different statutory standard of review is provided for in the Nebraska Fair Employment Practice Act, we are bound by the provisions of Neb. Rev. Stat. § 84-918 (Reissue 1981) . . . ." The statute referred to provides that the appeal to this court "shall be heard de novo on the record." In *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985), we held that regardless of the incongruity of a true de novo review of a district court decision wherein the review was for error only, the legislative mandate of the Administrative Procedure Act must be acknowledged. Following *Zalkins* and *Haeffner*, we hold that the standard of review in this court for appeals from the Liquor Control Commission is de novo on the record.

Reviewing de novo on the record before us, we agree with the district court that the penalty imposed was too severe. Given the nature of the violation charged, together with the fact that this was the first time that Trade Winds was cited for a violation of the Liquor Control Act, it is our considered judgment that the appropriate sanction is a 60-day suspension. The order of the district court is therefore affirmed.

AFFIRMED.

BOSLAUGH, J., dissents.

BRYAN WIBBELS, APPELLEE, V. KENNETH FRED UNICK, CONSERVATOR FOR THE ESTATE OF FRED UNICK, APPELLANT, TOWN & COUNTRY COOP, SCOTIA, NEBRASKA, INTERVENOR-APPELLEE.

426 N.W.2d 244

Filed July 15, 1988. No. 86-741.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Pretrial Procedure: Summary Judgment.** Matters admitted pursuant to Neb. Disc. R. 36 (rev. 1986) are a proper predicate for a summary judgment.
3. **Pretrial Procedure.** Neb. Disc. R. 36 (rev. 1986) is intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry.
4. _____. Neb. Disc. R. 36 (rev. 1986) promotes an objective of discovery, the reduction of trial time, by (1) facilitating proof concerning issues that cannot be eliminated from the case and (2) narrowing issues and eliminating the necessity of proof on undisputed matters.
5. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.
6. **Pretrial Procedure: Proof: Evidence.** Neb. Disc. R. 36 (rev. 1986) is not self-executing, but requires that a party, claiming another party's admission by failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must subsequently offer the request for admission as evidence.
7. **Pretrial Procedure.** While not self-executing, Neb. Disc. R. 36 (rev. 1986) is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
8. **Pretrial Procedure: Time.** By order within a court's discretion, a party may obtain an enlargement or extension of time beyond 30 days to respond to a request for admission.
9. _____: _____. If a party does not seek an extension of time to respond outside the 30-day period specified by Neb. Disc. R. 36(a) (rev. 1986), and the subject matter of the request for admission is, therefore, deemed admitted, a party may request to withdraw such admission under Rule 36(b).

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with direction.

Patrick J. Nelson and Terri S. Harder, of Jacobsen, Orr, Nelson & Wright, P.C., for appellant.

Gregory G. Jensen for intervenor-appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

SHANAHAN, J.

Kenneth Fred Unick, conservator for the estate of Fred Unick, appeals from the judgment for Town & County Coop, Scotia, Nebraska (Coop), on Unick's counterclaim. Unick's appeal presents a question concerning consequences of a party's failure to respond timely to a request for admission, pursuant to Neb. Disc. R. 36 (rev. 1986).

Bryan Wibbels commenced an action against Fred Unick and claimed that Unick, as lessor, failed to pay Wibbels, as lessee, an amount due under their farmland lease. Coop filed its petition of intervention in Wibbels' suit on September 24, 1985, and alleged that, relying on Unick's tendered check for $25,200 payable to the Coop and Wibbels, the Coop supplied petroleum products, labor, and fertilizer which were valued at $25,774. When the bank refused to honor Unick's check, Coop intervened in the Wibbels-Unick litigation, requesting that any amount recovered by Wibbels be awarded to Coop. Responding to Coop's petition of intervention, Unick filed his demurrer and a motion to strike or dismiss Coop's petition. Shortly thereafter, without disposition of the demurrer or motion, Unick filed his answer to Coop's intervention petition, denied liability to Coop, counterclaimed that Coop owed Unick $25,200 for fertilizer which Coop had agreed to deliver but failed to apply on the leased land, and requested judgment accordingly. On October 25, Unick served "Requests for Admission" on Coop, which included requested admissions that Unick's check for $25,200 was delivered to Coop pursuant to its promise to apply fertilizer to the leased land, Coop did not apply the fertilizer, and Coop owed Unick $25,200. On January 22, 1986, Coop filed its answer and generally denied Unick's counterclaim.

In support of his motion for summary judgment, filed on

March 6, 1986, or some 4 1/2 months after service of the request for admissions, Kenneth Unick, as conservator for Fred Unick, asserted that Coop had failed to respond to the request, notwithstanding service pursuant to Rule 36. On March 26, Coop transmitted answers to Unick's request for admissions, denied the agreement with Unick for application of fertilizer on the leased land, and, correspondingly, denied failure to apply fertilizer on the leased land and consequent liability for such failure. At the hearing on Unick's motion for summary judgment, held on April 8, Unick proved that his request for admissions had been served on Coop, which had failed to answer or object within 30 days after service of the request, and offered the request for admissions to which Coop had made no response. Before and at the hearing for summary judgment, Coop did not offer an explanation for its failure to answer or object to the requested admissions and never asked the court to enlarge or extend time for answering or objecting to Unick's request for admissions. Rather, at the summary judgment hearing, after Unick's request for admissions was received as evidence for the purpose of the summary judgment, Coop introduced its answers to Unick's request for admissions. The court denied Unick's motion for summary judgment. Somewhere along the line, Wibbels and Unick settled their differences, leaving Unick's counterclaim as the only actionable matter before the court. Later, after a trial on the merits, the court entered judgment for Coop on Unick's counterclaim.

Unick complains that, as the result of Rule 36, all elements necessary to prevail on his counterclaim were conclusively established by Coop's admissions through its failure to respond timely to Unick's request, thereby entitling Unick to judgment as a matter of law on his counterclaim and precluding a trial on the counterclaim. Coop contends that its tardy response to Unick's request for admissions should not obviate a trial on the merits regarding Unick's counterclaim and the judgment favorable to Coop.

Rule 36, "Requests for Admission," in pertinent part provides:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for

purposes of the pending action only, of the truth of any matters within the scope of Rule 26 (b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . . The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

. . . The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him or her. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. . . .

. . . .

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., ante* p. 160, 425 N.W.2d 872 (1988); *Lowry v. State*

Farm Mut. Auto. Ins. Co., 228 Neb. 171, 421 N.W.2d 775 (1988).

Matters admitted pursuant to Rule 36 are a proper predicate for a summary judgment. *U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987); *Luick v. Graybar Electric Company, Inc.*, 473 F.2d 1360 (8th Cir. 1973); *All State Leasing v. Top Hat Lounge*, 198 Mont. 1, 649 P.2d 1250 (1982); *Wagner v. Carex Investigations & Sec.*, 93 Nev. 627, 572 P.2d 921 (1977). Cf. *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984) (appellate reinstatement of summary judgment based on a request for admission, when the trial court vacated the judgment after a motion for new trial).

As we stated in *McKinstry v. County of Cass*, 228 Neb. 733, 734-35, 424 N.W.2d 322, 324 (1988):

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Alliance Nat. Bank v. State Surety Co., supra*. Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29, 60 A.L.R.4th 953 (1986).

In *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 536, 407 N.W.2d 146, 153 (1987), we noted that "[a] purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute."

In substance, Rule 36 is the Nebraska counterpart to Fed. R. Civ. P. 36, which is "intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed

at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry." 8 C. Wright & A. Miller, Federal Practice and Procedure § 2252 at 705 (1970). Wright & Miller contains the following observation concerning a request for admission:

> "Through such definition and limitation, admissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements."

Id. at 704-05 (quoting Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371 (1962)). See, also, 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 36.02 (2d ed. 1984) (federal Rule 36 facilitates and expedites a trial by presenting undisputed facts and proof otherwise burdensome in time and expense). Rule 36 promotes an objective of discovery, the reduction of trial time, by (1) facilitating proof concerning issues that cannot be eliminated from the case and (2) narrowing issues and eliminating the necessity of proof on undisputed matters. See 4A J. Moore, J. Lucas & D. Epstein, *supra*, ¶ 36.01[5]. Also, Rule 36 has a significant role and function regarding Neb. Ct. R. on Case Progression Standards (rev. 1986), which prescribes the deadline for a trial on the merits in civil cases.

This court has recognized and adopted the rule that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission. In *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 422, 344 N.W.2d 59, 60 (1984), this court, construing Neb. Rev. Stat. § 25-1267.41 (Reissue 1979), the statutory forerunner of Rule 36, stated: "A failure to appropriately respond within the time allotted to a properly served request for admission of facts

constitutes an admission of facts sought to be elicited. [Citations omitted.]" When the defendants failed to respond to the request for the admission of facts within the time allotted, the facts sought to be elicited were admitted and no longer subject to controversy in the action. See, also, *Macklem v. Valley Bank of Union County*, 221 Neb. 227, 229, 375 N.W.2d 907, 909 (1985): matters admitted pursuant to Rule 36 are "conclusively and unequivocally established." See, further, *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984); *Kissinger v. School District No. 49*, 163 Neb. 33, 77 N.W.2d 767 (1956); *Mueller v. Shacklett*, 156 Neb. 881, 58 N.W.2d 344 (1953). In *Mangan v. Broderick and Bascom Rope Company*, 351 F.2d 24, 28 (7th Cir. 1965), the court stated: "Rule 36 places the burden upon a party to whom requests are directed to take some affirmative action, either by response to the requests or by objecting thereto if any ground he has."

Rule 36 is not self-executing, but requires that a party, claiming another party's admission by failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must subsequently offer the request for admission as evidence. See, *Gilbert v. General Motors Corporation*, 133 F.2d 997 (2d Cir. 1943); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); 8 C. Wright & A. Miller, *supra*, § 2264.

> A party who fails to respond to a request should be held to have admitted it even though the request was objectionable or the party may have some valid reason for not answering it. The rule is quite explicit that matters shall be deemed admitted unless, within the specified time limits, a sworn statement is filed or objections made. It is needlessly wasteful of judicial effort to allow a party to obtain a reversal on appeal because of an objection he could have but failed to make when the request was served.

8 C. Wright & A. Miller, *supra*, § 2259 at 725-26.

Thus, while not self-executing, Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a

request for admission. When a party has been served with a request for admission, pursuant to Rule 36, but fails to answer or object to the request, the subject matter of the request stands admitted by the unresponsive party and is conclusively established, unless the court on motion permits withdrawal of the admission by a party's failure to respond. See, *Sargent Feed & Grain v. Anderson, supra*; *Aetna Cas. & Surety Co. v. Nielsen, supra*.

By order within a court's discretion, a party may obtain an enlargement or extension of time beyond 30 days to respond to a request for admission. Rule 36(a). See, *Schuett v. Hargens*, 173 Neb. 663, 114 N.W.2d 508 (1962) (construing § 25-1267.41 (Reissue 1956), statutory predecessor to Rule 36); *U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987); *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98 (Utah 1985). If, however, a party does not seek an extension of time to respond outside the 30-day period specified by Rule 36(a), and the subject matter of the request for admission is, therefore, deemed admitted, a party may request to withdraw such admission under Rule 36(b). See, *U.S. v. Kasuboski, supra*; *Jensen v. Pioneer Dodge Center, Inc., supra*; *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981).

In *Kasuboski, supra*, the government served requests for admission on Kasuboski, pursuant to Rule 36 of the Federal Rules of Civil Procedure. Kasuboski failed to respond to the government's request. Five months after service of the requests for admission, the government moved for summary judgment. Kasuboski never requested the court's permission to respond outside the 30-day period specified by federal Rule 36 and did not seek to withdraw his admissions after the 30-day period had expired without Kasuboski's response. Recognizing the potentially harsh consequence of failure to respond as prescribed by federal Rule 36, the court, nevertheless, granted summary judgment and commented:

> The failure to respond to admissions can effectively deprive a party of the opportunity to contest the merits of a case. This result, however, is necessary to insure the orderly disposition of cases; parties to a lawsuit must comply with the rules of procedure. In addition, the

> harshness is tempered by the availability of the motion to withdraw admissions, a procedure which the defendants did not employ.

834 F.2d at 1350.

In the present case, the undisputed facts demonstrate that Coop failed to answer or object to Unick's request for admissions within the 30-day period prescribed by Rule 36(a). Coop never sought an enlargement or extension of time to respond to Unick's request for admissions and did not request the court's permission to withdraw the admissions effected by failure to respond to the request. As the result of Coop's failure to respond to Unick's request for admissions, in accordance with Rule 36(a), the subject matter of Unick's request was admitted by Coop and was conclusively established through Rule 36(b) for the purpose of a summary judgment. Coop's admissions established the elements necessary for Unick's recovery, as a matter of law, on his counterclaim.

Because no genuine issue of material fact existed for recovery on Unick's counterclaim, the district court incorrectly denied summary judgment for Unick on his counterclaim. The district court's judgment denying summary judgment to Unick is reversed, and this matter is remanded to the district court with direction to enter judgment for Unick in accordance with his counterclaim. Also, the district court's judgment for Coop entered after a trial on the merits is reversed.

REVERSED AND REMANDED WITH DIRECTION.

JUDITH E. KINKAID, APPELLANT, V. ROBERT G. KINKAID, APPELLEE.

425 N.W.2d 888

Filed July 15, 1988. No. 86-746.

1. **Appeal and Error.** In an action at law, the findings and conclusions of the trial court will not be set aside unless clearly wrong.
2. _____. In an action at law tried without a jury, it is not for 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 Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Donald J. Pepperl, of Pepperl, Melcher & McMahon-Boies, for appellant.

Daniel F. Kaplan and, on brief, Earl J. Witthoff, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

PER CURIAM.

The plaintiff, Judith E. KinKaid, and the defendant, Robert G. KinKaid, were married on June 6, 1967. Two children were born from that marriage. On September 26, 1974, the parties were divorced by a decree in the Ohio court of common pleas. The decree of divorce ordered:

> [T]he Defendant-Father shall pay to the Plaintiff for support for the parties' minor children the sum of One Hundred Dollars ($100.00) each per month for a total of Two Hundred Dollars ($200.00) per month, payable in semi-monthly installments of One Hundred Dollars ($100.00) each commencing with September 15, 1974 and to continue on the 30th and 15th days of each month thereafter until the further order of the Court.

After the divorce the plaintiff moved to Nebraska, where she lived for a period of approximately 6 months. She then moved back to Ohio, where she, the children, and the defendant, now her ex-husband, resumed living together. The parties lived in Ohio until 1976 and then moved to Nebraska. During the time that the parties were living together, they resumed the marital relationship, incurred debts, and acquired both real and personal property.

The parties terminated their relationship in November of 1978. The plaintiff then hired an attorney and had him prepare a written contract, the purpose of which was to provide for the

disposition of their assets and protect her financially. It is this contract which is now in dispute.

The contract which the plaintiff produced states in part:

> WHEREAS, Judith E. Kinkaid and Robert G. Kinkaid, Sr. do wish to enter into a contract agreement to settle all property rights by and between themselves, *and insofar as permitted by law, do wish to enter into an agreement for custody, visitation and payment of child support for their two minor children*, and
>
> WHEREAS, the parties do wish the following contract and agreement to be binding upon themselves, and do wish the same to be approved by any Court that in the future may enter a decree of divorce between the two of them; or do wish it to be approved by any Court that may have previously entered a decree of divorce, awarded child custody and child support; *and do further agree that this contract shall serve as an application to any such Court to modify previous award of custody and child support* to the extent that such custody and support shall be consistent with the following provisions . . . .

(Emphasis supplied.)

At issue are the following provisions:

> NOW, THEREFORE, it is agreed by and between the parties as follows:
>
> . . . .
>
> 4. That Robert G. Kinkaid, Sr. shall pay by way of child support the sum of One Hundred Seventy-Five Dollars ($175.00) per month per child commencing as of the 1st day of the month upon closing of the sale of the real estate herein described, and continuing on the 1st day of each and every month thereafter until said minor children reach legal age, become free and emancipated, or no longer dependent upon Judith E. Kinkaid for support; said child support shall be paid to Judith E. Kinkaid either directly or thru [sic] the Clerk of any District Court that may be determined in the future to have jurisdiction of the parties and the subject matter hereto.
>
> . . . .
>
> 7. The parties further stipulate and agree that they are

presently the joint owners of the following described real estate, to-wit:

Lot Six (6), Block One (1), Quail Valley First Addition to Lancaster County, Nebraska

That said property is presently listed for sale and both parties do agree to sign any and all documents necessary or convenient to the sale of said property at the earliest possible date; said sale to be in the sum of Fifty-One Thousand Five Hundred Dollars ($51,500.00) or such other amount as may be agreeable to both parties. That during the pendency of this sale, Robert G. Kinkaid, Sr. does agree to make the monthly house payment in the sum of Four Hundred Thirty Dollars ($430.00) per month. . . .

The parties' signatures and acknowledgments appear at the end of the document.

The record indicates that the defendant made house payments for November and December of 1978 and January and February of 1979. The property was sold in June 1979.

The plaintiff commenced this action to recover the amounts she alleges are due her under the contract. In her amended petition, filed November 21, 1984, and a later amendment, the plaintiff alleged that $1,720, representing four mortgage payments, and $11,913 in unpaid child support are due her. The action is based solely on the November 1978 contract, and not on any money due under the Ohio decree.

In his answer the defendant denied having entered into the contract produced by the plaintiff and affirmatively alleged that the contract was an attempt by the plaintiff to usurp the authority of the court of common pleas of Ohio and the district court of Nebraska by changing and modifying the terms of the 1974 decree. He further alleged that the proper relief available to the plaintiff, if any, would have been to have the child support provisions of the decree modified.

At the trial, the defendant testified that the contract he signed provided for child support in the amount of $100 per month per child, not $175. He further testified that after he signed the contract, the plaintiff's attorney, Jerry Snyder, sent him a letter explaining that the plaintiff and her attorney had increased the amount of child support to $175 per child per

month. Neither the defendant nor Snyder produced a copy of this letter. Snyder testified by deposition that he believed no changes were made after the contract was executed. According to Snyder, the time at which the defendant was to begin making child support payments was changed prior to the execution of the contract. As originally drafted, the contract provided that the defendant was to pay $175 per month per child commencing on the first day of December 1978. This provision was changed so as to allow the defendant to begin making the child support payments after he was no longer making the mortgage payments, that is, child support payments were not to begin until the previously described real estate was sold. The plaintiff testified that she requested this change. Snyder also testified that it was his belief that the change involved the time when payments were to begin. The plaintiff testified that the defendant signed the contract, which reflected the time change, in front of her in Snyder's office.

The trial court found that the plaintiff had failed to sustain the burden of proving the allegations of the amended petition and dismissed the amended petition. The plaintiff has appealed.

The plaintiff's assignments of error are that (1) the district court's finding that she had not proven by a preponderance of the evidence the allegations contained in her petition was clearly erroneous; (2) the district court erred in failing to find that the contractual agreement between the parties was enforceable; and (3) the district court erred in failing to enter judgment in her favor.

Since this is an action at law, the findings and conclusions of the trial court will not be set aside unless clearly wrong. In an action at law tried without a jury, it is not for 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. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988); *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 419 N.W.2d 518 (1988).

The plaintiff's position in this case is that there are no

questions of fact and that the trial court was required to find in her favor as a matter of law. Although the document produced by the plaintiff tends to corroborate her testimony, there are other circumstances in the case which weaken her position. Snyder had no independent recollection of the facts and had to rely upon notes and memoranda in his file.

Although the contract was executed in 1978, the plaintiff apparently made no effort to enforce it until sometime around 1986. However, in the meantime, the plaintiff testified and correspondence and other documents contained in Snyder's office file indicate that the plaintiff made some effort in 1979 to modify the Ohio decree by a proceeding in Ohio. The defendant testified that he did not cooperate in that matter because he had not agreed to the proposed increase of child support from $100 to $175 per month per child. Then, in 1981, the plaintiff commenced some kind of an action in Arizona against the defendant, but she could not remember whether that action was based on the Ohio decree or the 1978 contract.

There are numerous canceled checks in evidence which represent direct payments of child support in the amount of $200 per month to the plaintiff in the years after 1978 and before commencement of this action.

As we view the record, the evidence presented questions of fact which the trial court resolved against the plaintiff. The judgment is, therefore, affirmed.

AFFIRMED.

CAROLYN JONES DONAHOO, DOING BUSINESS AS PALM GARDENS, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

426 N.W.2d 250

Filed July 15, 1988. No. 86-764.

1. **Liquor Licenses: Appeal and Error.** Appeals from the Nebraska Liquor Control Commission are heard in the Nebraska Supreme Court de novo on the record.
2. **Administrative Law: Judicial Notice: Appeal and Error.** As a general rule, the

Nebraska Supreme Court will not take judicial notice of administrative rules or regulations.

3. **Appeal and Error.** Cases are heard in the Nebraska Supreme Court on the theory upon which they were tried.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Andrew J. McMullen for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

CAPORALE, J.

Defendant-appellee, Nebraska Liquor Control Commission, suspended the retail Class C liquor license held by the plaintiff-appellant, Carolyn Jones Donahoo, doing business as Palm Gardens, for a period of 20 days on the ground that she sold liquor to one less than 21 years of age, in violation of a commission rule or regulation. The suspension was affirmed by the district court, and as a consequence Donahoo has appealed to this court. She asserts the district court erred in failing to find a "lack of evidence." As the assertion of error is without merit, we affirm.

The commission charged that on or about February 9, 1985, Donahoo permitted "the selling, dispensing or giving away" of beer to one "Kevin D. Lyons, he being less than 21 years of age, in violation of 237-LCC6-019.01A (16A ed.83) of the Rules and Regulations" of the commission.

We review this matter de novo on the record, *R.D.B., Inc. v. Nebraska Liquor Control Comm., ante* p. 178, 425 N.W.2d 884 (1988), and note at the outset that although the record very carefully designates the number of the rule or regulation under which the commission proceeded, the record neither tells us the difference between a commission rule and a commission regulation, nor does it tell us whether what it has designated is a rule or a regulation. What may prove to be of even greater importance to the commission in some future case is the fact that the commission failed to make the contents of the rule or

regulation involved a part of the record. Because establishing the existence and contents of a particular administrative rule or regulation at any given time is often a difficult and uncertain process, it is an established principle that, as a general rule, this court will not take judicial notice of such rules or regulations. See, *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987); *Nevels v. State*, 205 Neb. 642, 289 N.W.2d 511 (1980). It is incumbent upon the party relying on an administrative rule or regulation to prove both its existence and its language. In the case at hand, however, the commission is saved by the fact that both it and Donahoo proceed on the implicit theory that the rule or regulation in question parallels Neb. Rev. Stat. § 53-180 (Reissue 1984), which prohibits, among other things, the sale of alcoholic liquor to a "minor," such a person being defined for these purposes as any person "under twenty-one years of age, regardless of marital status," except for one who was 20 years of age or older on January 1, 1985. Neb. Rev. Stat. § 53-103(23) (Reissue 1984). "Alcoholic liquor" includes beer. § 53-103(6). No one claims that the sanction imposed is not authorized by the rule or regulation in question. Since cases are heard in this court on the theory upon which they were tried, *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982), we proceed on the basis that commission regulation or rule "237-LCC6-019.01A (16A ed.83)" prohibits the sale of beer to one less than 21 years of age and authorizes the sanction imposed.

Once the content of the rule or regulation involved is established, disposition of the case becomes remarkably simple. The record includes Lyons' testimony that on the relevant date he was but 19 years of age, that he went to the Palm Gardens, and that he bought some beer, two "six-packs," to be precise. He further testified that no one asked him about his age and that he did not volunteer the information. No one contradicts Lyons' testimony. That evidence alone convinces us that Donahoo did indeed violate the commission rule or regulation in question and that the judgment of the district court affirming the decision of the commission is correct.

Donahoo's suggestion that there was no proof the person selling the beer to Lyons was in fact her agent can only be described as fatuous; we refuse to assume that some nefarious

interloper mysteriously invaded the Palm Gardens.

AFFIRMED.

FRANCES SLUKA, WIFE, AND AS GUARDIAN AND CONSERVATOR FOR JAMES SLUKA, HER HUSBAND, APPELLANT, V. GARY HERMAN AND KATHLEEN HERMAN, HUSBAND AND WIFE, APPELLEES.

425 N.W.2d 891

Filed July 15, 1988. No. 86-920.

Actions: Pleadings: Limitations of Actions. The filing of a petition does not toll the running of a statute of limitations for the purpose of bringing subsequent actions on the same set of facts.

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

Michael J. O'Bradovich for appellant.

Mark A. Klinker for appellees.

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

HASTINGS, C.J.

As stated in appellant's brief at 1, "This is an action for damage to real property filed by the Appellants/Plaintiffs on June 26, 1985, in the District Court of Douglas County, Nebraska." From an order of the district court sustaining defendants' motion for summary judgment and dismissing plaintiff's petition, the plaintiff has appealed. Assigned as error is the granting of the motion for summary judgment.

Plaintiff, Frances Sluka, brought this action in her own name and as guardian and conservator for James Sluka, her husband. Her petition alleged that the defendants, who were owners of land adjoining the property of Slukas, committed willful trespass on the Slukas' real estate on September 1, 1978. This, it was alleged, was accomplished by cutting into that property and building a fence on the same property in the early

spring of 1981. The fence was removed and placed on the correct boundary line in "mid-summer of 1981." The case was tried in the district court and briefed and argued in this court simply as a case seeking damages for trespass.

Defendants, in their answer, alleged as a defense the running of the statute of limitations, Neb. Rev. Stat. § 25-207 (Reissue 1985), which restricts the bringing of an action for trespass upon real property to 4 years after the offending incident. The uncontroverted evidence in support of that motion was that plaintiff's survey, done in April of 1981, located the proper boundary line and confirmed the fact of defendants' trespass and that defendants, realizing that they were trespassers, removed the fence on May 21, 1981. The present petition's not having been filed until June 26, 1985, the statute of limitations would have run.

In an effort to avoid the effect of the statute of limitations, plaintiff contends that on August 13, 1982, an almost identical petition was filed which would have been well within the limitations of the statute. However, that petition, or rather a substituted amended petition, was dismissed on August 23, 1984, for want of prosecution.

Although the legal effect of these facts is argued, there is no dispute as to the facts themselves. "[I]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," summary judgment shall be granted. Neb. Rev. Stat. § 25-1332 (Reissue 1985).

Plaintiff urges this court to adopt a rule that a statute of limitations is tolled during the pendency of the first cause of action. She argues this as being required by fair and equal administration of justice and to protect her substantive rights. However, at the time of dismissal, she still had 8, or possibly 9, months in which to file her present petition.

We know of no rule in Nebraska which declares that the running of a statute of limitations is tolled during the pendency of an action so as to permit a second filing more than, in this case, 4 years after the trespass. The filing of suit within the statutory period certainly satisfies the requirements of the

statute of limitations and permits a final judgment in that proceeding, whether before or after the expiration of 4 years. However, it is another thing to say that such filing tolls the statute. To interpret the law in that fashion would create a situation in which a plaintiff could file, have dismissed, refile, and have dismissed, an action, ad infinitum.

Plaintiff's argument that to fail to apply such a rule in this instance would result in unfair and unequal treatment and a deprivation of her substantive rights was addressed generally in *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978). In that case, the plaintiff, having failed to diligently prosecute his cause of action, suffered an order of dismissal. He appealed that order, pointing out that the statute of limitations had now run and that, in effect, his substantive rights to prosecute his action were impaired. We said that "[t]he fact that a new suit would be barred is an important consideration, but in and of itself does not demonstrate that there has been an abuse of discretion. . . . We cannot conclude in the present case that the trial court abused its discretion." *Id.* at 224-25, 263 N.W.2d at 104.

Although authorities differ on this narrow issue of tolling, we feel that the better reasoned rule is that the filing of a petition does not toll the running of a statute of limitations for the purpose of bringing subsequent actions on the same set of facts, and we do so hold. See, *King v. Lujan*, 98 N.M. 179, 646 P.2d 1243 (1982); *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191 (8th Cir. 1976); *Rakestraw v. Berenson*, 153 Ga. App. 513, 266 S.E.2d 249 (1980); *Armstrong v. Ablon*, 686 S.W.2d 194 (Tex. App. 1984); *Willard v. Wood*, 164 U.S. 502, 17 S. Ct. 176, 41 L. Ed. 531 (1896); *Dupree v. Jefferson*, 666 F.2d 606 (D.C. Cir. 1981); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26 (6th Cir. 1987).

The judgment of the district court is affirmed.

AFFIRMED.

WILLIAM M. KRUEGER, APPELLANT, V. DONALD H. ZARLEY ET AL., APPELLEES.

425 N.W.2d 893

Filed July 15, 1988. No. 87-250.

1. **Jurisdiction: Final Orders: Appeal and Error.** Generally, a successful challenge to jurisdiction does not constitute a final disposition of a case and is not appealable.
2. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order and therefore is not appealable.

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

William M. Krueger, pro se.

Wayne J. Mark, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

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

HASTINGS, C.J.

Plaintiff has appealed from the judgment of the district court which denied his motion for summary judgment, "the court having no jurisdiction," claiming such action to be in error.

The record itself does not disclose the reason for the trial court's finding that it had no jurisdiction. Whatever the basis for that finding, the fact remains that generally, a successful challenge to jurisdiction does not constitute a final disposition of a case and is not appealable. *Ranch & Farm Lines, Inc. v. Dressman*, 185 Neb. 328, 175 N.W.2d 299 (1970); *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965).

In any event, we have repeatedly stated that the denial of a motion for summary judgment is not a final order and therefore is not appealable. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., ante* p. 160, 425 N.W.2d 872 (1988); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984).

Plaintiff's appeal is ordered dismissed.

APPEAL DISMISSED.

ALICE MARIE DRENNEN, APPELLANT, V. MICHAEL HARVY DRENNEN, APPELLEE.
IN RE INTEREST OF T.L.H., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. DENNIS LEE HUTSELL, APPELLEE.

426 N.W.2d 252

Filed July 15, 1988. Nos. 87-363, 87-730.

1. **Constitutional Law: Trial: Appeal and Error.** Constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.
2. **Constitutional Law: Legislature.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.
3. **Judgments: Collateral Attack.** A void judgment may be attacked at any time in the proceedings.
4. **Constitutional Law: Statutes.** Neb. Rev. Stat. §§ 43-1601 to 43-1607 (Cum. Supp. 1986) are unconstitutional as violating Neb. Const. art. I, § 13; art. II, § 1; art. III, § 18; and art. V, §§ 1 and 9.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Robert M. Spire, Attorney General, and Royce N. Harper, and Ronald E. Bucher, Deputy Lancaster County Attorney, for appellant Drennen.

Dennis R. Keefe, Lancaster County Public Defender, for appellee Drennen.

Michael G. Heavican, Lancaster County Attorney, and Ronald E. Bucher, Deputy Lancaster County Attorney, for appellant State.

James M. Kelley for appellee Hutsell.

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

GRANT, J.

These two cases, *Drennen v. Drennen* and *In re Interest of T.L.H., State v. Hutsell*, both on appeal from the district court

for Lancaster County, have been consolidated for hearing in this court. In the *Drennen* case, a decree of dissolution of that marriage was rendered on January 16, 1986. Included in that decree was an order requiring Michael Harvy Drennen, respondent husband and appellee in No. 87-363, to pay $100 per month child support for each of two children. On October 2, 1986, pursuant to Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 1986), the district court, on its own motion, appointed the Lancaster County attorney to commence and prosecute contempt of court proceedings against Drennen for his failure to pay child support pursuant to the decree of dissolution. The district court order directed that appellee should appear before the "Honorable Jan Dutton, District Court Referee . . . and bring with him his income tax returns for the past 3 years and his last 3 wage statements prior to hearing." This order was served on appellee Drennen.

The "District Court Referee" had been appointed pursuant to the provisions of Neb. Rev. Stat. §§ 43-1601 to 43-1607 (Cum. Supp. 1986), hereinafter referred to as the Referee Act.

Appellee Drennen appeared before the referee on October 27, 1986, in response to the district court order. At that time he completed and filed a poverty affidavit and requested that an attorney be appointed to represent him. The referee told Drennen that she would "recommend the public defender be appointed to represent you." On October 28, a district court judge appointed the Lancaster County public defender to represent appellee. On December 3, Drennen appeared before the referee, with appointed counsel, and a hearing was held. After preliminary questions as to his residence, the deputy county attorney asked Drennen, "And are you the father of—?" At that point, Drennen's counsel instructed Drennen not to answer any more questions and to "claim Fifth Amendment grounds." The county attorney stated, "I'd offer this witness immunity in accordance with Chapter 42." The referee then stated, "Immunity will be granted to the witness." Further questioning then followed. At the conclusion of this hearing, the referee stated on the record:

> Very well, the Court makes the following findings. First of all, that the Court does have jurisdiction over the parties

> and the subject matter . . . .
>
> . . . .
>
> Accordingly, it is the finding of the Court that the respondent has willfully and contumaciously failed to comply with the Court's judgment and order to pay child support herein; that the respondent is hereby found to be in willful and contumacious contempt of court.

The referee then asked if Drennen had any plan to "purge himself of said contempt of court." Drennen or his counsel did not offer any plan. The referee then stated, "Very well, Mr. Drennen, it has been the court finding, order and judgment that you are and have been found to be in willful contempt of court." The referee then ordered Drennen to appear before the district court judge "for sentencing and/or final disposition on this matter on January 8th, 198[7] . . . ." The referee signed an order on December 3, 1986, setting out the above findings.

On December 10, 1986, in the district court, Drennen filed a "Petition for Review and Motion to Dismiss," requesting the court to determine that §§ 43-1601 et seq. were unconstitutional, and to dismiss the order to show cause issued by the referee requiring Drennen to show to the referee reasons why he (Drennen) should not be held in contempt for not complying with the district court's support order.

A hearing was held on Drennen's pleading on December 23, 1986, in the district court. At this hearing, the deputy Lancaster County attorney appeared "as counsel for the State" representing Alice Marie Drennen, petitioner wife in the marriage dissolution case, and appellant herein. A representative of the Attorney General also appeared and acknowledged he had been notified of the case and the fact that constitutional issues were raised.

The parties stipulated as to the statutes in question, various federal regulations concerning child support, the Nebraska Supreme Court Child Support Rules, and the proceedings before the referee as set out above. No further evidence was adduced. On March 23, 1987, the district court rendered its order sustaining Drennen's petition for review and motion to dismiss, making various findings, and determining §§ 43-1601 et seq.

> unconstitutional to the extent set out in the findings provided that nothing in this order shall prevent the child support referee from hearing child support cases assigned to the referee by a District Judge, making proposed findings of fact and recommendations to a District Judge as to how the case should be decided.

The district court concluded that the referee's order was without subject matter jurisdiction and that the Referee Act was unconstitutional as violating Neb. Const. art. II, § 1, and art. V, §§ 1 and 21.

Alice Marie Drennen has appealed, represented by the Lancaster County attorney and the Attorney General. On appeal, she assigns as error that the district court erred "in finding the child support referees were given full judicial powers and are therefore, unconstitutional as violating Article V, Sections 1 and 21 of the Nebraska Constitution"; that the court erred "in finding the contempt power is exclusively a judicial power"; that the court erred "in finding the Child Support Referee Act violates the separation of powers clause" found in Neb. Const. art. II, § 1; and that the court erred "in finding there is no rational basis for the disparity between treatment of IV-D and non IV-D cases."

Case No. 87-730 is the State of Nebraska, on behalf of a named minor child, v. Dennis Lee Hutsell, the adoptive father of the minor child. The record in that case shows that on June 24, 1985, defendant-appellee, Dennis Hutsell, was ordered by the district court, in a temporary consent support order, to pay $50 per month for the support of the minor child, who was a ward in the custody of the Nebraska Department of Social Services. The initial pleadings in this case are not in the record, but it was apparently filed by the State in an effort to require Dennis Hutsell to provide support for his adopted child, who had been made a ward of the State. On July 24, 1986, the Lancaster County attorney filed a motion requesting the district court "to review the Defendant's ability to increase child support payments . . . ." On the same day, a notice of hearing was filed setting the motion "for hearing before the Honorable Jan Dutton . . . ."

A hearing was held on August 6, 1986, before the referee.

Hutsell appeared pro se. By "Referee's Findings and Order" filed August 6, the referee found that defendant "has equity in real estate of approximately $30,000.00 and a vehicle with equity of $2,500.00," and that "[r]espondent's child support be established on a permanent basis of $100.00 per month continuing under the provisions of the June 24, 1985 support order."

On August 11, 1986, an order was entered, stating, in part,

> Evidence was submitted, and in consideration thereof, and upon the recommendation of the District Court Referee, the Court FINDS, ORDERS, ADJUDGES, AND DECREES:
>
> 1. The Court has jurisdiction over the defendant and the subject matter.
>
> 2. There has been a material change of circumstances since the entry of the Temporary Support Order on June 25, 1985.
>
> 3. The child support obligation shall be increased to $100 per month commencing September 1, 1986, and continuing thereafter until the child reaches age nineteen, marries, dies, becomes self-supporting, joins the Service, or until further order of the Court.
>
> . . . .
>
> 7. . . . [T]hat failure to comply with the provisions of this section be punishable by contempt.

This order was signed by the district court referee.

On March 13, 1987, in the same case, in the district court, Hutsell, as defendant and third-party plaintiff, filed an "Application for Declaratory Judgement, Application for Modification of Order," and for other relief. In this pleading, appellee Hutsell pled that §§ 43-1601 et seq. were unconstitutional in that they violate Neb. Const. art. V, § 21; Neb. Const. art. II, § 1; and U.S. Const. amend. XIV. Hutsell's third-party action directed against his former wife, the adoptive mother of the minor child, was dismissed and is not a part of this appeal.

Plaintiff-appellant, State of Nebraska, answered appellee's application, alleging that the Referee Act was constitutional, that appellee had not utilized the review procedure of

§ 43-1605, and that the determination of the referee had become final.

Appellee Hutsell then filed a motion for summary judgment. On July 21, 1987, a judge of the district court granted appellee's motion and found that §§ 43-1601 et seq. were unconstitutional for the reasons set out in the district court case of *Drennen v. Drennen*, set out above. The district court in the *Hutsell* case found that Hutsell's application challenged the referee's order by collateral attack, rather than appeal, but that the referee's order was void for lack of subject matter jurisdiction and was therefore subject to collateral attack. In *Hutsell*, the appellant, in addition to the assignments of error found in *Drennen*, asserts an additional assignment of error, that the district court erred in finding that the referee's order was made without subject matter jurisdiction and was consequently void and subject to collateral attack. We affirm the judgment of the district court in each case for the reasons set out below.

Since the determinative factor in both cases is the constitutionality of §§ 43-1601 et seq., and that determination is a question of law, we consider the stipulations made by the parties in the two cases together where appropriate. The record before us shows that the Child Support Enforcement Program was established by the U.S. Congress under title IV-D of the Social Security Act. The stated purpose of the program is to establish paternity, locate absent parents, obtain child support orders, and enforce existing child support obligations. On August 16, 1984, the Congress adopted Pub. L. No. 98-378, 98 Stat. 1305 (1984), which provided that the act may be cited as the "Child Support Enforcement Amendments of 1984." The act is now codified in various sections of 42 U.S.C. §§ 651 through 675 (Supp. II 1984), insofar as this case is concerned. Regulations pursuant to the act were adopted by the Department of Health and Human Services, Office of Child Support Enforcement, and became effective May 9, 1985. Some of these regulations appear in 45 C.F.R. §§ 301, 302, 303, 304, 305, and 307 (1987). Section 303.101(b) requires that "[t]he State must have in effect and use expedited processes as specified under this section to establish and enforce support orders in intrastate and interstate cases." Section 303.101(a)

contains a definition of "expedited processes," defined as "administrative or expedited judicial processes or both which increases [sic] effectiveness and meet processing times . . . and under which the presiding officer is not a judge of the court." Section 303.101(c) provides that under the expedited process:

> (1) Orders established must have the same force and effect under State law as orders established by full judicial process within the State
>
> (2) The due process rights of the parties involved must be protected;
>
> (3) The parties must be provided a copy of the order;
>
> (4) There must be written procedures for ensuring the qualification of presiding officers;
>
> (5) Recommendations of presiding officers may be ratified by a judge; and
>
> (6) Action taken may be reviewed under the State's generally applicable judicial procedures.

The Nebraska Legislature passed 1985 Neb. Laws, L.B. 7, effective November 16, 1985, and 1986 Neb. Laws, L.B. 600, effective July 17, 1986, in response to U.S. Pub. L. No. 98-378 and its implementing regulations. These bills are now codified, in part, in §§ 43-1601 et seq. A summary of the Referee Act follows.

Section 43-1601 provides the procedure for the appointment of a child support referee, namely, that the referee is appointed by the district court "only when the Supreme Court finds that existing judicial resources, including available county judges, are insufficient to accommodate the case progression standards established by Public Law 98-378." The referee is subject to confirmation by the Supreme Court and may be removed by either the district court or the Supreme Court.

The duties and powers of the referee in regard to "any IV-D case" are specifically set out in § 43-1602. The phrase "IV-D" is not defined or otherwise explained in the Nebraska Referee Act. Examination of the legislative history of L.B. 7, other statutes in L.B. 7 (such as Neb. Rev. Stat. § 43-512.02(3)(a) (Cum. Supp. 1986)), and Pub. L. No. 98-378, referred to in § 43-1601, shows that the shorthand phrase means the law as set out in 42 U.S.C. chapter 7 ("Social Security"), subchapter

IV ("Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services"), part IV-D ("Child Support and Establishment of Paternity"), at 858-84 of the 1982 main edition, and as amended and modified in 42 U.S.C. supp. III at 807-23 (1985). Section 43-1602 provides in part:

> For any IV-D case, the child support referee shall determine any matter pertaining to (1) the establishment, modification, enforcement, and collection of child support, (2) the enforcement and collection of spousal support if such support is part of an order which provides for child support and the child and spouse are living in the same household, (3) visitation, and (4) paternity.

The section further provides that the referee may order the issuance of process to compel the attendance of parties and witnesses, administer oaths, supervise pretrial preparation pursuant to the rules of discovery promulgated by the Supreme Court pursuant to Neb. Rev. Stat. § 25-1273.01 (Reissue 1985), grant adjournments, and exercise related powers in the same manner as a county or district court judge. Section 43-1603 provides:

> A trial before a child support referee shall be conducted in the same manner as a trial in the district court. A child support referee shall have authority to use all legal and equitable powers available to a district court judge, except that a child support referee shall not have authority to set bail and order detention in lieu of bail.
>
> In any judicial district where a child support referee is appointed who is not a county or district court judge, if incarceration is recommended for civil or criminal contempt of court, the child support referee shall refer the matter, together with a written recommendation, to the district court judge for final disposition.

Section 43-1604 provides that the "child support referee shall announce his or her decision orally or in writing to the parties . . ." and that the referee "shall transmit the written decision or a copy to the clerk of the district court . . . ."

Section 43-1605(1) provides in part that "[a] child support referee's decision may be reviewed by the district court" and

establishes a review procedure. The procedure requires that a petition for review shall be in writing, that the petition for review "shall set forth specifically the errors of law or fact alleged to have been committed by the child support referee," and that "[t]he review hearing shall be on the record made before the child support referee, supplemented in such fashion as the court may permit." Additionally, § 43-1605(2) provides:

> If the petition for review does not set forth the errors committed by the child support referee or is otherwise insufficient, it may be dismissed without a hearing or further review, and the decision of the child support referee shall become the judgment of the district court immediately upon entry of the order of dismissal, with the right of appeal reserved to all parties.

Section 43-1605(3) provides: "The filing of a petition for review shall not stay the decision of the child support referee unless specifically ordered by the district court."

Section 43-1605(4) provides:

> If no petition for review is filed within the fifteen-day period, the decision of the child support referee shall become the judgment of the district court, with the right of appeal reserved to all parties. If no appeal is taken, the judgment shall be entered upon the judgment record of the district court in the manner provided in section 25-2210.

Sections 43-1606 and 43-1607 provide for the funds and operating procedures for the Referee Act. Our examination of the Referee Act does not purport to determine whether that act complies with the guidelines set out by the U.S. Congress and the issued regulations. Our task is only to determine if the Referee Act, as enacted by the Nebraska Legislature, violates the Constitution of the State of Nebraska. There is no question before us of controlling and overriding federal law. We make no determination as to whether a statute can be enacted by the Nebraska Legislature that would comply both with the applicable federal law and the Nebraska Constitution. We are fully cognizant of the controlling effect of federal law over this State's legal actions, but in this case we need not determine the supremacy of the federal law on the subject. Apparently, in this

case, the "carrot" approach is used by the Congress rather than the "stick," because it appears that if the Nebraska Referee Act does not conform generally with the requirements set out in the federal regulations, Nebraska may lose certain federal funds to be made available to complying states. See 42 U.S.C. § 603(h) (Supp. III 1985). As stated, the question as to whether the Nebraska Referee Act complies with the federal law is not before this court, but only the question of the constitutionality of the Nebraska Referee Act under the Nebraska Constitution.

In that regard, the provisions of the Referee Act are set out above. After the hearing in the *Drennen* case, the district court found:

> 6. That insofar as The Referee Act attempts to permit a child support referee to exercise the legal and equitable powers of a District Court Judge and to exercise them in the same manner as a County or District Court Judge in finding a non paying child support payor in contempt of court The Referee Act violates Article II, Sec. 1, and Article V, Sections 1 and 21 of the Constitution of the State of Nebraska.
>
> 7. That insofar as The Referee Act purports to give the Referee the same powers as a District Judge to find the respondent or others in like circumstances in contempt of court, the Act violates Article II, Sec. 1, and Article V, Section 1 and 21 of the Constitution of the State of Nebraska.

In the *Hutsell* case, the district court, relying on the reasoning of the *Drennen* case in the district court, concluded that "the Referee Act is unconstitutional to the extent pertinent here" and that the referee's order was void.

Appellant in each case presents the view of the State of Nebraska; and the two appellants, in the respective cases, present the following common assignments of error: (1) The district court erred in finding the Nebraska Referee Act unconstitutional as violating Neb. Const. art. V, §§ 1 and 21 (*Drennen* assignment No. 1 and *Hutsell* assignment No. 2; the brief in *Drennen* particularizes this assignment by alleging in its second assignment of error that the district court also erred in that it found the contempt power is exclusively a judicial

power); (2) the district court erred in finding the Referee Act violates the separation of powers clause set out in Neb. Const. art. II, § 1 (*Drennen* and *Hutsell* assignment No. 3); and (3) the district court erred in finding that the Referee Act violated "the equal protection clauses of the Nebraska and Federal constitution" (*Hutsell* assignment No. 4) or in finding "there is no rational basis for the disparity between treatment of IV-D and non IV-D cases" (*Drennen* assignment No. 4). Insofar as *Hutsell* assigns as error a violation of a Nebraska equal protection clause, we assume reference is made to Neb. Const. art. I, § 13, referred to in the *Drennen* district court order, or to Neb. Const. art. III, § 18, since Nebraska has no equal protection provision, as such, in its Constitution. See *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986).

In the *Hutsell* case, the State also assigns as error the trial court's finding that the referee's order in that case was made without subject matter jurisdiction and was therefore subject to collateral attack.

We determine that none of the assigned errors have merit; that the Referee Act is unconstitutional for the reasons hereinafter stated; and that the decision of the trial court in each case should be affirmed.

We first consider the first two joint assignments, as set out above. The issue in connection with these assignments is set out at 7 in the appellant Drennen's brief, as follows: "The issue then in this case is whether the Nebraska Legislature has granted full judicial power to the child support referee . . . ." Appellant Drennen admits that if the Referee Act has granted such power, then the statutes in question would violate Neb. Const. art. V, §§ 1 and 21.

Appellee Drennen states, at 10 of his brief, that the issue is, "Does The Referee Act grant judicial powers to the child support referee? If so, the Act is unconstitutional. But if the Referee Act only vests quasi-judicial powers in an adjunct of the district court, as the appellant argues, then the Act is constitutional."

Neb. Const. art. V, § 1, provides in part:

> The judicial power of the state shall be vested in a Supreme Court, district courts, county courts, in and for

> each county, with one or more judges for each county, or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law.

The quoted part of the Nebraska Constitution authorizes the creation of *courts*, not judgeships. The Nebraska Constitution clearly provides that the Legislature has the power to specify the number and duties of judges in a newly created court, so long as that court is lower in order to the Supreme Court. In Neb. Const. art. V, § 11, the Constitution specifically provides that the Legislature "may change the number of judges of the district courts . . . ." It is also clear that the duties and powers of a judge in a newly created court may not usurp the powers granted to constitutionally created courts.

Neb. Const. art. V, § 9, provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law." This article grants original, but not exclusive, jurisdiction in equity matters to the district court. *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

We have held that district courts have constitutional equity jurisdiction which may be exercised without legislative enactment, *Matteson v. Creighton University*, 105 Neb. 219, 179 N.W. 1009 (1920), and, further, that the equity jurisdiction conferred on the district courts by this section of the Constitution is *beyond* the power of the Legislature to control, *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981). Jurisdiction over divorces, including child support orders, is within the chancery and equity powers of the district court. *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939).

Section 43-1602 states in part:

> For any IV-D case, the child support referee *shall* determine any matter pertaining to (1) the establishment, modification, enforcement, and collection of child support, (2) the enforcement and collection of spousal support if such support is part of an order which provides

> for child support and the child and spouse are living in the same household, (3) visitation, and (4) paternity.

(Emphasis supplied.)

The plain meaning of that language is that the district court is deprived of original jurisdiction in each of the designated areas. The Legislature may not limit the constitutionally granted original jurisdiction of the district court. This portion of the act is clearly unconstitutional as violative of Neb. Const. art. V, § 9.

The grant of exclusive and original jurisdiction to the referee denies the persons chargeable with potential or delinquent child support obligations access to the district court as an original trier of fact. The U.S. Supreme Court has noted:

> [C]onstitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). This purported grant of judicial power in § 43-1602 violates Neb. Const. art. I, § 13, which provides, "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Neb. Const. art. I, § 3, provides, "No person shall be deprived of life, liberty, or property, without due process of law."

We hold that the Referee Act violates Neb. Const. art. I, § 13, and art. V, §§ 1 and 9, and is, therefore, void.

Such a determination, in itself, would require affirming the district court orders in each of the cases under review. Nonetheless, we feel it is appropriate to discuss the other error assigned by each appellant in the orders of the district court. The *Drennen* district court held, and the *Hutsell* district court agreed, that the Referee Act was also unconstitutional in that it denied equal protection of the law in arbitrarily denying child support payors in a "IV-D" case the same access to the courts as other child support payors. While Nebraska's Constitution has no specific equal protection clause which is the same as U.S.

Const. amend. XIV, Neb. Const. art. I, § 13, provides, in part, that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law," and art. III, § 18, provides, "The Legislature shall not pass local or special laws in any of the following cases, that is to say: For granting divorces. . . . Regulating the practice of Courts of Justice. . . . In all other cases where a general law can be made applicable, no special law shall be enacted." Appellees contend that the Referee Act violated the Nebraska Constitution by directing child support referees to hear "IV-D cases," while all non-"IV-D cases" would be heard by a district court judge.

Both appellants contend that there is no constitutional violation because there is a rational basis for treating IV-D cases differently than non-IV-D cases. We do not agree. It is first necessary to define the term "IV-D case." For the purposes of this opinion, we define a "IV-D case," as the phrase is used in § 43-1602, as a case involving a dependent child as defined in Neb. Rev. Stat. § 43-504 (Reissue 1984), that is, a child who is receiving, or is eligible for, aid from the State. The State, in turn, is getting some reimbursement from the federal government.

It is this type of case that the referee procedures of §§ 43-1601 et seq. are specifically designed for. The question controlling this point, as stated in appellant Drennen's brief at 22, is: Is there "a rational basis for the disparity in treatment" between IV-D cases and non-IV-D cases?

> "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment."

Taylor v. Karrer, 196 Neb. 581, 585, 244 N.W.2d 201, 204 (1976), quoting from *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974).

The effect of the Nebraska Referee Act is to provide an expedited form to effect repayment to the State for assistance

given to certain children. That effort does not in any way assist children who need assistance but who are not receiving state or federal aid. The classification is not reasonable. It is no answer to say that the same services are available to non-IV-D cases on payment of a fee (however small). In that case, a custodial parent, not receiving AFDC, must pay additional money to receive a service available automatically to those receiving AFDC. The other side of the same situation affects the noncustodial parent in that the custodial parent may, by paying or not paying a set fee, determine whether a hearing is held before a district judge or a nonjudge referee. We hold the classification is not reasonable, and the Referee Act is unconstitutional as violating the equal protection clause of the U.S. Constitution and Neb. Const. art. I, § 13, and art. III, § 18.

In the *Hutsell* case, appellant raises the additional question of appellee's right to challenge the Referee Act by collateral attack. As examination of the facts set out above shows, on August 11, 1986, appellee Hutsell was ordered by the referee to make the increased support payments commencing September 1, 1986. No order or judgment was signed by a district judge. In the same docket, on March 13, 1987, appellee Hutsell filed an application for declaratory judgment, seeking an order of the district court holding the Referee Act unconstitutional. Hutsell contended the referee appointed under the Referee Act "lacked personal jurisdiction over Dennis Lee Hutsell and subject matter jurisdiction over the matters at issue."

The district court in the *Hutsell* case recognized that Hutsell challenged the referee's order by collateral attack rather than by appeal. The trial court held that since the Referee Act was unconstitutional, the judgment under the act against Hutsell was void. We agree. The judgment against Hutsell was rendered and signed by the referee, not a judge. In that event, the judgment was void. We have held, "[A] void judgment may be attacked at any time in any proceeding." *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 249, 328 N.W.2d 759, 763-64 (1983). The judgment against Hutsell could be attacked collaterally.

Neither appellant has the standing to raise a further issue

which we feel should be mentioned. We note that § 43-1602 provides, "For any IV-D case, the child support referee *shall determine* any matter pertaining to . . . (4) paternity." (Emphasis supplied.) Such grant of judicial authority is in direct conflict with 1985 Neb. Laws, L.B. 7, § 74, the same legislative bill containing the Nebraska Referee Act in §§ 1 through 7. Section 74 amended Neb. Rev. Stat. § 43-1406 (as now codified in Cum. Supp. 1986). Section 43-1406 provides for paternity actions in the district court, and specifically provides "jurisdiction is hereby vested in the district court of the district where the child is domiciled or found to hear and determine such actions for support."

Neb. Rev. Stat. § 43-1411 (Cum. Supp. 1986) provides, "A civil proceeding to establish the paternity of a child may be instituted, in any district court . . . ." Either the mother or putative father, whether in a IV-D case or not, is entitled to have paternity determined in the district court, and such persons may not be deprived of the access to the courts provided in Neb. Const. art. I, § 13.

We point out the foregoing because we are conscious of our holdings that

> [w]here it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 826, 140 N.W.2d 668, 674 (1966). See *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988).

We hold that §§ 43-1601 to 43-1607 may not be separated in any fashion as to render any part of the Referee Act constitutional, and the entire act is determined to be unconstitutional as violating Neb. Const. art. I, § 13; art. II, § 1; art. III, § 18; and art. V, §§ 1 and 9.

We agree with the statements of the trial courts that the unconstitutionality of §§ 43-1601 et seq. does not impinge on

the general traditional authority of courts to appoint referees who may conduct various proceedings, hear evidence, and make recommendations to the district court; nor do we imply that referees may not be appointed under the regulations implementing Pub. L. No. 98-378, insofar as the regulations refer to recommendations of a child support referee, adopted by a district judge and reflected in a judge's order. See 45 C.F.R. § 303.101(c)(5) and (d)(2) (1987).

The judgment of the district court in each case is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. ETTLEMAN, APPELLANT.

425 N.W.2d 894

Filed July 15, 1988. No. 87-602.

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.
2. **Homicide: Intent: Words and Phrases.** Malice, in the context of second degree murder, denotes a condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is any willful or corrupt intention of the mind.
3. **Homicide: Intent: Evidence.** Malice and intent may be inferred from the circumstances relating to the criminal act.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing judge.

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 LeRoy W. Sievers for appellee.

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

GRANT, J.

After a trial to a jury in the district court for Douglas County, the 19-year-old defendant, Joseph L. Ettleman, was found guilty of second degree murder and use of a knife to commit a felony. The defendant was sentenced on the murder count to 30 years' incarceration. On the use of a knife to commit a felony count, the defendant was sentenced to 1 to 3 years' incarceration, to be served consecutively. Defendant appeals, contending that the evidence was insufficient to sustain the second degree murder conviction and that the sentences imposed were excessive. We affirm.

The record shows the following facts. On September 17, 1986, the defendant; the victim, Patrick Paulson; the defendant's girlfriend, Leslie Sammons; her roommate, Tomika Nielsen; and Don Jacobs were gathered in an apartment shared by Sammons and Nielsen, located near downtown Omaha. The group was at the apartment from approximately 2 until 9 p.m., smoking hashish and drinking beer and whiskey. During the course of the party, the victim became intoxicated, aggravated defendant and punched him, and attempted to fondle defendant's girlfriend. The defendant became very upset, but was persuaded by Sammons and Nielsen not to start a fight.

As the evening wore on, the tension between the defendant and the victim mounted. At approximately 9 p.m., the party came to an end when the group ran out of beer and whiskey. The defendant informed Sammons that he and Jacobs were leaving to go to the defendant's grandmother's house. At Sammons' request, the defendant agreed to take the victim with him.

The defendant, the victim, and Jacobs then left the apartment and began walking east toward the downtown area. The defendant and Jacobs both testified that the victim had difficulty walking because of his intoxicated condition. As they proceeded toward the downtown area, the defendant testified, the victim continued to taunt him. The defendant led the parties to a secluded lot behind a chemical plant located near the

downtown area. When the parties reached the lot, the victim criticized defendant and cursed him. At that point, the defendant testified, he "cracked," turned around to take a swing at the victim, and hit him in the chest. Defendant testified that he then stabbed the victim with a 5-inch knife which defendant often carried with him.

The defendant further testified that he stabbed the victim after the victim attempted to hit him. Defendant also testified that as he and Jacobs were walking away from the victim, Jacobs suggested that they return to the body to search for cash. The defendant testified that he cut out the pockets of the victim's jeans in order to facilitate the search for money.

Jacobs and the defendant then left the area and parted. Defendant walked to his stepfather's house and gave him the knife which the defendant had used. The knife was eventually taken into custody by the police, and was introduced into evidence at trial.

Approximately 1 1/2 to 2 hours after the stabbing, the defendant met Sammons and Nielsen. Nielsen testified that defendant had blood on his jeans, was very upset, and told her that he had stabbed the victim seven to eight times. Sammons testified that the defendant told her that he had killed the victim and that he had stabbed him four to eight times.

The victim's body was discovered the next morning. The body had sustained 11 stab wounds. The defendant was arrested in the early morning hours of September 19. On that same morning, after proper *Miranda* warnings, the defendant gave a taped confession, which was introduced into evidence at trial. The confession was fully corroborated by defendant's testimony at trial.

In his first assignment of error, the defendant contends that the evidence was insufficient to sustain the defendant's second degree murder conviction. 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. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. *State v. Bodfield*, 228 Neb. 205, 421

N.W.2d 794 (1988).

The defendant argues that the State presented no evidence at trial that the defendant intended to kill the victim, and that the evidence was sufficient only for a manslaughter conviction. We do not agree. A person commits murder in the second degree if he or she causes the death of a person "intentionally, but without premeditation." Neb. Rev. Stat. § 28-304 (Reissue 1985). We have held that the essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986). Malice, in the context of second degree murder, denotes a condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is any willful or corrupt intention of the mind. Malice and intent may be inferred from the circumstances relating to the criminal act. *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988); *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987).

There was more than sufficient evidence upon which the jury could find beyond a reasonable doubt that the defendant purposely and maliciously killed the victim. The 11 stab wounds alone support this conclusion. At trial and in his taped confession, the defendant admitted that he killed the victim. There was testimony by a witness who was present when the defendant stabbed the victim. Taking the view most favorable to the State, the jury could infer that the defendant intentionally and with malice killed the victim. Defendant's first assignment of error is without merit.

In his second assignment of error, the defendant contends that the sentences imposed are excessive. Second degree murder is a Class IB felony, punishable by a term of imprisonment from 10 years to life. The use of a knife to commit a felony is a Class III felony, punishable by a minimum of 1 year's imprisonment or a maximum of 20 years' imprisonment. The defendant was sentenced to 30 years' imprisonment on the murder count and 1 to 3 years' imprisonment on the use of a knife to commit a felony count. The sentences are well within the statutory maximums. It is well settled that a sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse

of discretion on the part of the sentencing judge. *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988). There was no abuse of discretion in this case.

The judgment of the district court is affirmed.

AFFIRMED.

DAVID J. SNYDER, APPELLANT, V. IBP, INC., APPELLEE.

426 N.W.2d 261

Filed July 15, 1988. No. 87-682.

1. **Constitutional Law: Equal Protection.** The function of the equal protection clause of U.S. Const. amend. XIV is to measure the validity of classifications created by state laws.
2. _____: _____. Equal protection does not require that all persons be dealt with identically, but it does require that the distinction have some relevance to the purpose for which the classification is made.
3. **Constitutional Law: Legislature: Statutes.** Although the power of classification rests with the Legislature, a statute which makes an artificial and baseless classification violates Neb. Const. art. III, § 18.
4. _____: _____: _____. The Legislature may make a reasonable classification of persons, corporations, and property for the purpose of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.
5. **Constitutional Law: Statutes: Public Policy.** To be valid, a classification must rest on some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
6. **Constitutional Law: Statutes.** A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions may be allowed where they are made applicable to all persons of the same class similarly situated.
7. _____: _____. Where the valid portions of an act can be enforced independently and the invalid portion did not constitute an inducement to passage of the act as a whole, the invalid portion is severable.
8. **Workers' Compensation.** The provisions in Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 1984) which bar proceedings to modify an award of compensation payable periodically over a period of less than 6 months are invalid as an unreasonable classification.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Paul W. Deck, of Deck & Deck, for appellant.

Wayne E. Boyd, of Smith & Boyd, for appellee.

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

BOSLAUGH, J.

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

The plaintiff, David J. Snyder, injured his right shoulder on December 27, 1983, as the result of an accident arising out of and in the course of his employment by the defendant, IBP, inc. The plaintiff recovered an award for compensation for temporary total disability for 22 weeks, which was affirmed by this court in *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). In that proceeding the compensation court found that the plaintiff had failed to prove that he had sustained any disability after June 10, 1984.

On June 26, 1986, the plaintiff filed a petition in the compensation court seeking a modification of the previous award. The petition alleged there had been an increase in the incapacity of the plaintiff due solely to the injury of December 27, 1983, and that the plaintiff now has an anterior subluxation of the shoulder and a degenerative change in the cartilaginous surface of the glenoid and contiguous humeral head, resulting in total disability. The petition further alleged that the plaintiff will require surgery and additional medical services. The defendant's answer alleged that the increase in disability, if any, was not due solely to the injury of December 27, 1983, and that under Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 1984), the award was not subject to modification.

After a hearing before a single judge, the compensation court found that the award was not subject to modification. At the rehearing before a three-judge panel, an expert witness for the plaintiff testified by deposition that the plaintiff now has a 25-percent disability of his right upper extremity as a result of the injury to his shoulder on December 27, 1983. The compensation court, however, again found that the award was not subject to modification and dismissed the petition. The

plaintiff has appealed.

In this court the plaintiff contends that the compensation court erred in finding that the award was not subject to modification and that §§ 48-140 and 48-141 were not unconstitutional.

Sections 48-140 and 48-141 provide in relevant part as follows:

> All settlements by agreement of the parties with the approval of the compensation court and *all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment* . . . .

(Emphasis supplied.) § 48-140.

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump-sum payments, shall be final, *but the amount of any agreement or award payable periodically for six months or more* may be modified as follows . . . .

(Emphasis supplied.) § 48-141.

By providing that only awards of compensation which are payable periodically for 6 months or more are subject to modification, the statutes divide awards into two classes. Awards which are payable over a period of less than 6 months are not subject to modification.

The plaintiff contends that the classification made by the statutes is invalid because it is arbitrary and unreasonable and lacking in any rational basis. The plaintiff argues that the classification violates both U.S. Const. amend. XIV and Neb. Const. art. III, § 18.

The function of the equal protection clause of the 14th amendment is to measure the validity of classifications created by state laws. *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106 (1979). Equal protection does not require that all persons be dealt with identically, but it does require that the distinction have some relevance to the purpose for which the classification is made. *Parker v. Roth, supra.*

The issue is whether the distinction is "founded upon a reasonable distinction, or difference in state policy, or if any

state of facts can reasonably be conceived which would sustain the classification." *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 700-01, 358 N.W.2d 754, 759 (1984).

Although the power of classification rests with the Legislature, a statute which makes an artificial and baseless classification violates Neb. Const. art. III, § 18. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). The Legislature may make a reasonable classification of persons, corporations, and property for the purpose of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). To be valid, a classification must rest on some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions may be allowed where they are made applicable to all persons of the same class similarly situated. *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985).

We are unable to discern any reasonable basis for denying injured workers the right to a modification of an award of compensation merely because the award is payable periodically over a period of less than 6 months. The defendant has offered no explanation or justification for the discriminatory classification made by the statutes.

In 3 A. Larson, The Law of Workmen's Compensation § 81.10 at 15-128 and 15-129 (1983), the author states:

> In all states, some kind of provision is made for reopening and modifying awards. This provision is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments

> during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to claimant's changed condition. Theoretically, then, commissions ought to exercise perpetual and unlimited jurisdiction to reopen cases as often as necessary to make benefits meet current conditions. But the administrative and practical difficulties of such a course have led to severe limitations on the power to reopen and alter awards. The most serious administrative problem lies in the necessity of preserving the full case records of all claimants that have ever received any kind of award, against the possibility of a future reopening. Moreover, any attempt to reopen a case based on an injury ten or fifteen years old must necessarily encounter awkward problems of proof, because of the long delay and the difficulty of determining the relationship between some ancient injury and a present aggravated disability.

The problem of a time limit to bar proceedings to reopen ancient awards is solved largely by the statute of limitations applicable to proceedings to modify an award. In *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953), we held that such a proceeding must be brought within 1 year from the time the employee knows or is chargeable with knowledge that his condition has materially changed.

In *Landreneau v. Liberty Mutual Insurance Company*, 309 So. 2d 283 (La. 1975), the Louisiana Supreme Court overruled a line of cases where, relying on a similar statute with a 6-month limitation, the court had prevented reopening of a workers' compensation case for modification. Citing Professor Malone's treatise on workmen's compensation, the court said:

> "If, then, the original award was for a period of less than six months, and the judgment has been fully paid when the time comes when a modification is available, is the right to modification lost? There would seem to be little reason why it should be. The purpose of the statute is to insure that the employee will be paid compensation during the full period of his disability and that the employer will not

> be required to pay for any longer than this period of disability. . . . The discretion vested in the court to estimate the probable duration of disability and to fix an arbitrary number of weeks is given to the court for mere administrative convenience and to avoid undue hardship on the employer in cases where it is estimated that the period of disability will not exceed six months. It seems highly doubtful to this writer that it was ever intended to empower the court to so act in advance as to deprive the worker of his usual privilege of seeking a modification whenever his condition has changed. Yet this was the conclusion reached by the Supreme Court in Lacy v. Employers Mut. Liability Ins. Co. of Wisconsin recently. The court expressed the opinion that the statute envisions that the judgment for compensation must be extant at the time the application for modification is made. The court did not seem to be impressed by the fact that the entire compensation scheme instigated by the Legislature even more strongly envisions that compensation payments shall be made during the entire period of disability so long as the maximum period is not exceeded, and the statute contemplates that necessary adjustments should be made after judgment to that end. If a court-administered system is to fulfill successfully a function performed elsewhere through a compensation commission with a continuing supervisory jurisdiction, the statute must be so interpreted as to empower the court to carry out the purpose of this statute. The act should not be so interpreted as to defeat its obvious main purpose—compensation so long as the worker is disabled, but no longer." (1964 Supplement, § 281, pp. 57, 58).

309 So. 2d at 285.

We think it is apparent that there is no rational basis for the classification made by the statutes, and the provisions prohibiting modification of awards payable periodically for less than 6 months are invalid. We also believe the invalid provisions are severable. The valid portions of the act can be enforced independently, and the invalid portions did not constitute an inducement to passage of the act as a whole. See,

State ex rel. Douglas v. Sporhase, 213 Neb. 484, 329 N.W.2d 855 (1983); *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988).

Since the compensation court did not consider the issue of the plaintiff's right to modification of the award on its merits, the cause must be remanded to that court for further proceedings.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LINDA LOUISE LANGE, APPELLANT.

426 N.W.2d 897

Filed July 15, 1988. No. 87-998.

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

Linda Louise Lange, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

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

WHITE, J.

In this pro se appeal the appellant furnishes us with a brief in which no assignments of error are set forth. Therefore, we must search the record for plain error. *Nebraska Mut. Ins. Co. v. Farmland Indus.*, 227 Neb. 93, 416 N.W.2d 221 (1987).

The information charged appellant with two counts of violation of Neb. Rev. Stat. § 28-603(1) (Reissue 1985) (forgery), Class III felonies. In return for an agreement with the county attorney not to file additional charges and to dismiss

count I, the appellant pled guilty to count II of the information.

We have carefully examined the record of the arraignment and sentence and conclude that the proceedings fully comply with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and that the plea was voluntary. Further, we conclude that the sentence of from 2 to 5 years' imprisonment is not excessive.

Finding no plain error, we affirm.

AFFIRMED.

SUSAN K. GETZSCHMAN, APPELLEE AND CROSS-APPELLANT, V. THE YARD COMPANY, INC., AND DAVID GORDON SPANGLER, APPELLANTS AND CROSS-APPELLEES.

426 N.W.2d 499

Filed July 22, 1988. No. 86-724.

1. **Motor Vehicles: Negligence: Trial.** Where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury.
2. **Motor Vehicles: Negligence.** Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
3. _____: _____. A driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
4. **Directed Verdict: Motor Vehicles: Trial.** Before a verdict can be properly directed against one who has looked and failed to see, the position of the oncoming motor vehicle must be definitely located in a favored position, that is, within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury.
5. **Directed Verdict.** In granting a motion for directed verdict, all controverted facts and all inferences must be construed most strictly against the moving party and in favor of the party against whom the motion was directed.
6. **Verdicts: Appeal and Error.** A successful party has the right to keep the benefit of a jury verdict unless there is prejudicial error in the proceedings by which it was secured.

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

Jerry W. Katskee and David A. Castello, of Katskee & Henatsch, for appellants.

Wallace Hopkins and Richard S. McMillin, of Marks & Clare, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

NORTON, D.J.

This is an appeal arising out of a jury trial over an automobile accident which occurred at the intersection of 132d Street and Westwood Lane in the city of Omaha, Nebraska, July 2, 1984. The uncontroverted evidence would show that the accident happened at approximately 4:45 p.m. on the day mentioned; that the weather was sunny and clear; that this was a controlled intersection; that 132d Street is a four-lane street, running north and south, with two lanes of traffic in each direction and left turn lanes at the intersection in question; that Westwood Lane is a two-lane street running east and west, with one lane of traffic in each direction; that the intersection where the accident occurred is on a level, but that traffic approaching the intersection on 132d Street from the north is moving uphill; and that this street to the south of the intersection begins to slope downward.

Immediately preceding the accident, the plaintiff, Susan K. Getzschman, was operating her motor vehicle in a southerly direction in the curb (west) lane on 132d Street north of the intersection at a speed of approximately 30 to 35 miles per hour. At or about the same time the defendant David Gordon Spangler was operating a pickup truck belonging to his employer, The Yard Company, Inc., in a northerly direction on 132d Street and was approaching the intersection from the south. As Spangler approached the intersection he noted the light was red, whereupon he pulled into the left turn lane and stopped. While stopped he noted opposite him an automobile headed south that had also stopped at the intersection in either the east (inside) lane of traffic or the left turn lane. He did not see the plaintiff. When the light changed to green, he waited for the automobile opposite to move, but after "approximately 30

seconds" it had not moved, so he commenced his left-hand turn. He testified that he again looked to the north and did not see the plaintiff. He further testified that he crossed the east lane of the southbound traffic and had entered the west (curb) lane when he was struck by the plaintiff's vehicle. The impact drove the vehicle that Spangler was operating in a southwesterly direction across both lanes of Westwood Lane. There is a conflict in the evidence as to the final location of both vehicles after the accident, but it is apparent that the vehicle driven by Spangler was against or upon the curb on the south side of Westwood Lane. The physical damage from the collision on the plaintiff's vehicle was confined to the front end. The damage on the vehicle being driven by Spangler was located principally from the passenger door to the rear wheel. Spangler testified that he did not remember if he had turned on his left turn signal.

The evidence would further indicate that the plaintiff had entered 132d Street approximately two blocks north of the intersection and that she had reached a speed of approximately 30 to 35 miles per hour; that she first noted the light and the defendant's vehicle when she was approximately one-half block from the intersection; that at that time the light was green and the defendant's vehicle motionless in the left turn lane; that she had removed her foot from the accelerator but had not applied the brakes; that when she was about "a quarter of a block away" from the intersection the defendant commenced his left-hand turn; that she did not see any signal, but had assumed that he was going to turn left because of his position at the intersection; that she continued to approach the intersection without applying her brakes; and that when the defendant moved into the west, or curb, lane, she moved her foot from above the accelerator to the brake pedal, but that the collision occurred almost immediately thereafter, when the defendant's vehicle was at least halfway into the west lane.

These are the only facts that are essential to the issues presented by this appeal. The case proceeded to trial on July 22, 1986. Following the presentation of the plaintiff's case, the defendants moved for an order directing the jury to return a verdict in favor of the defendants, which was overruled by the trial court. After the presentation of the defendants' case, the

plaintiff moved for an order directing the jury to enter a verdict in favor of the plaintiff on the issue of liability and to submit only the issue of damages, and the defendants renewed their motion previously submitted. Both motions were overruled, and the case was submitted to the jury on the issues of liability, contributory negligence, and damages. The jury returned a verdict for the defendants on July 24, 1986.

Thereafter, the plaintiff moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. On hearing, the trial court overruled the motion for judgment, but sustained the motion for a new trial on the theory that the defendant Spangler was negligent as a matter of law in the operation of the vehicle he was driving and that such negligence was a proximately contributing cause of the accident. The jury verdict was vacated and set aside and a new trial granted on the issues of the contributory negligence of the plaintiff, if any, and plaintiff's damages. This appeal by the defendants and cross-appeal by the plaintiff followed.

The defendants raise five assignments of error:

1. The trial court erred in granting plaintiff a new trial in that same was not supported by the evidence and is contrary to the evidence and the law.

2. The trial court erred in finding that it should have directed negligence against defendants as a matter of law and submitted only the contributory negligence of plaintiff to the jury for [its] deliberation.

3. The trial court erred in setting aside the verdict of the jury.

4. The trial court erred in substituting its judgment for that of the jury.

5. The trial court erred in setting aside a verdict based on conflicting evidence as to which reasonable minds could differ.

In her cross-appeal, the plaintiff raises four assignments of error:

1. The trial court erred in denying Plaintiff's Motion for a Directed Verdict at the close of all the evidence.

2. The trial court erred in denying Plaintiff's post-trial Motion for Judgment (as to liability) Notwithstanding the

Verdict and for a new trial on damages only.

3. In denying the aforesaid Motions, the trial court erred in not determining that Defendant Spangler was negligent as a matter of law.

4. In denying the aforesaid Motions, the trial court erred in not determining that the Plaintiff was free from negligence as a matter of law.

Simply stated, this case involves the propriety of a left-hand turn by the defendant Spangler into a lane of traffic being used by the plaintiff. The law with regard to this matter is summarized with clarity in *Mitchell v. Kesting*, 221 Neb. 506, 508, 378 N.W.2d 188, 190 (1985), a case involving a left-hand turn, where the court stated:

> Plaintiff argues that this case should have been allowed to go to the jury. In support of his position is a rule that applies where there is evidence showing that one vehicle was not in a favored position. "[T]he applicable rule is that where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury." *Kremlacek v. Sedlacek*, 190 Neb. 460, 465, 209 N.W.2d 149, 154 (1973). "Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position." *Treffer v. Seevers*, 195 Neb. 114, 118, 237 N.W.2d 114, 117 (1975). However, "it is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law." . . . *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 408, 308 N.W.2d 503, 510 (1981).

(Emphasis omitted.)

The essential question that arises in this matter is whether or not the plaintiff's vehicle was "undisputably located in a favored position." What constitutes a favored position was discussed by this court in *Hermansen v. Anderson Equipment Co.*, 174 Neb. 325, 330, 117 N.W.2d 791, 794 (1962), where the court stated:

> Defendant contends that plaintiff should have seen his

> car approaching and was required to notice his approach. We held in Pupkes v. Wilson, 172 Neb. 15, 108 N.W.2d 220, that: "Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. . . . The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury."

Treffer v. Seevers, 195 Neb. 114, 237 N.W.2d 114 (1975), involved a left-hand turn from a highway onto a county road. The defendant was operating a tractor upon the highway and was pulling a rake. Upon reaching the intersection of the highway with the county road, she looked for traffic approaching from the opposite direction. Seeing no traffic, she commenced a left-hand turn. The plaintiff, who was operating a motorcycle and was approaching from the opposite direction, struck the right side of the tractor behind the front wheels. The plaintiff testified that he was within 45 to 50 feet from the intersection when the tractor turned. The court found: "Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury." *Id.* at 119, 237 N.W.2d at 118.

The evidence in this case would show that after stopping at the intersection involved, the defendant Spangler looked and did not see the plaintiff approaching from the north. By the plaintiff's own admission she first observed the defendant's motor vehicle at a point one-half block from the intersection. When Spangler commenced his left-hand turn, he looked once

again and did not see the plaintiff. At that point she was approximately one-quarter block away. Spangler entered her lane of traffic while she was still approaching the intersection. The collision occurred when his vehicle was at least halfway into her lane. Spangler testified that at the time of the collision the "majority of the front of the truck" was into Westwood Lane. The difference in the evidence as to where the collision occurred, coupled with the location of the physical damage on the two vehicles, the position where they came to rest, and the plaintiff's own admission that she had observed the defendant turning at a distance within which she could easily have stopped her vehicle, raises questions of placement and speed of the plaintiff's vehicle as it approached the intersection, from which reasonable minds could draw different conclusions. Thus, one cannot conclusively say in this case that the plaintiff was "within that radius which denotes the limit of danger" when the defendant Spangler entered her lane of traffic and, thus, "undisputably located in a favored position." The case was properly submitted to the jury.

In granting the plaintiff's posttrial motion and directing liability, the trial court was bound by the proposition that all controverted facts and all inferences must be construed most strictly against the moving party and in favor of the party against whom the motion was directed. See *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984).

Moreover, in setting aside the verdict of a jury, the trial court must bear in mind that a successful party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured. See *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988). The plaintiff raises error questions based only on the failure of the court to direct at the conclusion of the trial and its ruling to submit contributory negligence after the granting of the motion for a new trial. As the issue of whether or not the plaintiff was in a favored position is a jury question, and all issues of negligence and contributory negligence are properly jury issues, no prejudicial error occurred until the granting of the posttrial motion. The action of the trial court at that point constituted error.

For the foregoing reasons, the judgment of the district court for Douglas County setting aside the jury verdict and granting plaintiff's motion for a directed verdict and new trial is reversed, and the matter is remanded with instructions to reinstate the verdict of the jury rendered July 24, 1986. Plaintiff's cross-appeal is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

GRANT, J., dissenting.

I agree with the court's opinion that plaintiff-appellee's cross-appeal should be denied. I dissent from the majority's holding that the trial court erred in sustaining plaintiff's motion for a new trial on the theory that defendant Spangler was negligent as a matter of law and should have directed a verdict as to defendant's negligence and submitted only the issues of the contributory negligence of plaintiff, if any, and plaintiff's damages.

I feel that the applicable law is set out in *Mitchell v. Kesting*, 221 Neb. 506, 508, 378 N.W.2d 188, 190 (1985), where we stated, " '[I]t is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law.' " (Emphasis omitted.) Defendant Spangler made a left turn at an intersection at which he was stopped. He did not see plaintiff approaching so closely that defendant's vehicle was struck on the right side before defendant could complete his turn. Spangler may have looked, but he testified he did not see plaintiff, who was "favored over him" and had the right-of-way. I would affirm.

WHITE, J., joins in this dissent.

COUNTY OF POLK, NEBRASKA, APPELLEE, V. RAYMOND WOMBACHER AND VIOLA WOMBACHER, HUSBAND AND WIFE, APPELLANTS, VILLAGE OF SHELBY, POLK COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

426 N.W.2d 266

Filed July 22, 1988. No. 86-806.

1. **Summary Judgment: Appeal and Error.** In ruling on an appeal from the granting 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.

2. **Summary Judgment.** Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.

3. _____. 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.

4. **Parties: Actions: Pleadings.** The rule requiring the defense that plaintiff is not the real party in interest to be specially pleaded is not applicable where the case is one in which the facts showing interest must be established as an essential of the cause of action, or where the circumstances of the case are such that the objection raised goes to the existence of the cause of action.

5. **Parties: Actions: Judgments.** In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.

6. **Taxation: Liens: Real Estate: Foreclosure: Counties.** Because the lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute, a foreclosure of that tax lien by the county will preclude any foreclosure by another governmental entity of that same lien.

7. **Tax Sale: Real Estate: Foreclosure: Counties: Trusts.** A county purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. The trust property or trust res under these circumstances is the tax sale certificate with the rights evidenced thereby.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Raymond and Viola Wombacher, pro se.

Ronald E. Colling, Polk County Attorney, for appellee County of Polk.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

HASTINGS, C.J.

This is an appeal from the district court for Polk County involving the foreclosure by Polk County of a tax sale certificate covering village special assessments of the village of Shelby, Nebraska. The district court found that the county was the owner and holder of the county treasurer's certificate of tax sale No. 100 and granted summary judgment for the county, entitling it to foreclose its lien of the certificate.

Since the matter arises from the entering of 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. *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988); *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). "Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear." *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 849, 415 N.W.2d 453, 459 (1987). 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. *Lowry, supra*; *Stodola v. Grunwald Mechanical Contractors*, 228 Neb. 301, 422 N.W.2d 341 (1988).

Appellants, Raymond and Viola Wombacher, husband and wife, were the owners of several parcels of land in Shelby which were being foreclosed upon by Polk County. The county had

purchased this real estate, which was being sold for special assessments levied by the village of Shelby. The assessments were pavement assessments against the appellants' lots.

The county is the owner and holder of the county treasurer's certificate of tax sale No. 100, covering the parcels of real estate in question and issued on July 23, 1985. The amount of tax due is stated on the certificate as $9,885.20. However, there is an irregularity on the certificate itself in that the above amount is incorrectly typed on the line for delinquent taxes rather than on the line for special improvement taxes (special assessments). This information was provided by means of an affidavit of the county treasurer, Dorothy Fjell.

In its sixth cause of action, the county's petition sought foreclosure of its tax sale certificate as the first lien against the Wombachers' property. For their answer, the Wombachers filed a general denial on September 23, 1985.

The Wombachers challenged the county's standing to foreclose, asserting that the real party in interest was the village of Shelby. Their motion for summary judgment included a brief in support thereof on this basis. The motion was heard and overruled.

The county then moved for summary judgment with the support of the affidavit of the county treasurer. Upon a hearing the court found that the county had a first lien on the property in question and was entitled to foreclosure of the lien of its certificate as a matter of law.

The Wombachers prosecute this appeal and raise the following issues as error: (1) whether Polk County may foreclose on a tax sale certificate for a special assessment of the village of Shelby; (2) whether the county treasurer of Polk County may issue a tax sale certificate for a special assessment when no real estate taxes are in default or delinquent; and (3) whether Polk County has the capacity and standing to sue for the collection of special assessments when there are still moneys due but not delinquent from the real estate so charged.

The county maintains that because the appellants' answer contained only a general denial, they have waived the real party in interest defense, which must have been specially pleaded. *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963),

overruled on other grounds, Chlopek v. Schmall, 224 Neb. 78, 396 N.W.2d 103 (1986).

The first time the real party in interest issue was raised was in a brief marked "Exhibit 'A' " and attached to the Wombachers' motion for summary judgment. The defense is not properly raised in an exhibit to a motion for judgment on the pleadings. That issue generally cannot be raised by general denial. *Neill v. McGinn, supra.*

However, this court stated in *Durand Associates, Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 356, 183 N.W.2d 246, 251 (1971):

> We hold that the rule requiring the defense that plaintiff is not the real party in interest to be specially pleaded is not applicable where the case is one in which the facts showing interest must be established as an essential of the cause of action, or where the circumstances of the case are such that the objection raised goes to the existence of the cause of action.

As applied, it is an essential element of the cause of action that Polk County hold and own the tax sale certificate upon which it seeks foreclosure. It is thus true that the objection goes to the existence of the cause of action; yet, it should be noted that the county's petition clearly sets forth facts sufficient to support its claim of ownership of the certificate.

Regardless, the court holds that Polk County is the real party in interest within the meaning of Neb. Rev. Stat. § 25-301 (Reissue 1985), which states that every action must be prosecuted in the name of the real party in interest.

> " ' "In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end." ' "

Peerless Ins. Co. v. Bukacek, 211 Neb. 505, 507, 319 N.W.2d 98, 100 (1982).

In *Flansburg v. Shumway*, 117 Neb. 125, 131, 219 N.W. 956, 959 (1928), this court held: "The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute." It is obvious that a foreclosure of the tax lien by Polk County will preclude any foreclosure by the village of Shelby. The procedure by which Polk County is authorized to foreclose is governed by statute. The county's initial lien upon real estate within its boundaries is established in Neb. Rev. Stat. § 77-1901 (Reissue 1986) for *all* taxes due thereon to any governmental subdivision of the state.

No distinction is made between taxes and assessments. The distinction between the meaning of "taxes" and "assessments" is based on the different classes of public burdens. Taxes are imposed for general revenue, assessments for public improvements, mainly locally beneficial.

A determination of the issues in this case requires an indepth review of the Nebraska revenue statutes. The premise that the county treasurer shall commence the sale of lands on which taxes have not been paid is rooted in Neb. Rev. Stat. § 77-1806 (Reissue 1986). As a starting point for analysis, Neb. Rev. Stat. § 77-1858 (Reissue 1986) grants power to county treasurers to collect special assessments of municipalities as follows:

> Wherever power is now given by the revenue laws of this state to the county treasurer of any county in this state to sell real estate, on which the taxes shall not have been paid as provided by law, it shall include the power to sell said real estate for all the taxes and special assessments levied or hereafter levied by any county, municipality, drainage district, or other political subdivision of the state, and *all provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district, or other political subdivision of the state.*

(Emphasis supplied.)

Once established that the county treasurer may sell real estate, Neb. Rev. Stat. § 77-1809 (Reissue 1986) provides that the county may buy such real estate:

> At all sales provided by law, the county board may purchase for the use and benefit, and in the name of the county, any real estate advertised and offered for sale when the same remains unsold for want of bidders. The county treasurer shall issue certificates of purchase of the real estate so sold in the name of the county. . . .

When construed together, the two statutes clearly give Polk County power to purchase real estate sold for delinquent special assessments.

The county treasurer of Polk County issued certificate of tax sale No. 100 as a record of this purchase. The right to foreclose the lien of taxes where a tax sale certificate has been issued is found in Neb. Rev. Stat. § 77-1902 (Reissue 1986). This section provides:

> Where land has been sold for delinquent taxes and a tax sale certificate . . . has been issued, the holder of such tax sale certificate . . . may . . . proceed in the district court of the county in which the land is situated to foreclose the lien for taxes represented by the tax sale certificate . . . and all subsequent tax liens thereon, in the same manner and with like effect as in the foreclosure of a real estate mortgage . . .

This statute requires only that one who brings an action to foreclose the lien of taxes be the holder of a tax sale certificate. Polk County was clearly the owner and holder of the tax sale certificate foreclosed in the proceedings where the appellants, Raymond and Viola Wombacher, were defendants. Polk County is the real party in interest in this matter.

Furthermore, Neb. Rev. Stat. § 77-1908 (Reissue 1986) supplies a presumption regarding possession of a tax sale certificate. The tax sale certificate, in and of itself, is "presumptive evidence of all facts necessary to entitle the plaintiff to a decree for the amount appearing to be due thereon . . . ." Construing the several statutes together, it is evident that Polk County, as the buyer of the real estate, is entitled to foreclosure of its lien.

Contrary to the appellants' position that Polk County has no interest in this lawsuit as it is foreclosing special assessments of the village of Shelby is the general principle:

> "A county purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. The trust property or trust res under these circumstances is the tax sale certificate with the rights evidenced thereby. . . ."

County of Lincoln v. Provident Loan & Investment Co., 147 Neb. 169, 176, 22 N.W.2d 609, 612 (1946). Certainly Polk County will ultimately reap some benefits derived from the pavement assessments, as the village of Shelby lies within its boundaries.

Appellants insist that the county was required to allege and prove the regularity of all proceedings necessary to the issuance of a valid tax sale certificate in its tax foreclosure action. Appellants rely upon *Pettijohn v. County of Furnas*, 150 Neb. 736, 35 N.W.2d 828 (1949).

Apparently, the error on the tax sale certificate did not come to the attention of the county until after its petition was on file. A correction was attempted by an affidavit of the county treasurer. We hold that the error should be deemed a mere irregularity which in no way affects the validity of the certificate or defeats the lien of the purchaser. See *Sanford v. Moore*, 58 Neb. 654, 79 N.W. 548 (1899). Regarding such irregularities, Neb. Rev. Stat. § 77-1854 (Reissue 1986) provides:

> The following defects, omissions and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings from and including the assessment and to and including the execution and delivery of the deed of the property sold for taxes, shall be taken and deemed to be mere irregularities within the meaning of section 77-1853: . . . (7) any irregularity, informality or omission in any . . . record of any real or personal property assessed for taxation, or upon which any tax is levied, or which may be sold for taxes.

Section 77-1858 makes this provision equally applicable to special assessments of municipalities.

Appellants also assert that the county has proceeded under the incorrect statute. We are directed to examine Neb. Rev. Stat. § 77-1917.01 (Reissue 1986). The statute reads:

> All cities, villages . . . in Nebraska shall have a lien upon real estate within their boundaries for all special assessments due thereon to the municipal corporation . . . . When such special assessments have become delinquent, without the real property against which they are assessed being first offered at tax sale by the tax sale certificate method or otherwise, the municipal corporation or district involved may itself as party plaintiff proceed in the district court of the county in which the real estate is situated to foreclose, in its own name, the lien for such delinquent special assessments in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917, which shall govern when applicable. Final confirmation of sale in such foreclosure proceeding and issuance of deed to the plaintiff, or its assignee, cannot be had until two years have expired from the date of the sale held by the sheriff, and, after expiration of such two-year period, personal notice has been served on occupants of the real property. The remedy granted in this section to cities, villages and sanitary and improvement districts for the collection of delinquent special assessments shall be cumulative and in addition to other existing methods.

The express language of the last sentence of the statute grants the remedy to cities, villages, and sanitary and improvement districts. The county not only should not have proceeded under the statute, it could not have done so.

The county's petition and praecipe states that it is the owner and holder of the tax sale certificate under the provisions of § 77-1809. The petition further states that the foreclosure on the certificate is instituted and prosecuted in accordance with the provisions of article 19 of chapter 77 of the Nebraska Revised Statutes.

Section 77-1917.01 is an independent act, affording a remedy which did not previously exist, i.e., a direct foreclosure

proceeding by the levying municipality against the real estate which is subject to the special assessment lien. The statute cured the problem wherein cities, etc., were limited in the means by which they could collect delinquent assessments. Prior to its enactment, they could not themselves bring an action for sale of the property.

The direct method, however, is not the exclusive remedy. The statute merely "affords the subdivisions of government an additional remedy previously not available." *Sanitary & Improvement Dist. # 222 v. Metropolitan Life Ins. Co.*, 201 Neb. 10, 15, 266 N.W.2d 73, 75-76 (1978). By the very words of the statute, this method of remedy is "cumulative and in addition to other existing methods." § 77-1917.01.

The brief of appellants claims that § 77-1858 is not the correct statute under which this action may be brought. They assert that general delinquent taxes are a prerequisite to suit under this section for special assessments.

The county responds that the allegation that no general taxes are due and owing was not raised in the pleadings before the district court and should not be considered on appeal. Actually, the Wombachers' answer denied the allegations in the sixth cause of action and, thus, properly denied that $9,885.20 in delinquent taxes were due.

Albeit true that the procedure followed in this case is not the general procedure, an explanatory note helps to clear up the situation. Polk County filed its petition to foreclose 8 different certificates of tax sale in 10 causes of action. All certificates, except the one in this case, involved delinquent *general* taxes, but the petition particularly mentioned special assessments as well. Certificate of tax sale No. 100 has now had to be singled out and handled specially because the amount due was typed on the incorrect line as a delinquent general tax. The ultimate result was simply a roundabout way of collecting on special assessments.

It is important to observe that before the enactment of § 77-1917.01, we stated that all special assessments are to be enforced and collected in the same manner as general taxes. *Belza v. Village of Emerson*, 159 Neb. 651, 68 N.W.2d 272 (1955). There is no law which would preclude Polk County

from reverting back to this earlier method of collection.

Polk County is entitled to foreclose its tax sale certificate on land encumbered by unpaid delinquent assessments levied thereon for pavement benefits by the village of Shelby. The discrepancy on the tax sale certificate has been designated a mere irregularity by statute. There is no issue of material fact, and the county is entitled to judgment as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

DONALD L. GREEN, JR., APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

425 N.W.2d 897

Filed July 22, 1988. No. 86-1003.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Appeal dismissed.

Charles D. Hahn for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

PER CURIAM.

This matter is an appeal from the district court for Nemaha County, Nebraska, which affirmed the order of the director of the Department of Motor Vehicles revoking the appellant's driving privileges for refusal to comply with the Nebraska implied consent law, Neb. Rev. Stat. § 39-669.08 (Reissue 1984).

We learned at oral arguments from the attorney for the appellee that no stay of the suspension of the appellant's driving privileges by the director was entered by the district court and

that the suspension has been completed. Therefore, this case is now moot, and the appeal must be dismissed. *Torrey v. Torrey*, 207 Neb. 246, 298 N.W.2d 154 (1980).

APPEAL DISMISSED.

SOUTHERN LUMBER & COAL CO., A NEBRASKA CORPORATION, APPELLANT, V. M. P. OLSON REAL ESTATE AND CONSTRUCTION CO., INC., A NEBRASKA CORPORATION, AND MARVIN P. OLSON, APPELLEES.

426 N.W.2d 504

Filed July 22, 1988. No. 86-1017.

1. **Corporations: Equity: Liability: Debtors and Creditors.** Proceedings seeking disregard of the corporate entity, that is, seeking to pierce the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions.
2. **Equity: Appeal and Error.** The Nebraska Supreme Court reviews an appeal of an equity matter de novo on the record and is required to reach findings independent of the trial court, subject to the rule that where credible evidence is in conflict on a material issue of fact, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Corporations: Equity: Fraud.** In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.
4. **Corporations: Liability: Proof: Fraud: Debtors and Creditors.** A creditor seeking to pierce the corporate veil and impose on a shareholder liability for a corporation's debt has the burden to show by a preponderance of the evidence that the corporate entity must be disregarded to prevent fraud or injustice to the creditor.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

James E. Riha for appellant.

C. Jan Headley, of Headley & Sullivan Law Offices, for appellees.

HASTINGS, C.J., CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

CAPORALE, J.

Plaintiff-appellant, Southern Lumber & Coal Co., a Nebraska corporation, alleges that the corporate defendant-appellee, M. P. Olson Real Estate and Construction Co., Inc., also a Nebraska corporation, is a sham, as the consequence of which its corporate existence should be disregarded as to the individual defendant-appellee, Marvin P. Olson, and both he and the corporate defendant should be held liable for certain debts the latter incurred. The trial court entered judgment in the sum of $8,726.42, plus prejudgment interest of $3,766.87 together with a $1,000 attorney fee, in favor of plaintiff against the corporate defendant, but dismissed the petition as to the individual defendant Olson. In this appeal, plaintiff asserts the trial court erred in dismissing its action against Olson. The corporate defendant has not appealed. We affirm.

Olson was involved in the home construction business in Omaha from approximately 1972 through 1983 and formed the corporate defendant in February of 1974 for the purpose of building and selling houses on land developed by others.

Olson initially capitalized the corporate defendant, which so far as the record reveals still existed at the time of trial, with $1,000 in cash, a note for $7,500, and the donation of equipment, furniture, and fixtures; he subsequently contributed two building lots and additional cash totaling approximately $12,000 in value, for which he took back the corporate defendant's note, which was carried on the corporation's books as a "note payable." Both the corporate defendant's accountant and the plaintiff's tax expert testified that such an arrangement is common in the housing construction industry. The corporate defendant subsequently built homes on the two building lots contributed by Olson; the corporate defendant's 1982 tax return states that its debt to Olson totaled $14,628.16 by the end of that year.

Minutes of the corporate defendant's directors' meetings indicate that Olson served as president and treasurer of the corporation throughout its life. The first person serving as vice president and secretary resigned on May 15, 1974. The individual succeeding to those positions resigned in 1982, at

which time Olson was elected secretary. Apparently, no one was thereafter elected as corporate vice president, and Olson has served as the corporate defendant's sole director since 1983. Annual stockholder's meetings were held every January from 1975 through 1986, inclusive. The record indicates that in 1984, 1985, and 1986, the corporate defendant held joint stockholder's and director's meetings; Olson was the only person attending in either capacity.

Throughout the existence of the corporate defendant, Olson was its sole shareholder and its only employee. There was no arrangement for Olson to draw wages from the corporate defendant; instead, Olson received an annual bonus determined in consultation with the corporate defendant's accountant and dependent upon the corporation's profits. According to the corporate defendant's accountant, he at some point erroneously treated a personal investment Olson made in Kopecky Development, Inc., as an asset of the corporate defendant. Olson discovered this mistake as he and the accountant were closing the books of the corporate defendant. Although the corporate defendant's 1983 tax return indicates that the $14,628.16 loan from the shareholder, Olson, was repaid by the end of 1983 and that Olson also received a $15,803.31 management fee from the corporation that year, both Olson and the corporate defendant's accountant testified that these were paper transactions necessary to close the corporate defendant's books and cease corporate activity and that Olson in fact received no cash from the corporate defendant in either transaction. Olson declared the $15,803.31 management fee as "other income" on his 1983 individual income tax return, paid income tax on this amount, and did not take a bad debt deduction.

In general, the corporate defendant purchased building lots in development tracts from Southern Land & Development Co., a closely held corporation whose principals were Milton and Betty Faulk, paying $200 down with the seller carrying the balance. The corporate defendant would then purchase construction materials on credit from plaintiff (another closely held corporation whose principals were Milton, Betty, Charles, and Robert Faulk), use those materials to build a house on the

lots it had acquired, and pay off sums due the two Southern companies upon the sale of the house and lot on which it was built. The corporate defendant would sometimes negotiate construction loans from commercial lenders and secure them by giving those lenders first mortgages; in such cases plaintiff would take back second mortgages on the properties. Olson had personally established and participated in this business arrangement with the Southern companies prior to formation of the corporate defendant. Following formation of the corporate defendant, the relationship which had existed between the Southern companies and Olson continued between the Southern companies and the corporate defendant. Over the years, Olson, and later the corporate defendant, participated in such an arrangement with the Southern companies on as many as 100 occasions. Prior to formation of the corporate defendant, plaintiff had drafted purchase agreements which named Olson in his individual capacity as buyer; after formation of the corporate defendant, the corporation was named as buyer in similar documents. The bookkeeper and office manager for both Southern companies testified he was aware that Olson had a corporation; however, he also stated that he was "never really, I guess, made aware, fully aware, that he was doing business as a corporation" with plaintiff.

Olson testified that from the time the corporate defendant was formed, he kept his personal accounts separate from those of the corporate defendant. However, plaintiff's bookkeeper testified that he had issued checks, reflecting amounts reimbursed to a purchaser for timely payment of bills, to Olson in his individual capacity, following payment for supplies used by the corporate defendant to construct houses. The record tells us only, however, that these checks were negotiated by Olson at the bank where the corporate defendant kept its corporate accounts.

During the corporate defendant's first year, only 3 to 5 houses were built; later, as retained earnings grew, the corporate defendant built approximately 20 houses per year. These structures ranged, over the years, from models which sold for about $20,000 to models which sold for more than $55,000. By staggering the start and completion dates of houses

under construction at any given time, the corporate defendant was able to limit its risk in terms of mortgage exposures.

The corporate defendant suffered no losses from 1974 through 1980, accruing retained earnings through this period which stood at $50,570.90 at the end of the 1980 tax year. However, in 1981 the corporate defendant started suffering reversals; by the end of 1982, retained earnings had dropped to $26,700, and the decision was made to cease operations. In its 1983 tax return the corporate defendant declared a loss of $27,629.98. Olson testified that the initial capitalization cash of $1,000, plus the remaining retained surplus, was sufficient to cover this loss at that time.

The corporate defendant was able to negotiate reduced terms and pay off other suppliers, leaving only the sum owed plaintiff unpaid when the corporate defendant ceased operations in 1983.

The unpaid bills which are the subject of this suit derive from the last three houses the corporate defendant built. Olson testified that the amount owed was in dispute because some of the lumber plaintiff supplied was of poor quality and had to be returned. According to the corporate defendant's framing subcontractor, the poor lumber quality resulted in delays, extra work, and occasional reconstruction. The record also reveals plaintiff had a method of giving credit for materials returned to it.

Plaintiff's expert testified that after 1982, the corporate defendant's debt to equity ratio was roughly 14 to 1 and that, as a result, the corporation would have been characterized as a "thinly capitalized corporation" for federal income tax purposes. However, on cross-examination this witness testified that with $50,082.60 of retained earnings in 1979 as against roughly $16,000 in debt, the corporation was not "thinly capitalized" at that time; the corporate defendant continued to be profitable, increasing retained earnings slightly in 1980. Plaintiff's expert also noted that losses were suffered in 1981 and 1982; in 1981, Olson took a $4,000 cut in his take from the corporation, and in 1982, he took no pay from the corporation. In addition, during 1981 and 1982, Olson contributed between $13,000 and $14,000 in loans to the corporation. This witness

also observed that it is common practice for small corporations to carry a note payable to a principal shareholder and to retain earnings, investing sums thus derived for growth. Plaintiff's expert admitted that this appears to have been Olson's strategy in his dealings with the corporate defendant and that the corporation did in fact grow steadily until 1981.

Plaintiff's expert based his opinions entirely upon examination of Olson's and the corporate defendant's tax returns; he did not examine the corporate defendant's books. He testified that tax returns are more reliable indicators of a corporation's financial health than are its books, because the returns "are signed under penalties of perjury," whereas the books of a closely held corporation can be adjusted to "make them reflect almost anything [one wants] them to show." The corporate defendant's 1981 tax return shows that the corporation passed the balance sheet test of solvency at the end of that year, having then $44,994.54 in total assets against $1,519 in current liabilities. Nor was the corporate defendant insolvent at the end of 1982, having total assets at that time of $44,399.57 and current liabilities of $16,650.03. In the expert opinion of the corporate defendant's accountant, the corporation was never insolvent, not even when it ceased activity in 1983, even if the error regarding Olson's personal investment in Kopecky Development, Inc., were removed from its balance sheet as of the end of 1982. Nevertheless, the plaintiff's expert testified that had the Kopecky Development, Inc., investment been treated differently, the tax returns would have shown the corporation to be insolvent as of the end of 1982; in this expert's opinion Olson "mixed corporate and individual tax attributes to benefit himself."

In contrast, the corporate defendant's accountant testified that the corporate defendant

> was obviously properly capitalized when he incorporated because he operated for years on that capital and very successfully. And then I don't know when; but I do know in the early '80s, there was a great deal of problems in the economy. I mean, interest rates went to 22 percent and so forth. And of course, home builders and a lot of other small businesses had problems at that time.

> Now, I can't recall exactly; but someplace, you know, eight years or seven years, six years, after he incorporated, why, the company evidently then started losing money. And at that time, I don't think the corporation owed him any money. But he put — he did loan the company some money. And I don't call that a capitalization. In fact, oftentimes, when a small business is given to that problem, you know, they can't borrow any money. And so if they feel optimistic about their business, that they can turn it around, they will sometimes dig in their own pockets and loan the corporation money. And it appears to me that's what he did.

While the corporate defendant's 1983 tax return reports the corporation had no assets as of the end of that calendar year, its books seem to reflect it had personal property worth approximately $10,000, which included a dump truck, a 1977 pickup truck, a 1976 Lincoln automobile, and certain items of office furniture and equipment. By the time of trial the vehicles had been sold, but the record does not tell us when they were sold or what their value was at that time. Olson retained some of the items of office furniture and equipment in his possession. The corporate defendant's accountant testified that the corporate returns indicated the corporation received nothing from these sales and that by the time the corporate defendant ceased operations, the vehicles and office furniture had been fully depreciated and were, from his perspective, of "immaterial" value, and their disposition was without tax consequences.

In essence, this court is asked to rule that the trial court erred in refusing to allow plaintiff to pierce the corporation's "veil" and reach Olson's individual assets in satisfaction of the debt owed plaintiff by the corporate defendant. Proceedings seeking disregard of the corporate entity, that is, seeking to pierce the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions. *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986). Appeal of such a matter to the Supreme Court is tried de novo on the record, and the Supreme Court is required to reach findings independent of the trial court, subject to the

rule that where credible evidence is in conflict on a material issue of fact, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra*; Neb. Rev. Stat. § 25-1925 (Reissue 1985).

In *Dahlbeck, supra* at 494, 391 N.W.2d at 113 (quoting *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980)), this court affirmed the rule that " '[i]n equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.' " As noted in *Dahlbeck, supra* at 494, 391 N.W.2d at 113 (quoting *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962)),

> " 'A court of equity will not permit mere corporate forms to serve as a cloak and a shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud.' "

Nevertheless, " ' "[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears . . . ." ' " *Dahlbeck, supra* at 497, 391 N.W.2d at 114 (quoting *Scribner Grain & Lumber Co. v. Wortman*, 204 Neb. 92, 281 N.W.2d 394 (1979)).

Among the factors which are relevant in determining to disregard the corporate entity on the basis of fraud are (1) grossly inadequate capitalization; (2) insolvency of the debtor corporation at the time the debt is incurred; (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. These are not acts of fraud in themselves but, rather, are elements of circumstantial proof of fraud.

" '[T]hey are facts having a tendency to show the existence

> of fraud, although their value as evidence is relative not absolute. They are not usually conclusive proof; they are open to explanation. . . . When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent . . . .' "

Dahlbeck, supra at 498-99, 391 N.W.2d at 115 (quoting *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986)).

We have held that a creditor seeking to pierce the corporate veil and impose on a shareholder liability for a corporation's debt has the burden to show by a preponderance of the evidence that the corporate entity must be disregarded to prevent fraud or injustice to the creditor. *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986).

The foregoing recitation of the facts adduced in the trial court demonstrates that plaintiff failed to adduce sufficient evidence to show that the corporate defendant was insolvent at the time the debt to plaintiff was incurred or that the corporate defendant was a mere facade for the personal dealings of the shareholder who carried on the operations of the corporate defendant in disregard of the corporate entity. While in this latter regard plaintiff places heavy reliance on the treatment of the Kopecky investment, it is not the place of this court to review the wisdom of the tax advice given Olson; suffice it to say that the treatment given the matter falls short of convincing us that Olson disregarded the nature of the corporate defendant.

Of necessity, plaintiff attaches great significance in this court to the corporate defendant's capitalization. This court has observed that "inadequate capitalization" means capitalization very small in relation to the nature of the business of the corporation and the risks the business necessarily entails. *Dahlbeck, supra.* Inadequate capitalization is measured at the time of formation; a corporation which was adequately capitalized when formed but which has suffered losses is not necessarily undercapitalized. Undercapitalization presents a question of fact that turns on the nature of the business of the particular corporation.

In *Dahlbeck, supra*, the corporation, the purpose of which was real estate development, held 65 building lots totaling approximately $430,000 in land value. This court held that $3,000 was grossly inadequate capital for a corporation faced with the task of developing so much land. In *Brown v. Alron, Inc.*, 223 Neb. 1, 388 N.W.2d 67 (1986), the entity was incorporated in 1975 but was not capitalized at all until 1981, at which time it was capitalized with a mere $100. Alron was asserted by its shareholder to be a stock holding corporation charged with the task of acquiring an office equipment and supply business for a negotiated price of $77,699. This court had no difficulty determining that under those circumstances Alron's capitalization was grossly inadequate. See, also, *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982); *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980).

In this case the corporate defendant was capitalized with $1,000 in cash, a note against Olson for $7,500, and the donation of equipment, furniture, and fixtures of unstated additional value. Both plaintiff's and the corporate defendant's experts are in agreement that Olson's initial capitalization of the corporate defendant was consistent with the usual course of business in the housing construction industry at the time. On these facts we are unwilling to say that the corporation was "grossly inadequately capitalized" when formed in 1974.

This leaves for consideration whether Olson improperly diverted corporate funds or assets to his own uses, as plaintiff claims. As part of its argument in this connection, plaintiff calls our attention to Neb. Rev. Stat. § 21-2046 (Reissue 1983), which in relevant part provides:

> In addition to any other liabilities, a director shall be liable in the following circumstances unless he or she complies with the standard provided in sections 21-2001 to 21-20,134, for the performance of the duties of directors:
>
> . . . .
>
> (3) A director who votes or assents to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known

> debts, obligations, and liabilities of the corporation shall be liable, jointly and severally with all other directors so voting or assenting, to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations, and liabilities of the corporation are not thereafter paid and discharged.

Not having pled a cause of action under the statute, plaintiff appears not to urge that the foregoing statutory language applies directly to the situation at hand or provides an independent statutory basis for piercing the corporate veil, matters we therefore do not address, but, rather, that the statutory language sheds light on the manner in which the treatment of the items of personal property should be viewed.

Not only is the evidence less than certain that the items of personal property had any substantial value even in 1983 when the corporation ceased operations, the record does not tell us the value of the vehicles when they were sold. So far as the record shows, nothing was done with the items of office furniture; the fact they remained in Olson's possession does not necessarily mean they were not still owned by the corporation at the time of trial. Once again, we are unwilling to say on this set of facts that significant corporate assets were diverted to Olson's own uses such as to necessitate imposing personal liability on Olson for debts contracted by the corporate defendant.

AFFIRMED.

DON MILLER, APPELLEE, V. STAN ORTMEIER CONSTRUCTION CO., A NEBRASKA CORPORATION, APPELLANT.

426 N.W.2d 272

Filed July 22, 1988. No. 86-1027.

1. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly wrong.
2. **Damages: Proof.** Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
3. _____: _____. Damages, like any other element of a plaintiff's cause of action,

must be pled and proved, and the burden is on the plaintiff to offer evidence of difference in value if the judgment is to be based on that measure.

4. **Damages: Jury Instructions.** It is the duty of the trial court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed as modified.

John D. Feller, of Feller Law Office, for appellant.

Hurt & Gallant for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

HASTINGS, C.J.

The plaintiff, Don Miller, brought this cause of action against the defendant, Stan Ortmeier Construction Co., alleging breach of express and implied warranties. The jury found for the plaintiff in the amount of $15,000. The defendant's motions for judgment notwithstanding the verdict and new trial were overruled.

The plaintiff owned a hog operation in Cuming County, Nebraska. Defendant is involved in the manufacture and sale of pig nurseries in Beemer, Nebraska. On January 4, 1985, the plaintiff informed defendant that he was interested in purchasing a nursery, and defendant invited plaintiff to visit it to see what it had to offer. That evening, plaintiff traveled to Beemer and furnished defendant with specifications of his needs.

Plaintiff was seeking a two-stage nursery. Defendant recommended a double-deck nursery, 12 by 18 feet in size (11 by 17 feet inside), in which the smaller pigs were confined in small pens on the upper level and the older pigs were confined in larger pens on the lower level. The pigs on the upper level were provided with supplemental heat through heat lamps over each pen, and with fresh feed. The entire building was ventilated with a "Martin-Air ventilator," and a flushing system was installed to carry away the manure which fell through the floor of the pens.

Plaintiff agreed to purchase the nursery, and on January 22,

1985, installation was completed. Plaintiff paid $21,386.05 to defendant for the nursery and installation. Plaintiff put the nursery into operation immediately upon installation.

Plaintiff soon noticed that the humidity level in the nursery seemed excessively high, the air circulation was excessive (creating a windchill effect), and the pigs were overcrowded, with no freedom of movement. In addition, the plaintiff felt that the rate of weight gain by the pigs was "totally unsatisfactory." The pigs were rough in appearance, gaunt, and had below-normal feed consumption. On occasion, the newly weaned pigs moved into the nursery actually weighed more than the older pigs which had been confined in the nursery for a period of time.

In spite of efforts to modify the building and equipment and to change feeding procedures, plaintiff saw no improvement. The pigs remained rough and unthrifty in appearance, with substandard weight gains. Some of the pigs contracted a virus, which the veterinarian testified is more commonly seen when pigs are under stress and the pigs' immunity systems are overwhelmed by drafty conditions, high humidity, or other factors.

In November 1985, the plaintiff weighed his options. Remodeling the building would not have been compatible with his operation, so he decided to trade in the unit. The defendant refused to take the nursery back, or trade it in, so the plaintiff traded it to another company and bought a used building.

Plaintiff testified that the building was represented to him by defendant to house 168 pigs, but that its actual capacity was near 120. Because of the reduced capacity, the worth of the building was reduced by $6,110.30; i.e., a nursery which could only take care of 120 pigs would be worth $15,275.75, as opposed to the $21,386.05 purchase price which the building would have been worth if it would have been as represented. This calculation was based on a fixed cost per pig.

At the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict and a dismissal of the plaintiff's petition. It asserted that the plaintiff had not made a definite showing of damages or proximate cause. The trial judge overruled the motion, but found that the plaintiff had failed to

show lost profits and, therefore, informed the parties that he would instruct the jury on damages regarding implied warranty of fitness as to the building only.

The defendant presented evidence, and the jury was instructed. Concerning the element of damages, the court instructed the jury: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the building accepted and the value it would have had if it had been as warranted." Neither party had objections to the instructions.

The jury returned a verdict in favor of plaintiff in the amount of $15,000. The defendant moved for judgment notwithstanding the verdict and for a new trial. After a hearing, the court overruled both motions. The defendant subsequently appealed to this court.

Defendant assigns as error: (1) The trial court failed to rule that there was insufficient evidence of proximate cause of the damages; (2) the trial court entered judgment on a jury's verdict which exceeds the competent evidence and instructions of the court; and (3) the trial court failed to order a remittitur.

The plaintiff contends that, as the defendant failed to make a motion for directed verdict at the close of all of the evidence, it is precluded from arguing the overruling of its motion for judgment notwithstanding the verdict on appeal. While this may be true (see *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986)), the defendant nevertheless raised the issues that are now assignments of error in its motion for new trial. Thus, on appeal, the issues properly before this court may be summarized as: (1) whether the jury's finding of liability was supported by the evidence, and (2) whether the amount of damages assessed by the jury was excessive.

The defendant contends that the jury's finding that the defendant proximately caused the plaintiff's damages was not supported by the evidence. A jury verdict will not be disturbed on appeal unless it is clearly wrong. *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988); *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987). Thus, the question is whether the jury's verdict as to the defendant's liability was clearly wrong.

The defendant argues that none of the plaintiff's witnesses, including the agricultural engineer and the veterinarian, specifically stated that the building design or construction caused the plaintiff's problems. Therefore, it argues, because there was evidence that other factors could have contributed to plaintiff's problems, the plaintiff failed to show proximate cause.

While plaintiff's witnesses may have failed to affirmatively state that defendant's building was a definite cause of the plaintiff's damages, there was more than a preponderance of evidence which could have led the jury to this permissible conclusion. The engineer did state that the building was "not satisfactory," and all 10 of his recommendations for improving the weight and health of the pigs involved modifications of the structure and operation of the nursery. Coupled with the evidence of the extensive attempts made by the plaintiff to rule out other factors (e.g., feed problems or other underlying health problems which could have caused the unsatisfactory results), the testimony of the plaintiff's witnesses was sufficient to indicate to the jury that the building itself was the true source of the plaintiff's damages. The evidence provided by the defendant did little, if anything, to contradict this conclusion. On the record and evidence before this court, it cannot be said that the jury's verdict was clearly wrong.

As to damages, the plaintiff attempted to prove damages "in the increased costs of producing marketable pigs." He also attempted to show the estimated cost of remodeling the building to meet his needs. He then attempted to show the price of the replacement nursery which he bought after trading in the nursery which he had purchased from defendant. In all of these attempts to prove consequential damages, the plaintiff encountered a great number of difficulties and a great number of objections. Lastly, the plaintiff testified as to the value of the building as purchased versus the value of the building as warranted. Again, plaintiff's counsel had great difficulty in eliciting the relevant information, but plaintiff eventually testified that, in his opinion, the building's actual value was $6,110.30 less than the value of the building if it would have been as warranted. This figure was based on the fixed cost per

pig with a 120-pig capacity, as compared to the fixed cost per pig with a 168-pig capacity.

At the close of the plaintiff's evidence, the court informed the parties:

> [T]here is not sufficient evidence in the record, as far as I view this record, for me to instruct this jury on any other element of damages. The only element of damages that I feel I can instruct on is the implied warranty of fitness as to the building only. The lost profits issue, I think plaintiff failed to meet its burden of proof.

At the conclusion of all of the evidence, the court instructed the jury:

> If you find for the plaintiff on the issue of liability on Plaintiff's petition, you must then fix the amount of money which will fairly and reasonably compensate plaintiff for any damages proved by a preponderance of the evidence to have proximately resulted from the defendant's breach of warranty.
>
> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the building accepted and the value it would have had if it had been as warranted.
>
> Whether any damages have been proved by a preponderance of the evidence is for you to determine.
>
> You are not permitted to allow any damages by way of punishment or through sympathy.
>
> Your verdict must be based upon evidence and not upon speculation, guess or conjecture.

Neither party objected to these instructions. The jury returned a verdict in the amount of $15,000 damages.

The defendant claims that this assessment of damages was excessive. The only evidence presented to the jury as to the difference between the value of the building as accepted by the plaintiff and its value if it had been as warranted by the defendant was plaintiff's testimony that he figured the difference in value was $6,110.30. Thus, asserts the defendant, any amount awarded over that amount was unjustified by the evidence and law, and should be the basis for a new trial or a remittitur.

The plaintiff emphasizes the court's instruction that the jury could award "*any* damages proved by a preponderance of the evidence to have proximately resulted from the defendant's breach of warranty," and apparently argues that the jury was not limited in this assessment by the formula for breach of warranty stated in the next paragraph of the instruction. (Emphasis supplied.)

Neb. U.C.C. § 2-714(2) (Reissue 1980) provides that the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted ($15,275.75, according to plaintiff's calculations) and the value they would have had if they had been as warranted ($21,386.05, the plaintiff's purchase price). However, this is not intended as an exclusive measure. § 2-714, comment 3. The buyer may also recover incidental and consequential damages where warranted. § 2-714(3) and Neb. U.C.C. § 2-715 (Reissue 1980). See, also, *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981).

> When the purchaser of goods under the Uniform Commercial Code claims a breach of warranty, he must not only prove the warranty and the breach thereof; in addition, "[t]he purchaser has the burden of proving both the cause of the loss and the extent thereof. § 2-715, U.C.C., comments 4 and 5. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. . . ."

209 Neb. at 29, 305 N.W.2d at 898; *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975); *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984). See, also, *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985).

The plaintiff presented evidence as to the difference in value between the building as purchased and as warranted. "Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on plaintiff to offer evidence of difference in value, if the judgment is to be based on that measure." *Settell's, Inc., supra* at 30, 305 N.W.2d at

898-99; *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983). The plaintiff met his burden of proving his damages in this respect; i.e., he presented evidence as to the difference in value with sufficient certainty as to allow the jury to reach a conclusion as to those damages. Cf. *Settell's, Inc.*

However, the court found that the plaintiff had failed to meet his burden of proof as to the other damages which he had attempted to prove. " 'It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.' . . .'Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation.' " *Nebraska Truck Serv., supra* at 759, 331 N.W.2d at 268. Hence, the court refused to allow the jury to consider any measure of damages other than the "difference-in-value" formula on which the jury was instructed. "It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture." *Shotkoski, supra* at 28-29, 237 N.W.2d at 97; *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

Thus, the only measure of damages which was proved with sufficient certainty so as not to be subject to a verdict based on guess or speculation was the measure of the difference in value between the building as purchased and as warranted. The court's instructions to the jury reflected this finding. The court specifically instructed the jury on the difference-in-value calculation and warned it against basing a verdict upon "speculation, guess or conjecture." Taken as a whole, the instructions made it clear to the jury that it was not to consider any measure of damages other than the difference in value, and the plaintiff's argument to the contrary misses the mark.

The record, as a matter of law, does not support a verdict and judgment for more than $6,110.30. Accordingly, we modify the judgment by reducing the award from $15,000 to $6,110.30. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

RUSSELL GRUENEMEIER, A MINOR, BY AND THROUGH VICTORIA GRUENEMEIER, MOTHER AND NEXT FRIEND, APPELLANT, V. SEVEN-UP COMPANY ET AL., APPELLEES.

426 N.W.2d 510

Filed July 22, 1988. No. 87-043.

1. **Pleadings: Words and Phrases.** The phrase "facts sufficient to constitute a cause of action" means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
2. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
3. _____. Glass bottles are not so inherently dangerous that a manufacturer could be found negligent for marketing its product in glass bottles.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis P. Crawford, of Friedman Law Offices, for appellant.

Kathleen A. Jaudzemis, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The plaintiff, Russell Gruenemeier, commenced this action through his mother and next friend to recover damages for the injuries he sustained on May 6, 1983.

The amended petition alleged that the defendants, as part of a marketing scheme, had placed two glass bottles of Like cola on the front entrance of the plaintiff's residence. The plaintiff, who was then 9 years of age, began playing while holding one of the bottles. The plaintiff tripped and fell, and the bottle broke and severely cut the plaintiff's right eye, causing the plaintiff to lose his eye.

The amended petition further alleged that the proximate cause of injury to the plaintiff was the negligence of the defendants in (1) placing potentially dangerous instrumentalities, glass bottles, within the reach of small children and (2) failing to utilize unbreakable containers as a

part of the defendants' marketing scheme.

The defendants filed a general demurrer to the amended petition, which was sustained. The plaintiff elected not to plead further, and the amended petition was dismissed. The plaintiff has now appealed to this court.

The issue is whether the plaintiff pleaded facts sufficient to constitute a cause of action against the defendants. We have said that the phrase "facts sufficient to constitute a cause of action" means " 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " *Schuyler State Bank v. Cech*, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988), citing *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956).

In *Tiede v. Loup Power Dist.*, 226 Neb. 295, 299, 411 N.W.2d 312, 316 (1987), we stated that "[f]or actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987)." Furthermore, we have defined "duty" as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Tiede v. Loup Power Dist., supra* at 300, 411 N.W.2d at 316.

This case turns on the allegation that a glass bottle is such a potentially dangerous instrumentality that it was negligent for the defendants to place glass bottles of Like cola on the front entrance of the plaintiff's residence within the reach of small children.

In *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980), the plaintiff was an 8-year-old child who had found a discarded glass beer bottle manufactured by the defendant. The plaintiff proceeded to throw the bottle against a telephone pole, where it shattered and caused eye injuries to the plaintiff. The plaintiff contended that the defendants should have been aware of the dangers inherent in bottles and, thus, should have marketed a product which would withstand such foreseeable misuse as breakage in the course of improper handling by children. The district court found, and the appeals court

affirmed, that " 'the defendant could [not] be negligent in any respect, nor, realistically, liable under any theory of warranty on the facts alleged. . . .' " *Id.* at 189. The appeals court went on to state the following:

> "The propensity of glass to break under pressure is common knowledge" . . . . No reasonable consumer would expect anything but that a glass beer bottle, apparently well suited for its immediate intended use, would fail to safely withstand the type of purposeful abuse involved here. In fact, one would suspect that the present eight year old plaintiff knew well the expected result, if not the potential injury, of his conduct. What, if not the possibility of shattering the bottle, would lead him to throw it against the pole in the first place? . . . ("It must be assumed . . . that children at play sometimes throw available objects for various reasons. But almost every object placed in schoolhouses and play yards for school purposes may conceivably inflict serious and regrettable injury when thrown.")
>
> The same considerations which lead us to conclude that the district court properly dismissed the plaintiff's warranty claim indicate that the claims grounded in negligence are likewise fatally deficient. "By and large, the standard of safety of goods is the same under the warranty theory as under the negligence theory. In both actions the plaintiff must show . . . that the goods were unreasonably dangerous . . . for the purpose to which they would ordinarily be put. . . ." . . .
>
> . . . We see no evidence that the Massachusetts courts have abandoned their previously expressed view that "a common or straightforward product, if safe for normal uses reasonably to be anticipated at the time of manufacture, is not defective [i.e., unfit for its intended use] simply because it is foreseeable that it may cause injury to someone using it improperly."

(Citations omitted.) *Id.* at 190-91.

In *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 428 P.2d 990 (1967), the 9-year-old plaintiff instituted a negligence suit for injuries she suffered after colliding with a plate glass door

while a guest in another's home. The plaintiff's suit named both the homeowner and the installer of the door as defendants. The court, in affirming the lower court's dismissal of the complaint as against the installer, wrote:

> It is our opinion that glass doors are like other common objects or conditions in and about a home. They are not so inherently or imminently dangerous to third persons that they can be said to be embraced within the exceptions to the rule.
>
> "We do not think negligence ought to be found merely because the door was made of one large piece of glass. * * * A door of this kind is to be classed with other forms of construction such as various types, whether new or old, of doors, floors, stairs, and ramps, not out of repair, upon which it is possible for an invitee to receive injury, but which are not of such a character that danger is reasonably to be anticipated from them to persons exercising ordinary care." [Citation omitted.]

Id. at 315, 428 P.2d at 993.

Killeen v. Harmon Grain Products, Inc., 11 Mass. App. 20, 413 N.E.2d 767 (1980), involved a products liability action against the manufacturer and seller of cinnamon-flavored toothpicks. The plaintiff, a 10-year-old, fell face down while holding one of the toothpicks in her mouth and sustained facial injuries. The court there wrote:

> We similarly reject any contention that such unreasonable danger inheres in toothpicks—flavored or otherwise—that the manufacturer or distributor is subjected to strict liability. . . . Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of *glass*, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless

> manufacturer or supplier. . . . Rather, liability of the manufacturer or supplier must be grounded in negligence, in a want of the care which a reasonable person should exercise in the circumstances.

(Citations omitted.) (Emphasis supplied.) 413 N.E.2d at 770.

Glass bottles are commonly found in all households, where they are used as containers for a variety of products, including food and beverages. As a matter of law, they are not so inherently or potentially dangerous that a manufacturer could be found to be negligent for marketing its product in glass bottles. As stated by the court in *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980), a common or straightforward product, if safe for normal uses reasonably to be anticipated at the time of manufacture, is not unreasonably dangerous because it may cause injury when used improperly.

The judgment of the district court is affirmed.

AFFIRMED.

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

426 N.W.2d 277

Filed July 22, 1988. No. 87-528.

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.

Appeal from the District Court for Dawson County: LLOYD G. KAUFMAN, Judge. Affirmed.

P. Stephen Potter for appellant.

James M. O'Rourke, Dawson County Attorney, for appellee.

W. Wesley Lubberstedt, guardian ad litem.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

HASTINGS, C.J.

The mother, K.A., appeals from the termination of her parental rights in the county court for Dawson County.

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. *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988).

The county attorney filed a petition on July 23, 1984, alleging that T.A. and her half-brother J.A. fell within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982); that is, that they were minors who lacked proper parental care by reason of the fault or habits of their parents, or whose parents neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the children, or who were in a situation injurious to the health or morals of the children. Upon a hearing, the children were placed in the custody of the Department of Social Services (DSS).

The children first came to the attention of the State in July 1984, when it was learned that T. (date of birth February 20, 1981) was being sexually abused by her mother's boyfriend (J.'s father) and her cousin. T. reported that her mother's boyfriend sexually abused her in her mother's presence. She also reported one instance of sexual abuse by the appellant herself. In addition, there was evidence that both T. and J. (date of birth August 14, 1983) had been physically abused by their mother. T. had welts on her body when first placed in foster care, and told

her foster mother that her mother pulls her hair (T. refused to wear ponytails for this reason), twists her nose hard, twists her arm, kicks her, and bends her fingers back "until it really hurt." There was also evidence of extreme verbal abuse.

After visits to the appellant's home, the children often returned upset. They reported being hit and called names while at the appellant's home. T., who stated to her foster parent that she had been beaten with a board, also told her foster parent that she did not want to visit the appellant again because she had been hit and called "stupid." On one occasion, the boyfriend knocked J. out and told T. not to tell; in another instance, the appellant and her boyfriend gave J. beer to put him to sleep.

The condition of the home was filthy. The DSS employees reported finding standing water on the kitchen floor, trash on the unswept floor, a dirty blanket on the bed, no pillowcases on very dirty pillows, and one bed with no sheets and the springs exposed.

The matter was set for adjudication on September 25, 1984. At that time, the appellant admitted that she had not maintained the home in a proper condition, and the court found that the children were as defined in § 43-247(3)(a).

At the dispositional hearing on October 23, 1984, the court placed the children in foster care and requested DSS to draw up a plan for reunification.

A review hearing was held on April 16, 1985. An exhibit received at this hearing indicated that the appellant had, in the past 3 months, attended only four of her seven scheduled appointments with her therapist. The therapist stated that the appellant was "extremely resistant to therapy" and that her defensive, hostile, and explosive behavior was "extremely unhealthy for children to be around." The court continued the placement of the children with DSS. A rehabilitation plan was implemented.

The matter once again came on for review on October 16, 1985. The court continued the matter and ordered the appellant to cooperate fully with DSS for 1 month.

At the review hearing on November 20, 1985, the DSS worker testified that since the last hearing the appellant had

made slow progress on her homemaking skills, did not find employment, and did not complete her parenting classes. Nevertheless, the court allowed the appellant to have temporary physical custody of the children, with strict supervision by DSS.

On March 12, 1986, the court found that the appellant had made some progress, and continued custody of the children with the mother.

On September 10, 1986, the county attorney moved to terminate the appellant's parental rights under Neb. Rev. Stat. §§ 43-291 and 43-292(1), (2), (3), (4), and (6) (Reissue 1984). The motion alleged, inter alia, that reasonable efforts under the direction of the court had failed to correct the conditions leading to the determination that the children were as described in § 43-247(3)(a) (Reissue 1984). The reports of the DSS worker from the time of the last hearing in March until the motion was filed showed that the appellant had made no progress toward rehabilitation; although "[i]n February, many positive things were occurring in the family . . . [n]ow almost everything is negative." The reports reveal that the appellant conducted "pot parties" and often spent her income on marijuana; the house continued to be filthy; the new boyfriend lived with the appellant despite the court's order against this (the appellant stated that she was aware that this was contrary to her service plan but that it was a "chance she had to take"); and although the appellant did find employment at Dottie's Diner, she was fired in less than 2 weeks for repeatedly failing to show up for work. The appellant attended only a little over half of her therapy sessions, quit vocational counseling with one counselor and did not keep any appointments with her other counselor, quit her volunteer work without notice, and made no progress toward obtaining her GED. She continued to use inappropriate discipline, and on one occasion left the children with a babysitter until 3 a.m., when she and her boyfriend went to the races.

T. developed a strep infection in July 1986; J. had a rash around his groin; in August 1986, T. contracted a staph infection; and in September 1986, T. had impetigo and both children had scabies. The doctor noted that both children were

dirty and that filth and dirt kept the infection going. Although T.'s hands were oozing and she had scar-producing sores on her back, the appellant did not take T. to the doctor; the DSS worker finally took her. T. also had several allergies which were agitated by smoke; nevertheless, the appellant and her boyfriend ignored the court's order not to smoke in T.'s presence. The appellant also refused to wait, as instructed, to see if T. would have a reaction to her allergy shots. The appellant's attitude toward children was also revealed by statements that she made over these months. In April, she stated that she did not care if she lost her children again. In June, she remarked that with one more child, she could collect more money and afford a nicer place to live.

There was no direct evidence of continued sexual abuse, but sexual "acting out" by the children increased. On more than one occasions, J. would invite T. to watch as he masturbated. There was also evidence that J. and T. engaged in sexual activity with one another and with two neighbor girls. During the time she spent back in the appellant's home, T. regressed to the point where her speech became babyish, and she was put into developmental kindergarten.

Upon hearing the evidence, the court returned the children to foster care and set the matter for a termination hearing.

The hearing on the termination motion was held on February 11, 1987. The parties presented evidence, and the appellant was given an opportunity to review certain documented evidence until February 18, 1987. The hearing continued on February 18, at which time the court continued the motion for an additional 90 days. Furthermore, the court imposed additional conditions on the appellant's rehabilitation plan.

In the DSS review report dated December 15, 1986, it was noted, "[The appellant] was told [at the September 10, 1986, hearing] that she would have about 2 months to demonstrate an improvement in her parenting ability; there has been no progress." The report also noted that T. had "regressed appreciably" when with the appellant and that both children had delayed speech development. A report by a mental health professional additionally revealed that T. had a "disturbed and deteriorating" psychiatric condition, and had such anxiety and

hostility, especially toward sexual stimuli, that her thought processes were interrupted. The report stated that T. met her need for nurturance and made up for the lack of family warmth by engaging in sexual activity with her brother. The foster parents also reported several incidents of inappropriate sexual activity by the children.

The appellant did complete an inpatient drug and alcohol abuse program, although her prognosis was poor as she had failed to adequately follow through with aftercare. She attended three followup sessions, but canceled or simply did not show up for six others.

The final hearing was on May 13, 1987. Evidence was presented by both sides. The evidence showed the appellant's continued pattern of failing to follow the rehabilitation plan, with the only real achievement being her completion of the inpatient drug and alcohol abuse program. The court found that, despite the appellant's progress in confronting her alcohol problem, "We are no closer today to your being able to provide for those children [than] we were 18 months ago, or 24 months ago when this thing originally started." Upon determining the best interests of the children, the court terminated the appellant's parental rights pursuant to § 43-292(2).

The following were assigned as error: (1) The court erred in terminating the appellant's parental rights under § 43-292(2); (2) the court erred in failing to address whether or not the appellant had complied with the court-ordered plan; and (3) the court erred in not finding that the appellant had complied with the plan.

In its argument, the appellant's brief advances arguments based on due process, the admission of ex parte evidence, and the Nebraska and U.S. Constitutions. These claims were not assigned as error and thus cannot be considered on appeal. *McCoy v. Steffen*, 227 Neb. 72, 416 N.W.2d 16 (1987).

The remainder of the appellant's argument loosely concerns the assigned errors. The appellant basically argues that the court terminated her parental rights under the wrong subsection of § 43-292: since the petition was initially brought pursuant to § 43-247(3)(a) (Cum. Supp. 1982), and since § 43-292(6) provides for termination when, "[f]ollowing 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," then the court should have relied on § 43-292(6) as the applicable provision for termination. Instead, the court stated that the appellant's parental rights were terminated under § 43-292(2). ("The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.") The appellant interprets § 43-292(6) as *requiring* the court to proceed under that subsection (as opposed to (2) or any others) whenever a determination has been made under § 43-247. By not proceeding under subsection (6), the appellant argues, the court completely failed to take into account the plan with which the appellant had been ordered to comply.

The argument is without merit. Section 43-292 states that the court may terminate parental rights when it appears that any one of the six conditions has been met. Failure to correct the conditions leading to the determination that the children fall under § 43-247 is only one possible reason for termination; the court is free to terminate parental rights under any of the other subsections if the evidence supports such a decision. The appellant has misinterpreted the language of § 43-292(6).

The appellant argues that the court completely failed to consider whether she had complied with the court-ordered rehabilitation plan when making its final determination of termination. Although the court did state that it was terminating the appellant's parental rights under § 43-292(2) ("The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection"), the court did not "completely disregard" the rehabilitation plan, as the appellant alleges. To the contrary, the record shows that the court was well aware of the plan throughout the many months that the appellant was under the court's jurisdiction. Moreover, although it did not specifically mention "the plan" at the determination, it is clear that the court was considering the appellant's failure to rehabilitate herself when it made the

decision to terminate. The court stated that it agreed with the guardian ad litem, who had specifically pointed to the appellant's noncompliance with the plan, and stated that "[w]e are no closer today to your being able to provide for those children [than] we were 18 months ago, or 24 months ago when this thing originally started." Clearly, the court took the appellant's performance into account when reaching its decision.

The appeal is without merit. The appellant was clearly unable to properly care for her children, and this fact did not change in the 2 years that the appellant was given to improve herself. The court's decision to terminate the appellant's parental rights is affirmed.

AFFIRMED.

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

426 N.W.2d 513

Filed July 22, 1988. No. 87-647.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
2. _____: _____. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
3. **Effectiveness of Counsel: Proof.** To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different.

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

Lavern R. Holdeman and Rick L. Williams, of Peterson Nelson Johanns Morris & Holdeman, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

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

WHITE, J.

Defendant, Robert R. Painter, has appealed from an order of the district court for Madison County which denied his motion for postconviction relief. The motion to vacate sentence raised three issues on postconviction: (1) whether defendant's confession was coerced; (2) that defendant was incompetent at the time of the proceedings against him and unable to assist in his defense; and (3) ineffective assistance of counsel.

In January of 1986, the defendant was charged with sexual assault of a child, a Class IV felony, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985). On February 10, 1986, defendant entered a plea of guilty to that charge pursuant to a plea agreement in which the State agreed to refrain from charging Painter with first degree sexual assault, a Class II felony, and to not recommend a specific term of incarceration regarding a probation violation. Painter was sentenced to a term of not less than 20 months' nor more than 5 years' imprisonment in connection with the sexual assault on a child conviction.

Further, following revocation of his probation due to the sexual assault conviction, he was sentenced to the same term for the earlier conviction for aiding and abetting the commission of a theft. The court ordered, as part of the second sentence, that the two sentences would be served consecutively. The two cases involved were consolidated on direct appeal, and the convictions and sentences were affirmed by this court in all respects. *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986).

Painter was granted an evidentiary hearing on his postconviction motion and was represented by counsel in those proceedings. The district court granted the State's motion to dismiss the first two issues raised by the postconviction petition, the coerced confession issue and the alleged incompetence of the defendant at the time of his conviction for sexual assault on a child. The evidentiary hearing proceeded, and further

evidence was adduced on the third issue of ineffective assistance of counsel.

On this appeal Painter assigns one general error. Appellant alleges that the district court erred in failing to vacate the judgment and sentence imposed upon Painter, as the same were void or voidable under the Constitutions of the United States and the State of Nebraska. From that vague assigned error it is difficult to tell whether the appellant takes issue with the court's decision to dismiss the first two grounds of relief in the petition or if the only error complained of is the court's ruling on the ineffective assistance of counsel claim. In any event, we can dispose of any claimed errors as to the court's ruling on the first two issues in the petition by referring to our longstanding rule that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). The questions of coerced confession and the defendant's competence could have been raised on direct appeal and cannot be the basis for postconviction relief. Aside from that rule, the district court did review the deposition evidence introduced by defendant on those issues and made specific findings against the defendant as to those claims. For those reasons, any alleged error based on the court's order dismissing the first two grounds of relief are without merit.

Appellant's principal basis for relief on postconviction is a claim of ineffective assistance of counsel. Painter alleges that his counsel failed to adequately investigate the case, failed to request an evaluation to determine Painter's competence at the time of arraignment and sentencing, and failed generally to render effective assistance in preparing Painter's case and his defenses thereto.

A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. *State v. Rivers, supra*; *State v. Fries*, 224 Neb. 482, 398 N.W.2d 702 (1987).

> "When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for

> determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions."

State v. Broomhall, 227 Neb. 341, 343, 417 N.W.2d 349, 351 (1988).

To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different. *State v. Propst*, 228 Neb. 722, 424 N.W.2d 136 (1988); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The *Strickland* standard for evaluating claims of ineffective assistance of counsel applies to ineffective assistance claims arising out of the plea bargaining process as well as the usual criminal trial context. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The "prejudice" requirement enunciated in the *Strickland* test "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

Painter's ineffective assistance claim is based generally on counsel's alleged failure to adequately investigate his case. Specifically, that failure to investigate includes (1) failure to interview key witnesses and (2) failure to obtain an independent assessment of Painter's competence.

In *Strickland*, the Supreme Court stated that the duty to investigate can be defined as "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. The

reasonableness of a decision not to investigate is to be judged according to the circumstances of each case, with great deference given to the attorney's decision. *Strickland v. Washington, supra.*

Given the above-stated standard, and for additional reasons to follow, we hold that the district court properly rejected Painter's postconviction claim. First, we note that Painter has not alleged what outcome-altering facts or evidence would likely have been discovered by his counsel had the child victims, their mother, or Sharon Nore (employee of the domestic task force) been independently interviewed. "[T]he determination whether [counsel's] error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill v. Lockhart, supra* at 474 U.S. at 59.

As stated earlier in this opinion, Painter bore the burden in these proceedings of setting forth factual allegations that could have been discovered by these independent interviews which would have altered his decision to plead guilty and led him to insist on a trial. Painter has merely set forth a conclusionary allegation that his counsel failed to adequately delve into a "number of inconsistencies between the story of the children and what the office [sic] reported what he felt to be the facts." Nowhere has Painter set forth the substance of these alleged inconsistencies. It is therefore impossible to determine whether there is a reasonable probability that his decision to plead would have been different.

Painter's trial counsel admitted at the postconviction hearing that he did not interview the child victims, their mother, or Sharon Nore. He did, however, obtain and review the police reports and went over the evidence and facts with his client. His testimony indicates that Painter's recitation of the facts was "mostly consistent" with the police reports. From this record it is logical to assume that trial counsel reasonably believed that further investigation and extensive witness interviews would not lead to any unknown or exculpatory facts. Under the circumstances we believe that counsel's investigation was sufficient.

The second prong of Painter's ineffective assistance claim alleges that trial counsel was ineffective for failing to request an evaluation of Painter's competence at the time of arraignment and sentencing.

A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987).

At the postconviction hearing, Painter's trial counsel testified that he was aware of the above-stated rule as to competency and that in his opinion Painter met those tests for competency. Counsel testified that

> [a]fter considering his demeanor, his discussions with me, feedback he gave me, the level of the discussions, and the nature of the rhetoric used, it was my opinion that he understood fully what the proceedings were about and how they were affecting him. I believe his decisions, which he always made the final decision, were his own.

In addition, the bill of exceptions from the trial and sentencing court clearly shows that the court informed the defendant of his constitutional rights and examined the defendant to determine that he understood those rights as required by the *Boykin-Turner* rule set forth in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The record from the trial court in this case is clearly sufficient to support an implicit finding by that court that Painter was competent at the time he entered his plea.

Painter's deposition indicates, at least at one point, that he did not understand what he was charged with when being questioned by the court. At another point, upon further questioning, he stated that, yes, he did know the nature of the charges. This testimony was hardly conclusive on the issue.

The only additional evidence offered by Painter which might have shed any light on his competence was the deposition of a clinical psychologist, William R. Stone, Jr., who was retained for purposes of the postconviction proceedings. That deposition, however, contains no opinions as to Painter's competence at the time of his plea or sentencing. Admittedly,

there is testimony that Painter is only "one percentile [or so]" above mental retardation; however, mental retardation does not necessarily imply incompetence to plead or stand trial. *State v. Tully, supra*; *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). Stone's deposition dealt largely with whether Painter was an individual who was subject to suggestibility. In fact, Stone stated: "I did not talk to him about the offense or anything relating to that. I talked to him briefly about the statement that he had made and about his subsequent admission of guilt on the sexual assault charge."

Given trial counsel's judgment of his client's abilities, coupled with the plea and the sentencing court's implicit determination of Painter's competence, we believe that counsel's decision not to have his client evaluated was reasonable under the circumstances as they existed at the time. Stone's evaluation sheds no light on Painter's competence at the time he entered his plea or was sentenced. Any factual dispute regarding what Painter did or did not understand is left to the determination of the district court. We cannot say that the district court decision was clearly erroneous, given the record in this case. The judgment of the district court is affirmed.

AFFIRMED.

GEORGE A. HORMEL AND COMPANY, APPELLANT, V. RANDALL D. HAIR ET AL., APPELLEES.

426 N.W.2d 281

Filed July 22, 1988. No. 87-793.

1. **Employment Security: Labor and Labor Relations.** As a general rule, a provision which disqualifies employees from receiving benefits when their unemployment is caused by a stoppage of work due to a labor dispute refers to the employer's plant operations rather than the employee's labor.
2. **Employment Security: Labor and Labor Relations: Words and Phrases.** A work stoppage exists when a substantial curtailment of work occurs in an employing establishment.

3. **Employment Security: Labor and Labor Relations.** Under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1982), the refusal to cross a picket line has been determined to be a protected activity.
4. _____: _____. In a determination of whether or not any work is suitable for an individual, a claimant shall not be denied benefits if the position offered is vacant due directly to a labor dispute.

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

Kevin J. Kinney, of Krukowski & Costello, S.C., Kelly S. Breen, of Laughlin, Peterson & Lang, and James W. Cavanaugh for appellant.

Laureen Van Norman and John F. Sheaff for appellee Commissioner of Labor.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GITNICK, D.J.

This action involves an appeal from the judgment of the district court for Dodge County, which had affirmed the decision of the Nebraska Appeal Tribunal allowing unemployment compensation benefits to the claimants.

This appeal requires us to examine the activities of certain employees, hereinafter claimants, of George A. Hormel and Company, hereinafter Hormel, and of Hormel, which operates a meatpacking plant in Fremont, Nebraska, to determine if the activities of the claimants constituted a work stoppage and whether the claimants were improperly awarded benefits to which they were not entitled, pursuant to Neb. Rev. Stat. § 48-628 (Cum. Supp. 1986). Neb. Rev. Stat. § 48-640 (Cum. Supp. 1986) mandates that our review is de novo on the record made in the trial court of the proceedings tried before the Nebraska Appeal Tribunal of the Nebraska Department of Labor, which, therefore, requires us to retry the factual issues involved in the findings complained of and to reach independent conclusions therefrom. *Norman v. Sorensen*, 220 Neb. 408, 370 N.W.2d 147 (1985); *School Dist. No. 21 v. Ochoa*, 216 Neb. 191, 342 N.W.2d 665 (1984).

Hormel, the appellant and employer, operates meat

processing plants in Fremont, Nebraska, in Austin, Minnesota, and elsewhere. The claimants are 43 employees of Hormel at the Fremont plant, and all are members of the United Food and Commercial Workers Union Local 22. Hormel's Austin, Minnesota, plant was struck by Local P-9 of the international union on August 17, 1985, which for operational purposes resulted in shutting down the Austin plant. In an effort to broaden the impact of the strike at the Austin plant, the leadership of Local P-9 sought authority from the international union to extend picket lines to other plants, including the Fremont facility, but was unable to obtain such authorization.

At about the same time as the commencement of the strike at the Austin plant, a local organization was formed in Fremont, which was designated as the "United Support Group," with an announced purpose of supporting the efforts of Local P-9 in its bargaining efforts with Hormel, and which included members of Local 22 of the Fremont plant. Local 22 did not strike the Fremont plant, but approximately 80 of its members out of a work force of 860 employees failed to report for work on January 27, 1986. Local 22 did increase its dues structure because of the strike activities at other plant locations, and the revenues were distributed to the membership of the striking local unions. Also, at least one of its members did participate in an informational picket line at the Fremont plant established by Local P-9 of the Austin plant. It is unclear from the evidence whether any other members of Local 22 were actually manning the picket line at the Fremont plant, but the evidence does show the line was primarily manned by spouses of members of Local 22 and by other members of the United Support Group.

On January 27, 1986, Hormel was unable to operate the ham, skin, and fat line division of its Fremont operations due to the failure of a number of its employees to report for work, but all other operations of the plant did continue. Hormel commenced hiring replacement workers and was operational in all departments the next day. On January 29, 1986, all employees honoring the picket line gave formal notice to Hormel that they were honoring a legally established picket line and that they had not resigned their respective positions. Hormel thereafter notified all employees honoring the picket

line that they were being permanently replaced by new personnel.

In order to enlist the aid of the Nebraska Job Service in obtaining replacement employees, on February 13, 1986, Hormel and the leadership of Local 22 sent a joint letter to the office of the division of employment of the Nebraska Department of Labor, in which they jointly stated that there was no work stoppage at the Fremont plant.

The picket line established by Local P-9 remained at the Fremont plant until June 4, 1986, and all of the claimants refused to cross the picket line to return to other jobs. On June 4, 1986, all claimants who had not otherwise terminated their employment relationship with Hormel made an offer to return to work, and Hormel placed them on its preferential recall list.

All of the 43 claimants involved in this case filed claims for unemployment compensation benefits, and the Nebraska Department of Labor undertook an investigation to determine the propriety of the claims. At a conference with the claims deputy, Hormel's Fremont plant personnel manager advised that the picket line activity resulted in a 4.9-percent loss of production and a 2.9-percent loss of hours; that the Fremont plant sustained a reduction in production, but "not . . . anywheres (sic) near 25 percent," because it had to reassign certain of the workers it had and had to hire untrained replacement personnel; and that there was a reduction in the number of the work force of from 9.4 percent on January 27, 1986, to a reduction of approximately 2 percent by the end of the first week.

The Department of Labor determined there was no work stoppage due to a labor dispute at the Fremont plant and allowed benefits without any disqualification period, which determination was affirmed by the Nebraska Appeal Tribunal and, on appeal, by the district court for Dodge County. This appeal followed.

Hormel assigns as error the determination there was no work stoppage, as defined in § 48-628(d), as it contends the preponderance of the evidence demonstrated that the claimants' unemployment arose out of a labor dispute at the Hormel plant; that the claimants left their employment without

good cause as defined in § 48-628(a); and that the claimants failed, without good cause, to accept its offer of suitable work within the meaning of § 48-628(c).

Section 48-628(d) provides a two-part test for disqualification of a claimant's right to receive unemployment benefits, as it requires that the Commissioner of Labor must find (1) that the unemployment of the claimant is due to a work stoppage and (2) that the work stoppage results from a labor dispute.

There is no question but that a labor dispute existed when the claimants honored the picket line established by the Local P-9 membership at the Fremont plant and absented themselves from their employment. Hormel asserts that because a labor dispute existed and the claimants participated therein, and because the claimants financed the labor dispute which caused the work stoppage, the claimants should be automatically disqualified from receiving unemployment benefits.

Hormel supports its position by citing the case of *Baker v. General Motors Corp.*, 478 U.S. 621, 106 S. Ct. 3129, 92 L. Ed. 2d 504 (1986). However, that case is premised on a Michigan statute which specifically disqualifies claimants where " 'the individual's total or partial unemployment is due to a labor dispute in active progress . . .'," 478 U.S. at 622 n.1, and this is substantially different from the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1984 & Cum. Supp. 1986), which provides for a disqualification when the claimant's unemployment is caused by a work stoppage resulting from the labor dispute. "As a general rule . . . [a] provision which disqualifies employees from receiving benefits when their unemployment is caused by a stoppage of work due to a labor dispute refers to the employer's plant operations, rather than the employee's labor." 81 C.J.S. *Social Security* § 244 at 490 (1977). Therefore, the issue for determination is whether a work stoppage existed within the meaning of our Employment Security Law.

We have previously discussed the issue in our opinion in *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942), as to when and what constitutes a "work stoppage." In that opinion, we pointed out that a stoppage of work exists when a

substantial curtailment of work occurs in an employing establishment, and we look to the effect that the curtailment of work has upon the employer's operations produced by the labor dispute to determine whether it is substantial, rather than simply whether a cessation of work by the claimants occurred. "Substantial" has been defined to mean "material," "important," "massive," or "considerable in amount." Webster's Third New International Dictionary, Unabridged 2280 (1981). Accordingly, it becomes difficult to fix any definitive standard by which to gauge when a stoppage of work starts or stops.

In adopting this approach, its effect was to require a case-by-case review of the particular facts and circumstances unique to each case, because we adopted a fluid test to determine when a *substantial* curtailment of work commences, and we remain convinced that this commonsense approach is both logical and reasonable and is the interpretation and application under similar statutes of other jurisdictions. See cases noted in Annot., 28 A.L.R.2d 287 (1953). We further point out that since we adopted this standard in 1942, the Legislature of this state has not seen fit to reject the approach which we have taken, and Hormel's arguments for a more restrictive approach should more properly be addressed to that body.

The evidence as to whether a work stoppage exists is that a 4.9-percent loss of production occurred, together with a 2.9-percent loss of total work hours; that the plant personnel manager had stated to the investigating claims deputy that "he was almost certain production was not cut anywheres (sic) near 25 percent"; that the only affected production section within the plant, the ham, skin, and fat line, was shut down for 1 day; and that Hormel at no time experienced a total operational shutdown of its Fremont operations.

Additionally, the record reflects that Hormel filled approximately 98 percent of the affected positions by the end of the first week following the establishment of the picket line, and therefore, any potential stoppage of work ended when Hormel was able to resume substantially normal operations. Furthermore, we note that Hormel, itself, notified the division

of employment of the Department of Labor by letter on February 13, 1986, that there was no work stoppage at the Fremont plant, and this letter must mean exactly what it said.

While we agree that Hormel suffered a loss of productivity and experienced difficulties as a result of the displacement occasioned by the conduct of the claimants and that the profit margins of the meatpacking industry may be razor thin, as argued by Hormel, there is no evidence from the record that the loss in productivity of Hormel as a result of the claimant's actions negatively impacted on Hormel's profitability to any degree or to any significant degree. Hormel asks us to speculate on this point simply because product was not produced. We point out that it is just as reasonable to conclude that Hormel was losing money on its production before the claimant's actions as to conclude it was making money, when no evidence of the cost accounting impact of the absent production is available in the record. We decline to speculate on either conclusion.

We then conclude that neither individually nor collectively are the loss of productivity and difficulty experienced by Hormel of such severity as to amount to a substantial stoppage of work in this case, either on the plant as a whole or on the individual department affected, as the impact was not significant in either case, based on the evidence in the record.

Having determined that no work stoppage occurred within the meaning of the Employment Security Law, we need not address the other argument made by Hormel in support of its first assignment of error, as the determination that there was no work stoppage avoids any consideration under § 48-628(d) as to whether or not the claimants financed the labor dispute which caused the work stoppage by their contribution of union dues which may ultimately have reached the membership of other striking local unions.

Hormel then argues that the claimants are disqualified from receiving benefits because they effectively left their employment voluntarily and without good cause, as provided in § 48-628(a), by refusing to cross the picket line. As to this issue, we note in *Beaman v. Safeway Stores*, 78 Ariz. 195, 277 P.2d 1010 (1954), it was held that the fact that claimants

voluntarily left their employment as grocery department employees because they refused to cross a picket line established by meat department employees, where each department was separate, did not constitute refusal to accept suitable employment, and such claimants were not deemed unavailable for work and were, therefore, not ineligible for benefits. The court in that opinion stated at 199-200, 277 P.2d at 1013:

> We do not believe the Court was correct in finding the claimants ineligible because of unavailability for work. Generally, the courts test whether one is available for work by whether the claimant is able, willing and ready to accept suitable work which he does not have good cause to refuse and is genuinely attached to the labor market. Muraski v. Board of Review, supra; Reger v. Administrator, Unemployment Compensation Act, 132 Conn. 647, 46 A.2d 844.
>
> This does not mean necessarily that there are no possible conditions under which one may be considered available although not willing to accept certain suitable employment. Stated another way, he is eligible even if he refuses to accept suitable work without good cause if such refusal does not effectively remove his services from the labor market. If the refusal is for a cause and upon such conditions as so restrict his willingness to work that his services are rendered unmarketable, he has removed himself from the labor market and is ineligible. Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S.E.2d 524, 25 A.L.R.2d 1071. In the event such refusal merely limits the field of suitable work which he will not accept to an individual employer, he might be disqualified but he could not be said to be unavailable and removed from the labor market unless the circumstances warrant the conclusion he is unwilling in general to accept suitable work.
>
> In the instant case all the claimants did was to refuse to work for one employer because of the existence of a picket line. A finding that such claimants were for this reason alone removed from the labor market and unavailable was not warranted.

Additionally, we note that the right of employees to engage in peaceful picketing for legitimate purposes has free speech aspects under the 1st amendment, which guarantees that the right of free speech will not be infringed by the federal government, and under the 14th amendment, which guarantees the same protections against infringement by the several states. *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). Furthermore, under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1982), the refusal to cross a picket line has been determined to be a protected activity. *N.L.R.B. v. Browning-Ferris Ind., Chem. Serv.*, 700 F.2d 385 (7th Cir. 1983).

Hormel lastly argues that claimants failed, without good cause, to accept an offer of suitable work in violation of § 48-628(c). A reading of the record in this case shows, however, that Hormel made no specific offer of work to the claimants, and no evidence appears as to which positions, if any, remained open, or whether Hormel made any offer to return the claimants to work after the hiring of replacement personnel. Since Hormel had "permanently replaced" the claimants with other employees, obviously their positions were no longer available. This conclusion is buttressed by the evidence that Hormel then placed the claimants on a preferential recall list, rather than immediately placing them for work.

Lastly, § 48-628(c) provides, in pertinent part, that "[i]n determining whether or not any work is suitable for an individual," a claimant shall not be denied benefits "[i]f the position offered is vacant due directly to a . . . labor dispute." There is no question that a labor dispute existed in this case between Hormel and Local P-9.

We conclude that the claimants were not disqualified from benefits on the ground that they had voluntarily refused to accept suitable work.

The judgment of the district court was correct in all respects, and we, therefore, affirm its decision that the claimants are entitled to receive their respective unemployment compensation benefits.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT C. BEWLEY, APPELLANT.

426 N.W.2d 286

Filed July 22, 1988. No. 87-799.

1. **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.
2. **Verdicts: Appeal and Error.** 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.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed, absent an abuse of discretion.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett for appellee.

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

FAHRNBRUCH, J.

After his unprovoked, racially motivated shotgun attack on a black man, Herbert C. Bewley, a white man, was found guilty by a jury of first degree assault and use of a firearm in the commission of a felony.

Bewley was sentenced to the maximum possible indeterminate prison term of not less than 6 2/3 nor more than 20 years on the assault. The weapons sentence was a prison term of not less than 5 nor more than 10 years, to run consecutively to the assault sentence.

Bewley appeals, claiming there was insufficient evidence to convict him and that his sentences are excessive. We affirm.

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. Hook*, 228 Neb. 138, 421 N.W.2d 456 (1988); *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Bodfield*, 228 Neb. 205, 421 N.W.2d 794 (1988).

Just before 1:30 a.m. on August 31, 1986, Luches Conway, a black man, and his white female friend were eating nachos while seated in the friend's car located in the parking lot of a 7-Eleven store in Omaha, Nebraska. Two white males drove by the car on a motorcycle and yelled a racial slur directed at Conway and his friend. The motorcycle and its riders returned. Conway got out of the car. A fight ensued between Conway and the two white males. A third white male, not involved in either the yelling or the fight, was standing near his own car in the 7-Eleven parking lot. He was later identified as the defendant, Bewley. With a vulgarity, Bewley yelled for the two white males to leave. The two white males remounted their motorcycle and left. Conway noted that Bewley had a shotgun pointed at him.

Conway told Bewley that he was going to call the police. Conway testified the defendant responded, "No, you aren't, nigger. I'm going to kill you." Conway was shot on the right side of his head and fell to the sidewalk. Following the shooting, Conway was hospitalized and remained in a coma for several weeks. After 3 months, Conway was discharged from the hospital. There was some damage to Conway's brain.

The first police officer arrived at the scene of the shooting at 1:31 a.m. Conway's female companion gave the officer a description of the assailant and his vehicle. She also remembered a license number for the car. Ultimately, after some confusion concerning the license number, police officers traced the vehicle and were given permission to search the car by its owner, Bewley's girlfriend.

Inside the car were found several live 12 gauge shotgun shells. At least two of these shells were the same color, brand, and gauge as a spent shell found at the scene of the crime. The vehicle was impounded.

After searching the car, officers questioned the defendant

inside the apartment he shared with his girlfriend. Bewley admitted driving the car that night. He claimed he returned home around 1 a.m. Bewley did not match the description given by Conway's friend, and the police officers did not immediately arrest him. Later that day, Conway's friend was asked to view a live lineup, which included the defendant. She picked out Bewley as the man who shot Conway. Conway's friend was also taken to the police impoundment lot where she positively identified the car Bewley had admitted driving the night before and early morning of the shooting. On October 15, 1986, a police officer took a photographic lineup to the hospital where Conway was recovering. Conway also picked out the defendant as the man who shot him. At trial, Conway positively identified Bewley as the man who shot him.

The State called as a witness Pamela Gwynn, a clerk at the 7-Eleven store on the night of the shooting. She identified Bewley as a regular customer of the store. She testified that he came into the store shortly before the shooting. Gwynn saw Conway fall after he was shot, and called police.

The defendant did not testify at the trial. In his defense, Bewley presented the testimony of Jackie McGinnis, a bartender at a local bar. McGinnis claimed she saw Bewley talking with two women outside the bar after closing time. She testified that she left the bar at approximately 1:20 a.m. McGinnis said she stopped and talked with Bewley until about 1:45 a.m. Esparanza Williamson testified that she and another woman talked with Bewley outside the bar until they left at approximately 1:20 a.m.

The alibi testimony presents the only conflict in the evidence. If the alibi story is accurate, Bewley could not have committed a crime which police officers arrived to investigate at 1:31 a.m., and Bewley's identification by Gwynn, Conway, and Conway's friend would all be erroneous.

Clearly, the jury chose not to believe the alibi testimony. The State's evidence, if believed, was more than sufficient to sustain Bewley's conviction. The jury obviously believed the State's evidence.

Bewley also complains that the sentences he received are excessive. Both crimes of which Bewley was convicted are Class

III felonies. The penalty for a Class III felony is a minimum of 1 and a maximum of 20 years' imprisonment, or up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). The law requires that a sentence for use of a firearm in the commission of a felony shall be served consecutively to the underlying sentence. Neb. Rev. Stat. § 28-1205(3) (Reissue 1985).

A sentence imposed within statutory limits will not be disturbed, absent an abuse of discretion. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Frelo*, 228 Neb. 122, 421 N.W.2d 447 (1988).

Both of Bewley's sentences are within the statutory limits. Among the factors to be considered by the sentencing judge are the motivation for and the nature of the offense, the amount of violence involved in the commission of the crime, and the seriousness of the offense. *State v. Moreno, supra*. At sentencing, the trial judge noted that Bewley "intentionally and brutally without provocation assaulted a person by shooting at him point-blank with a shotgun leaving the victim paralyzed and disfigured and dependent on others for the rest of his life."

Shooting another human being with a shotgun is an extremely serious crime. Conway could easily have died as a result of Bewley's action. The record is clear that Conway did nothing to provoke the attack. Racial bias apparently was Bewley's only motive for committing the crimes. The trial court did not abuse its discretion in imposing the sentences it did.

The judgment and sentences of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY P. KUDLACEK, APPELLANT.

426 N.W.2d 289

Filed July 22, 1988. No. 87-861.

1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly wrong.
3. **Trial: Evidence: Appeal and Error.** A defendant may not predicate error on the admission of evidence to which a timely objection was not made.
4. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

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

John C. Person, of Person, Dier & Person, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

BOSLAUGH, J.

The defendant, Rodney P. Kudlacek, was convicted of driving while intoxicated, first offense, and was placed on probation for 1 year and fined $100, and his driver's license was suspended for 60 days. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends (1) that the trial court erred in overruling his motion to suppress and (2) that the trial court erred in receiving into evidence, without sufficient foundation, the results of the Alco-Sensor preliminary breath test and the Intoxilyzer test.

The record shows that on September 1, 1985, at approximately 11:30 p.m., the defendant was stopped by Nebraska State Patrol Officer Larry E. Williams at a location

approximately 3 miles east of Alma, Nebraska, on U.S. Highway 136. The defendant was stopped because the radar unit in Officer Williams' patrol car showed the defendant's vehicle traveling at 64 m.p.h. in a 55 m.p.h. zone. Officer Williams told the defendant of the reason for the stop and at that time noticed that the defendant had a light odor of alcohol on his breath, his eyes were bloodshot and pupils contracted, and his face was flushed. Officer Williams placed the defendant in his patrol car and administered the horizontal gaze nystagmus test, which the defendant passed. The defendant was then required to perform the walk-and-turn test and the one-leg stand, both of which he failed. Officer Williams then administered the Alco-Sensor preliminary breath test, which the defendant failed. The defendant was placed under arrest and taken to the Harlan County sheriff's office in Alma, where a chemical test of his breath indicated a blood alcohol level of .133 percent.

Prior to trial the defendant filed a motion to suppress the results of the Intoxilyzer Model 4011AS test and any equilibrium test because no probable cause had existed to stop the defendant's vehicle. The hearing on the motion to suppress was held simultaneously with the trial. The court denied the motion to suppress and found that there had been probable cause to stop. The defendant contends that there was insufficient foundation evidence to establish the accuracy of the radar unit, and, therefore, the radar reading was not admissible as evidence of probable cause to stop the defendant.

"Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation." *State v. Green*, 217 Neb. 70, 76, 348 N.W.2d 429, 433 (1984); *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957). "Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required." *State v. Snyder*, 184 Neb. 465, 467, 168 N.W.2d 530, 532 (1969).

We think the evidence was sufficient to show that the radar unit operated by Officer Williams was accurate and functioning properly. At 1:30 a.m. on September 1, 1985, Officer Williams

performed three tests on the model S-80 radar unit that was in his patrol car. The first test was the light test to determine that all light bars within the radar unit were operating. The second test involved the use of tuning forks to check the machine's calibration. Officer Williams explained that the radar unit comes with two tuning forks, one fork certified at 80 m.p.h. and the other at 35 m.p.h. The machine is tested by turning on the radar and placing the fork in front of each radar antenna. The machine should record a reading of 80 m.p.h. for the 80 m.p.h. fork and a reading of 35 m.p.h. for the 35 m.p.h. fork.

Finally, an internal calibration test was performed by comparing the patrol window on the radar with the speedometer in the patrol car. All three tests demonstrated that the unit was functioning properly.

The tests were performed at the end of Officer Williams' shift. Between that time and the time the defendant's vehicle was stopped, approximately 22 hours later, the radar unit was not used.

The defendant argues that because the unit was not tested immediately prior to the time the defendant's vehicle was stopped, the foundation evidence required to show the unit's accuracy was lacking.

Officer Williams testified that the State Patrol would like to have the officers calibrate the radar units at the beginning and end of each shift and that he in fact did not calibrate the unit at the beginning of the shift during which the defendant was stopped. However, he also testified that there are no regulations or procedures concerning the testing of radar units and that the tests he performed were conducted pursuant to the normal practice in his district station. Under the facts in this case, the fact that the unit was not tested immediately prior to the time the defendant's vehicle was stopped did not create an inference that the unit was not functioning properly.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). The evidence was sufficient for the trial court to find that the radar unit was properly functioning.

In his second assignment of error, the defendant contends the foundational evidence was not sufficient for the trial court to receive into evidence the results of the preliminary breath test and the Intoxilyzer breath test. He specifically contends that the results from both tests should not have been admitted because the State failed to prove that the tests were properly conducted in accordance with a method currently approved by the Nebraska Department of Health, as required by *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

The defendant's specific complaints go to the certificate attached to the copy of the rules and regulations of the Department of Health which was received in evidence and to the simulator solution used in the maintenance of the Intoxilyzer machine.

The certificate attached to the certified copy of Neb. Admin. Code tit. 77, ch. 1 (1985), which contains the rules and regulations relating to methods and techniques approved by the Department of Health, was dated January 28, 1985, and recited that the rules were in force "up to December 22, 1984." The defendant argues that the foundation evidence was deficient because there was no showing that the rules were in effect on September 2, 1985, the date on which the defendant's breath was tested. No contention is made and no evidence was offered to suggest that the rules or regulations had been amended during the intervening period.

At the time the exhibit was offered and received in evidence the defendant made no objection to the offer, and the exhibit was received in evidence without objection. Under these circumstances any objection to the exhibit was waived. A defendant may not predicate error on the admission of evidence to which a timely objection was not made. *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988).

The defendant's second complaint relates to the certification of the beam attenuator reference standard which was performed by Deputy Christopher Becker on December 26, 1984. In that procedure, a solution, No. 65, supplied by the Department of Health is used. The solution has a known alcohol content value of .10 percent weight per volume at 34°C.

The argument is similar to that which was made in *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), regarding the test of radar equipment. In the *Snyder* case the defendant contended that it was not sufficient to test radar equipment with a calibrated tuning fork and by using a speedometer check with another patrol car unless there is additional evidence that the comparative testing devices were also proved to be accurate and functioning properly. In regard to that argument, we said, "We cannot agree. Such a chain of evidence might have to proceed ad infinitum." *Id.* at 466, 168 N.W.2d at 531.

We then held that reasonable proof that the equipment was accurate and functioning properly was all that was required. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957).

We believe a similar rule is applicable in this case. Reasonable proof that the Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. The record in this case shows that requirement was satisfied.

The judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS COUNTY HEALTH DEPARTMENT EMPLOYEES ASSOCIATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF DOUGLAS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

427 N.W.2d 28

Filed July 29, 1988. No. 86-748.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing a decision of the Commission of Industrial Relations, this court will consider whether the decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Administrative Law: Evidence: Witnesses: Appeal and Error.** It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as the

trier of fact.

3. **Commission of Industrial Relations: Evidence: Appeal and Error.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the commission and should be given due deference.
4. **Trial: Evidence.** Generally, the reception of evidence is within the discretion of the trial court.
5. **Commission of Industrial Relations: Evidence.** The manner in which the Commission of Industrial Relations is to determine what is comparable to the prevailing wage rate is left to a large extent to the discretion of the commission.
6. **Commission of Industrial Relations: Evidence: Proof.** The burden is on the moving party in a case to establish or alter the scale of wages under Neb. Rev. Stat. § 48-818 (Reissue 1984) to demonstrate that existing wages are not comparable to the prevalent wage rate.
7. **Commission of Industrial Relations: Evidence.** As a general rule the factors most often used to determine comparability in a Commission of Industrial Relations case are geographic proximity, population, job descriptions, job skills, and job conditions.
8. **Commission of Industrial Relations: Evidence: Appeal and Error.** Of necessity, attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the commission could have concluded that the employers used by it did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the commission.
9. **Commission of Industrial Relations: Evidence.** There are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists.
10. _____: _____. The test in determining comparability of wages and other conditions of employment generally is work comparability, not employer comparability.
11. _____: _____. In its measurement, the Commission of Industrial Relations is required to offset possible unfavorable comparison between employers with other comparisons which are favorable when reaching its decision establishing wage rates.
12. _____: _____. In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Commission of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates.
13. **Commission of Industrial Relations: Jurisdiction: Pleadings: Service of Process.** The jurisdiction of the Commission of Industrial Relations is invoked when a petition is filed with it, not when service of process is perfected.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Thomas J. Young, of Young, LaPuzza & Stoehr, for appellant.

William A. Harding and Jerry L. Pigsley, of Nelson & Harding, and Ronald L. Staskiewicz, Douglas County Attorney, and H.L. Wendt for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

HASTINGS, C.J.

This action was filed by the plaintiff-appellant, Douglas County Health Department Employees Association (Association), against the defendant-appellee, County of Douglas (County), in the Nebraska Commission of Industrial Relations (CIR). The Association prayed that the CIR settle an industrial dispute as to wages, hours, fringe benefits, and conditions of employment for the contract year July 1, 1985, through June 30, 1986. After a hearing, a findings and order some 60 pages in length was issued by the CIR, establishing certain wages and benefits. The Association appeals to this court, assigning 14 errors, summarized as follows: The CIR erred in (1) its determination of employers to be included in its arrays; (2) constructing a national array and a local array; (3) prorating wages of employers in the array to reflect differing contract periods and utilizing certain wage data; (4) not instituting a wage-step progression schedule; (5) ordering certain wage decreases; (6) not determining that the County's failure to grant a 5-percent wage increase was improper; and (7) not determining that the County improperly eliminated and consolidated certain job classifications.

The County cross-appeals, assigning error in 10 respects, summarized as follows: The CIR erred in (1) failing to grant the County's motion to dismiss for insufficient service of process; (2) allowing the Association to submit written interrogatories after the date of the filing of the petition; (3) sustaining the Association's objection to the County's counterclaim; (4) failing to grant the County's motion to limit evidence; (5) failing to consider economic factors in selecting an "out-state" array; (6) failing to decrease certain wages at the start of the contract

year in dispute; and (7) failing to compare certain local employers.

In reviewing a decision of the CIR, this court will consider whether the decision is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *IBEW Local 244 v. Lincoln Elec. Sys.*, 222 Neb. 550, 385 N.W.2d 433 (1986). It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as the trier of fact. *Id.*; *City of Omaha v. Omaha Police Union Local 101*, 222 Neb. 197, 382 N.W.2d 613 (1986).

With regard to the specific assignments of error at hand, we have held that determinations made by the CIR in accepting or rejecting claimed comparables are within the field of expertise of the CIR and should be given due deference. *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984).

In reference to the County's objection to the CIR's ruling on certain evidence, the standard is that, generally, the reception of evidence is within the broad discretion of the trial court. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

On July 1, 1984, the Association became a department of the County and was no longer a joint city/county operation. A 1984-85 collective bargaining agreement had been reached. The County reassigned certain job classifications—consolidating and eliminating classifications such as Environmental Health Scientist III and Laboratory Scientist III. Involved in this dispute are a total of 23 job classifications.

The 71 bargaining unit employees of the Association involved in this action are divided into two categories: professional/paraprofessional and clerical/support personnel. An impasse had been reached for the contract wage and fringe benefits for the year July 1, 1985, through June 30, 1986. On October 16, 1985, the Association petitioned the CIR to settle the industrial dispute, listing the disputed items as hours of work, seniority, layoffs and recalls, sick leave, vacation leave, holidays, insurance, travel expenses, overtime, promotions, wages, and classifications within the bargaining unit. The petition sets forth three causes of action, but only the first cause

of action is involved in this appeal.

On October 21, 1985, the County filed a motion to dismiss for insufficient service of process. The petition and notice of pendency were served upon Richard Schoettger, the administrative assistant to the Douglas County Board of Commissioners. The County claimed that this was improper under Neb. Rev. Stat. § 25-510.02(2) (Reissue 1985) and denied the CIR jurisdiction. On October 23, 1985, the Association then served process upon the Douglas County clerk in compliance with § 25-510.02(2).

Upon a hearing by telephone conference call, the CIR overruled the County's motion to dismiss, finding that it obtained jurisdiction when the Association filed its petition.

Another trial agency ruling involved the service of interrogatories upon the County with the supplemental service upon the clerk. The interrogatories did not accompany the originally served petition, but were served on October 23, 1985, with a supplemental notice of pendency. The County's oral objection was overruled.

The County filed a counterclaim on February 4, 1986, urging the CIR to reduce wages, fringe benefits, and total compensation of certain workers to correspond to prevalent comparability levels. The Association objected to the counterclaim, as it was not filed within the rules prescribed by the CIR. The objection was sustained.

On February 21, 1986, the County filed a motion to limit evidence. The motion was overruled at the time of trial. A hearing was held before the CIR on February 24, 25, and 26, 1986. Evidence before the CIR included expert testimony from both parties regarding the criteria to be utilized in selecting comparable employers for inclusion in an array to determine the prevalent wage rates paid and conditions of employment for establishing wages and fringe benefits for the Association. Testifying for the Association was expert Dr. Robert L. Otteman and for the County were experts Dr. Jerome F. Sherman and Thomas A. Haller.

The Association introduced one survey for consideration by the CIR, combining several local and national employers. The County introduced three separate, prospective arrays: national

employers, local employers, and a third survey which contained only County departments.

Dr. Otteman testified that he selected comparables using a gross screening process and then a finer screening process. He selected health departments based upon their being in the north central census region and qualifying under four characteristics within certain limitations (not less than one-half the size of Douglas County nor more than twice the size of Douglas County). The north central census region includes the States of North and South Dakota, Nebraska, Kansas, Iowa, Minnesota, Wisconsin, Illinois, Indiana, Michigan, and Ohio. The four characteristics were standard metropolitan statistical area (SMSA), organization size, labor market area, and metropolitan area within the SMSA. Health departments generally within these guidelines were selected for inclusion in the Association's array based upon organization size, department size, population of the area served, hours worked, and the number of comparable jobs surveyed and matched.

Dr. Sherman testified for the County that the factors of paramount importance are geographic proximity, percentage of state unionization, percentage of county manufacturing, and population of the SMSA.

Dr. Otteman further conducted interviews with department heads, supervisors, and representatives of personnel departments to determine specific job content, the degree of comparability with the Douglas County Health Department, fringe benefits, and related working conditions. He reviewed the existing contracts, job descriptions, fringe benefit booklets, and related documents to determine the level of job match, prevalent wage rates, and other conditions of employment. These materials are in evidence.

The CIR issued a 60-page findings and order in which it composed two separate arrays. The first array consisted of nonlocal health departments. The second array was termed a local array. The local array was utilized by the CIR for clerical (secretarial) and custodial job classifications.

The order established wages and benefits, increasing some wages effective July 1, 1985, and decreasing some wages effective July 10, 1986. The CIR refused to review the County's

reassignment of individuals within certain job classes, stating:

> The Commission will not enter the realm of management prerogative and review the reassignment of individuals within certain job classifications. However, where evidence conclusively shows that salary anomalies exist as a result of extenuating circumstances, in this case the consolidation of the Department, the Commission will take this into consideration when adjusting current wages to the prevalent rate, if necessary.

The CIR also found two characteristics propounded by the County to be inappropriate. These aspects were percentage of state unionization and percentage of county manufacturing. The CIR found that the County had not established that economic dissimilarities had a direct bearing on the wage rates.

Our analysis begins with Neb. Rev. Stat. § 48-818 (Reissue 1984), which provides in relevant part:

> The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Commission of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the commission shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees.

There is no dispute that the CIR was acting within its authority in composing arrays and adjusting wages and benefits accordingly.

The manner in which the CIR is to determine what is comparable to the prevailing wage rate is left to a large extent to

the discretion of the CIR. *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981). It is the selection of comparables which is the most critical part of the process performed by the CIR, as the task of the CIR is to determine prevalent wage rates paid and conditions of employment. Once these are established, they are compared with those of the employer before the CIR, and then wage rates and fringe benefits are adjusted accordingly.

The law is clear that the burden is on the moving party in a § 48-818 case to demonstrate that existing wages are not comparable to the prevalent wage rate. *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984). It is necessary for the Association to establish by evidence what were the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.

> "In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate."

Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln, 216 Neb. 274, 278, 343 N.W.2d 735, 739 (1984). The CIR need not consider every conceivable comparable, but only has to consider a sufficient number in a representative array so that it can determine whether the wages paid or the benefits conferred are comparable.

As a general rule it may be said that factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. *AFSCME Local 2088, supra.*

Due to the apparent fact that the employees fall into two separate categories of professional and clerical, the CIR composed a national and a local array. The local array was developed for custodial and clerical/secretarial employees and the nonlocal array for professional and paraprofessional employees. This is consistent with past practice and in keeping

with reality, since an employer competes locally for hourly and clerical workers, but nationally as well for professionals. See *AFSCME Local 2088, supra.*

Composing the nonlocal array were Lincoln/Lancaster County; Des Moines, Iowa (Polk County); Wichita, Kansas; Madison, Wisconsin; Peoria, Illinois; Oklahoma City, Oklahoma; State of Nebraska; Milwaukee, Wisconsin; and Colorado Springs, Colorado (El Paso County). Douglas County was not included.

From the arrays of both parties, there were three common employers: Lincoln/Lancaster County; Des Moines, Iowa; and Wichita, Kansas. These common employers composed the array created by the CIR along with three employers set forth by the Association—Madison, Wisconsin; State of Nebraska; and Milwaukee, Wisconsin—and three employers set forth by the County—Peoria, Illinois; Oklahoma City, Oklahoma; and Colorado Springs, Colorado.

In its first series of errors, the Association challenges the CIR's selection of proposed comparables. The Association presented statistics on Lincoln/Lancaster County, Des Moines, Iowa, and the State of Nebraska in its array to allow them to be selected as comparables. Yet, in its brief, the Association questions them as appropriate comparables. The burden is on the moving party to demonstrate that existing wage rates, hours of labor, and conditions of employment are not comparable to the prevalent wage rates, hours of labor, and conditions of employment. The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence. *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977). The Association is not now in a position to complain.

Wichita, Kansas, was also chosen as a common employer. Three other locales offered by the Association which were chosen are Madison and Milwaukee, Wisconsin, and the State of Nebraska.

The proposed comparable of Madison is located in Dane County, one of the County's proposed comparables. The County's proposed comparable is the county health department, while the Association's proposed comparable, the

one selected by the CIR, is a city health department. Madison is within acceptable criteria on almost all of the characteristics before the CIR; it was properly included within the CIR's array.

Considering the high number of job matches and the conformity with the great majority of the characteristics before the CIR, it was also appropriate for the CIR to include Milwaukee within its nonlocal array.

The County's evidence consisted of comparisons with employees in Peoria, Illinois; Oklahoma City, Oklahoma; and Colorado Springs, Colorado.

The Peoria County Health Department is within the north central census region and is within limits with regard to organizational size (1,200 to 1,900). Departmental size is very close (106 to 90), and the SMSA is within one-half (355,900 to 607,400). It is reasonably close to the County (325 miles), and the employees work the same number of hours (2,080). This sector does not serve the core city of Peoria and in that regard is dissimilar to the County. The number of job matches is 7 of the 13 possible that the County compared.

The Oklahoma City Health Department was a joint city/county operation and is within guidelines with regard to organizational size (2,000 to 1,900) and with regard to departmental size (151 to 90). The SMSA is within acceptable limits (962,600 to 607,400). The population served is the same as the SMSA, and the Oklahoma City/County Health Department does serve the core city of Oklahoma City. This health department is within reasonable geographic proximity (400 miles), and the hours worked are identical (2,080). The inclusion of the Oklahoma City/County Health Department in the CIR array is rational.

The organizational size of Colorado Springs is within limits (1,100 to 1,900), and the departmental size is acceptable (120 to 90). The SMSA is acceptable (349,100 to 607,400); it is only 475 miles from Douglas County; and the hours worked are identical.

Colorado Springs is not within the north central census region, and the actual population served is unknown, as is the question of whether or not this health department serves the core city of Colorado Springs. The number of matching jobs is

7 out of 13.

Considering the fact that the actual population served is unknown, the Association submits that this health department should not have been included within the CIR array for comparison purposes. We disagree. The CIR accurately determined that Colorado Springs was an acceptable comparable.

The CIR chose entities west and south as well as east of the County. Thus, some were not necessarily located in the north central census region.

We are bound by the fundamental:

> Of necessity, attempting to arrive at comparables requires granting some discretion to the CIR; and unless there is no substantial evidence upon which the CIR could have concluded that the counties used by the CIR did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the CIR.

AFSCME Local 2088 v. County of Douglas, 208 Neb. 511, 518, 304 N.W.2d 368, 373 (1981). See, also, *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984).

With regard to the second array, the County argues that the CIR erred in failing to include in its array the two local employers of Immanuel hospital and HNG Internorth. The County quotes at length from the case of *AFSCME Local 2088 v. County of Douglas, supra*, where we reversed an order of the CIR for rejecting Omaha-based employers in comparing employees to Douglas County Social Service employees. We stated at 208 Neb. at 520, 304 N.W.2d at 374:

> Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the CIR *unless* evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. Having failed to consider the salaries paid by the other Omaha-based facilities, the order of the CIR in this matter must be reversed.

(Emphasis supplied.)

The local array chosen consisted of: Omaha Public Power District; city of Omaha; State of Nebraska; Bishop Clarkson

hospital; University of Nebraska Medical Center; Creighton University; St. Joseph Hospital; Metropolitan Utilities District; and Lincoln/Lancaster County Health Department (city of Lincoln). The CIR was correct in formulating a local array for clerical/secretarial and custodial personnel, as "there are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists." *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 278-79, 343 N.W.2d 735, 739 (1984).

The three common survey points of the parties were the Omaha Public Power District, the city of Omaha, and the city of Lincoln. The Association is especially critical of the inclusion of St. Joseph Hospital in the array.

St. Joseph Hospital had three of four job matches. The employee size was 2,822 compared to 1,900 for the County. The number of hours worked was the same, 2,080 hours. The CIR's decision to include St. Joseph Hospital was supported by the evidence.

In response to the County's assignment of error regarding exclusion of Immanuel hospital and HNG Internorth, it is observed that both employers had only one of four job matches. Further, HNG Internorth's employee size was 1,373, the lowest of the proposed comparables; thus, they were not hiring employees to perform the same or similar skills. The CIR did not act arbitrarily or capriciously in attempting to arrive at comparable wages. Its decision is given due deference.

The County advances the argument that the CIR erred in "establishing a new comparability standard based on job matches." In its order, the CIR ruled:

> The more data available on the key classes surveyed, (job matches) the greater the indication of similarity of operation between the Respondent employer and the surveyed employer. *IBEW v. O.P.P.D.* at 559. Consequently, an employer offering only 2 or 3 job matches out of a potential 23 will not be considered as comparable as an employer with a larger number of job matches, *all other factors being equal.*

(Emphasis supplied.)

While it is true that the essence of the statutory test established by § 48-818 is one of work comparability, not employer comparability, the CIR has not, by its ruling, unfairly excluded employers with low numbers of job matches. The County has overlooked the last key clause emphasized above, "all other factors being equal." For practicality purposes, the CIR is entitled to work the above guideline into its structure of work comparability.

Another assignment of error on cross-appeal challenges the CIR's exclusion of the County's proposed array No. 1. This array proposed the organizations of Douglas County Hospital, Douglas County courthouse, and Douglas County civil service for comparison. The array examined 6 clerical/custodial positions and 19 fringe benefits or other conditions of employment. The CIR offered no explanation or justification for its exclusion of this array. Although a comparison of other employees of the same employer is clearly authorized, the essence of the test is work comparability, not employer comparability.

It is most difficult to second-guess the CIR's motive in arriving at a manageable array. The local array chosen was certainly adequate. We affirm the CIR's decision, as it does not have to compare every possible employer, and its decision should be given due deference.

The CIR did not order that the County incorporate a longevity plan into its present pay structure. The Association's expert, Dr. Otteman, testified in favor of such a plan, as the County does not currently have such a plan. The CIR's failure to institute a plan, based upon data of the Lincoln/Lancaster County Health Department, is assigned as the Association's third series of errors.

Clearly, the majority of compared counties and businesses did not have longevity pay plans. The County was thus comparable with the prevalent in this regard.

In its fourth assignment of error, the Association insists that the CIR erred in finding that the County had an established wage-step progression schedule and in failing to institute one. The CIR was correct in finding that the current progression

process at the County is comparable in length to the prevalent.

We have stated that the manner in which an individual moves from the minimum to the maximum salary rate of a job classification is a timing difference in the salary schedule, which must be adjusted to reach a comparability determination. *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984). This condition of employment is another way of defining experience in employment.

The Association contends that the testimony of Haller, John Taylor, and Dr. Otteman reflects that there are no salary steps for health department employees. The exhibits entitled "Salary Range Progression" list the timeframe between wage steps as "Not defined."

The CIR has set a minimum and maximum salary to be paid without providing a basis upon which employees can move within that range. A wage-step progression schedule is a condition of employment which the CIR has been given statutory authority to establish. See, also, *Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth*, 205 Neb. 567, 288 N.W.2d 729 (1980).

Although the evidence is not entirely clear, it appears as though the County has some sort of step schedule to which it adheres, for purposes of vacation leave for example. Haller did receive a pay scale from the department for his review. The County apparently utilizes the civil service system of classification, moving from the minimum to the maximum position of pay within approximately 10 years.

The Association is also critical of the manner in which the CIR arrived at a fringe benefit determination toward its overall compensation award. In this area, the CIR is to consider vacations, holidays, other excused time, and all benefits received, including insurance and pensions. § 48-818. The Association focuses on the alleged deficient pension contributions made by the County and the inclusion of local employers, especially St. Joseph Hospital, in the tables compiled by the CIR.

In its measurement, the CIR is required to offset possible unfavorable comparison between employers with other comparisons which are favorable when reaching its decision establishing wage rates. *Crete Education Assn. v. School Dist.*

of Crete, 193 Neb. 245, 226 N.W.2d 752 (1975). Table 30 of the CIR's findings and order included both the local and the national arrays. The Association points out that the local employers contribute substantially less for pensions. The County ranked last, along with St. Joseph Hospital, with an employer contribution of only 4 percent.

The Association is aware that the CIR has no general jurisdiction over contractual disputes and is unable to amend pension plans. See *Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth, supra*, but it is the Association's position, nonetheless, that the CIR should have provided for appropriate wage increases in lieu of an order altering pension contributions.

Tables 23 through 29 and table 31 of the CIR's order show that the County fringe benefits are comparable with the prevalent under the titles of longevity and seniority, progression (in general), health insurance, vacations, sick leave, holidays and holiday pay rates, travel expenses, and hours of work. The CIR properly considered all fringe benefits in arriving at an overall compensation package. See *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

With regard to pensions, the CIR found little evidence beyond the percentage of employer contribution with which it could evaluate the individual pension benefits received. The statistics for the other elements of a pension review were not thorough.

The CIR properly refrained from adjusting wages according to pension benefits received as an issue depending entirely upon speculation, surmise, or conjecture, which is never sufficient to sustain a judgment, and one so based would be set aside by this court. *Lincoln Fire Fighters Assn., supra.*

We reject the Association's contention that the CIR erred in prorating wages paid by employers. Stipulation No. 3 reflects the various wages and contract years utilized for comparison. Adjustments in wages may be made for differences in contract years.

Changes which had taken place from July 1, 1985, until the time of the hearing in February of 1986 were prorated to reflect those changes that would have taken place during the year. For

example, if a wage raise was given in January of 1986 of 6 percent, the figures were updated by 3 percent. This situation involved only four employers selected for the national array.

Under this theory, all wage increases are essentially for the prior year's work. The Association claims that employers who had given a wage increase prior to the contract year in question should have their wage rates adjusted too, so as not to skew the prevalent rate downward. The CIR was not required to impute an increase to the wage rate of an employer whose contract year preceded that of the County.

The fifth assignment of error challenges the CIR's action in ordering certain wage decreases. On cross-appeal, the date of the adjustment is also challenged. It is clearly within the authority of the CIR to order a reduction of wages. This is so whether or not lowering wages was an issue at the bargaining table, because § 48-818 allows for a wage decrease: "[The CIR] *shall establish rates of pay* and conditions of employment *which are comparable to the prevalent wage rates paid . . . .*" (Emphasis supplied.)

The County urges that the CIR should have ordered more wage decreases where it found "anomalies" to exist. The CIR removed certain individuals (six) from any salary adjustment because their titles had been changed from Environmental Health Scientist III to Environmental Health Scientist II. Despite the reclassification, job duties and responsibilities remained the same. Due to this unique circumstance, the salaries of these six highest paid individuals properly remained the same.

A similar situation arose with an individual who was reclassified to a Laboratory Scientist II position from a prior Laboratory Scientist III position. This individual's salary was again properly removed from the wage range.

According to the testimony before the CIR, the individuals in the former Class III had performed the same duties as those in Class II. The promotion to Class III has simply been a way to better compensate some. Salaries of health department personnel had been relatively low, so the third classification was a way of giving some a raise. The CIR must have trusted that these persons' previous wage increases were deserved and

left them undisturbed due to extenuating circumstances upon reclassification.

On the same subject, the CIR did not determine that the County improperly eliminated or consolidated these job classifications. The Association assigns this as error No. 7. In the secretarial positions, a large number of the incumbents were placed in the job classification entitled "Clerk Typist II," notwithstanding the fact that their salary and job duties and responsibilities were greater than the incumbents in the Clerk Typist III position.

> The actions of the County in unilaterally modifying the collective bargaining agreement in existence between the parties without conducting negotiations with the Association is presently at issue in the District Court of Douglas County, Nebraska, in an action captioned, Douglas County Health Department Employees Association, Plaintiff vs. County of Douglas, Defendant and indexed at Docket 849, Page 735.

Brief for appellant at 37.

The CIR rightly refused to enter into the realm of management prerogative and review the reassignment of individuals within certain job classifications or order wages based upon both groups of job classifications.

In *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 14-15, 277 N.W.2d 529, 536 (1979), this court stated:

> The adoption of sections 48-801 to 48-838, R.R.S. 1943, was not intended to in any way remove the lawful responsibility or the proper prerogative of public employers in the exercise of their recognized management rights, or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the CIR in resolving industrial disputes as prescribed by the statutes.
>
> In a similar situation involving a school district, we attempted in some small measure to point out that *there are certain areas under the Nebraska public sector laws which are "rights of management" over which no controversy can be created nor any authority vested in the*

> *CIR*. In School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752, at p. 784, we said, "Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed. . . ."
>
> . . . [N]ot all matters about which the public employer and its employees disagree constitute an industrial dispute over which the CIR obtains jurisdiction.

(Emphasis supplied.)

The wage reduction order that was issued was not retroactive, as it was to take effect on July 10, 1986. The increase, however, was retroactive, taking effect at the start of the contract year in dispute. A retroactive wage increase is within the authority of the CIR.

The CIR did not act arbitrarily in failing to order a retroactive wage decrease, especially in light of difficult implementation and policy questions. The County's sixth assignment of error on cross-appeal is meritless. Also, the employees' failure to receive a 5-percent across-the-board increase tends to buttress the CIR's failure to make the wage decrease order retroactive. However, the 5-percent increase is not in issue.

The Association's sixth assignment of error states that the CIR erred in not determining that the County's action in not instituting an overall 5-percent wage increase given to all other County employees was improper. The Association submits that the County openly discriminated against its employees for exercising their right to come before the CIR. According to Daniel Worthing, the employees did not receive an overall 5-percent wage increase because they had filed this particular action.

The Association cites *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), for the proposition that a reduction of wages was inappropriate in light

of the withholding of the 5-percent wage increase by the County. The issue of the 5-percent wage increase was raised in the Association's second cause of action. Only the first cause of action was addressed by the CIR and is properly before this court. This is admitted in the appellant's brief. Thus, the issue is not addressed here and is to be tried separately.

In its fifth assignment of error on cross-appeal, the County alleges that the CIR erred in failing to consider economic factors in selecting an "out-state" array. We have held that in determining prevalent wage rates for comparable services in reasonably similar labor markets, the CIR is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates. *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates.

The alleged economic dissimilarities are higher degrees of state unionization and county manufacturing. These have a tendency to increase wage levels in a particular area, according to the County's expert, Dr. Sherman. He testified that those states he identified as having higher degrees of manufacturing and unionization should be excluded from the Association's proposed array. The states which Dr. Sherman would have excluded from which employers were eventually chosen for the CIR's nonlocal array were Wisconsin and Illinois.

On cross-examination, however, it was elicited from Dr. Sherman that no discernible cause and effect could be shown between higher degrees of unionization and manufacturing and salaries paid to health department employees included in the arrays of the parties. The County did not meet its burden of proof on this point.

The County charges that the CIR erred in the preliminary matter of failing to dismiss the Association's petition for failure to obtain proper service of process. The CIR was correct in finding that jurisdiction is invoked when a petition is filed with it, not when service of process is perfected. Neb. Rev. Stat.

§ 48-811 (Reissue 1984) provides for the filing of a petition with the CIR invoking its jurisdiction. Furthermore, Neb. Rev. Stat. § 48-813(1) (Reissue 1984) provides that once the jurisdiction of the CIR is invoked, service may be had upon the adverse party. We hold that the CIR was sufficiently vested with jurisdiction when the Association filed its petition.

The second assignment of error on cross-appeal involves the related issue of service of interrogatories. The County was served with interrogatories when the petition was properly served with a supplemental proof of service upon the county clerk on October 23, 1985. The CIR ruled that its rule 21A would not preclude discovery in this case, but was meant to apply at the time a petition is properly filed with the county clerk. Rule 21A states that interrogatories shall be served at the time the petition is filed. The CIR's overruling of the County's oral objection is consistent with its earlier ruling regarding service of process.

The third challenge on cross-appeal is also without merit, as the CIR properly sustained the Association's objection to the County's filing of a counterclaim beyond the time period prescribed by the rules of the CIR. The answer in this case was filed on October 21, 1985, and the amended answer on November 6. The counterclaim was filed on February 4, 1986. This filing was in violation of rule 6 of the CIR, which states in part that the only responsive pleading that "is permitted shall be an answer in which the responding pleader *shall* assert every defense, objection, and claim . . . ." (Emphasis supplied.)

The CIR's overruling of the County's motion to limit evidence is the subject of the County's fourth assignment of error. The County's written brief in support of the motion is not before this court. The evidence in question consists of the Association's exhibits J-1 through J-4 on job class series progression. The exhibits listed job duties as well as salaries for two job titles in the various comparable regions. The exhibits were relevant, as the Association has requested the CIR to resolve "[a]rrangements of classifications within [a] single job family," as reflected in the report of pretrial conference.

The exhibits did not affect a management prerogative or right delineated in *University Police Officers Union v.*

University of Nebraska, 203 Neb. 4, 277 N.W.2d 529 (1979). The CIR did not abuse its discretion in receiving the evidence.

We conclude there was sufficient evidence for the CIR to find that wages received by employees of the Douglas County Health Department were not comparable to prevalent wage rates. In selecting the employers to be used for comparison, the CIR considered relevant factors and did not act arbitrarily or capriciously in using the communities it did in fact use. The method of selection employed was in accord with the requirements of § 48-818. See *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980). All assignments of error being without merit, the CIR's order is affirmed.

AFFIRMED.

ARTHUR J. AND DIANE K. ANDERSON, APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT.

426 N.W.2d 518

Filed July 29, 1988. No. 86-904.

1. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. The traveler must look, where by looking he or she could see, and listen, where by listening he or she could hear, and if the traveler fails without a reasonable excuse to exercise such precautions, then the traveler is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train.
2. _____: _____: _____. When a motorist approaches a railroad crossing, with which the motorist is acquainted or conversant but for which the motorist's view is restricted or obstructed, the motorist has the duty to look and listen at a time and place where looking and listening will be effective to prevent an accident, and failure to observe this rule, without reasonable excuse for noncompliance, may be negligence.
3. _____: _____: _____. At a railroad crossing obstructed to an approaching motorist's view, the approaching motorist has no absolute duty to stop before traveling on the crossing, but such duty to stop exists where a reasonably prudent person in the exercise of ordinary care would have considered a stop necessary under the circumstances.

4. **Jury Instructions.** Notwithstanding absence of a request for a specific instruction, a trial court must instruct a jury on material or relevant issues presented by the pleadings and supported by the evidence.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Kay & Kay for appellant.

Graten D. Beavers and Dirk V. Block, of Knapp, Mues, Beavers & Luther, for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and THOMPSON and SPRAGUE, D. JJ.

SHANAHAN, J.

Union Pacific Railroad Company appeals from a judgment on the verdict for Arthur J. and Diane K. Anderson as the result of a truck-train collision at a public crossing. Andersons alleged that Union Pacific negligently created and maintained a "dangerous and hazardous" railroad crossing, which proximately caused damage to Andersons' semi when a Union Pacific freight train collided with the tractor and trailer. Union Pacific raised the affirmative defense of contributory negligence by the semi's driver, who was Andersons' employee.

In all but one of the errors assigned, Union Pacific claims that, as a matter of law, Andersons' driver was contributorily negligent in a degree which barred recovery and which necessitated a summary judgment, directed verdict at conclusion of all the evidence, judgment notwithstanding the verdict, or new trial. In its final assignment of error, Union Pacific contends that the jury should have been instructed on the truckdriver's failure to maintain reasonable control over the semi, an element of the alleged contributory negligence. We affirm.

APPELLATE REVIEW; NEGLIGENCE CASES

"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 on an issue are such that reasonable minds can draw but one conclusion from the evidence. *Rahmig v. Mosley Machinery Co., supra.* In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question. *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988). See, also, *Rahmig v. Mosley Machinery Co., supra.*

> [I]n a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. [Citations omitted.] If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.

Rahmig v. Mosley Machinery Co., supra at 451, 412 N.W.2d at 75.

> To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances. . . .
>
> . . . .
>
> 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.

Lynn v. Metropolitan Utilities Dist., 225 Neb. 121, 126-27, 403 N.W.2d 335, 339 (1987). See, also, *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988); *Rahmig v. Mosley Machinery Co., supra.*

CONDITIONS AT THE CROSSING

Surrounded by industrial facilities which generate high levels of noise, Union Pacific's crossing near Darr, Nebraska,

involves a two-lane gravel county road, which runs north and south over three sets of east-west tracks. The length of the crossing is approximately 45 feet. A main line track runs parallel with and on each side of a center siding track. In traversing the crossing, a northbound motorist crosses the eastbound main line, the center siding track, which usually contained empty railroad cars, and, finally, the westbound main line. The main lines are 14 feet from the center siding track. Standard crossbuck signs at the south and north edges of the railroad right-of-way inform approaching motorists that there are three sets of tracks crossing the public road. Beneath the crossbuck are alternating red lights, flashers which are supposed to automatically warn motorists about railroad traffic. The flasher-signals, however, for some time had been falsely indicating the presence of an approaching train, when actually no train was approaching. Beginning in the late 1970s, the signal's alternating lights would flash continuously for hours at a time, notwithstanding the absence of any train or railroad car on the tracks. Some of the local folks had notified Union Pacific about the malfunctioning crossing flashers, but the railroad claimed it had no knowledge of the signals' false indication and, therefore, never rectified the deceptive signals. Although employees at a nearby alfalfa mill verified that the signals were malfunctioning with false indications 2 weeks before the accident, Union Pacific steadfastly maintained that the crossing flashers were properly working 4 months before the collision. Several witnesses testified that they would ignore the flashing warning lights at the crossing, taking for granted that the warnings were false, and looked for trains no matter what the signals were indicating.

On the center siding at a point 218 feet east of the crossing, Union Pacific parked a string of 17 empty hopper cars, each with an approximate length of 55 feet, for a combined distance of around 935 feet from the first hopper to the last at the east end of the string of cars. Although Union Pacific had been repeatedly requested to take away the empty cars, the railroad did not remove the hoppers before the accident. West of the crossing, Union Pacific had also placed a number of hopper cars on the center siding.

Ken Zimmerman, manager of the alfalfa mill near the crossing, testified that one could not see a train on the westbound Union Pacific main line when hopper cars were on the center siding, obstructing a northbound motorist's view to the east of the crossing. According to Zimmerman, railroad traffic on the westbound main line would "blend in" with the stationary railroad cars on the center siding. An engine's whistle could be faintly heard while a westbound train was behind the railroad cars on the siding. As characterized by Zimmerman, on account of the obstructed view from the railroad cars standing on the siding, the only way a motorist "could pass safely" would require a motorist to stop on the crossing, get out of the vehicle, and go to a point where the motorist could look down the westbound main line to assure there was no approaching traffic. Union Pacific acknowledged that empty railroad cars were not supposed to be parked on a siding too close to a grade crossing.

THE COLLISION

Weather conditions were not a factor in the accident which occurred on February 9, 1984. Ronald R. McCully, Andersons' employee, was driving the Andersons' semi north on the road toward the crossing and did not recall whether the flasher-signal was operating at the time. Having used this particular crossing in his route during the past, McCully had previously observed that the warning signals continually flashed even when no train was approaching the crossing. McCully did not know which tracks were main line or siding. Somewhere around 6 feet south of the flasher for northbound vehicles, McCully "looked to the right or east to see if there was any trains coming . . . started across the tracks and looked across to make sure there was no trains coming." Without stopping, McCully passed the south flasher and again looked for approaching railroad traffic, but saw only the hopper cars on the center siding east of the crossing. At 7 miles per hour, the semi moved onto the tracks. As the semi was crossing the eastbound main line, McCully noticed an approaching southbound truck at the north edge of the crossing. Having determined that no railroad traffic was in the area, McCully began watching the approaching southbound truck. After the Anderson semi had crossed the

eastbound main line, McCully "heard the whistle," and "At that time I knew there was a train coming. I stepped on the accelerator, looked in my right rear-view mirror and seen the train hit the trailer." In McCully's words, it was only "a second or two" between the time he heard the engine's whistle and the impact of the collision. As McCully explained, after he had looked for the second time while traversing the crossing, McCully no longer looked for trains because "I figured the tracks were clear and that alfalfa truck was coming. I was concerned what he [the driver of the approaching truck] was going to do."

The westbound Union Pacific freight consisted of 126 cars and 6 diesel locomotive units. The first unit, where the engineer was located, had a yellow flashing light rotating atop the cab and had its dual headlights operating at the time of the accident. Therefore, at the time of the collision, the engine's lights were on, its bell was ringing, and its whistle was sounding. The engineer first noticed the truck on the crossing when the engine had cleared the westernmost hopper on the center siding. Union Pacific admitted that the engineer first noticed the truck when the train was 50 to 100 feet from the crossing. The head brakeman, located in the engine's cab, saw the truck when the train was 100 to 200 feet from the crossing. Union Pacific claimed that its train was moving at 40 to 50 miles per hour, but no tachogram substantiates that speed, because Union Pacific was "unable to locate [the] speed tape." As soon as he saw the semi, the engineer grabbed the brake valve and "went into emergency," but was unable to avoid the collision which occurred "almost immediately" after the engineer first observed the semi. As a result of the impact, the Anderson rig was shoved approximately 600 feet westward, destroying the semi. An employee of the alfalfa mill testified that he was driving his westbound vehicle on U.S. Highway 30, parallel with the Union Pacific main line, and noticed that the freight train was traveling 65 miles per hour as it approached the crossing.

ANDERSONS' EXPERT WITNESS

Andersons' expert witness, Dr. William Berg, a professor of civil and environmental engineering, examined and evaluated

the grade crossing where the collision occurred. Much of Dr. Berg's testimony related to the interwoven issues of the railroad's negligence and the contributory negligence of McCully. Dr. Berg concluded that the crossing was dangerous because Union Pacific failed to satisfy minimum safety standards in constructing and maintaining the crossing. Automatic crossing gates should have been installed, on account of the multiple main line, a motorist's obstruction of view resulting from stationary railroad cars on the center siding, and high-speed train operation, combined with the multiple tracks at the crossing and the obstructed view for northbound motorists. The setting at the crossing resulted in the likelihood of a "hidden train" moving behind the stationary hoppers on the center siding. Automatic crossing gates would have kept vehicular traffic off the crossing until an approaching train had passed over the crossing.

The false warnings from the malfunctioning signal-flashers caused a "credibility problem" for motorists. Knowing that the flashers had continually malfunctioned by giving false indications of train traffic, motorists would disregard the signals and proceed to a point on the crossing where they might visually verify the presence of approaching railroad traffic. The situation is dangerously compounded by the presence of standing railroad cars on the center siding. A driver must continue to move forward on the crossing to see around the stationary railroad cars before there is visual verification of an approaching train behind the hoppers on the siding. At the point of such verification, there will be inadequate time for the motorist's vehicle to clear the track on which the train is approaching.

Given the semi's speed of 7½ miles per hour, the train's speed of 46 miles per hour, and the driver's reaction time of 2½ seconds to stop the Anderson semi, Dr. Berg calculated that there was "no time available" for McCully to stop the semi in advance of the westbound main line, after McCully passed the center siding and could have seen the approaching westbound train: "The last point that you would have been able to apply the brakes and stop was also the very first point in which that train could have been viewed if you were looking directly at it."

While only the head end of an approaching westbound freight was hidden by the hoppers on the center siding, the remainder of the train, although visible beyond the furthest hopper on the east, would have been indiscernible as a separate and moving train, or, as explained by Dr. Berg:

> [B]ecause at that distance [between Andersons' semi and the furthest hopper] everything blends together. In other words, in perspective, this train, the farther it is away, gets smaller and smaller and smaller. And if you were to see another approaching train or if there in fact was another approaching train, it would be very difficult to determine whether it was simply a part of this train that's on a center track or whether it is another train approaching. So, no, it would be unreasonable to expect a motorist to be able to make that judgment reliably.

In summary, Dr. Berg testified that the principal causal factors of the accident were (1) lack of a credible warning device and (2) sight obstruction caused by the stationary hoppers on the center siding. Under the circumstances, Dr. Berg concluded that McCully's conduct in operating the semi was not the cause of the accident inasmuch as the obstruction on the center siding prevented a motorist's perception of the threat from an approaching train on the westbound main line.

At the conclusion of all evidence, Union Pacific requested a directed verdict against Andersons, which the district court denied. The transcript does not contain Union Pacific's requested instructions. However, at the conference on instructions, Union Pacific requested that the jury be instructed "on the failure of the plaintiffs' driver to maintain a semi-tractor trailer under reasonable control," to which the district court responded: "I don't find any evidence of that, so I won't use it." After the verdict for Andersons, Union Pacific requested judgment notwithstanding the verdict or a new trial, both of which were denied by the court. As previously indicated concerning the assignments of error, Union Pacific does not question the jury's finding that the railroad was negligent; rather, Union Pacific questions only the effect of McCully's conduct as contributory negligence and the court's refusal to give an instruction concerning lack of reasonable control in the

operation of Andersons' semi.

CROSSING A CROSSING

Neb. Rev. Stat. § 39-655(1) (Reissue 1984) provides in pertinent part:

> Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances set forth in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad and shall not proceed until he can do so safely. The requirements of this subsection shall apply when:
>
> (a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;
>
> . . . .
>
> (c) A railroad train approaching within approximately one quarter mile of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard; or
>
> (d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

Regarding the rules generally applicable to motorists approaching a railroad grade crossing, this court has consistently stated:

> " 'It is a well-established rule in Nebraska that a traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. . . .' "

Whitaker v. Burlington Northern, Inc., 218 Neb. 90, 94-95, 352 N.W.2d 589, 593 (1984). See, also, *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 306 N.W.2d 902 (1981); *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983); *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 279

N.W.2d 369 (1979); *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975).

When a motorist approaches a railroad crossing, with which the motorist is acquainted or conversant but for which the motorist's view is restricted or obstructed, the motorist has the duty to look and listen at a time and place where looking and listening will be effective to prevent an accident, and failure to observe this rule, without reasonable excuse for noncompliance, may be negligence. See, *Neusbaum v. Chicago & N. W. Ry. Co.*, 162 Neb. 754, 77 N.W.2d 299 (1956); *McQuin v. Missouri P. R. Corporation*, 122 Neb. 423, 240 N.W. 515 (1932).

In *Bertrand v. Missouri Pacific Railroad Company*, 160 So. 2d 19, 21-22 (La. App. 1964), the court characterized the "dangerous trap doctrine" applicable to railroad grade crossings:

> "[I]f a crossing is unusually dangerous because the view of the motorist is so obstructed as to require that he place himself in a position of peril dangerously near the tracks, before he has a view of the oncoming train, the railroad company will be held liable, unless it can show that it took unusual precautions, such as reducing the speed of the train, or increasing its warnings and providing signaling devices, etc. The theory of this doctrine is that the railroad may not rely upon the duty of the motorist to stop and look, if the physical circumstances are such that stopping and looking will do the motorist no good."

At a railroad crossing obstructed to an approaching motorist's view, the approaching motorist has no absolute duty to stop before traveling on the crossing, but such duty to stop exists where a reasonably prudent person in the exercise of ordinary care would have considered a stop necessary under the circumstances. See *Pennington v. Southern Pac. Co.*, 146 Cal. App. 2d 605, 304 P.2d 22 (1956). A rule similar to the immediately preceding was applied in *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33, 124 N.W. 932 (1910), a wrongful death action for a decedent who was run over and killed by Missouri Pacific's steam engine moving on a track obstructed by freight cars near the crossing on which the plaintiff's decedent, a

9-year-old girl, was walking. Background noise "drowned the noise" from defendant's engine, including the sound of the ringing bell and blowing whistle, and other traffic in the vicinity distracted the little girl on the crossing. 86 Neb. at 39, 124 N.W. at 934. A plaintiff's verdict was upheld against the railroad's appeal, and this court stated:

> The rule in this state is not that there is an absolute obligation upon a person crossing a railway track to stop, look and listen before attempting to cross, but, as laid down in *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, the duty of the traveler upon a public highway approaching a railroad crossing is to exercise ordinary care. If he goes "upon a railroad crossing without first listening and looking for the approach of a train, *without a reasonable excuse therefor* . . . and if such failure to look and listen contributes to the party's injury, he cannot recover." The qualifying words, "*without a reasonable excuse therefor*", are of great significance in this connection. If, as in this case, the view of approaching trains is obstructed by freight cars standing near the crossing, if the traveler's attention is distracted by moving trains upon other tracks, or by other sounds or sights, if no warning signals are given or lookouts stationed, it is a question for the jury as to whether or not the traveler exercised ordinary care.

86 Neb. at 44, 124 N.W. at 936.

We do appreciate the predicament of the crew, who were charged with the responsibility of moving a mile-long freight train with dispatch and who were confronted with the stationary screen of railroad cars near the crossing, a trap set not by the train crew but by their employer. By the same token, we appreciate the problem facing a northbound motorist using the crossing, who might have to consider stopping in advance of the westbound main line, leave his vehicle on the crossing and perhaps blocking the eastbound main line, move to a point where the motorist could peer around the screen of cars parked on the center siding, and, on ascertaining there was no approaching westbound railroad traffic, return to his vehicle to continue the trek across the tracks, if his vehicle had not been hit by an eastbound train. Under the circumstances, the only

absolute rule to prevent a train-vehicle accident on the crossing in question would be: When a train and a vehicle simultaneously approach an obstructed crossing, both shall come to a complete stop, and neither shall depart until the other has gone. That rule, however, is somewhat impractical.

Union Pacific chides McCully's conduct, states that McCully violated § 39-655(1), asserts that "unreliability of the crossing signals and presence of railroad cars on the center siding track required Mr. McCully to exercise greater care" (brief for appellant at 25), and concludes that, as a matter of law, McCully was contributorily negligent, barring Andersons' recovery, because McCully

> was aware of the presence of the cars on the center siding track east of the crossing as he approached the crossing. Mr. McCully testified that while he was proceeding across the crossing his attention was focused on a truck approaching the crossing from the south [sic]. Neither the approaching truck nor the cars on the center siding track excused Mr. McCully from his duty to look, listen and stop for an approaching train.

Brief for appellant at 33.

As in the case of any other statute, applicability of § 39-655(1) depends on the particular factual setting. McCully did look twice to assure himself that no train was approaching and concurrently saw the southbound truck as it prepared to use the crossing. The parked railroad cars on the center siding may have caused a twofold effect in production of the accident. First, the stationary cars caused an optical distortion of approaching westbound trains. Second, the cars on the siding muted the sound of the engine's ringing bell and blowing whistle as well as prevented a northbound motorist's seeing the engine's lights. Acuity of a northbound motorist's hearing may have been dulled by the industrial din at the crossing. Of no small import is the continually malfunctioning flasher-signal with its false warning, a lighted Lorelei luring motorists onto the crossing where they had to make a necessarily belated determination whether train traffic was approaching. To obtain the continuous panoramic view of the crossing, as Union Pacific would require, a motorist must look to the east for an

approaching westbound train, then ahead for oncoming vehicular traffic at or on the crossing, and, finally, to the west for an eastbound train. Upon completion of that sequence, the motorist would have to immediately reverse the cycle or repeat the sequence, all within a millisecond or less for oscillation of the motorist's head, to assure observation of any possible or probable danger in every sector of the crossing. The more realistic approach to a situation such as that in the present case is the rule applied in *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33, 124 N.W. 932 (1910), namely, if there is a reasonable excuse for not seeing the approaching train, such as an obstruction preventing one from seeing the train or a distraction diverting the attention, the question whether conduct in traversing a railroad crossing is reasonable is a matter for the jury. In view of the variables and conditions inherent in the setting for the crossing accident in this case, we cannot conclude that McCully's conduct was unreasonable and, as a matter of law, was contributory negligence as a bar to Andersons' recovery. Under the circumstances, whether McCully's conduct was reasonable, that is, whether he exercised ordinary care and prudence in operating Andersons' semi, was a jury question. Since McCully's conduct presented a jury question, Union Pacific's claims of error regarding the district court's denying a summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial are without merit.

REJECTED INSTRUCTION

Although Union Pacific's requested instruction does not physically appear in the record, nevertheless, we treat Union Pacific's assignment of error as tantamount to a claim that the district court should have given an instruction on McCully's alleged lack of reasonable control in operating the Andersons' semi. Notwithstanding absence of a request for a specific instruction, a trial court must instruct a jury on material or relevant issues presented by the pleadings and supported by the evidence. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985); *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984); *Juniata Feedyards v. Nuss*, 216 Neb. 29, 342 N.W.2d 1 (1983). As the district court quite correctly noted, there is no evidence that McCully failed to control the semi; hence, the

court properly refused to instruct on lack of control.

AFFIRMED.

ADAMS STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. NAVISTAR FINANCIAL CORPORATION, FORMERLY KNOWN AS INTERNATIONAL HARVESTER CREDIT CORPORATION, A DELAWARE CORPORATION, APPELLANT.

426 N.W.2d 525

Filed July 29, 1988. No. 86-982.

1. **Uniform Commercial Code: Security Interests: Proof.** Where a party is proceeding against a secured party to recover its loss allegedly caused by the secured party's failure to dispose of collateral in a commercially reasonable manner under the Uniform Commercial Code, the burden of proof as to commercial reasonableness is on the party seeking to recover a loss.
2. **Guaranty: Claims.** Generally, there can be no claim under a guaranty agreement until the primary obligor is in default.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded with directions.

Michael G. Helms, of Schmid, Mooney & Frederick, P.C., for appellant.

James G. Sharp, of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

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

WHITE, J.

This is an action brought by plaintiff-appellee, Adams State Bank (bank), against defendant-appellant, Navistar Financial Corporation (Navistar), to recover damages in the amount of $86,676.33 alleged to have been sustained as a result of Navistar's failure to dispose of certain collateral in a commercially reasonable manner. See Neb. U.C.C. §§ 9-504(1) and 9-507(1) (Reissue 1980). The parties stipulated that Navistar (then known as International Harvester Credit

Corporation) held a perfected first lien and the bank held a perfected second lien upon certain assets owned by Adams Implement, Inc.

From 1982 until late 1984, Dennis Hestermann operated Adams Implement, Inc., an International Harvester dealership in Adams, Nebraska. In early November 1984, Hestermann closed the business and voluntarily turned over possession of the new and used equipment and parts inventory to the bank. The bank then turned the property over to Navistar on November 20, 1984.

International Harvester Company (IHC) agreed to buy the new equipment and parts inventory from Navistar pursuant to the sales and service agreement between IHC and Adams Implement. IHC paid dealer cost for those items, less any shortages for missing parts. Navistar received $1,794,573.72 for the new equipment and $178,542.55 for the parts inventory. The used equipment was sold both by private sale to other dealers and by public auction, for a total of $178,400. Navistar also collected $41,270.71 from accounts receivable which had been assigned to it by Adams Implement. After the disposition of all of the collateral, Adams Implement was still indebted to Navistar in the amount of $52,746.96.

Max Gramann, vice president of the bank, was the sole witness to testify for the bank. Gramann was experienced in the farm implement business, having been a part owner of Adams Implement before selling it to Hestermann. Based upon an inspection of the property and certain documents, he valued the new equipment at $2,140,817, the used equipment at $314,857, and the parts inventory at $255,598. The bank did not contest the amount Navistar received for accounts receivable. At the time of trial Adams Implement owed the bank $86,676.33.

At trial the bank did not assert that the amounts actually received for the various property were commercially unreasonable; rather, the bank complained that Navistar did not exercise proper control over the property during the time when it was in possession. The bank contends that this caused shortages which left a substantial amount of property unaccounted for. According to the bank, if all of the property had been accounted for, Navistar would have received a surplus

large enough to cover Adams Implement's debt with the bank. The jury apparently agreed, awarding the bank the amount prayed for in its amended petition.

Navistar attempted to introduce evidence that Adams Implement had agreed to guarantee certain retail financing provided by Navistar to customers of Adams Implement. This evidence was excluded from consideration by the jury.

On appeal, Navistar contends that the district court erred (1) in denying Navistar's motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict; and (2) in refusing to permit Navistar to introduce evidence with respect to the amount of financing guaranteed by Adams Implement and secured by the collateral.

The burden of proof as to the commercial reasonableness of a sale is placed upon the secured party conducting the sale where the secured party is seeking a deficiency judgment. *First Nat. Bank of Bellevue v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972); §§ 9-504(1) and 9-507. However, where, as here, a party is proceeding against the secured party to recover its loss caused by the secured party's failure to dispose of collateral in a commercially reasonable manner under the Uniform Commercial Code, the burden of proof as to commercial reasonableness is on the party seeking to recover such a loss. *First Nat. Bank & Tr. Co. of Enid v. Holston*, 559 P.2d 440 (Okla. 1976). See, also, *Transport Equipment Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. 1975); *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728 (1973).

In this case it was necessary for the bank to prove that not all of the property which it turned over to Navistar was accounted for in the subsequent sales to IHC, other dealers, and auction bidders. Gramann testified for the bank that the value of the new equipment at the time the bank was in possession was $2,140,817. Dale Ball, district manager for Navistar, admitted that there were parts missing from the new equipment, for which IHC did not give credit. Navistar asserts, however, that the bank failed to prove that these shortages were attributable to Navistar. We agree. On cross-examination, Gramann testified concerning the procedure he followed in valuing the new equipment:

Q. Just one other thing I think that I need to clear up. When you inspected the new machines and testified as to the value of those, did you inspect each machine to determine whether or not it was short any equipment?

A. Yes.

Q. Okay. And did you determine whether or not there were shortages?

A. I just ---

Q. Were there?

A. What I did was count the machine that was there. I didn't look for shortages.

It is apparent that the shortages could have existed at the time the new equipment was turned over to the bank and that the bank failed to prove otherwise. There is simply no evidence that Navistar was responsible for the shortages on the new equipment.

Gramann testified that the value of the used equipment at the time the bank turned it over to Navistar was $314,857. Upon cross-examination, however, Gramann admitted that his estimation was based in part on used equipment not owned by Adams Implement. Gramann's testimony concerning the value of the used equipment was meaningless, absent knowledge of how much of the used equipment was actually owned by Adams Implement. The bank failed to meet its burden of proof with respect to the used equipment.

Gramann's estimation of the value of the parts inventory was based upon a spot check of approximately 10 percent of the parts. Gramann testified that he did not find a significant number of parts missing, so he based the value of the parts on the amount shown on Adams Implement's computer accounting records, which was $255,598. Ball testified for Navistar that IHC gave credit for every part actually delivered and that there were no parts for which Navistar was not paid. Neither party introduced the records of parts inventory upon which it relied.

The bank's evidence that there were no parts shortages, together with the fact that Navistar received less than the amount the bank claimed was shown as due by the records, presented an issue for the jury to resolve.

Navistar's remaining assignment is that the district court erred in excluding from evidence the documents and testimony showing the nature and amount of guaranty agreements between Adams Implement and itself covering retail financing extended by Navistar to customers of Adams Implement. In its offer of proof Navistar asserted that Adams Implement guaranteed notes in the amount of $379,180.

Navistar contends that the amount of the notes guaranteed by Adams Implement should have been added to the calculation of indebtedness. We note that the code drafters did not attempt to define the word "indebtedness" used in § 9-504(2). It seems obvious, however, that an amount not yet due from the primary obligor should not be considered as an amount due and owing from the guarantor under this section. Generally, there can be no claim under a guaranty agreement until the primary obligor is in default. *Central Investment Co. v. Miles*, 56 Neb. 272, 76 N.W. 566 (1898). At most, Navistar may have a claim against Adams Implement for anticipatory breach of the guaranty agreements, assuming damages could be shown. Any other result would allow Navistar to collect twice on the guaranteed notes—once against the guarantor and once against the primary obligor. Navistar's second assignment is without merit.

As previously discussed, the bank failed to meet its burden of proof with respect to the new and used equipment, but successfully presented the issue of damages with respect to the parts inventory. We cannot assume from the record, however, that the jury found in favor of the bank with respect to each of the types of property. The jury could have rejected the bank's claim as to the parts inventory, but accepted the claims as to the new and used equipment, and still awarded the amount stated in the verdict. The judgment is therefore reversed and the cause remanded with directions to dismiss with respect to the new and used equipment, and reversed and remanded for a new trial with respect to the parts inventory.

REVERSED AND REMANDED WITH DIRECTIONS.

REPUBLICAN VALLEY BANK, A NEBRASKA BANKING CORPORATION, APPELLEE AND CROSS-APPELLANT, V. SECURITY STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE.

426 N.W.2d 529

Filed July 29, 1988. No. 86-987.

1. **Appeal and Error.** Where a law action is tried to the court without a jury, the findings of fact of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Banks and Banking: Debtors and Creditors: Notice.** When a bank has notice of a third party's interest in funds on deposit, the bank may not set off those funds against the antecedent debt of the depositor.
3. **Banks and Banking: Debtors and Creditors: Time.** A bank's right of setoff is governed by the time of the exercise of the right.
4. **Banks and Banking: Words and Phrases.** The statement "not transferable except on the bank's books" is simply another way of saying a certificate of deposit is not negotiable.
5. **Assignments: Contracts: Words and Phrases.** A nonnegotiable instrument is assignable, like any other contract right, even though the assignee could never be a holder in due course.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Margaret M. Manhart, of Sherwood Law Office, for appellant.

Bruce E. Sandahl, of Person, Dier & Person, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

FAHRNBRUCH, J.

Security State Bank (Security Bank) and Republican Valley Bank (Republican Bank) each claim the right to two certificates of deposit owned by Robert W. and Bonnie J. Fish. After a bench trial, the Furnas County district judge found that each bank was entitled to one certificate of deposit.

Security Bank appealed, claiming entitlement to both certificates of deposit. Republican Bank cross-appealed, also claiming entitlement to both certificates. We hold that Republican Bank is entitled to the proceeds from both

certificates of deposit.

Where a law action is tried to the court without a jury, the findings of fact of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Kramer v. Mid-Western Development, Inc., ante* p. 86, 425 N.W.2d 336 (1988); *Russell v. Board of Regents*, 228 Neb. 518, 423 N.W.2d 126 (1988); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988).

The Fishes purchased from Security Bank certificates of deposit No. 81122 on February 3, 1982, and No. 82183 on September 14, 1983. At that time, the Fishes were indebted to Security Bank in an amount greater than the total value of the two CDs. However, the record does not reflect that the CDs were ever pledged to Security Bank as collateral for the indebtedness.

On April 1, 1983, the Fishes assigned CD No. 81122 and, on September 16, 1983, CD No. 82183 to Republican Bank as security for a preexisting loan. Republican Bank took possession of both certificates of deposit.

The Fishes subsequently defaulted on their indebtedness at Security Bank, but that bank took no immediate action on the CDs. In July of 1985, Republican Bank sought to cash the two CDs at the request of a bank examiner. Security Bank informed Republican Bank that it intended to exercise its right of setoff against the CDs. This right was exercised on July 31, 1985.

The trial court found that Security Bank was entitled to CD No. 81122. It further found that Republican Bank was entitled to CD No. 82183 because that certificate did not have a box checked next to the phrase "not transferable except on the [bank's] books."

On appeal, Security Bank assigns as error the trial court's finding that an assignee of a certificate of deposit acquires a priority to the proceeds greater than the right of setoff of a depository bank. In its cross-appeal, Republican Bank assigns as error the trial court's finding that its interest in CD No. 81122 was inferior to the right of setoff claimed by Security Bank.

The question before this court is whether a bank may exercise its right of setoff with deposits which have been assigned by the depositor to a third party. This is a case of first impression in

Nebraska. Consequently, we look to other states for guidance.

Briefs for both parties contain arguments regarding applicability of Neb. U.C.C. art. 9 (Reissue 1980). Section 9-104 states, "This article does not apply . . . (i) to any right of set-off." Obviously, article 9 is not applicable to this case as far as setoffs are concerned.

The Texas Court of Civil Appeals was faced with a similar factual situation in *First Nat'l Bk. in Grand P. v. Lone Star Life Ins. Co.*, 524 S.W.2d 525 (Tex. Civ. App. 1975). T.H. Hamilton purchased a CD at First National, then assigned the CD to Lone Star under a security agreement. The bank had actual notice of Lone Star's interest in the CD. Hamilton defaulted on loans from the bank and from Lone Star. The bank attempted to offset Hamilton's loans against the CD, and Lone Star sued.

Lone Star argued that the rule announced in *National Indemnity Co. v. Spring Branch State Bank*, 162 Tex. 521, 348 S.W.2d 528 (1961), should apply. *National Indemnity* held that a bank may not set off a depositor's funds against the debt of the depositor when it knows that a third party has an interest in those funds. In *Lone Star*, the Texas Court of Civil Appeals noted that *National Indemnity* was decided before the adoption of the Uniform Commercial Code in Texas. In holding for Lone Star, the Texas appeals court applied article 9 of the Texas Uniform Commercial Code to the setoff. The court refused to permit the bank to set off the CD against Hamilton's debt, thereby affirming the decision of the trial court. The Texas Supreme Court refused the bank's writ of error and allowed the judgment to stand. However, it expressly rejected the intermediate court's finding that article 9 applied to setoffs, impliedly approving the *National Indemnity* rule. *1st Nat. Bk. of Gr. Prairie v. Lone Star L. Ins.*, 529 S.W.2d 67 (Tex. 1975).

In 1986, the U.S. Court of Appeals for the Fifth Circuit applied Texas law in another case with similar facts in *Citibank (New York State), N.A. v. Interfirst Bank*, 784 F.2d 619 (5th Cir. 1986). In *Citibank*, a small business, Country Junction, purchased a CD from Interfirst and then pledged it as security with Citibank. After Country Junction filed a chapter 11 petition for relief under the Bankruptcy Code, Interfirst set off the proceeds of the certificate against Country Junction's debt.

Later, Citibank presented the certificate to Interfirst and demanded payment, which was refused.

Citing *National Indemnity*, the U.S. Court of Appeals found that, under Texas law, "a bank cannot validly setoff funds which it knows or should know are held for the benefit of a third party or which belong to a third party." 784 F.2d at 621. The court noted the Texas Supreme Court's conclusion that article 9 did not govern in setoff cases. Instead, the above-quoted rule was applied, with a judgment in favor of Citibank. A similar rule has been followed in Wisconsin. *First Wis. Nat. Bank v. Midland Nat. Bank*, 76 Wis. 2d 662, 251 N.W.2d 829 (1977), held that plaintiff's security interest in funds represented by certificates of deposit precluded the defendant bank from exercising setoff against those funds. The Texas rule is logical and sensible. Accordingly, we adopt the rule and hold that, when a bank has notice of a third party's interest in funds on deposit, the bank may not set off those funds against the antecedent debt of the depositor.

In Nebraska, a bank's right of setoff is governed by the time of the exercise of the right. *Sherman County Bank v. Lonowski*, 205 Neb. 596, 289 N.W.2d 189 (1980). Therefore, the question becomes: Did Security Bank have notice of the Fishes' assignment to Republican Bank before it exercised its right of setoff?

Dwight L. Bash, executive vice president of Republican Bank, testified he called Security Bank sometime in July of 1985 to inquire about cashing the CDs. At that time he informed Security Bank vice president, Loraine M. Schoen, of the assignment and was told by her that Security Bank intended to exercise its right of setoff. Republican Bank also produced exhibit 5, a copy of a letter from Bash to Schoen, dated April 26, 1985, informing Schoen of the assignments.

Schoen testified that she was not certain when she spoke with Bash regarding the CDs, but believes it was after the bank had already set off the deposits. Schoen also did not remember receiving a copy of exhibit 5, but admitted that the letter could have been placed in the Fish file without her seeing it.

The trial judge found that before exercising its right of setoff, Security Bank had notice that the two CDs involved here

were assigned to Republican Bank. After reviewing the record, we cannot say the trial judge's finding was clearly wrong.

Since Security Bank had notice of Republican Bank's interest in the Fish CDs, it could not validly set off the proceeds of those CDs against the Fish antecedent debt. Accordingly, Republican Bank was entitled to both certificates of deposit. The trial court's judgment must be and is affirmed as to CD No. 82183.

In its cross-appeal, Republican Bank urges this court to reverse the trial court's judgment regarding CD No. 81122. The words "not transferable except on the [bank's] books" are printed next to a box on the face of each CD. The box on CD No. 81122 is checked; however, the box on CD No. 82183 is blank. The trial court found this difference in the certificates to be the controlling factor, awarding No. 81122 to Security Bank and No. 82183 to Republican Bank. We have concluded that this language on the face of the certificates is not relevant to the issues in this case.

In *In re Estate of Sheimo*, 261 Iowa 775, 156 N.W.2d 681 (1968), the Supreme Court of Iowa considered whether certificates of deposit found in a decedent's safety vault box belonged to the decedent's estate or to the payees named on the certificates. Each certificate included the words "transferable only on the books of this bank." The Iowa court held that this language meant only that the CDs were nonnegotiable instruments. We agree with the Iowa Supreme Court and find that the statement "not transferable except on the [bank's] books" is simply another way of saying the certificate is not negotiable.

The CDs at issue were clearly not negotiable. They do not meet the requirements of a negotiable instrument specified in Neb. U.C.C. § 3-104 (Reissue 1980). Also, the word "non-negotiable" appears in bold print on the face of each certificate. Whether the box on the front of each CD was checked, further indicating a nonnegotiable instrument, is irrelevant.

Even though nonnegotiable, the CDs were assignable to Republican Bank as collateral for the Fishes' loans. The certificates are instruments which may be transferred by delivery in the ordinary course of business. § 9-105. A

nonnegotiable instrument is assignable, like any other contract right, even though the assignee could never be a holder in due course. *First Nat'l Bk. in Grand P. v. Lone Star Life Ins. Co.*, 524 S.W.2d 525 (Tex. Civ. App. 1975). See, also, *Franke v. Third Natl. Bank & Trust Co.*, 31 Ohio App. 3d 189, 509 N.E.2d 955 (1986).

The rules announced in earlier portions of this opinion are equally applicable to both CDs. Republican Bank is entitled to the proceeds of CD No. 81122, and the trial court's judgment regarding that certificate of deposit is reversed. The cause is remanded for further proceedings in accordance with this opinion.

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

GARY LEE SMALL, APPELLANT, V. JUDY ANN SMALL, APPELLEE.
427 N.W.2d 42

Filed July 29, 1988. No. 87-015.

Divorce: Jurisdiction. A district court cannot acquire jurisdiction over dissolution of marriage proceedings unless one of the parties is a resident of the county in which the court is located at the time the original petition is filed.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed in part, and in part reversed and dismissed.

S. Caporale for appellant.

Mark J. Milone for appellee.

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

FAHRNBRUCH, J.

A major issue in this case is whether a district court has jurisdiction in a dissolution of marriage action if neither of the parties is a resident in the county where the court is located

when the petition is filed.

The Douglas County District Court found it did not have jurisdiction under those circumstances. We affirm the trial court's finding and the vacation of the default decree, reverse other findings, and direct that the case be dismissed.

Gary Lee Small filed a petition in the Douglas County District Court to dissolve the marriage between himself and his estranged wife, Judy Ann Small. Neither party was a resident of Douglas County at the time. However, Judy filed a voluntary appearance. On November 3, 1986, a default decree was entered dissolving the marriage, granting Gary custody of the parties' minor child, and distributing the couple's property. Judy was not present. Judy later filed a motion to vacate the decree and transfer the proceedings to a different district court. The Douglas County District Court, within the same term of court and within 6 months of when the default decree was entered, determined it lacked jurisdiction to try the case. The court, also finding that the distribution of property was grossly disproportionate, vacated the decree.

The November 3 default decree awarded Judy all items in her possession at that time. The evidence shows that this property was worth approximately $8,000. Gary was awarded custody of the couple's child, the family home, and all items in his possession. The value of the property awarded to Gary totaled approximately $100,000.

Gary appeals the trial court's rulings on Judy's motion to vacate, claiming that the trial court erred in finding it did not have jurisdiction to grant a dissolution of the marriage.

Judy left the family home, located in Sarpy County, Nebraska, in July of 1986. She initially moved to Cass County, and then to Otoe County, Nebraska. Gary remained in the family home with the couple's 8-year-old daughter. He continued to reside there throughout these proceedings.

The evidence shows that Judy often returned to the family home to visit and to collect personal items. She also called regularly, but never disclosed where she was living or how she could be reached.

On August 22, 1986, Gary filed his petition for dissolution of the marriage. He told Judy of the filing, and on one of her visits

to the home, she was presented with a voluntary appearance form prepared by Gary's attorney. Judy later signed the form and took it to her husband's attorney. She testified she asked to be informed of the time of trial, but was not notified.

Judy continued to call the home and visit her daughter. However, she did not give an address or telephone number where she could be reached. She did, at some point, contact an attorney.

Subsequently, Judy's attorney contacted Gary's attorney requesting information on the status of the divorce action. He was informed of the default decree. A copy of the decree was mailed to Judy's attorney. On November 13, 1986, Judy filed a motion to vacate the decree and transfer the proceedings to a different court.

Neb. Rev. Stat. § 42-348 (Reissue 1984) provides that dissolution of marriage proceedings "shall be brought in the district court of the county in which one of the parties resides." The question presented for this court is whether the requirements of § 42-348 are jurisdictional or pertain to venue. This issue has previously been decided by this court.

In *Fletcher v. Fletcher*, 182 Neb. 549, 156 N.W.2d 1 (1968), the plaintiff left the marital home in Hall County, Nebraska, and moved, with her children, to Brown County, Nebraska. The same day, she filed a petition for divorce in the Brown County District Court. That court's jurisdiction was questioned by the defendant. The trial court found that the plaintiff resided in Brown County and that it, therefore, had jurisdiction to hear the case.

On appeal, this court considered Neb. Rev. Stat. § 42-301 (Reissue 1968), which stated: "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on application by the petition of the aggrieved party . . . ." Relying on past case law, the court held that "[t]he residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court." 182 Neb. at 552, 156 N.W.2d at 4.

On rehearing, this court held in *Aldrich v. Steen*, 71 Neb. 57, 58, 100 N.W. 311, 312 (1904), that "the district court has no jurisdiction in divorce cases unless one of the parties is a

resident of the county." At that time, in 1904, the statute, Comp. Stat. ch. 25, § 6 (1903), provided: "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on the application by the petition of the aggrieved party in either of the following cases: . . . ."

Section 42-301 was repealed in 1972 by the legislative enactment of no-fault divorce. In comparing the repealed ch. 25, § 6, statute, § 42-301, and the current § 42-348, it is apparent that the change of the word "may" to "shall" reinforces this court's prior determination that residency of one party in the county where the petition is filed is jurisdictional. The rule announced in *Fletcher* is still valid. The district court for a county cannot acquire jurisdiction over dissolution proceedings unless one of the parties is a resident of that county at the time the original petition is filed.

The trial court's finding that it did not have jurisdiction over the Smalls' dissolution of marriage is correct. That finding and the court's vacation of the decree are affirmed. However, because the court lacked jurisdiction, the balance of its findings and its order to transfer the proceedings to Sarpy County District Court are reversed and the case dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

SANDRA R. DECKER, APPELLANT, V. MARVIN C. DECKER, APPELLEE.

426 N.W.2d 533

Filed July 29, 1988. No. 87-077.

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

Steven J. Lustgarten, of Lustgarten & Roberts, P.C., for appellant.

James L. Koley and Pamela Hogenson Govier, of McGill, Koley, Parsonage & Lanphier, P.C., for appellee.

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

PER CURIAM.

This is a dissolution action in which the petitioner-appellant wife, Sandra R. Decker, claims the trial court's division of marital assets was unreasonable, the award of alimony was insufficient, and the award of attorney fees was inadequate. We have reviewed the trial court's judgment de novo on the record and determined that the trial court did not abuse its discretion in either the division of those assets or in its award of alimony and attorney fees. Accordingly, the decree of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ABIE ANTILLON, APPELLANT.

426 N.W.2d 533

Filed July 29, 1988. No. 87-823.

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. _____: _____. If, taking the view most favorable to the State, there is sufficient evidence to sustain the conviction, it will be upheld on appeal.
3. **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.
4. **Parties: Words and Phrases.** A party in a lawsuit is one who has a right to control the proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment.
5. **Indictments and Informations.** The trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

6. _____. In general, an information is sufficient if it sets forth the crime in the language of the statute or the equivalent thereof.
7. _____. The information must inform the accused with reasonable certainty of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
8. **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.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Donald W. Walters for appellant.

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

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

HASTINGS, C.J.

The defendant was found guilty by a jury in Hall County of two counts of first degree sexual assault of a child. He was sentenced to two concurrent terms of 15 to 20 years' incarceration. He appeals the judgment and sentences.

Defendant's assignments of error are: (1) The evidence was insufficient to support the convictions; (2) the court erred in ruling that the victim was not a party-opponent for purposes of impeachment under Neb. Rev. Stat. § 27-613 (Reissue 1985); (3) the court erred in allowing the State to amend the information at the conclusion of the State's case; and (4) the sentences were excessive.

The defendant, Abie Antillon, was approximately 23 years old at the time of the incidents. He and Catherine Bucholz moved to 414 North Oak in Grand Island in June 1985. They were married in January 1986. Also living with them were Abie, Jr., born to the defendant and Catherine in March 1984, and the victim, Catherine's son from a former marriage, born in August 1978.

In June 1986, the victim went to visit his maternal grandparents in Lincoln. While there, his uncle took him to a

movie. On the way home, the victim told his uncle that the defendant had physically and sexually abused him. His uncle encouraged him to tell his grandparents about the incidents, which he did. The grandfather then "contacted authorities."

Steven Wilson, a Child Protective Services worker, met with the victim on three occasions to interview him about the allegations. Subsequently, the defendant was charged with two counts of first degree sexual assault on a child: one incident in the bedroom and one in the living room.

The victim described the assaults at trial. He testified that the first incident took place in his bedroom. As the victim was getting ready for bed, the defendant entered the former's bedroom with "a weird look on his face," pulled down his own pants and underwear, and pushed the victim's head down. The defendant made a fist and told the victim that he would "punch [his] lights out" if he told anyone. The defendant then forced the victim to "suck his wienie" until "white stuff" came out. A friend of the defendant's then knocked on the door, and the defendant left the bedroom.

The second incident occurred in the defendant's bedroom. (This was actually the same bedroom in which the first incident took place, but the defendant and the victim had traded bedrooms since that time.) The defendant told the victim to come into his bedroom, shut off the light, and forced the victim again to perform oral sex on him. The victim testified that he got a "funny taste" in his mouth and that "[i]t taste- —It just — It felt just like it did in the other one." Afterward, the defendant threatened the victim with a knife and told him that he would throw the victim's little brother "against the walls and out the window" if the victim told anyone what had happened.

The defense attempted to impeach this testimony by cross-examining Wilson concerning certain inconsistencies between the victim's testimony at trial and the information he gave in an earlier adjudication hearing attended by Wilson. The judge disallowed this questioning.

At the close of the State's evidence, the State moved to amend the information to conform with the evidence by substituting "the living room" with "a bedroom." The court allowed the amendment, over objection by the defense. The defense then

moved to dismiss the case. The court ruled, "The motions of the defendant for a directed verdict are denied."

The defendant argues that recent cases lessening the stringent requirement of corroboration have lost sight of the reasons behind the corroboration rule, i.e., protection from guilty verdicts based solely on sympathy and passion. He asserts that the only evidence adduced which supports the verdict is (1) the residence of the victim and defendant, (2) the fact that the defendant babysat the victim while his mother worked, and (3) statements made by the victim to third parties. Since (1) and (2) are as consistent with innocence as with guilt, it is (3), the victim's statements to others, which supports the verdict. These statements, claims the defendant, are riddled with inconsistencies and are not sufficient corroboration by themselves.

The State responds with a call for the abolition of the corroboration rule. The rationale for the corroboration rule simply does not exist, according to the State. Moreover, it claims, even with the corroboration requirement in this case, the evidence (i.e., statements made by the victim to his uncle, grandparents, and caseworker) is sufficient to support the jury's verdict.

It is not necessary to eliminate the corroboration rule in order to uphold the jury's verdict in this case. As in *State v. Stone*, 228 Neb. 389, 422 N.W.2d 568 (1988), also a case involving the sexual assault of a child,

> There were many conflicts in the evidence and some inconsistencies between testimony given [earlier] 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.

Id. at 391, 422 N.W.2d at 570. "[I]f, taking the view most favorable to the State, there is sufficient evidence to sustain the conviction, it will be upheld on appeal." *State v. Polyascko*, 224 Neb. 272, 275, 397 N.W.2d 633, 635 (1986).

As to the corroboration requirement, this court has held:

" ' "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." . . .' " *State v. Stone, supra* at 390, 422 N.W.2d at 569. The court then determined that the fact that the victim made a complaint to a person to whom a statement of such an occurrence would naturally be made is competent corroboration of the victim's testimony. In *Stone*, the fact that the 12-year-old victim described the incidents to her mother, who later contacted police, was sufficient evidence of corroboration.

In *State v. Schon*, 227 Neb. 482, 418 N.W.2d 242 (1988), the defendant sexually assaulted his wife's 6-year-old daughter. This court found that the fact of the assault was established by the victim's descriptions of the assault to her mother, to the investigating officer, and to the court during the trial. Furthermore, these facts were corroborated by a change in the victim's behavior and by a "report to the police that was made within a reasonable time after the assault." *Id.* at 485, 418 N.W.2d at 244.

In *State v. Polyascko, supra*, also involving the sexual assault of a child, the victim told her school counselor of the incident, who in turn contacted police. The victim then told the police officer the facts of the assault. The court found that this was a sufficient corroboration of the victim's account of the assault to support the verdict. The court took note of the decision in *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980), in which a conviction for sexual assault was upheld based upon corroborating evidence which consisted of the facts told by the victim to his mother, a jail administrator, and a police detective; and *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981), in which the defendant's conviction for sexually assaulting his minor stepdaughter was upheld, and the only testimony corroborating the victim's testimony was testimony by the victim's mother and a police officer, to whom the victim had complained.

In the present case, the victim told his uncle about the assaults. At the uncle's suggestion, the victim then related his

account to his grandmother and then to his grandfather. When authorities were contacted, the victim discussed the incidents with a caseworker. The testimony of the victim was adequately corroborated by the testimony of those to whom he told of the assaults.

The second prong of defendant's first assignment of error is that the court should have sustained his motion for dismissal. This argument is essentially an extension of the defendant's first argument—i.e., that the evidence was insufficient to sustain the conviction. The defendant again points to "major discrepancies" in the victim's "uncorroborated" testimony, "mak[ing] the events as related by the victim so doubtful in character that a finding of guilt thereon can only result from passion or prejudice." Brief for appellant at 21-22. The State responds by stating that the jury found the victim's testimony to be credible enough to support a guilty verdict and that there is sufficient evidence to uphold its findings.

Contrary to the defendant's assertion, the evidence was not so lacking that a guilty verdict could only be the result of emotion, rather than factfinding. The jury found the victim's testimony to be credible, despite the (minor) inconsistencies which developed. Making a judgment as to the credibility of the witnesses and the sufficiency of the evidence was a function of the jury. The Supreme Court will not resolve conflicts in the evidence, judge the credibility of witnesses, evaluate explanations, or reweigh the evidence presented. Those responsibilities belong to the jury. See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

To the extent that defendant's argument encompasses the denial of the motion to dismiss made at the close of the State's evidence, the State at that point was entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

The court properly refused to dismiss the case or to direct a verdict of not guilty. The evidence, despite minor inconsistencies, nevertheless overwhelmingly pointed to the defendant's guilt and presented a question for the jury to

decide.

Defense counsel, in cross-examining Wilson about his observations of the victim's testimony during the prior adjudication hearing, attempted to question Wilson about prior inconsistent statements made by the victim at the hearing. The court sustained the State's objection to this questioning as "improper impeachment of a witness who's testified and who is available for cross-examination." Counsel later renewed his request to use this testimony for impeachment under § 27-613 and Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1985). The court held that these statutory sections were inapplicable, as the victim was not a party-opponent in the case.

Section 27-613(2) provides that a witness who is impeached by a prior inconsistent statement must be given an opportunity to explain or deny the prior statement, *unless* that statement is an admission of a party-opponent as defined in § 27-801(4)(b). (Section 27-801(4)(b) provides that statements made or adopted by a party are not hearsay.) Thus, the defendant argues that since the victim is a "party-opponent" in this case, he may be impeached by prior inconsistent statements without being given the opportunity to explain or deny those statements. A "party" is a person whose name is designated on the record as a plaintiff or defendant. *M & A Electric Power Cooperative v. True*, 480 S.W.2d 310 (Mo. App. 1972). The record in this case clearly designates the State as plaintiff and Abie Antillon as defendant. The victim appears as a witness only.

A party, in general, is one who has a right to control the proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment. *City of Chattanooga v. Swift*, 223 Tenn. 46, 442 S.W.2d 257 (1969); *Gibbons v. Belt*, 239 Ia. 961, 33 N.W.2d 374 (1948). The victim possessed none of those rights as the victim in this case.

"Party" is a technical word with a precise legal meaning. It refers to those by or against whom a legal suit is brought; the party plaintiff or defendant. All others who may be affected by the suit, indirectly or consequentially, are persons interested, but are not parties. *Banks v. Rockwell Intern. N. Am. Aircraft Operations*, 666 F. Supp. 1053 (S.D. Ohio 1987); *Golatte v. Mathews*, 394 F. Supp. 1203 (M.D. Ala. 1975). Again, it is clear

that the victim, as a victim-witness, did not meet the legal definition of party to the case. His role in the action was not to bring or defend against charges, but merely to provide testimony about the allegations. As such, he was not a party-opponent, as the lower court properly ruled.

At the close of the State's case, the prosecutor moved to amend the information for count II to conform with the evidence which had been presented at trial. The prosecutor requested that the change be made to allege that the second incident occurred in "a bedroom," rather than "the living room" as originally pled. The defense objected, asserting the possibility of a double jeopardy problem, and asked that the defendant be permitted to defend based upon the information as originally filed. The court took the motion under advisement.

The following morning, the court ruled that the State be allowed to amend the information to strike the reference to "living room." The defense was then given the opportunity to show how the defendant was prejudiced by the ruling. The defense counsel noted that the entire defense was based on inconsistencies between the victim's prior statements and his testimony at trial. By permitting the amendment, claimed defense counsel, an inconsistency was eliminated and the defense was weakened. Furthermore, the jury could become "confused" by changing the charges against the defendant during the trial. The court nevertheless allowed the ruling to stand.

The general rule regarding the amendment of informations was recently stated in *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987). Quoting from *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973), this court held: " '[T]he District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.' " 226 Neb. at 646, 413 N.W.2d at 640.

In general, an information is sufficient if it sets forth the crime in the language of the statute or the equivalent thereof. *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985). In

addition, the information must " 'inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.' " *Id.* at 559, 378 N.W.2d at 676. See, also, *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

It has been established that the addition of a nonessential allegation to the information does not change the offense charged, *State v. Gascoigen, supra*; *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982), and the defendant does not claim that the amendment creates an additional or different charge. Rather, the defendant contends that the second prong of the test was not met in his case; i.e., the defendant's substantial rights were prejudiced by the amendment.

Although this court has apparently not confronted the specific issue of whether amending the information as to the location of the offense constitutes prejudice to the defendant, other state courts have considered the topic. For an overview of state court decisions upholding the amendment of an information concerning the location of the offense, see, *Morris v. State*, 273 Ind. 614, 406 N.E.2d 1187 (1980) (defect in information which read "Jefferson, Missouri," was immaterial, and thus allowing amendment so that information read "Jefferson City, Missouri," was not error); *Felchlin v. State*, 159 Ga. App. 120, 282 S.E.2d 743 (1981) (amendment to change site of offense from Cleveland Avenue to Cleveland Road was not a material change requiring a mistrial or continuance); *People v. McQuiston*, 264 Cal. App. 2d 410, 70 Cal. Rptr. 531 (1968) (court did not abuse discretion in permitting amendment of information to correct date and place of the charge); *State v. McLallen*, 522 S.W.2d 1 (Mo. App. 1975) (amendment of information to work a technical change in title of one of the burgled premises was proper, since such amendments did not alter the charge or defendant's defense); and *State v. Bleau*, 132 Vt. 101, 315 A.2d 448 (1974) (location of offense amendment, made 5 minutes prior to commencement of trial in order to conform to evidence prosecutor knew would be forthcoming at trial, was allowable).

In *State v. Aston*, 412 S.W.2d 175 (Mo. 1967), the court allowed the State to amend the information at the close of the evidence to reflect that the burglary occurred at the victim's tavern, not his residence. The court held at 182: "Such amendments are governed by our Rule 24.02 which permits an amendment at any time before verdict if no 'additional or different offense is charged and if substantial rights of the defendant are not prejudiced.' " Note that this rule parallels the rule of law in Nebraska concerning amendments laid out in *Aldrich, supra*, and *Gascoigen, supra*. The court concluded at 182: "We are convinced that no substantial rights of defendant were prejudiced in that he and his counsel knew all along, and *specifically* from the very beginning of the trial, what the charge actually was." (Emphasis in original.)

In *State v. Brean*, 136 Vt. 147, 385 A.2d 1085 (1978), the court upheld an amendment to the information made by the prosecutor at the close of the State's case. The amendment changed the alleged location of the DWI from Connecticut to Vermont, and added the name of the county, which had been left blank in the original information. Once again, the governing rule was that "the trial court may permit an information to be amended at any time after trial has commenced and before verdict for any purpose 'if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.' " *Id.* at 149, 385 A.2d at 1087. The court found that the amended information did not charge an additional or different offense. Furthermore, held the court,

> we can find no prejudice from a review of the record. . . . The officer's affidavit of probable cause set forth that the offense occurred in Vermont. Defendant obviously understood when and where the alleged offense took place. That defendant was not "surprised" by the amendment is evidenced, in part, by the fact that he made no motion for continuance at the time the motion to amend was granted.

Id. at 149-50, 385 A.2d at 1087.

Thus, a consideration in determining the propriety of the amendment and whether the defendant was prejudiced thereby

is whether the amendment "surprised" the defense. If the defendant was aware before the trial that the information did not comport with the evidence, theoretically he has not been prejudiced when the information is corrected to reflect that evidence. Such is the case here.

The court sentenced the defendant to concurrent terms of not less than 15 nor more than 20 years on each count. The defendant argues that this was an excessive sentence which was not commensurate with the offense. He points out that "no physical harm was done to the victim," as is possible in sexual assault cases, and that the defendant is only 24 years old. Brief for appellant at 22.

> 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. Moreno, 228 Neb. 210, 218, 422 N.W.2d 56, 62 (1988).

The defendant was convicted of first degree sexual assault, a Class II felony under Neb. Rev. Stat. § 28-319 (Reissue 1985). Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that a Class II felony is punishable by a minimum of 1 and a maximum of 50 years in prison. The sentence of 15 to 20 years on each count was well within the statutory range of 1 to 50 years.

> 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.

228 Neb. at 218, 422 N.W.2d at 62. Furthermore, "The seriousness of the offense is an important factor in the setting of a sentence," and "Evidence as to a defendant's life, character, and previous conduct is highly relevant to the determination of a proper sentence." *Id.* at 218-19, 422 N.W.2d at 62. Additionally, § 28-319(2) provides that in a first degree sexual assault case, "The sentencing judge shall consider whether the

actor shall have caused serious personal injury to the victim in reaching his decision on the sentence."

The defendant has a history of criminal behavior and incarceration which dates back to 1979, when he was 16. He did not complete high school, he is continually unemployed, and there is indication of drug and alcohol abuse (as well as drug dealing). The crime itself, although not involving actual physical harm to the victim, will undoubtedly have a lasting and sizable psychological impact on the boy. The defendant shows no remorse over his activities; to the contrary, he denies the allegations and feels that "any sentence, I don't — I don't think any sentence that the Court gives would be right."

Given the nature of the crime and the background of the defendant, the sentences given by the trial judge are not an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN and GRANT, JJ., concur.

IN RE INTEREST OF D.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. D.C.C., APPELLANT.

426 N.W.2d 541

Filed July 29, 1988. No. 87-877.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, 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.
2. **Parental Rights.** Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated.
3. _____. Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home.

Appeal from the District Court for Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Margene M. Timm, of Legal Services of Southeast Nebraska, for appellant.

James Elworth, Deputy Lancaster County Attorney, for appellee.

J. David Thurber, of Doyle & Doyle Law Office, guardian ad litem.

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

WHITE, J.

D.C.C., the natural mother of the minor child, D.C., involved in these proceedings, appeals from an order of the separate juvenile court of Lancaster County which terminated her parental rights pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1984). The court also terminated the parental rights of G.C., the child's father; however, G.C. has not appealed from that judgment, and we concern ourselves solely with the issues raised by D.C.C.

Appellant contends that the court below erred in (1) allowing the child's guardian ad litem to prosecute the termination petition filed by the State; (2) not finding that the Nebraska Department of Social Services had not made reasonable efforts to reunify the child with his mother; and (3) finding that clear and convincing evidence existed for termination of parental rights pursuant to § 43-292(2) and (6) and that it was in the best interests of D.C. to terminate the mother's parental rights.

In an appeal from a judgment terminating parental rights, the Supreme Court tries 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 M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

On September 13, 1983, the State petitioned the separate juvenile court of Lancaster County, alleging that the juvenile, D.C., lacked proper care due to the faults and habits of his

mother and was, therefore, a child defined by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). Specifically, the petition alleged that D.C.C. resided with a man to whom she was not married, who physically abused both her and the child. The inappropriate discipline of the child by this man caused bruises on the child. In addition, on June 13, 1983, D.C.C. had bruises on her arms and a cut lip caused by her live-in boyfriend. It was alleged that the child was at risk due to D.C.C.'s failure to protect the boy from physical abuse.

On September 22, 1983, D.C.C. entered an admission to an amended petition which contained the same essential allegations listed above. The court then found that D.C. was a child as defined by § 43-247(3)(a) by virtue of the acts and omissions of his mother. Pending final disposition, D.C.C. was permitted to keep the child in her care, provided that she give him proper care and protection and that he remain in Lancaster County.

Shortly before the first of two further dispositional hearings in November 1983, D.C.C. voluntarily placed the child in foster care while attempting to resolve her situation with the live-in boyfriend. On November 18, the court ordered that the child could be returned to D.C.C. with the supervision of the Department of Social Services and parenting classes, if the boyfriend was not to be a part of the family. If he was to be in the home, the court ordered that he undergo psychological and psychiatric evaluation prior to the child's return.

Within a few days, D.C.C. informed the court that her relationship with the boyfriend had ended, and by December 2 the child was returned to his mother. However, Child Protective Services (CPS) subsequently learned that D.C.C. and the child had in fact been in the company of the boyfriend on at least two occasions. On December 23, a supplemental petition was filed in the matter; however, following a hearing on January 5, 1984, the court found that the further specified facts did not constitute lack of proper care. The court did find that D.C.C. had lied to her CPS caseworker about contact with the boyfriend and that any further deception would result in termination of the child's placement with his mother. The November 18, 1983, order remained in effect and unchanged as

to custody and the plan for correcting the original neglect.

Following the child's return to D.C.C. in December of 1983, D.C.C. did begin participation in mental health counseling and parenting classes through the PACT program. Participation in PACT continued through late April 1984, as did D.C.C.'s mental health counseling.

On April 26, 1984, a hearing was held to determine whether D.C.C. was in violation of the November 18 order by allowing the abusive boyfriend to be present in her home. Although testimony indicated that D.C.C. and the boyfriend had been in contact on a few occasions, those contacts were due largely to his pursuit of her. D.C.C. indicated to the court and her social services workers that she would like to continue the relationship, but only if the boyfriend agreed to the psychiatric evaluation as ordered by the court and if he would submit to counseling. The court determined that D.C.C. was not in violation of the court order.

In June of 1984, at a further hearing on this matter, the court was informed that D.C.C. and the child could not be located at their Lincoln address. A neighbor informed CPS that D.C.C. had in fact moved from the address. Sharon Isaacson of CPS testified that pursuant to a CPS alert she was informed by the Council Bluffs CPS that it had received a referral on a family matching the description of D.C.C., the child, and the boyfriend. The referral alleged that a man, calling himself by the boyfriend's name, had been abusing a child in a restaurant. The boyfriend was allegedly pulling the child's hair, slapping the child and pulling his ears, and threatening the mother. Attempts by Council Bluffs CPS to contact these people were unsuccessful. The boyfriend had, on a previous occasion, told Isaacson that his home was the Council Bluffs-Omaha area. At that hearing, no other information was available on the child's whereabouts.

At that June hearing, the court ordered the Department of Social Services to take physical custody of the child as soon as he could be located, and to place the child in foster care immediately thereafter.

At a hearing on September 24, the court was informed that the child had been located on September 17 in Omaha. The

Douglas County sheriff's office picked the child up at the address supplied to CPS, and the child was returned to Lincoln and placed in foster care. Isaacson testified that when the child arrived in Lancaster County he had "a bruise in the center of his forehead and a lump [and] a small bruise on his right eyelid and he had a cut on the right half of his lower lip."

D.C.C. was not present at the September 24 hearing, but her counsel was present to represent her. Counsel informed the court that D.C.C. was making no request for return of her son; her plan was to stay in Omaha to locate suitable housing and employment, seek individual counseling, and comply with other provisions of the earlier court orders. D.C.C. requested visitation with her son and agreed to assume all the burdens of transportation to Lancaster County to exercise these visits. The court entered an order allowing supervised visitation on the above terms. In addition, the court ordered D.C.C. to present a plan showing that she could provide proper care and protection for the child. The parties agreed that the plan was to be submitted within 60 days. Apparently, no such plan was ever received by the court as ordered.

The State filed a second supplemental petition on November 8. D.C.C. admitted the allegations in the petition, as amended, on December 18. Those admissions and the testimony of other witnesses left unexplained the cuts and bruises on the child on September 17, 1984, but established that the abusive boyfriend did pull the child's hair and ears in the restaurant incident, that he had previously been abusive to the child, and that during a period from May until September of 1984 the boyfriend, mother, and child had lived in 10 different locations in 5 different states. Evidence was also introduced establishing that the child, D.C., had begun to act in a self-abusive manner due to the abusive treatment and lack of a stable environment.

The child continued his placement in a foster care home in Lincoln, and legal custody remained with the Department of Social Services. On January 8, 1985, the juvenile court approved a rehabilitative plan designed to correct the conditions of lack of proper care which led to the original juvenile court adjudication.

At the January 8 hearing, D.C.C. testified that she had

discontinued her relationship with the first abusive boyfriend. She testified that for the sake of her "self-worth" she would continue living in Omaha, but if she had not obtained employment within 1 month, she would return to Lincoln.

A 6-month review hearing was held on July 8. At that hearing, evidence was introduced indicating that D.C.C. was involved in another abusive relationship. Her second live-in boyfriend had beaten her so severely in January of 1985 that surgery was required to repair damage to her inner ear. Nevertheless, D.C.C. continued to reside with this individual.

According to evidence introduced at the July 8 hearing, D.C.C. has admitted a repeated pattern of becoming involved with abusive males. Evidence shows that prior to March of 1985, D.C.C. had been involved in five consecutive abusive relationships, beginning with D.C.'s father.

On December 2, the State filed a third supplemental petition in this matter, this time seeking termination of parental rights due to D.C.C.'s continued inability to provide proper care and a stable home for her child. This third petition sparked another 2 years of litigation in this case and generated nearly 1,500 pages of testimony and exhibits, compiled in over 7 volumes of bills of exceptions.

In October of 1986, the juvenile court terminated D.C.C.'s parental rights, but subsequently set aside its order by sustaining a motion for a new trial based on an evidentiary error during the court proceedings. D.C.C. was once again given additional time to continue rehabilitation efforts.

Ultimately, in July and August of 1987, extensive testimonial evidence was taken on this matter, the final result being termination of D.C.C.'s parental rights.

After extensive review of the record in this case, this court is convinced that D.C.C., after 4 years, made little or no progress toward correcting the conditions which led to the initial juvenile court determination that her child was a child as defined by § 43-247(3)(a).

Two major concerns have dominated the adjudication of this case from the outset. The first and more important is D.C.C.'s chronic tendency to become involved with abusive, violent males. Inevitably related to this first problem is D.C.C.'s

inability, or unwillingness, to provide a safe, secure home for her child, free from the abuse inflicted by her male companions.

Our review of the record indicates that D.C.C. continues to be involved with men who have violent tendencies. The first boyfriend referred to in this opinion abused both D.C.C. and her child on several occasions, yet she chose to leave Lancaster County with this man, taking her child with them, to embark on a five-state escapade over 5 months, only to return to Omaha with a bruised and lacerated child.

D.C.C. then chose to remain in Omaha while her child was in Lincoln in foster care. She became involved with a second man who beat her so severely about the head that she required inner-ear surgery, yet she continued to live with this man, spoke of marriage to him, and had a child by him in 1985. This boyfriend, in November of 1985, contacted an Omaha CPS worker by phone and "threatened to cause [her] physical harm . . . if [she] came near [D.C.C.] or her home."

The third and most recent boyfriend was described by D.C.C. herself as having a history of "everything except murder and rape." D.C.C. testified that his history did not concern her.

The record is clear that D.C.C. has not completely severed her ties with any of these three men. In January of 1987, D.C.C. still was expressing a desire to keep her first boyfriend, whom the child continues to express fear of, as a friend. Although D.C.C. alleges that she ended her relationship with the second boyfriend in December 1985, she still has frequent contact with the man. As late as June of 1987, she still was unable or unwilling to tell this man to stay out of her life. At the same time D.C.C. continued to see the third boyfriend up until the time of the final termination hearings. She has admitted lying to her caseworkers regarding this boyfriend's past violent history and also admitted telling him to "cool it and not come around . . . anymore" just prior to the final termination hearings.

At the time of the termination hearings D.C.C. was living in an Omaha hotel which she admits is not a suitable place for a child. She describes the area as "hooker heaven" and plagued

with violence and alcohol abuse. In addition, D.C.C. admits that she had not seriously searched for an appropriate home since December of 1986, despite housing lists' being provided by her caseworkers.

D.C.C. testified that she was not asking the court for custody, only a continuation of a plan for reunification. She presented evidence from her individual therapist, who described D.C.C. as making progress. She requested time to continue to seek appropriate housing for the purpose of beginning in-home visits from her child. In short, D.C.C. was asking the juvenile court for one more chance.

This court finds that D.C.C. was given numerous attempts at one more chance. Over a 4-year period, D.C.C. has sought individual counseling, attended parenting classes (the first of which she was terminated from due to her continued involvement with the first boyfriend; the second she dropped out of by her own choice), has unsuccessfully sought full-time employment, and has unsuccessfully attempted to maintain a stable, secure home environment. We do not agree that D.C.C. has shown sufficient progress over these 4 years to warrant another chance. Her involvement with abusive men continues, and she has been unable to secure and maintain a safe home environment for a child; nor do we see a concerted effort on her part to obtain such housing.

Nowhere in this extensive record do we see any evidence of an overwhelming desire on D.C.C.'s part to regain permanent physical custody of her child. After 4 years, during 3 of which the child has been in continuous foster care, D.C.C. is only at a point where she is requesting in-home visits sometime in the future. As we have said before, where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated. *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988); *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987).

This court also finds that the State adduced clear and convincing evidence that the best interests of D.C., the child, were served by termination. The record indicates consistent behavioral problems associated with D.C.'s uncertainty as to his

placement. In 1986 and 1987 the child's counselors testified that he was experiencing bed-wetting, noncompliant behaviors, bad dreams, aggressive behavior, and anxiety due to his uncertainty about a permanent home. There was also evidence of anxiety and depression stemming from abuse and neglect.

Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home. *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987). D.C.C.'s request of the juvenile court, and of this court, is to continue the status quo, keep her child in foster care, and continue reunification efforts. The evidence in this case indicates that this course of action would be deleterious to D.C.'s well-being and would only serve to continue his anxiety and insecurity. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

Appellant also alleges that the Department of Social Services did not make reasonable efforts to reunify her with her child. Our review of the record convinces this court that the Department of Social Services and the court went to great lengths to effectuate reunification. Prior to and after D.C.C.'s move to Omaha, a myriad of services were made available to D.C.C., apparently at no expense to her. She was provided with free weekly transportation to and from Lincoln and Omaha and free transportation within those cities. She was involved in three parenting programs, attended individual counseling in both cities, and was provided social services caseworkers in Lincoln and Omaha, a public health nurse, various public assistance funds, housing lists, and supervision during her visits with her child. We find no evidence in this record to indicate that D.C.C. was denied any services to which she was entitled.

In the final analysis, the appellant, damaged beyond measure by a cruel childhood, seeking approval by the only method she knew, i.e., abusive relationships, possessed of deep feelings of inferiority, only barely capable of coping with her own life, could not satisfactorily demonstrate an ability to meet the emotional needs of a child. That she failed to demonstrate even a minimal ability to care for a child in anything approaching a civilized standard is obvious. That she was

probably foreordained to failure, even with the efforts of the massive social machinery, is also obvious. The courts can only deal with reality. They cannot change the past, and can only hope, by timely action, to avoid repetition of the tragedy into another generation. Termination of D.C.C.'s parental rights, however harsh, is the only hope for the child.

Finally, appellant alleges that the juvenile court allowed the guardian ad litem to prosecute this termination case, in violation of Neb. Rev. Stat. § 43-272.01(2) (Cum. Supp. 1986), which states, inter alia, "The guardian ad litem . . . is not appointed to prosecute or defend the parents . . . but shall defend the legal and social interests of such juvenile."

Appellant's allegations seem to be based on two factors: first, that the State only called two witnesses in the July and August proceedings, and the guardian ad litem called five witnesses. Second, it is alleged that absent testimony from at least three of the five witnesses on behalf of the child which related to D.C.C.'s parental fitness, there would be insufficient evidence to meet the State's burden of proof.

We find no merit to this assigned error. Clearly, the guardian ad litem has the authority to "present evidence and witnesses and cross-examine witnesses at all evidentiary hearings . . . ." § 43-272.01(2)(e).

The fact that the guardian ad litem called more witnesses than the State, which filed this petition, is irrelevant. This is not a contest where whoever calls the most witnesses wins.

As to the substance of the guardian ad litem's witness testimony, it is only logical that evidence adduced by the guardian ad litem, when defending the interests of his ward, may implicate the fitness of the parent. If the guardian ad litem determines that the termination of parental rights best serves the child's interests, then the evidence produced may reflect unfavorably upon the parent. If such evidence is introduced, any party to the proceeding is entitled to the benefit of that evidence, even the State.

The judgment of the juvenile court is affirmed.

AFFIRMED.

KELLY KLOSURE, INC., A NEBRASKA CORPORATION, APPELLANT, V. JOHNSON GRANT & CO., A PARTNERSHIP, APPELLEE.

427 N.W.2d 44

Filed August 5, 1988. No. 85-1013.

1. **Limitations of Actions.** One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statute of limitations as a defense.
2. **Estoppel: Proof: Pleadings.** The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
3. **Judgments.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.
4. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed unless it is clearly wrong.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

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

Philip M. Aitken and Tyler J. Sutton, of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

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

GRANT, J.

Plaintiff, Kelly Klosure, Inc., a Nebraska corporation, filed a petition seeking damages from defendant, Johnson Grant & Co., an accounting partnership, for alleged malpractice in connection with accounting services rendered by defendant to Kelly Klosure. The petition was filed on July 15, 1982, and generally sought damages arising out of the formation of, and the performance of accounting services with regard to, a domestic international sales corporation, commonly referred to as a DISC. Plaintiff, aided and advised by defendant, had formed a Nebraska corporation, Kelly Klosure DISC, Inc., for the sole purpose of obtaining exemption from income taxes relating to the sale of products in commerce outside the United States.

In its second amended petition, filed October 22, 1984, plaintiff alleged that as a result of defendant's malpractice, plaintiff was unable to obtain the favorable tax benefits of a DISC because Kelly Klosure DISC, Inc., did not qualify under the Internal Revenue Code. The second amended petition sought damages for the tax years of Kelly Klosure DISC, Inc., ending April 30 of 1978, 1979, 1980, 1981, and 1982. The petition further alleged that plaintiff "first acquired knowledge of the aforementioned negligence of the defendant . . . on or about May 13, 1982," and that the plaintiff had not discovered and could not have reasonably discovered the negligence any sooner.

In its answer, defendant admitted that it had done accounting work for plaintiff for some time prior to 1977 up through March of 1981; generally denied any negligence; and raised certain affirmative defenses, including the allegation that plaintiff's cause of action, if any, was "barred by the applicable statute of limitations of the Statutes of Nebraska."

The case was tried to a jury between September 9 and 20, 1985. By agreement of the parties, the case was first submitted to the jury on special interrogatories. In the instructions submitted to the jury on the special interrogatories, the court divided plaintiff's claims against defendant into two: claim 1 for the tax year 1977-78; and claim 2 for the tax years 1978-79, 1979-80, and 1980-81. In answering these interrogatories, the jury found that plaintiff had proved its case and defendant had not proved its affirmative defenses in connection with plaintiff's claims 1 and 2.

The jury also found that defendant was estopped from asserting the defense of the statute of limitations because defendant had wrongfully concealed facts which, if known, would have caused plaintiff to file its action at a date before it did. The jury also determined that the plaintiff would reasonably have discovered the appropriate facts enabling it to discover defendant's alleged malpractice in October 1981.

No instructions and no special interrogatories as to liability or damages were submitted for the tax year 1981-82. Appellant does not claim any error in that action of the court, and issues concerning that tax year are not before this court.

After the return of the special interrogatories, the issue of damages was submitted to the jury by "Special Interrogatories - Damages." In these damages interrogatories, the jury was asked to assess damages for two periods, tax year 1977-78 and tax year 1978-79. No submission was made as to tax year 1980-81, and no claim of error is made in that connection. In its brief herein, and its reply brief, plaintiff prays only for the reinstatement of the jury verdict rendered. A new trial is not sought. The issues before this court are involved only with the tax year 1977-78, for which the jury determined the damages were $60,928, and 1978-79, for which period the jury determined the damages to be $9,004. The jury also determined additional damages for legal and accounting expenses in the amount of $6,499, resulting in a total verdict of $76,431.

After the verdict was returned, defendant filed a motion for judgment notwithstanding the verdict. The court sustained the motion and entered judgment for defendant. Plaintiff timely appealed, and in this court assigns two errors: (1) "[T]he Trial Court erred in granting appellee's Motion for Judgment Notwithstanding the Verdict"; and (2) "The Trial Court erred in its application of the Statute of Limitations to the facts in the case at bar." We affirm.

The record shows the following. Plaintiff is a manufacturing firm located in Fremont, Nebraska. Defendant is an accounting firm which provided accounting services for plaintiff such as preparing tax returns, compiling financial reports, and giving tax advice. In the early months of 1977, plaintiff considered forming a DISC. In general, a DISC is a domestic corporation whose profit from exports may be partially sheltered from imposition of income tax. These profits may be sheltered until the stockholders decide to withdraw the profits. In the instant case, for the purpose of saving income taxes due to the special tax treatment of a DISC, plaintiff formed a wholly-owned subsidiary corporation entitled "Kelly Klosure DISC, Inc." (hereinafter Kelly DISC). Kelly DISC was a paper corporation with the same officers as Kelly Klosure, Inc. Separate books and records were kept for Kelly DISC by employees of Kelly Klosure, Inc. Kelly DISC's first tax year ended April 30, 1978.

In order to qualify for the benefits for a tax year, Kelly DISC needed to satisfy five requirements with respect to that tax year. One of these requirements was the "qualified export assets test," which required that at the close of the tax year, the adjusted basis of Kelly DISC's qualified export assets must be at least 95 percent of the adjusted basis of Kelly DISC's total assets. Qualified export assets include such items as inventory facilities, accounts receivable, bank deposits, and loans to the parent corporation called "producer loans." In order for a loan from Kelly DISC to the parent corporation to qualify as a producer loan, and thus be a qualified export asset, the loan must meet four tests. One of these tests is that the obligation must be evidenced by a note with a stated maturity date not more than 5 years from the date of the loan. I.R.C. § 993(d)(1)(B) (1976). Kelly DISC failed to meet this test because the notes used to evidence the producer loans did not have a stated maturity date.

Bruce Hocking, an employee and partner of defendant partnership, met with plaintiff's board of directors in the early months of 1977 to discuss the desirability and details for setting up a DISC. Shortly thereafter, Ronald Kellogg, president of plaintiff, informed defendant that plaintiff would proceed with setting up a Kelly DISC. Hocking prepared the necessary documents and forwarded them to Kellogg for signing and filing.

When the parent Kelly Klosure, Inc., desired to borrow funds from Kelly DISC, through producer loans, at various times during the 1977-78 tax year, Kelly Klosure personnel prepared the producer loan note forms. The notes were made payable "on demand" rather than due and payable within 5 years. There is a dispute in the record, but the jury apparently determined that Hocking did not advise plaintiff that the notes on producer loans must have a stated maturity date and must be made payable within 5 years.

In the summer of 1979, an Internal Revenue Service (IRS) agent began an audit of Kelly DISC's 1977-78 income tax return. The agent found that the producer loan notes had no stated maturity date, and therefore did not qualify as "qualified export assets." Without the producer loan notes qualifying as

export assets, Kelly DISC failed to meet the 95-percent test (i.e., qualified export assets were less than 95 percent of total assets). The agent contended that this disqualified Kelly DISC for special tax treatments, and Kelly DISC's earnings, otherwise tax-deferred, became taxable to Kelly Klosure, Inc. Hocking failed in his challenge of the IRS' position on the producer loan issue.

In January of 1981, plaintiff employed a new accounting firm, Touche Ross & Co., and on August 20, 1981, plaintiff terminated defendant's services as accountants.

Plaintiff's two general assignments of error do not pinpoint, to any degree, the particular errors alleged to have been committed by the trial court. The first is a "generalized and vague" assertion that does "not advise this court of the issues submitted for decision. Such advice is a necessary function of valid assignments of error." *Coyle v. Janssen*, 212 Neb. 785, 786, 326 N.W.2d 44, 45 (1982). The first general assignment of error will be considered only with respect to the decision of the court, holding, in effect, that there was no evidence to support the jury finding in favor of plaintiff.

The second assignment of error is also general in nature, but the statute of limitations question is dispositive of this appeal, and plaintiff's position on the dispositive point may be determined from the argument and propositions of law set out in plaintiff's brief.

Plaintiff states in its brief at 19, "It is the position of the appellant herein that the appellee is estopped from raising the Statute of Limitations as a bar to any of the causes of action of the appellant herein . . . due to the inequitable and fraudulent conduct of appellee."

Plaintiff also states in its brief, at 31,

> However, it is the position of the appellant that the "continuous treatment" theory does in fact apply, and the Statute of Limitations should have been tolled until that relationship terminated, or until the representation of the appellant by Johnson Grant ended with regard to the DISC for the first fiscal year.

Before addressing the two specific contentions made by plaintiff on the statute of limitations issue, we must consider the

general problem presented on the limitations issue in this case. Neb. Rev. Stat. § 25-222 (Reissue 1985) provides in pertinent part:

> Any action to recover damages based on alleged professional negligence . . . shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

Due to the two contentions it makes on the statute of limitations question, plaintiff does not set out any particular "alleged act or omission in rendering or failure to render professional services" in connection with either the tax year 1977-78 (claim 1) or the tax year 1978-79 (claim 2).

Defendant, on the other hand, contends claim 1 had to be filed within 2 years after April 30, 1978. Defendant's position is that its negligence, if any, must be considered as completed when the tax year is completed on April 30, 1978. We note that Kelly DISC's income tax return for this period was filed on January 15, 1979. From the facts in the record before us, it is apparent that the latest possible date of any negligence committed by defendant in connection with claim 1 was January 15, 1979. Plaintiff therefore had to file its petition on that claim by January 15, 1981. Plaintiff did not file its petition against defendant until July 15, 1982. Plaintiff has not filed within the 2-year period of § 25-222. If its action is not to be considered time-barred, therefore, plaintiff must show that its action falls within the exceptions in § 25-222 as to its discovery of defendant's alleged negligence or that defendant's alleged act or omission constituting negligence occurred at a later date than suggested above.

Similarly, with regard to claim 2, defendant's position is that its negligence, if any, during that period had to be completed at the end of the tax year 1978-79, ending on April 30, 1979. Kelly

DISC's return for that period was filed on January 15, 1980, and defendant's negligence would have been completed on that date. As stated above, this action was filed on July 15, 1982, and again, if plaintiff's action is not to be considered barred by the 2-year statute of limitations as to claim 2, plaintiff must bring itself under the "continuous treatment" theory. It must be noted that in setting out the above possible dates, we do not determine the actual date on which defendant's alleged negligence occurred, but only determine that under any set of facts made apparent to us, more than 2 years elapsed between any negligent act or omission of defendant and the filing of the petition herein.

In determining if plaintiff has established that the 2-year statute of limitations should not bar its claims, we first consider plaintiff's position that defendant is estopped from availing itself of the defense of the statute. Plaintiff relies on our holding in *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 341, 348 N.W.2d 869, 871 (1984), where we quoted with approval earlier Nebraska cases stating: " ' "One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense . . . ." ' "

We adhere to that holding, but we recognize that the *MacMillen* opinion goes on to quote with approval at length from *Knaysi v. A. H. Robins Co.*, 679 F.2d 1366 (11th Cir. 1982), to the effect that

> "plaintiff's due diligence in bringing suit must 'be demonstrated by the plaintiff when he seeks the shelter of the doctrine [of equitable estoppel].' *Simcuski v. Saeli*, 44 N.Y.2d at 450, 377 N.E.2d at 717, 406 N.Y.S.2d at 263. The Court of Appeals went on to state: 'Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances. . . .' "

MacMillen, supra at 342-43, 348 N.W.2d at 872.

We have held that "[t]he burden of proof rests on the party who pleads an estoppel to establish the facts upon which the

estoppel is based." *Redick v. Redick*, 220 Neb. 86, 92, 368 N.W.2d 463, 467 (1985).

In the case at bar, the question whether defendant was estopped from asserting the affirmative defense of the statute of limitations by its conduct was submitted to the jury in the form of a special interrogatory. No objection was made by either party to this procedure, and it was done, in effect, at their request. The jury determined defendant was estopped from availing itself of the defense and that plaintiff could not discover defendant's negligence until October 1981.

In its ruling granting defendant's motion for judgment notwithstanding the verdict, the trial court necessarily held that the determination by the jury was not supported by the facts in this case. We agree with the trial court's ruling.

The uncontroverted facts show that plaintiff's president knew of the errors constituting malpractice on the part of defendant long before July 15, 1981. Plaintiff's petition was filed July 15, 1982. The evidence shows without dispute that the plaintiff discovered defendant's negligence or "facts which would reasonably lead to such discovery" more than 1 year before it filed its petition.

The record shows that in the summer of 1979, an IRS agent took over an audit of Kelly DISC. Ronald Kellogg, the plaintiff's president, engaged Bruce Hocking to represent Kelly DISC in the matter. This service was outside the accounting and related services covered by the engagement letter (or contract) between plaintiff and defendant. Hocking's first meeting with the IRS was in September of 1979, when Hocking was told that the notes between plaintiff and Kelly DISC did not qualify as export related assets because they did not contain a stated maturity date. Hocking was not able to change this determination of the IRS. Kellogg testified that at a meeting between himself and Hocking in "mid summer" of 1980, Hocking told Kellogg that the IRS was objecting to the form of the producer notes and that the government was taking the position that Kelly DISC did not qualify for the tax purposes plaintiff was seeking.

On June 27, 1980, Kellogg wrote a letter to Hocking, enclosing a copy of a letter that Kellogg proposed to send to the

IRS. This proposed letter, prepared by Kellogg, began:

> I'm hopeful that the points which I am about to make pertaining to additional tax levies for the fiscal years 1977-78 and 1978-79 totaling $43,406 will be influential enough to consider forgiving the entire amount.
>
> Although we did not have a statement on our notes concerning termination date for our producer loans within a five year time period, the parent Kelly Klosure, Inc., did in fact pay off all producer loans during April of 1979. We complied with the law, even though we didn't comply with the technicality of the law.

This proposed letter, prepared by plaintiff's president, shows without any doubt that before June 27, 1980, plaintiff was fully aware that Kelly DISC did not constitute a properly operated DISC and that it did not qualify to accomplish the only function it was designed to accomplish—to shelter tax payments.

To maintain this suit, plaintiff established to the satisfaction of the jury that, among other things, defendant had not properly advised it as to the form of the producer notes. Before June 27, 1980, plaintiff knew that defendant had made a mistake and that that mistake was going to cost it money. Plaintiff was a highly successful corporation operating in all of the United States and overseas. It is difficult to see how a potential plaintiff could make any clearer discovery of an act of professional negligence without even considering the knowledge as only of facts "which would reasonably lead to such discovery [of professional negligence] . . . ."

The trial court did not err in granting defendant's motion for judgment notwithstanding the verdict. In so holding we have applied our holding in *Havlicek v. Desai*, 225 Neb. 222, 225, 403 N.W.2d 386, 389 (1987), where we stated:

> On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Farm Bureau Life Ins.*

Co. v. Luebbe, 218 Neb. 694, 358 N.W.2d 754 (1984). A jury verdict will not be disturbed unless it is clearly wrong. *Id.*

The determination of the jury in this case was clearly wrong.

The second issue raised by plaintiff is the court's alleged wrongful application of the "continuous relationship" rule. That issue was raised in the following manner, after the evidence had been completed and before the jury was instructed. At a conference with the court, before the instruction conference, the following remarks were made:

> THE COURT: It's my understanding that counsel have decided now that the judge should decide as a matter of law the issue of whether or not there was a continuous relationship or continuous so-called treatment present in this case which would tole [sic] the Statute of Limitations and that this is not a fact question that should go to the jury. Are you actually agreeing it's not a fact question?
>
> MR. THOMSEN: Yes.
>
> MR. SUTTON: Yes.
>
> THE COURT: In view of this, I will rule that this aspect of the Statute of Limitation issue, that is, whether it was a continuous relationship or continuous treatment here is not present in this case and should not be an issue to the jury.
>
> Therefore, the only issue as to connection with the Statute of Limitations is the so-called estoppel or concealment and the court will instruct, hopefully give appropriate instructions.

The record does not show any objection to this ruling, but the matter is argued in plaintiff's brief. Plaintiff here is relying on the theory relied on by the plaintiff in *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 294, 338 N.W.2d 594, 597 (1983), where we said, "Lincoln advocates adoption of rules applicable to actions for medical malpractice, i.e., the statute of limitations does not commence to run until the treatment ends." In the *Lincoln Grain* case, we determined that there was not a continuous relationship between the plaintiff and defendant. We hold that the trial court in this case clearly was correct in holding the doctrine of continuous relationship does not apply

to the case before us. Defendant's services were broken up in clearly defined segments, as discussed above. It would be improper to hold otherwise and to adopt plaintiff's position that since plaintiff had hired defendant before the year 1977 and did not terminate defendant's services until August of 1981, the plaintiff had 2 years after the termination to begin an action against defendant. In the case before us, plaintiff was bound by its knowledge as to specific facts occurring in specific timeframes. In this case, we are not concerned with an uninformed patient being treated in a medical situation. The parties here were knowledgeable business people and fully informed.

There was no error in the trial court's ruling, and the judgment is affirmed.

AFFIRMED.

PATRICK R. RUSSELL, APPELLANT, V. STEVE NORTON ET AL., APPELLEES.

427 N.W.2d 762

Filed August 5, 1988. No. 86-697.

1. **Appeal and Error.** Generally, this court will not consider generalized and vague assertions of error which do not advise us of the issues submitted for decision.
2. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved and must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Patrick Russell, pro se.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellees.

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

GRANT, J.

Plaintiff-appellant is an inmate in the Nebraska Penal and Correctional Complex. He filed a civil suit in the district court for Lancaster County against defendants-appellees, Steve Norton, Fred Britten, Dennis Bakewell, William Foster, and Laurie Smith-Camp. Defendants are employees of the State of Nebraska, working at various levels in the Nebraska Department of Correctional Services. Plaintiff's petition alleges generally that certain letters he attempted to mail on January 21, 1985, were not "handed over to the United States Postal Service until January 25, 1985"; that plaintiff was not permitted to make a telephone call to the Federal Bureau of Investigation; and that plaintiff was not given requested copies of the Lincoln Correctional Center official memorandums. Plaintiff asked for punitive damages in varying amounts against each of the defendants in his or her official capacity and individually, and for an order requiring defendants to follow the rules and regulations of the Nebraska Department of Correctional Services.

Defendants answered in the form of a general denial of plaintiff's allegations.

Trial was held to the court in Lancaster County. At the conclusion of plaintiff's evidence, the court sustained defendants' motion for directed verdict and dismissed the case. Plaintiff appeals.

In his brief on appeal, plaintiff assigns the following errors:

1. Judge Blue errored [sic] in failing to grant the Appellant relief sought in the form of Court Orders.

2. Judge Blue errored [sic] in not properly identifying and receiving Appellants [sic] exhibits at the Pre-trial Conference.

3. Judge Blue errored [sic] in not making a Pre-trial Conference Statement as required by the Nebraska Practice Digest.

4. Judge Blue errored [sic] in not finding Witness Freda [sic] Cramer in contempt of Court for her failure to bring records with her called for by a Subpoena duces tecum and permitting the trial to continue in the absence of such exhibits.

We affirm.

With regard to assignments Nos. 2 and 3, there is no evidence in the record before us of any pretrial conferences, and the matters raised in these assignments are not before us. The assignments are without merit.

With regard to assignment of error No. 4, the record shows that Frieda Cramer was called as a witness by plaintiff. She was the mailroom supervisor at the Lincoln Correctional Center. No suggestion was made that this witness was in contempt, nor was the court asked to find her in contempt. The witness fully answered all the questions directed to her by plaintiff. Plaintiff's fourth assignment is without merit.

With regard to plaintiff's first assignment of error, we are aware of our rule that, generally, this court will not consider generalized and vague assertions of error which do not advise us of the issues submitted for decision. *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982). Nonetheless, in this particular instance, we will consider that the assignment means that plaintiff contends that the evidence was not such that defendants were entitled to a directed verdict, and we will examine the evidence in that light. On appeal from an order of a trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved and must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Hahn & Hupf Constr. v. Highlands Heights Nsg. Home*, 222 Neb. 189, 382 N.W.2d 607 (1986).

When the evidence is so viewed, it is apparent that the record shows plaintiff has not suffered any damages. Insofar as plaintiff requests that the court order that defendants follow the rules of the Department of Correctional Services, the evidence does not show that defendants have violated any rules.

With regard to the issue of the mailing of defendant's three letters, testimony showed that the applicable rule provided that, generally, prisoners' mail will be deposited within 24 hours. The evidence shows that plaintiff's letters were not presented for regular mailing, but were given to one of the defendants to be sent certified mail. Such mail requires that plaintiff pay additional postal fees. This was done by the execution of a

check by plaintiff and the attaching of the check to the letters. The determination of the validity of the check necessarily required some delay. The letters were placed in the mail on January 25, 1985. There was no evidence that there was any intentional delay of plaintiff's outgoing mail.

Similarly, there was no evidence that plaintiff was denied placing a telephone call when plaintiff followed the appropriate regulations of the prison.

With regard to the allegation that plaintiff was prevented from copying memorandum orders, the evidence is clear that plaintiff was given permission to copy unrestricted orders, so long as plaintiff paid for such copies. Plaintiff was properly denied the right to copy *all* orders, since some of those orders affected the security of the prison.

Plaintiff's first assignment of error is without merit. The decision of the trial court is affirmed.

AFFIRMED.

RAQUEL H. NEWMAN, TRUSTEE OF THE CALVIN M. NEWMAN AND RAQUEL H. NEWMAN CHARITABLE TRUST, APPELLEE, V. HINKY DINKY OMAHA-LINCOLN, INC., A NEBRASKA CORPORATION, APPELLANT.

427 N.W.2d 50

Filed August 5, 1988. No. 86-765.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

4. **Leases: Contracts.** A lease is construed as any other contract.
5. **Leases: Assignments.** Where a commercial lease does not expressly permit a lessor to withhold consent to an assignment or subletting and contains an approval clause, such as a provision that there can be no assignment of the lease or subletting without the lessor's prior consent, a lessor may withhold consent only when the lessor has a good faith and reasonable objection to assignment of the lease or subletting, even in the absence of a lease provision that the lessor's consent will not be unreasonably withheld.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Theodore J. Stouffer and Kurt F. Tjaden, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Warren S. Zweiback and Mary Lou Perry, of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and THOMPSON and SPRAGUE, D. JJ.

SHANAHAN, J.

This is a forcible entry and detainer action which resulted in a judgment of restitution of real estate to the plaintiff-lessor, Raquel H. Newman, trustee of the Calvin M. Newman and Raquel H. Newman Charitable Trust (Newman). See Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1985) (forcible entry and detainer). Hinky Dinky Omaha-Lincoln, Inc. (Hinky Dinky), the occupant and sublessee, appeals, thereby presenting to this court a question of first impression, namely: In the absence of an express lease provision specifically permitting a lessor to withhold consent to an assignment of the lease or subletting, must a lessor have a commercially reasonable objection to the assignment or subletting, when the lease allows assignment or subletting only with the lessor's consent?

Newman is the owner of real estate located in Lincoln, Nebraska. On July 1, 1977, Newman entered into a written lease of the premises with American Community Stores Corporation (ACS), a Texas corporation. The lease refers to Newman as the "Landlord" and ACS as the "Tenant," and calls for payment of fixed rent, with additional rent based on the tenant's gross receipts. ACS operated a chain of Hinky

Dinky supermarkets in Nebraska. Section 10.1 of the lease provides: "Tenant may not assign or transfer this Lease voluntarily or by operation of law or sublet the Leased Premises or any portion thereof without the written consent of Landlord first had and obtained."

ACS ceased all operations of its Hinky Dinky grocery store chain on February 16, 1985. Before that date, ACS asked Newman's consent for a proposed lease assignment to Nash Finch Company, and a subsequent sublease by Nash Finch to the appellant, Hinky Dinky. Although brief negotiations ensued concerning ACS' arrangement for the prospective lease assignment and sublease, Newman did not consent to the proposal. Later in February, ACS' lease assignment to Nash Finch and the sublease to Hinky Dinky were executed without Newman's consent.

On March 1, 1985, Newman notified ACS, Nash Finch, and Hinky Dinky, which then occupied the premises, that ACS was in default under the lease as the result of the assignment and subletting without Newman's consent, and on March 4, Newman served a "Notice to Vacate Premises" upon those entities. Newman accepted rental payments from Nash Finch during negotiations to resolve the conflict concerning the propriety and efficacy of the assignment and sublease. When negotiations reached impasse, on August 14, Newman served a "Notice to Quit" on the occupant, Hinky Dinky, and filed a petition for restitution of the premises on August 22, 1985. Whether Newman's acceptance of rent payments constituted a waiver was a matter of dispute by the parties.

After a hearing on Newman's motion for summary judgment, the district court ruled that there was no genuine issue of material fact whether Newman, as lessor, properly withheld consent to the assignment and sublease because, as a matter of law, a landlord may withhold consent for any reason. Citing *B & R Oil Company v. Ray's Mobile Homes*, 139 Vt. 122, 422 A.2d 1267 (1980), the district court stated that "the landlord may withhold consent for whatever reason the landlord deems proper. . . . There is not a genuine issue of fact as to this point." However, the court found that a factual issue existed on the question whether Newman had waived her rights

under the lease by accepting rent payments, knowing that, without Newman's consent, ACS had assigned the lease to Nash Finch, which sublet to Hinky Dinky. Consequently, after granting summary judgment to Newman on the issue of the lessor's consent, the court proceeded to try the question of waiver. See Neb. Rev. Stat. § 25-1333 (Reissue 1985) (summary judgment; case not fully adjudicated on motion). After trial, the district court held that Newman's acceptance of rent payments was not a waiver under the lease, and then granted Newman a judgment for restitution of the premises.

Hinky Dinky argues that the district court erred in (1) granting Newman a partial summary judgment by holding that a lessor may withhold consent to an assignment for any reason, and (2) finding that Newman's acceptance of rent after the alleged breach of lease had occurred was not a waiver.

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citation omitted.]

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., ante p. 160, 162-63, 425 N.W.2d 872, 875 (1988). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 1985). On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988); *Janssen v. Trennepohl*, 228 Neb. 6, 421 N.W.2d 4 (1988).

Partial summary judgment for Newman is correct only if, as a matter of law, Newman was entitled to withhold consent to an assignment and sublease for any reason, that is, Newman had an absolute right to withhold consent. However, if Newman could withhold consent only on the basis of a reasonable

objection, a factual issue concerning reasonableness precluded a summary judgment on the lessor's right to withhold consent to the assignment and sublease in the case at hand.

Hinky Dinky does not contend that Newman's consent to an assignment or sublease was unnecessary, but suggests that a lessor cannot unreasonably withhold consent. On the other hand, Newman suggests that, according to the language of the lease, a lessor has an absolute right to withhold consent to a lease assignment or subletting, however unreasonable or arbitrary the lessor's refusal might be.

Newman calls our attention to *Moritz v. S & H Shopping Centers, Inc.*, 197 Neb. 206, 247 N.W.2d 454 (1976), which involved a lessor's forcible entry and detainer action pursuant to a lease requiring that the lessee pay real estate taxes for the premises and protect against a mechanic's lien for improvements constructed on the leased property. Under the lease, cancellation of the lease on account of the lessee's default would not affect any sublessee. In resisting the lessor's action as the result of nonpayment of real estate taxes and proceedings to foreclose a mechanic's lien for construction on the leased premises, the defendant-tenant contended that the lessee's subtenants were necessary parties to the action. In rejecting the lessee's contention, this court concluded that the lessor had not consented to the sublease, notwithstanding a lease provision requiring such consent, and, therefore, the lessee had not transferred rights to the sublessees so as to make the sublessees necessary parties in the lawsuit. Consequently, *Moritz, supra*, does not dispose of the question whether a lessor's withholding consent to an assignment of a commercial lease or a sublease of the leased premises is an absolute right or must be based on a reasonable ground for the withheld consent.

> A lease is to be construed as any other contract. *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971). The proper construction of a written contract is generally a question of law to be determined by the courts. *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980).

Chadd v. Midwest Franchise Corp., 226 Neb. 502, 506, 412 N.W.2d 453, 457 (1987).

Newman relies on *B & R Oil Company v. Ray's Mobile Homes*, 139 Vt. 122, 422 A.2d 1267 (1980), in which the Vermont Supreme Court, construing lease language identical to the consent requirement in Newman's lease, embraced a rule recognizing a lessor's right to arbitrarily withhold consent to an assignment of a lease. We have previously considered Vermont cases on points of common law. See *Mattis v. Robinson*, 1 Neb. 3 (1871), examining and overruling *Pierce v. Brown*, 24 Vt. 165 (1852).

Another line of authority, however, recognizes that, where a lease contains an approval clause, such as a provision stating that the lease cannot be assigned without the lessor's prior consent, a lessor may withhold consent only when the lessor has a good faith reasonable objection to assignment of the lease, even in the absence of a lease provision stating that the lessor's consent will not be unreasonably withheld. See, *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985); *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 638 P.2d 1084 (1982); *Funk v. Funk*, 102 Idaho 521, 633 P.2d 586 (1981); *Hendrickson v. Freericks*, 620 P.2d 205 (Alaska 1981); *Warmack v. Merchants Nat'l Bk., Ft. Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981); *Homa-Goff Interiors, Inc. v. Cowden*, 350 So. 2d 1035 (Ala. 1977). Many courts which adhere to the foregoing rule of reasonableness have accepted the general principle recited in Restatement (Second) of Property § 15.2(2) at 100 (1977):

> A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

For example, see *Kendall v. Ernest Pestana, Inc., supra*. As the California Supreme Court observed in *Kendall*:

> "[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." [Citations omitted.] Here the lessor retains the discretionary power to approve or disapprove

> an assignee proposed by the other party to the contract; this discretionary power should therefore be exercised in accordance with commercially reasonable standards. "Where a lessee is entitled to sublet under common law, but has agreed to limit that right by first acquiring the consent of the landlord, we believe the lessee has a right to expect that consent will not be unreasonably withheld." [Citation omitted.]

40 Cal. 3d at 500, 709 P.2d at 845, 220 Cal. Rptr. at 826 (quoting *Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 289 P.2d 785 (1955), and *Fernandez v. Vazquez*, 397 So. 2d 1171 (Fla. App. 1981)).

Factors to be considered in determining whether a lessor has acted with good faith and reasonably in withholding consent to an assignment of a commercial lease or subletting include: financial responsibility of the proposed assignee or sublessee; the assignee's or sublessee's suitability for the particular property; legality of the proposed use; need for alteration of the premises; and the nature of the occupancy. See *Kendall v. Ernest Pestana, Inc., supra.* Pertinent to an assignee's or sublessee's financial responsibility under the lease may be past revenue received by the assignee or sublessee and, insofar as demonstrable or ascertainable, prospective receipts in relation to rent based on gross receipts from the business conducted or to be conducted on the leased premises. The foregoing factors are neither exhaustive nor components in an arithmetical formula for reasonableness. None of the factors is weighted so that more or less weight is attributable or assigned to any particular factor utilized in evaluating a lessor's good faith or reasonableness in withholding consent to a commercial lease assignment or subletting. Additional factors may be educed in future situations involving a lessor's withholding consent in cases similar to that now reviewed by this court.

The requirement of good faith and reasonableness in a commercial transaction is not totally foreign to Nebraska law. See Neb. U.C.C. § 1-203 (Reissue 1980): "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." We realize that the U.C.C. requirement of good faith is statutory, but a similar theme of

requisite good faith and reasonableness appears in this court's decisions pertaining to aspects of a commercial lease other than the question of a lessor's good faith and reasonableness in withholding consent to an assignment or sublease. For instance, in *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969), this court held that a lessor cannot arbitrarily or unreasonably refuse to accept a new tenant in mitigation of damages which resulted from the lessee's default under the lease. As still another example, a lease provision concerning construction on leased premises was construed in *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987), where a lease required that construction plans and the contractor's bid " 'shall be submitted to Tenant for acceptance and approval.' " (Emphasis omitted.) 226 Neb. at 506, 412 N.W.2d at 457. Referring to the lease's language concerning the tenant's acceptance and approval of the construction in *Chadd*, we commented:

> The party to be satisfied must act in good faith or not unreasonably disapprove the subject matter. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant. [Citations omitted.] The inference of good faith or reasonableness provides a standard against which a party's performance is measured. Such "on approval" or "satisfaction" clauses are not used as a vehicle to defeat contracts.

226 Neb. at 506-07, 412 N.W.2d at 457.

We believe that the rule of reasonableness, expressed in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985), is the correct rule and, therefore, hold that where a commercial lease does not expressly permit a lessor to withhold consent to an assignment or subletting and contains an approval clause, such as a provision that there can be no assignment of the lease or subletting without the lessor's prior consent, a lessor may withhold consent only when the lessor has a good faith and reasonable objection to assignment of the lease or subletting, even in the absence of a lease provision that the lessor's consent will not be unreasonably withheld. In the case before us, the lease does not expressly permit or authorize

Newman to withhold consent to an assignment of the lease or subletting. In the absence of an express provision of such nature, that is, a lessor's right to withhold consent, the provisions of the lease in question require that the lessor act in good faith and reasonably in withholding consent to an assignment or subletting. Whether Newman acted in good faith and reasonably in withholding consent to the assignment and sublease is a question of material fact. See *Chadd v. Midwest Franchise Corp., supra.*

Although the court's opinion in *Kendall v. Ernest Pestana, Inc., supra*, and Restatement (Second) of Property § 15.2(2) (1977) contain expressions of a policy against a restraint on alienation, our decision today is limited to the issue raised by the parties, namely, the question of a lessor's good faith and reasonableness in withholding consent to an assignment of the lease or subletting, when the commercial lease in question does not contain an express provision specifically permitting a lessor's withholding consent. We leave for another day and another case the question whether an express lease provision permitting a lessor to withhold consent amounts to a restraint on alienation, in contravention of public policy in Nebraska. See *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 473, 293 N.W.2d 843, 846 (1980):

> " ' "[R]estraint on alienation" refers not merely to the restriction of the legal power of alienation, but also to the restriction of alienability as a practical matter. Any provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation.' "

(Quoting from L. Simes & A. Smith, The Law of Future Interests § 1111 (2d ed. 1956).) Cf., *Burney v. Pick*, 186 Neb. 828, 186 N.W.2d 919 (1971) (deed granting fee simple but prohibiting grantee's alienation of the property without consent of third parties; held, provision against alienation was invalid); *Andrews v. Hall*, 156 Neb. 817, 58 N.W.2d 201 (1953) (fee simple devise containing restriction against sale, mortgaging, or disposing of property before death of testator's widow; held, a restraint on alienation in the form of a forfeiture and

termination of fee simple estate on condition subsequent was void); *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971).

By concluding that Newman could withhold consent for any reason regarding assignment and subletting, the district court erred in granting Newman a summary judgment on the question concerning the lessor's withheld consent. Unless and until it is determined that Newman's withholding consent to the proposed assignment and sublease was in good faith and reasonable, it is unnecessary to determine whether Newman waived a right to declare a default under the lease in question. Consequently, adjudication of the waiver question is premature. The judgments of the district court are reversed. This matter is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RITA M. LIEKHUS, APPELLEE, V. DENNIS H. LIEKHUS, APPELLANT.
427 N.W.2d 56

Filed August 5, 1988. No. 86-770.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Charles L. Caskey for appellant.

Francis R. O'Brien for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

PER CURIAM.

This matter is an appeal from the district court for Colfax County, Nebraska, from the decree of dissolution entered by that court awarding certain property and assigning certain debts to the parties. The appellant assigns as error "the finding that the petitioner is to receive the residence and household

goods not previously listed, which is not an equitable division of the real and personal property of the parties"; "the division of the marital estate of the parties"; and the district court's "abuse of discretion."

From our review de novo on the record, we find no abuse of discretion by the district court in its division of the marital property. Therefore, the decree of dissolution entered by the district court is affirmed. An attorney fee of $1,500 for services in this court is awarded to appellee.

AFFIRMED.

BONNIE KAY WACHTEL, BY AND THROUGH HER MOTHER AND NEXT FRIEND, BRENDA WACHTEL, APPELLANT, V. ROBERT A. BEER, M.D., ET AL., APPELLEES.

427 N.W.2d 56

Filed August 5, 1988. No. 86-1026.

1. **Summary Judgment.** As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
2. _____. The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 1985) is to provide an additional safeguard against an improvident or premature grant of summary judgment.
3. **Summary Judgment: Affidavits.** A Neb. Rev. Stat. § 25-1335 (Reissue 1985) affidavit need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.
4. _____: _____. Neb. Rev. Stat. § 25-1335 (Reissue 1985) should be applied with the spirit of liberality.
5. _____: _____. A party's access to witnesses or material is an important consideration for the court in the application of Neb. Rev. Stat. § 25-1335 (Reissue 1985).
6. _____: _____. A party filing an affidavit under Neb. Rev. Stat. § 25-1335 (Reissue 1985) must show how additional time will enable the party to rebut a summary judgment movant's allegations that no genuine issue of material fact exists for disposition by trial.
7. _____: _____. Refusal to apply Neb. Rev. Stat. § 25-1335 (Reissue 1985) is disfavored when the party opposing summary judgment makes a timely

application by an affidavit which specifically identifies the relevant information and indicates some basis for the conclusion that the sought information actually exists.

8. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance and other judicial action authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1985) are within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
9. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for further proceedings.

Stephen L. Gerdes and Peter J. Hoagland, and Vard Johnson, of Broom & Johnson, for appellant.

James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellees Beer et al.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Scheer.

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

SHANAHAN, J.

On October 25, 1985, Brenda Wachtel, mother and next friend of Bonnie Kay Wachtel, filed a negligence action against Robert A. Beer and Dean R. Thomson, physicians and partners in the Nebraska City Family Medical Clinic, and against St. Mary's Hospital of Nebraska City and Kathryn Scheer, a nurse-anesthetist. On account of the defendants' alleged negligence at the time of Bonnie Kay's birth, Brenda Wachtel sought damages for permanent injury to Bonnie Kay and medical expenses, past and future, which were assigned to Bonnie Kay for inclusion in the litigation.

Brenda Wachtel received prenatal care from Drs. Beer and Thomson for her pregnancy with Bonnie Kay. In labor late during her pregnancy, Brenda entered St. Mary's Hospital, where, in the early morning of October 30, 1983, there were

signs of fetal distress in Bonnie Kay, who was delivered by cesarean section around 3:30 p.m. on October 30. Attending Bonnie Kay's birth were Drs. Beer and Thomson and nurse-anesthetist Scheer. Bonnie Kay was born with brain damage and an eyesight disorder, which are permanent. Alleged as negligence are several items, including the physicians' misuse of the drug Nubain administered to Brenda, whose baby was in fetal distress; failure to promptly perform a cesarean section; failure to refer Brenda to an obstetrician to handle problems with a high-risk baby; failure to properly resuscitate Bonnie Kay after her birth; and failure to properly monitor Bonnie Kay's condition. Denying negligence in their answers, Drs. Beer and Thomson answered on November 27, 1985, and Scheer answered on December 4.

On August 16, 1986, Drs. Beer and Thomson moved for summary judgment. Scheer moved for summary judgment on September 9. At the hearing on the defendants' motions, held on October 3, each defendant introduced an affidavit, which very generally alleged that management of Brenda Wachtel's pregnancy and delivery of Bonnie Kay conformed with accepted standards and denied any negligence regarding Brenda Wachtel or Bonnie Kay. In addition to their affidavits, the defendants introduced "Plaintiff's Answers to Interrogatories," served on the defendants in December 1985, which stated that the plaintiff had not made a final determination concerning any expert witness who would testify for the plaintiff at trial.

At the October 3 hearing, plaintiff attempted to introduce exhibit 5, an affidavit signed by plaintiff's lawyer on October 3, which recited that the lawyer, at an unspecified time, had contacted a board-certified obstetrician and gynecologist, whom the affidavit did not identify but who was in Washington, D.C., and who, after reviewing records for Bonnie Kay, had concluded that "there is evidence that the defendants in the above-captioned case did not meet the appropriate standard of care for Nebraska City, Nebraska." The affidavit further stated:

> Affiant has recently retained Dr. Roger K. Freeman to testify on behalf of plaintiff. Dr. Freeman is Medical

> Director of the Women's Hospital, Memorial Hospital Medical Center of Long Beach, California. Dr. Freeman is a Professor in the Department of Obstetrics and Gynecology at the University of California at Irvine. Dr. Freeman has not yet had time to prepare a formal report.

Exhibit 5 did not disclose when plaintiff's lawyer had retained Dr. Freeman and did not supply an anticipated date for Dr. Freeman's report. Objecting to exhibit 5, defendants asserted that the lawyer's affidavit did not contain a medically expressed opinion or facts indicating that the defendants were negligent. In response, plaintiff's lawyer informed the court:

> We've not taken depositions on the case and so it's even a little difficult for the expert that I have retained to come in and render an opinion until after I have deposed the defendant doctors [because] you can't make a determination just on the bare records as to what happened in a delivery room. And so I think the affidavit becomes very relevant because it indicates to the Court that the plaintiff now does have an expert, and an expert who, when the appropriate discovery has been done, will render an opinion and will be subject to being deposed by defense counsel as to that opinion.

To the court's inquiry about a particular physician's affidavit for the plaintiff, the plaintiff's lawyer remarked:

> But the problem that I have is that I have been in the process of trying to get the expert. I just got the expert. He is not in a position yet to render an opinion. I'm on my way down to Kansas City to meet with another expert to review over the records. We've talked about it on the phone, but he hasn't had a chance to see the monitor strip so he can't give you an opinion. . . .
>
> And I would also indicate to the Court that prior to filing this case, I had discussed the matter with several doctors, obstetricians and gynecologists in the area, and they have given me the opinion that there are serious problems with the standard of care. But because of the obvious problem of doctors wanting to testify against a fellow doctor, I've honored their request and kept their names confidential.

When the court sustained the defendants' objection to exhibit 5, plaintiff's lawyer requested additional time to obtain affidavits from plaintiff's medical experts to counteract the defendants' affidavits offered for the summary judgment. After denying plaintiff's oral request for a continuance to obtain an additional affidavit from a physician, the court granted the attorneys time to file briefs regarding the issues raised at the October 3 hearing and took defendants' motions for summary judgment under advisement.

On October 10, 1986, plaintiff filed a "Motion to Conduct Second Hearing on Motion for Summary Judgment or to Receive Additional Evidence," which was heard on November 7, 1986. At that hearing, plaintiff offered the affidavit by plaintiff's lawyer, exhibit 5, which had been excluded from evidence at the October 3 hearing on defendants' motions for summary judgment. Regarding exhibit 5, counsel for Drs. Beer and Thomson stated to the court: "[I]f that affidavit is being offered to show some excuse for not offering evidence at the time of the first hearing, I think it ought to be received." Scheer's counsel agreed with that statement concerning exhibit 5. Referring to defendants' stated position relative to introduction of exhibit 5, the court responded: "I think so too. I think it ought to be received for that purpose. That's in conjunction with 1335."

Neb. Rev. Stat. § 25-1335 (Reissue 1985) states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

At the November 7 hearing, plaintiff offered other exhibits, namely, exhibit 7, another affidavit by plaintiff's lawyer; exhibit 8, an affidavit by John Calkins, M.D.; and exhibits 9, 10, and 11, plaintiff's supplemental answers to interrogatories, which stated that plaintiff would call Dr. Calkins to testify at trial concerning the matters mentioned in his affidavit, exhibit 8. On defendants' objection, the court excluded exhibits 8

through 11.

In exhibit 7, the lawyer's affidavit dated October 10, 1986, plaintiff's counsel stated that he had conferred with two obstetricians and gynecologists in the Omaha area, who demanded that they remain unidentified but who expressed opinions that "each defendant departed from the applicable standard of care for the delivery of babies" in Nebraska City. The affidavit then described other events and the problems plaintiff's lawyer was encountering in the dissolution of his law firm, such as handling the firm's files and complying with various court orders regarding the partnership dissolution. In June 1986, plaintiff's lawyer contacted Dr. Freeman, apparently the same physician mentioned in exhibit 5, and a Dr. Thomas J. Garite in Long Beach, California. The California physicians indicated they would review Bonnie Kay's records and would recontact plaintiff's lawyer. On August 15, 1986, the trial judge before whom plaintiff's case was pending, without objection, passed over plaintiff's case for trial in the fall jury term of 1986. While officiating at the U.S. Open Tennis Championships in New York from August 20 to September 6, 1986, plaintiff's lawyer discussed plaintiff's case with a Washington, D.C., obstetrician and gynecologist (presumably the same physician mentioned in the lawyer's previous affidavit, exhibit 5), who requested Bonnie Kay's records, which counsel transmitted. Although counsel repeatedly attempted to reach the Washington, D.C., physician by telephone, counsel's calls went unanswered. In late September 1986, Dr. Freeman, whom plaintiff's lawyer had contacted in June, told plaintiff's lawyer that he would testify but that the doctor's formal report could not be prepared for several months. At that point, plaintiff's lawyer contacted Dr. John Calkins, who said he would meet with plaintiff's counsel in Kansas City, Kansas, on October 3, 1986, when Bonnie Kay's records would be reviewed. Immediately after the October 3 hearing on defendants' motions for summary judgment, plaintiff's lawyer personally met Dr. Calkins in Kansas City, where the doctor, after reviewing Bonnie Kay's records, agreed to testify for the plaintiff.

Exhibit 8 was the affidavit of Dr. Calkins and contained an

extensive and impressive "Faculty Curriculum Vitae" of Dr. Calkins as an associate professor of obstetrics and gynecology at the University of Kansas Medical Center. In his affidavit, dated October 8, 1986, Dr. Calkins stated:

> I am familiar with the standard of care for the treatment of pregnant women and the delivery of babies in communities in Kansas and Nebraska such as Nebraska City, Nebraska, during the year 1983.
>
> . . . I have reviewed the medical records concerning the prenatal care and treatment of Brenda Wachtel [and] have reviewed also the medical records, including the fetal monitor strips, concerning the delivery of Bonnie Kay Wachtel in October, 1983.
>
> . . . It is my opinion that said medical records include evidence that each of the defendants . . . deviated from the standard of care for the delivery of babies in communities such as Nebraska City, Nebraska.

Dr. Calkins then expressed the reasons for his opinion that each of the defendants had "deviated from the standard of care" for Bonnie Kay's birth, namely, an inappropriate lapse of time between the decision to perform an emergency cesarean section and the time at which the surgery was actually undertaken; fetal monitor strips showing signs of severe fetal distress 45 minutes after the decision to perform the cesarean section; and the medical probability that Bonnie Kay had suffered brain damage as the result of fetal distress, because the cesarean section had been delayed. Dr. Calkins concluded that he would be able to make more specific statements concerning the nature of each defendant's "departure from the standard of care," after the defendants' depositions had been reviewed by the doctor.

Therefore, at the November 7 hearing, exhibits 5 and 7 (affidavits from plaintiff's lawyer) were received into evidence, and exhibits 8 through 11 were excluded as the result of defendants' objections.

On November 10, 1986, the court granted summary judgment to Beer, Thomson, and Scheer.

Brenda Wachtel claims that the district court erred in not granting a continuance to permit affidavits to be obtained,

depositions to be taken, or discovery to be completed, all as provided by § 25-1335 regarding a proceeding for summary judgment.

Beer, Thomson, and Scheer contend that the evidence at the October 3, 1986, hearing entitled them to summary judgment because the plaintiff did not make a counter-showing that a genuine issue of material fact existed for disposition by trial on the question of defendants' negligence. Therefore, defendants argue, they were entitled to judgment as a matter of law. To support their contention, the defendants refer to our decisions which contain the proposition that, when a party moving for summary judgment has made a prima facie showing that the movant would be entitled to judgment if the evidence is uncontroverted, summary judgment should be granted to the movant unless the opposing party offers evidence showing that there is a genuine issue concerning a material fact. See, *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987); *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), *appeal after remand* 216 Neb. 575, 344 N.W.2d 649 (1984). Defendants argue that Wachtel did not present evidence showing a genuine issue of material fact concerning defendants' negligence, because the affidavits by Wachtel's lawyer did not contain appropriate evidence on the question of negligence. See *Marshall v. Radiology Assoc., supra* (affidavit by plaintiff's lawyer, stating contents of medical records and indicating the expert witnesses would testify for plaintiff at trial, was not evidence to establish a question of fact concerning a defendant's malpractice).

However, we bear in mind that, as a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. See, *Draemel v. Ruffenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986) (summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact); *Hanzlik v. Paustian, supra.*

Section 25-1335 is a verbatim counterpart to Fed. R. Civ. P.

56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

According to 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2740 at 529-30, 532 (2d ed. 1983):

> Rule 56(f) protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit . . . present "facts essential to justify his opposition" to the motion. Under the rule a party who seeks the protection of subdivision (f) must state by affidavit the reasons why he is unable to present the necessary opposing material and the court then may (1) refuse to grant summary judgment, (2) order a continuance to permit affidavits to be taken or discovery to be had, or (3) "make such other order as is just."
>
> An important aspect of a Rule 56(f) affidavit is that it need not contain evidentiary facts going to the merits of the case; rather, it is merely a sworn statement explaining why these facts cannot yet be presented. . . . As [former] Massachusetts Supreme Court Justice, Benjamin Kaplan has stated: "Under rule 56(4) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting that proof by affidavit in opposition to the motion." [Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 77 Harv. L. Rev. 801, 826 (1964).] Thus Rule 56(f) allows a party who has no specific material contradicting his adversary's presentation to survive a summary judgment motion if he presents valid reasons justifying his failure of proof. . . .
>
> . . . .
>
> The purpose of [Rule 56(f)] is to provide an additional safeguard against an improvident or premature grant of

> summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality.

See, also, *Buchanan v. Stanships, Inc.*, 744 F.2d 1070 (5th Cir. 1984).

As observed in 6 J. Moore & J. Wicker, Moore's Federal Practice ¶ 56.24 at 56-1421, 56-1429, and 56-1430 (2d ed. 1987):

> Rule 56(f) . . . does not deal with the evidentiary affidavit. It authorizes the *party opposing* summary judgment to set forth reasons why he is presently unable to present "by affidavit facts," *i.e.*, evidentiary affidavits, "essential to justify his opposition"; and it authorizes the court, where the stated reasons are adequate, to take action appropriate to the circumstances of the case.
>
> . . . .
>
> If the trial court determines that the reasons stated in the affidavit are adequate, it has a broad discretion to determine the further course of the litigation. It may deny the motion for summary judgment and order the case to stand for trial; deny the motion upon condition that the opposing party be ready to proceed to trial when the case is reached in its regular order; deny the motion without prejudice to its renewal after the answer has been served, or after the opposing party has had sufficient time to obtain opposing affidavits, take depositions or make use of the discovery procedures; order a continuance to allow the opposing party time to obtain affidavits, take depositions, or otherwise make effective use of the discovery procedures available under the Rules; or make any other order that is just in the particular situation.

What has been stated concerning Rule 56(f) in 10A C. Wright, A. Miller & M. Kane, *supra*, and 6 J. Moore & J. Wicker, *supra*, applies equally to § 25-1335. Therefore, we hold as follows: The purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment. A § 25-1335 affidavit need not contain evidence going to merits of the case; rather, a § 25-1335

affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. Section 25-1335 should be applied with the spirit of liberality.

Regarding application of § 25-1335 and its counterpart, Rule 56(f), a party's access to witnesses or material is an important consideration for the court. See *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260 (10th Cir. 1984) (party filing the affidavit under Rule 56(f) must show how additional time will enable the party to rebut a summary judgment movant's allegations that no genuine issue of material fact exists for disposition by trial).

Refusal to apply § 25-1335 is disfavored when the party opposing summary judgment makes a timely application by an affidavit which specifically identifies the relevant information and indicates some basis for the conclusion that the sought information actually exists. See *VISA Intern. Service v. Bankcard Holders*, 784 F.2d 1472 (9th Cir. 1986).

In civil proceedings other than a summary judgment, we have repeatedly stated that a motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. See, *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987); *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986).

A continuance and other judicial action authorized by § 25-1335 are within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Exhibit 5, the October 3 affidavit by Wachtel's lawyer, stated that a physician had informed counsel that there is evidence that each of the defendants was negligent concerning Bonnie Kay's birth and that another expert, Dr. Freeman, a California physician, had not had sufficient time to prepare a formal report on the defendants' negligence. We construe the October 3 affidavit to be a statement that the plaintiff, at the time of the initial hearing on defendants' motions for summary judgment, was then unable to offer evidence essential to justify opposition

to the defendants' motions and that appropriate evidence would be forthcoming and available to resist the summary judgment motions. Beyond question, when exhibit 5 was excluded at the October 3 hearing, Wachtel's lawyer requested a continuance to obtain a counteraffidavit responsive to defendants' affidavits offered for the summary judgment. Although exhibit 5 was excluded at the October 3 hearing, the court took the defendants' summary judgment motions under advisement and resumed the hearing on November 7, when exhibit 5 was received into evidence without objection. In fact, lawyers for the defendants acknowledged that exhibit 5 was admissible "to show some excuse for [plaintiff's] not offering evidence at the time of the first hearing" on October 3. With defense counsel's approbation, reception of exhibit 5 into evidence at the November 7 hearing effectively characterized and constituted that hearing as a continuation of the hearing commenced on October 3 for summary judgment. In receiving exhibit 5 at the November 7 hearing, the court unequivocally stated that the lawyer's affidavit was received for the purpose of § 25-1335, that is, an affidavit to show that the plaintiff was presently unable to offer evidence essential to justify opposition to the defendants' motions for summary judgment. Exhibit 7, offered at the November 7, or second, hearing, included not only those matters alleged in exhibit 5 but also additional information and a more detailed description of what transpired and did not transpire regarding plaintiff's efforts to obtain necessary data from physicians. Therefore, we view exhibit 7, the second affidavit by Wachtel's lawyer, as an amplification or supplement to exhibit 5, which was also received as evidence at the November 7 hearing. Exhibit 7 described in detail the difficulties which Wachtel's lawyer experienced in obtaining information from physicians. Although exhibit 7 recounts some of the problems stemming from dissolution of the law firm of Wachtel's lawyer and counsel's occupation at a tennis tournament in Queens, New York, the real and obvious obstacle, by the very nature of the case—medical malpractice—was access to and availability of a qualified physician who was ready, willing, and able, in terms of time and temperament, to be a witness or affiant in Bonnie Kay's case. In

practicality, the complexities of an action for malpractice and the problems of gaining information and enlisting a reliable expert witness as well as formulating and preparing a malpractice case are myriad and usually major, a situation almost a matter of judicial notice.

Exhibit 8, Dr. Calkins' affidavit, offered but excluded at the November 7 hearing, indicates some of the complexity in the medical questions to be answered for an adequate presentation of an extremely important matter for a permanently brain-damaged child. According to Dr. Calkins, whose affidavit (exhibit 8) contained relevant information and should have been received into evidence, answers to those serious questions necessitate the defendants' depositions. Undoubtedly, defendants' depositions, without appropriate medical information as background and preparation by plaintiff's counsel, would likely be a pointless exercise. Appreciable time was consumed during the California physician's deliberation whether to testify for the plaintiff. The affidavits from Wachtel's lawyer and Dr. Calkins, when read together, show a reasonable excuse and good cause, explaining why Wachtel was then unable to offer evidence essential to justify opposition to the defendants' summary judgment motions. We have considered Dr. Calkins' affidavit only in relation to the application of § 25-1335. We have not decided, because we need not decide, whether Dr. Calkins' affidavit contains evidence going to the merits of Wachtel's case inasmuch as Dr. Calkins has indicated that his review of the defendants' depositions will enable him to be more specific concerning the nature of the defendants' negligence. Moreover, the district court excluded Dr. Calkins' affidavit and, therefore, apparently did not consider that affidavit in awarding summary judgment to the defendants. Whether Dr. Calkins' affidavit results in a genuine issue of material fact is, as yet, undetermined and may eventually become a question for the district court.

We note that there had not been a pretrial conference or other order in this case setting a time limit which had expired for obtaining the defendants' depositions. When the defendants' summary judgment motions were filed, Wachtel's case was

within the 18-month deadline for trial in a civil action. See Neb. Ct. R. on Case Progression Standards (rev. 1986).

A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

Denial of a continuance to Wachtel constituted an abuse of discretion by the district court because the improvident and premature summary judgments deprived Wachtel of her substantial right to present evidence opposing the defendants' evidence in support of their summary judgment motions, thereby denying Wachtel her day in court. Consequently, the judgment of the district court is reversed, and this matter is remanded to the district court for further proceedings.

This appellate disposition is not intended to prejudice defendants' right to renew their summary judgment motions after Wachtel has had the opportunity to participate in discovery or obtain counteraffidavits responsive to defendants' summary judgment motions and supporting evidence. Further, we do not intimate or otherwise indicate any view concerning the merits of defendants' motions for summary judgment and do not imply that there is or is not a genuine issue of material fact regarding Wachtel's negligence action.

We are aware that Bonnie Kay Wachtel's infancy and Neb. Rev. Stat. § 25-213 (Reissue 1985) (actions by infants; tolling of limitation) tolled the 2-year statute of limitations for medical malpractice (Neb. Rev. Stat. § 25-222 (Reissue 1985); see *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984)), which would have obviated the necessity to file a suit without specific medical information immediately available for judicial proceedings and would have eliminated exposure to summary judgment as the result of an inability to present countervailing evidence. However, because the claim of Bonnie Kay's parents for medical expenses was assigned to Bonnie Kay and thereby made a cause of action in the suit, suspension of the

statute of limitations, afforded by § 25-213, would not have inured to the parents' benefit to preserve actionability of the medical expenses. See *Macku v. Drackett Products Co., supra.* Consequently, under the circumstances, resolution of the presented question became necessary.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF LOUIS W. REIMER, DECEASED. JOHN C. WATSON, APPELLEE, V. FRANCES L. NELSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS W. REIMER, DECEASED, APPELLANT.

427 N.W.2d 293

Filed August 5, 1988. No. 86-1034.

1. **Decedents' Estates: Appeal and Error.** Our review in probate cases is for error appearing on the record.
2. **Decedents' Estates: Attorney Fees.** Fees allowed in probate proceedings under Neb. Rev. Stat. § 30-2481 (Reissue 1985) to persons nominated as personal representatives under a will are administration expenses.

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

Robert I. Eberly for appellant.

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

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

GRANT, J.

After the death of Louis W. Reimer on March 11, 1985, his daughter Frances L. Nelson was appointed special administrator of his estate on April 23, 1985, by order of the county court for Holt County, Nebraska. The order also appointed a guardian ad litem for three minor "heirs of the estate." On May 3, 1985, the guardian ad litem filed a petition for formal probate of the will of Louis W. Reimer.

John C. Watson was the nominated personal representative in the decedent's will. On May 2, 1985, Watson retained the services of Forrest F. Peetz to act as attorney for Watson as nominated personal representative. On May 8, Watson filed a petition in the county court joining in the petition for probate filed by the guardian ad litem and seeking the appointment of Watson as personal representative of the estate. On May 28, Henry F. Reimer, Louis Reimer, Audrey Taylor, and Frances Nelson, children of Louis W. Reimer, and Frances E. Reimer, the surviving spouse, filed objections to the "Purported Will" in the county court. On June 10, the decedent's children filed a notice of transfer, under Neb. Rev. Stat. § 30-2429.01 (Cum. Supp. 1984), transferring the proceedings to the district court for Holt County. On April 11, 1986, a judgment was entered in the district court proceeding that "the last will and testament of Louis W. Reimer, deceased, be admitted to probate" for certain stated purposes. The order protected the rights of the three minor great-grandsons of the decedent, provided for cash gifts to three daughters and a sister of the decedent and to two institutions, and provided for a widow's interest to the surviving wife of the decedent. The judgment was based on stipulations signed by twenty individuals, all of whom apparently had some interest in the estate of Louis W. Reimer. The order remanded the case to the county court for Holt County for probate. Forrest Peetz represented Watson throughout these proceedings.

On April 16, 1986, appellee Watson filed an application in the county court seeking fees for his attorney, Peetz, and renouncing appellee's right of appointment under decedent's will and any right to fees for his services as nominated personal representative of the decedent's will. A hearing was held on this application, and appellee testified that an agreement had been worked out among the various heirs of Louis W. Reimer and that in April 1986 Watson chose to renounce his priority as nominated personal representative. At this hearing, the application for fees was hotly contested by Henry Reimer, acting as attorney for appellant Frances Nelson.

After the hearing, the county court awarded appellee the sum of $737.25, as attorney fees for the services of Forrest Peetz'

acting as attorney for appellee. Frances Nelson appealed this order to the district court for Holt County. That court affirmed the order of the county court and assessed an additional fee of $200, as provided by Neb. Rev. Stat. § 24-541.10 (Reissue 1985). Nelson then appealed to this court.

In this court, appellant sets out nine assignments of error. These assignments may be consolidated into four: that the district court erred (1) in affirming the county court's granting appellee a fee for appellee's attorney, because appellee, although nominated in the will, never qualified and served as personal representative; (2) in ordering the fee to be paid as an administration expense rather than pursuant to the claim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1985); (3) in awarding an additional $200 fee based on appellant's "vexatious appeal" to the district court; and (4) in denying review of costs of the transcript and bill of exceptions charged by the county court. We affirm.

With regard to the first general assignment of error, Neb. Rev. Stat. § 30-2481 (Reissue 1985) provides: "If any personal representative *or person nominated as personal representative* defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." (Emphasis supplied.)

Appellee Watson without doubt was the personal representative nominated in the will of decedent Louis W. Reimer. The statute specifically provides that whether "successful or not," such a nominated person is entitled to receive his necessary expenses, including a reasonable attorney fee, when he prosecutes or defends any proceeding in good faith. Our review in probate cases is for error appearing on the record. *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985). Our examination of the record does not show any error committed by the county court or the district court. The evidence before the county court, and before the district court, supports the determination that Watson's efforts, through his attorney, were done in good faith to probate the will of Louis W. Reimer when that will was being attacked by Reimer's children. Under the statute, Watson was entitled to be paid his expenses,

including a fee for his attorney. Appellant's contention on this point is without merit.

With regard to appellant's second assignment of error, appellant points out that Neb. Rev. Stat. § 30-2404 (Reissue 1985) provides in part: "No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative." Neb. Rev. Stat. § 30-2209(33) (Reissue 1985) states: "Personal representative includes . . . special administrator . . . ." In this case, Frances Nelson was appointed special administrator on April 23, 1985, and was apparently appointed personal representative sometime between appellee's renunciation of his nomination on April 16, 1986, and Nelson's appeal on May 16 from the county court order setting appellee's fee. In any event, a personal representative was appointed during all relevant times in this case.

In general, appellant seems to contend that no award can be made to appellee for his attorney fee except through the claim procedures set out in the Nebraska Probate Code, including §§ 30-2404 and 30-2485. We point out the provisions of § 30-2485(2)(b), which provide: "All claims, other than for administration expenses, against a decedent's estate which arise at or after the death of the decedent . . . are barred . . . unless presented . . . [within certain time periods]." We determine that fees allowed in probate proceedings under § 30-2481 to persons nominated as personal representatives under a will are administration expenses and need not be paid pursuant to the probate claim statutes.

A part of this assignment of error is appellant's contention that the district court erred in failing to quash the garnishment against the estate funds for the payment of the allowed attorney fee. Since the fee was properly allowed, appellant's contention in this regard is without merit.

With regard to appellant's third assignment of error, § 24-541.10 provides in part:

> (2) In all matters arising under the Nebraska Probate Code, if it shall appear to the district court that an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an

> attorney's fee, to the adverse party in an amount fixed by the district court . . . .

The district court found that "this appeal has been taken vexatiously . . . and after allowance [of the fee] in the County Court this appeal would appear to this Court to be totally unnecessary and generally for the purpose of protracting this matter." Our examination of the record shows there was no error in this determination. Appellant's third assignment of error is without merit.

Appellant then alleges the county court erred in determining the costs assessed against her and appeals from the assessment of costs for preparing the transcript and the bill of exceptions on the appeal from county court to district court. The basis for appellant's contention on this issue is that she, through her attorney, ordered a partial transcript and the clerk of the county court prepared the entire transcript. Aside from the fact that the requested 11-page partial transcript did not submit enough of the pleadings to present the case properly, the clerk of the county court was required to comply with the statute in effect at the time of the appeal. Neb. Rev. Stat. § 24-541.04 (Reissue 1985) was in effect at the time of the notice of appeal on May 16, 1986, from the county court, and that statute then required that the transcript on appeal "shall contain all pleadings, orders, filings, and docket entries in the case." The statute has since been amended. Appellant's contention on this point is without merit.

Insofar as appellant contends in this court that the court reporter's cost of preparing the bill of exceptions in the county court should have been $143.52 rather than $195, we are not in any position to make factual determinations in such regards. Appellant is left to such other remedies as may be open to contest such matters.

The only other matter before us concerns appellee's request that we award attorney fees to him in this court. Appellant does not address this issue, but we are aware the practice in this state is that attorney fees will generally be allowed only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982). In this case, § 24-541.10

provides that a district judge shall award attorney fees to an appellee in appeals from county court to district court if it shall appear the appeal was taken "vexatiously or for delay." Such fees were awarded and were discussed above.

While the statute does not specifically provide that fees shall be awarded under the same circumstances on appeals from the district court to this court, we hold that this court has power to award fees under the situations set out in § 24-541.10. This power is based on this court's overall jurisdiction to supervise the conduct of judicial proceedings in this state, and on the general statements set out in *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

Our examination shows that the appeal to this court was taken vexatiously. That term has been defined to mean "lacking justification and intended to harass" or "lacking in peace or calm: full of disorder or stress." Webster's Third New International Dictionary, Unabridged 2548 (1981). The conduct of appellant and her counsel in the county court fully supports the determination that the appeal was taken vexatiously in all the defined respects. Appellee is awarded the sum of $1,500 for the services of his attorney in this court.

The judgment of the district court is affirmed in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIM D. BLANKENFELD, APPELLANT.

427 N.W.2d 65

Filed August 5, 1988. No. 87-784.

Indictments and Informations. Where the elements of a crime defined by statute are set out in an information or complaint, it is sufficient; and if words appear in such information or complaint which might be stricken, leaving a crime sufficiently charged, and such words do not tend to negative any of the essential averments, they may be treated as surplusage and be entirely rejected.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

PER CURIAM.

Defendant appeals from his conviction in Lancaster County District Court for driving while under a lifetime license suspension, a Class IV felony. He was sentenced to not less than 20 months' nor more than 5 years' imprisonment and fined $10,000.

Defendant's driver's license was permanently revoked on February 15, 1985, following his plea of guilty to a charge of driving while intoxicated, third offense. On January 30, 1987, defendant was charged with operating a motor vehicle while under permanent revocation, a Class IV felony. On February 11 defendant was arraigned on that charge and entered a plea of not guilty.

Defendant filed a pretrial motion to dismiss the felony information in the district court on May 12, 1987. The motion alleged, in essence, that the previous sentence of permanent revocation (a necessary element for a conviction of the Class IV felony charge of driving while under permanent revocation) was void due to improper execution of sentence in the district court following an affirmance of the third-offense DWI conviction by this court on December 18, 1985. It was argued that the district court, as an intermediate appellate court, could not execute sentence on our mandate. Instead, defendant alleges, it was required that the county court must execute sentence following affirmance, since it was the original sentencing court on the third-offense DWI conviction.

On May 28, 1987, a hearing was held on defendant's motion. The district court overruled the motion to dismiss based on a finding that the attack on the third-offense DWI conviction and sentence was an improper collateral attack.

On June 11 a bench trial was held on the Class IV felony

charge. Defendant made several motions at trial, continuing to attack the validity of the third-offense DWI conviction and sentence of permanent revocation. All motions were overruled, and defendant, following trial, was found guilty of operating a motor vehicle while under permanent license revocation.

We should note at this point that defendant also filed a motion to set aside conviction on June 10 in the district court for Lancaster County before Judge William D. Blue, the judge who presided over the district court appeal on the third-offense DWI conviction. That postconviction attack was premised upon the argument set forth above. The motion to set aside conviction was denied. Blankenfeld appealed that district court order to this court in case No. 87-661. Our recent decision in that case, found in *State v. Blankenfeld,* 228 Neb. 611, 423 N.W.2d 479 (1988), is partially dispositive of some issues raised on this appeal and will be referred to later in this opinion.

Defendant's brief in this case assigns several errors, which can be summarized as follows: The district court erred in (1) ruling that defendant's motions to dismiss constituted an impermissible collateral attack on a prior conviction, and (2) ruling that the prior conviction for third-offense DWI was a final judgment at the time the mandate was issued from this court. Finally, defendant alleges that the district court erred in finding that Blankenfeld was not a fit and proper candidate for probation.

In addition to the assigned errors, this court noted at oral arguments that the record in the case revealed an additional issue that required attention. We noted a variance between the information in this case and the proof offered at trial. On April 27, 1988, this court entered an order setting the case for reargument on the following issues: "Is the variance between the information and proof fatal to the convictions? Alternatively, is the language which describes the specific violations which resulted in the permanent suspension mere surplusage?" Briefs were submitted by both parties, and reargument was heard on Monday, June 6, 1988.

We will first address the issues presented on reargument. The record reveals that the defendant was charged by information with "driving while under a lifetime suspension: 39-669.08 F

IV." Specifically, the information alleged that

> Jim D. Blankenfeld on or about the 25th day of December 1986 . . . did[,] being a person whose Nebraska driver's license has been permanently revoked pursuant to subdivision (c) of subsection 4 of Neb. Rev. Stat. Section Number 39-669.08, operate a motor vehicle on the street or highways of this state.

This court discovered a disparity between the allegation that Blankenfeld was a person whose license was permanently revoked pursuant to Neb. Rev. Stat. § 39-669.08(4)(c) (Reissue 1984) and the proof. The record submitted in this case, as well as this court's records relating to Blankenfeld's previous third-offense DWI appeal (case No. 85-520), establishes that the defendant's driver's license was permanently revoked pursuant to Neb. Rev. Stat. § 39-669.07(3) (Reissue 1984), in other words, for a third-offense DWI conviction.

Sections 39-669.07 and 39-669.08 contain similar and often identical language. Although § 39-669.07 relates to driving under the influence of alcohol and § 39-669.08 relates to refusal to submit to a preliminary breath test or a chemical test of one's blood, breath, or urine, both statutes provide identical provisions for conviction of a Class IV felony if a person is found to be operating a motor vehicle while under permanent revocation. (For the sake of clarity, we note at this point that both statutes, as of April 19, 1986, allow for a 15-year license revocation instead of the previous lifetime revocation.)

Section 39-669.07(3) provides in part: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been *permanently revoked pursuant to this section* shall be guilty of a Class IV felony." (Emphasis supplied.) Section 39-669.08(4)(c) provides in part: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's *license has been permanently revoked pursuant to this section* shall be guilty of a Class IV felony." (Emphasis supplied.)

The relevant portions of the statutes referred to in the emphasized language above allow for a penalty of, inter alia, permanent revocation upon conviction of third-offense DWI or third-offense refusal to submit to a chemical test,

respectively.

We believe that the language in the information which describes the specific violation which resulted in Blankenfeld's permanent license revocation was mere surplusage. We have held that where the elements of a crime defined by statute are set out in an information or complaint, it is sufficient; and if words appear in such information or complaint which might be stricken, leaving a crime sufficiently charged, and such words do not tend to negative any of the essential averments, they may be treated as surplusage and be entirely rejected. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982).

If the words "pursuant to subdivision (c) of subsection 4 of Neb. Rev. Stat. Section Number 39-669.08" are stricken from the information, Blankenfeld was still sufficiently charged with the crime of "operat[ing] a motor vehicle on the street or highways of this state" while "being a person whose Nebraska driver's license has been permanently revoked." The stricken words are irrelevant to the essential elements of the crime charged which are (1) operating a motor vehicle (2) while one's driver's license is permanently revoked.

We note that the Supreme Court of Minnesota has reached a similar result in a case closely analogous to the case at bar. In *State v. Owens*, 268 Minn. 321, 129 N.W.2d 284 (1964), the court held, and cited several authorities in accord, that "where the specific acts constituting the offense with which the defendant is charged are set forth in the indictment with a sufficient degree of certainty to inform the defendant of the crime with which he is charged, the designation of the wrong statute is immaterial." *Id.* at 326, 129 N.W.2d at 287.

Thus, the court in *Owens* held that the incorrect citation of a statute in an information will be treated as mere surplusage, when raised for the first time on appeal, in the absence of prejudice to any substantial rights of the defendant.

Admittedly, the defendant in *Owens* pled guilty to the charge in the information, while in this case Blankenfeld was found guilty following a bench trial. However, it is clear from the record in this case that Blankenfeld and his counsel were well aware that his license had been revoked pursuant to a third-offense DWI conviction. The numerous motions to

dismiss and the attempted postconviction action were all intended to challenge that underlying conviction. The specific acts constituting the offense were set forth with sufficient certainty in the information to inform Blankenfeld of the charges he faced. The incorrect citation to the statute in this case is not fatal to the defendant's conviction.

In addressing the errors assigned by the defendant on appeal, we note that our prior decision in *State v. Blankenfeld,* 228 Neb. 611, 423 N.W.2d 479 (1988), disposes of the issue of the district court's ruling on the finality of the third-offense DWI judgment. In Blankenfeld's earlier case we held that the third-offense DWI judgment and sentence became final on January 8, 1986, the day we forwarded our mandate to the district court ordering execution of the sentence. The district court in this case was correct in ruling that Blankenfeld's prior third-offense DWI conviction became final upon issuance of the mandate by this court.

Defendant further alleges that the district court erred in ruling that the motions to dismiss the felony information based on an allegedly void third-offense DWI conviction were improper collateral attacks.

> To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.

State v. Davis, 224 Neb. 518, 519-20, 398 N.W.2d 729, 730 (1987). See, also, *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984).

Defendant's attempts to challenge the validity of his prior third-offense DWI conviction and sentence were improper in the proceedings before the district court on the charge of driving on a permanently revoked license.

Finally, defendant argues that the district court erred in finding that the defendant was not a fit and proper candidate

for probation. The granting of probation as opposed to imposing a jail sentence is a matter which is left to the sound discretion of the trial court. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

Defendant has a substantial history of alcohol-related arrests and convictions involving automobiles. He has ignored prior suspensions of his license and was viewed by the sentencing judge as an obvious threat to society due to his inability to control his behavior when he drinks. Given our review of defendant's past criminal history, we find no abuse of discretion in the sentence imposed.

AFFIRMED.

WHITE, J., dissenting.

I cannot agree with the majority's resolution of the variance issue in this case.

The two statutes at issue, Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984), relate to two separate and distinct offenses. See *State v. Stabler*, 209 Neb. 298, 306 N.W.2d 925 (1981). (Although this court in *Stabler* dealt with these statutes as they appeared in the reissue of 1978, prior to major legislative revisions in 1982, the premise that these statutes "create separate and distinct offenses" is equally applicable today.) Clearly, § 39-669.07 relates to the crime and penalties for driving under the influence of alcoholic liquor or drugs. On the other hand, § 39-669.08, the implied consent statute, relates to the crime and penalties for refusal to submit either to a preliminary breath test or a chemical test of one's blood, breath, or urine.

The fact that these statutes both provide for conviction of a Class IV felony upon a finding that one has operated a motor vehicle while under permanent revocation does not alter this court's conclusion in *Stabler* that each statute proscribes very specific and different behaviors.

This court has often held that in order to charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime *as defined by the law creating it*, either in the language of the statute or its equivalent. *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986); *State v. Banse*, 184 Neb. 534, 169 N.W.2d 294 (1969).

The law creating the statutory offense with which Blankenfeld was charged defines the essential elements as (1) "operating a motor vehicle" (2) "while his . . . license has been permanently revoked pursuant to this section," i.e., subdivision (c) of subsection (4) of § 39-669.08. On its face the information filed against Blankenfeld was sufficient to charge a statutory offense. The error in this case arose at trial, where the State introduced evidence of defendant's prior third-offense DWI conviction in an attempt to prove, in the words of the information, that he was "a person whose Nebraska driver's license has been permanently revoked pursuant to subdivision (c) of subsection 4 of Neb. Rev. Stat. Section Number 39-669.08 . . . ." That evidence did not prove the second essential element of the offense charged; it proved only that defendant's license had been permanently revoked pursuant to § 39-669.07(3).

It is a fundamental principle of statutory construction that a penal statute is to be strictly construed. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987). It is the province of the Legislature rather than the courts to define criminal behavior. *State v. Douglas, supra; United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977).

It is not for this court to supply missing words or sentences to make clear that which is indefinite in a statute. See *State v. Steele, supra*. Nor is it the province of this court to turn a blind eye to explicit statutory language which defines a crime in order to shroud an obvious error made by the State when it charged Blankenfeld in this case. Courts have no jurisdiction to change the language of a statute. *State v. Levell*, 181 Neb. 401, 149 N.W.2d 46 (1967).

It is a settled rule that the evidence in a criminal case must correspond with the allegations of the indictment (or information) which are essential and material to charge the offense. 41 Am. Jur. 2d *Indictments and Informations* § 261 (1968).

It is also true that this court has held that a variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the

case or such is prejudicial to the defendant. *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967).

The above-stated rule does not, however, save the conviction in this case. First, this is not a case of mere variance, but is a failure to prove an averment, proof of which is essential to a valid conviction. *The People v. Lewis*, 140 Ill. App. 493 (1908), cited in *State v. Temple*, 262 S.W.2d 304 (Mo. App. 1953). Second, failure to prove an essential element of the crime charged is certainly "material to the merits" of a case.

Finally, we must consider the principles set forth by the U.S. Supreme Court in *Ex Parte Bain*, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887), and *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). *Bain* stands for the rule that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States, supra* at 217. In *Stirone* the Court stated that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger v. United States*, 295 U. S. 78." 361 U.S. at 217-18.

Bain and *Stirone* are cases addressing grand jury indictments, not informations. The fifth amendment right to be tried upon indictment by a grand jury has never been extended to the states. However, the underlying basis for the principles announced in *Bain* and *Stirone* seems equally applicable if considered in light of the following observation regarding the variance rule:

> The Supreme Court has recognized . . . that if there is no amendment of the indictment, but only a variance between the facts alleged in the indictment and the evidence offered at trial, *the problem is not one of usurping the constitutionally guaranteed role of the grand jury* [emphasis supplied], but one of promoting the fairness of the trial and ensuring the defendant notice and an opportunity to be heard. [Citations omitted.] The variance rule, to the extent that it is constitutionally required, is more of a due process rule than is the flat fifth amendment prohibition against being tried on an indictment which a grand jury never returned.

United States v. Crocker, 568 F.2d 1049, 1059 (3d Cir. 1977).

With or without an extended discussion of the fine points of the law of variance, I believe a much more rudimentary principle is involved in this case. It is elementary that a person cannot be charged with one specific crime and then convicted on evidence of another separate and distinct crime. "Under an indictment [or information] charging a particular offense, a conviction cannot be had on evidence of another and distinct offense, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment." 42 C.J.S. *Indictments and Informations* § 261 at 1285-86 (1944). See, also, *State v. Voracek*, 353 N.W.2d 219 (Minn. App. 1984); *State v. Richardson*, 343 S.W.2d 51 (Mo. 1961); *State v. Temple, supra.*

Clearly, the crime charged in this case was not the crime that the defendant was convicted of after the bench trial in district court. The trial judge, as the trier of fact, specifically found that "Mr. Blankenfeld was operating a motor vehicle [and] at the time he was operating that vehicle . . . his driver's license had been permanently revoked pursuant to Section 39-669.08 and the court makes these findings beyond a reasonable doubt."

Generally, where a judge serves as the trier of fact in a criminal case, the factual findings will not be disturbed on appeal unless clearly wrong. *State v. Laue*, 225 Neb. 57, 402 N.W.2d 313 (1987). In this case, the trial judge's finding of fact that Blankenfeld's license had been permanently revoked pursuant to § 39-669.08 is clearly wrong.

SHANAHAN, J., joins in this dissent.

CAPORALE, J., concurring.

I find much of merit in my learned brother White's dissenting opinion. However, in my view, its reasoning is inapplicable because it attaches no significance to the unique circumstance under which the case at hand arises. Notwithstanding the mistaken reference in the information to the statute concerning a refusal to submit to testing, Neb. Rev. Stat. § 39-669.08 (Reissue 1984), it is clear that everyone at the trial court level—prosecution, defense, and judge—read the information as if it referred to the statute concerning the admittedly separate

and distinct offense of driving while under the influence of alcohol or other drugs, Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

While I certainly agree that it is not the office of this court "to shroud an obvious error made by the State," indeed this court has a positive duty to do otherwise, the unique posture of this case renders the State's error harmless beyond a reasonable doubt. The defendant, Jim D. Blankenfeld, was actually tried on the basis that his license to operate a motor vehicle had been permanently revoked under the then-existing law because he persisted in driving while drunk. Absolutely no one, least of all Blankenfeld, was misled into thinking anything other than that. In that unique setting I have no difficulty in saying that this court should review the matter on the theory on which it was tried, as it does civil cases. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, *ante* p. 160, 425 N.W.2d 872 (1988); *Donahoo v. Nebraska Liquor Control Comm.*, *ante* p. 197, 426 N.W.2d 250 (1988); *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982). I therefore concur in the result reached by the majority.

FAHRNBRUCH, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. GARRY BACHKORA, APPELLANT.
427 N.W.2d 71

Filed August 5, 1988. No. 87-801.

1. **Criminal Law: Intent.** One violates a statute predicated upon a reckless act by merely performing the act; it is not necessary that one have intended the consequences of his or her recklessness.
2. **Criminal Law: Assault: Homicide.** The pointing of a gun at another is a reckless act within the contemplation of Neb. Rev. Stat. § 28-310 (Reissue 1985) and sufficient, should the gun discharge, to support a manslaughter conviction under the provisions of Neb. Rev. Stat. § 28-305(1) (Reissue 1985).

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Lyle Joseph Koenig for appellant.

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

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

CAPORALE, J.

A jury found the then 17-year-old defendant, Garry Bachkora, guilty of manslaughter in violation of Neb. Rev. Stat. § 28-305(1) (Reissue 1985) for the shooting death of his 14-year-old brother, Brandon. He was so adjudged and thereafter sentenced to probation for a period of 5 years. Defendant appeals, asserting the trial court erred in (1) not instructing the jury as to what constitutes an "accidental" killing, (2) failing to define "intent," and (3) its definition of "reckless." Each of the assignments of error being without merit, we affirm.

The victim died as the consequence of the hemorrhaging and shock which resulted from a gunshot wound inflicted at the center of his forehead. At approximately 8:30 on the evening of the shooting, January 22, 1987, defendant, after waiving his *Miranda* rights, told Nebraska State Patrol Investigator Raymond Smee that after he left school, he drove around Geneva for some time, then went home and fixed himself something to eat. While he ate, he placed a rifle belonging to the victim, which he had retrieved from the upstairs of the house, against his chair. The victim then came home and showed defendant a model car he was constructing. As defendant turned to look at the model, the rifle fell and discharged, and the victim in turn fell. The shooting occurred between 5:25 p.m., when the victim arrived home, and 5:47 p.m., after defendant arrived at the hospital to which he took the victim. Defendant repeated this same story through four separate recitals, denying there were any other weapons present when the victim was shot.

In the meantime, a search of the defendant's home, where he resided with his mother, revealed the rifle defendant had described, some bloody newspapers, and a spent .22-caliber casing. Outside the home, a .22-caliber Ruger pistol was found hidden beneath a propane tank. Inside defendant's automobile,

a blanket had been laid over the back seat, and some bloodstained pants were found.

Later investigation revealed that the bullet taken from the victim's brain had not been fired from the rifle. While the firearms examiner determined the spent casing found inside defendant's home came from the Ruger pistol, he could not conclusively state that the bullet found in the victim was fired from that pistol. He also testified the Ruger found at defendant's home requires approximately 3 1/4 pounds of pressure to pull its trigger and produces a loud sound when fired.

On January 28, 1987, State Patrol Investigator Dan Scott questioned defendant on the details of the shooting. At first, defendant told Scott the same story he earlier had given to Smee. Scott asked defendant whether it was possible that there were any other firearms nearby. Defendant then described the Ruger pistol, which he kept fully loaded and hidden outside under the propane tank. Defendant also stated that he used the gun for target practice and to shoot rabbits and birds. When asked whether it was possible that the Ruger was in the home when the victim was shot, defendant replied in the affirmative. Defendant then explained that he was holding the pistol in his right hand when the rifle began sliding to the floor. After defendant reached for the rifle with his left hand, the victim went forward off the couch onto the newspapers. Defendant stated he went into a panic, screamed at Brandon, "[W]hat the hell are you doing," noticed blood squirting from the victim's head, and realized the victim had been shot. Defendant said he did not hear a shot or feel the pistol recoil in his hand, but the pistol was pointed in the victim's direction. Defendant further told Scott that because he did not think he had enough time to call an ambulance, he carried the victim to his automobile and drove him to the hospital. Defendant, however, took the time required to hide the pistol under the propane tank and to carefully cover the back seat of his automobile with a blanket so as not to get blood on the upholstery.

Elizabeth Rose, defendant's grandmother, visited defendant the morning after he was taken to the county jail. According to her, during this visit defendant said he was not "mad" at the

victim and that while he had the gun in his hand pointing it around the room and at the victim, he thought the safety was on. Prior to the victim's arrival, defendant had been shooting at birds. According to Rose and defendant's mother, the two brothers had enjoyed a close relationship.

Defendant maintains the shooting was accidental, and thus complains in the first assignment of error that the trial court made a mistake in not instructing the jury as to what constitutes an "accidental" killing. In so urging, he admits that he neither asked for such an instruction nor objected to its absence, but reminds us that it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not and that the failure to do so constitutes prejudicial error. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981); *State v. Ross*, 183 Neb. 1, 157 N.W.2d 860 (1968); *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

Although defendant does not tell us what the instruction he now thinks should have been given ought to contain, he appears to argue the jury should have been told that if it found he did not intend to fire the gun, then an accidental death occurred, but that there was no manslaughter and he could not be held responsible for his brother's death. Such a notion completely misapprehends the nature of manslaughter as defined in § 28-305(1): "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Neb. Rev. Stat. § 28-310 (Reissue 1985) makes, among other things, recklessly caused bodily injury an assault in the third degree, thereby rendering such a reckless act a criminal, that is, an unlawful, act. That pointing a gun at another is an unlawful act was determined early in this century in *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904), which holds that the fact the gun pointed at the deceased was thought to be unloaded did not constitute a defense to the crime of manslaughter.

As noted in *State v. Drew*, 216 Neb. 685, 687, 344 N.W.2d

923, 925 (1984), holding that an accused's claim the gun discharged accidentally during a scuffle with the deceased was not a defense to a charge of manslaughter, the focus of the inquiry in a manslaughter case is not "whether the gun discharged *accidentally* but, rather, whether the [accused] was acting lawfully at the time the gun discharged." (Emphasis in original.) Thus, contrary to defendant's claim, whether the discharge of a gun pointed at another is intentional or otherwise is immaterial.

In this case defendant himself finally admitted that the gun which killed the victim was pointed at the victim when it discharged. Under the circumstances, there was no basis on which the court could have properly instructed the jury concerning an "accidental" killing.

The second assignment of error rests on the trial court's refusal to instruct the jury that intent is a material element of manslaughter and to define "intent" in accordance with NJI 14.11.

This is but another way of phrasing the gravamen of the contention defendant makes in connection with the first assignment of error, that the discharge of the gun must be intentional; such, as the analysis of the first assignment of error demonstrates, simply is not correct. Indeed, the very case on which defendant places major reliance in support of his thesis holds to the contrary. In *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987), the very intoxicated accused was involved in an automobile accident resulting in the death of the driver of the other vehicle. The accused was charged, among other things, with recklessly causing serious bodily injury through the use of a dangerous instrument, in violation of a statute. The accused argued he could not be guilty of such a charge because his intoxication made it impossible for him to have formed an intent to have caused the death; in fact, the parties had stipulated that if the accused were to testify, he would say that he formed no such intent. In rejecting the accused's argument and upholding his conviction on the charge, we observed that one violates a statute predicated upon a reckless act by merely performing the act; it is not necessary that one have intended the consequences of his or her recklessness.

In connection with the third and last assignment of error, defendant concedes that the definition of "reckless" given the jury was substantially the definition he had requested. The jury was instructed:

> With respect to causing bodily injury to another person, RECKLESS shall mean acting when any person disregards a substantial and unjustifiable risk that bodily injury to another person exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, it's [sic] disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

Defendant does not claim the instruction misstates the law, noting that in its essential terms the definition is that specified by Neb. Rev. Stat. § 28-109(19) (Reissue 1985) as applicable in criminal cases "unless the context otherwise requires." Rather, he condemns the instruction by seizing upon language in *State v. Pribil*, 224 Neb. 28, 32, 395 N.W.2d 543, 547 (1986), characterizing the definition as "horrendously complicated," and suggests that its complexity misled the jury. In doing so, he acknowledges the rule that where an instruction is technically correct but an accused considers it to be couched in language which a jury is likely to misunderstand or misapply, it is the accused's duty to call the court's attention to the supposed defect and present a suitable instruction. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). He argues, however, in substance, that he should be excused from the operation of that rule because, as the trial court improperly refused to define intent for the jury, he had to ask for something, and what he requested seemed like a good idea at the time. Without getting into the merits or demerits of such a position, the fact remains that under the circumstances of this case, the instruction at issue is not only a technically correct statement of the law, it is not misleading or likely to have been misapplied by the jury.

The characterization of the instruction in *State v. Pribil, supra*, was made in the context of declaring erroneous but not prejudicial an instruction which permitted the jury to consider a

recklessly inflicted bodily injury to be a lesser-included offense of a charge requiring an intentional or knowingly inflicted injury. The concern in *Pribil* focused on the fact the defendant was put on notice only that he had to defend against an intentional or knowing act and not one which was merely reckless. That is not the situation presently before us; in this case we are dealing with but a single crime which rests solely upon a reckless act. The mere fact language is complex does not render it erroneous; at times, the expression of a complicated thought requires the use of equally intricate language. Under the circumstances, it cannot be said the court erred in instructing the jury as it did in this regard.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH R. ANDERSON, APPELLANT.
427 N.W.2d 764

Filed August 5, 1988. No. 87-826.

1. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Circumstantial Evidence: Conspiracy: Intent.** Circumstantial evidence may be sufficient to establish the existence of a conspiracy or the criminal intent necessary for the conspiracy.

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

John H. Sohl 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.

This is an appeal from the district court for Butler County. The defendant, Kenneth R. Anderson, was charged by information with three felonies: count I, aiding and abetting the manufacturing of a controlled substance (marijuana) in violation of Neb. Rev. Stat. §§ 28-206 (Reissue 1985) and 28-416(1)(a) (Cum. Supp. 1986); count II, aiding and abetting the crime of possession of marijuana with the intent to manufacture, distribute, deliver, or dispense a controlled substance (marijuana) in violation of §§ 28-206 and 28-416(1)(a); and count III, conspiring to manufacture, distribute, deliver, or dispense a controlled substance (marijuana) in violation of Neb. Rev. Stat. §§ 28-202 (Reissue 1985) and 28-416(1)(a). The defendant's wife, codefendant Letha K. Anderson, was charged by separate information with the same offenses, and the cases against the defendant and his wife were consolidated for trial to a jury. Mrs. Anderson's case is disposed of in the succeeding case, *State v. Anderson, post* p. 436, 427 N.W.2d 770 (1988). During the course of the trial, the charges contained in count II were dismissed against both defendants. The jury found the defendant guilty of aiding and abetting the manufacturing of a controlled substance and guilty of conspiring to manufacture, distribute, deliver, or dispense a controlled substance. On the aiding and abetting charge, the defendant was sentenced to incarceration for a term of not less than 6 nor more than 20 years. On the conspiracy charge, the defendant was sentenced to a term of incarceration of not less than 6 nor more than 20 years, with the sentences to be served concurrently. Defendant appeals, contending that the district court erred in (1) overruling defendant's attorney's motion to withdraw; (2) overruling defendant's motions for a directed verdict; and (3) not holding that the State failed to establish the defendant's guilt beyond a reasonable doubt. We affirm.

The record shows the following. In September 1986, members of the Nebraska State Patrol were conducting

surveillance of a trailer home and an abandoned two-story farmhouse located near David City, Nebraska, after receiving information that a possible marijuana harvesting operation was taking place at that location. At the time the surveillance was conducted, the premises were occupied by Michael and Joanie Huber. With the aid of binoculars, officers observed the activity at the Huber residence from a cornfield located approximately 150 to 200 yards south of the trailer home. The farmhouse was located approximately 50 feet north of the trailer.

At trial, Trooper Thomas Hayes testified that on September 9, he observed Joanie and Michael Huber and their child drive away from the trailer home. Approximately 5 minutes later, Trooper Hayes observed Joanie Huber driving back to the trailer home without Michael. During the course of the day, Trooper Hayes testified that he observed Joanie Huber carrying several brown trash bags from the trailer home to the farmhouse. Trooper Hayes testified that later that afternoon, he observed Kenneth and Letha Anderson and a third individual named Norman Patton drive up to the Huber residence in the defendant's car. The Andersons had recently moved from Indiana to Nebraska. Letha Anderson testified they were visiting the Hubers in order to pick up keys to a house the Andersons were planning to rent from Joanie Huber's father, Olan Collins. At the time of their arrest, the Andersons were renting a home 3 miles south of Bruno, Nebraska. Norman Patton was a friend of the Andersons'. The defendant and Patton went into the farmhouse while the defendant's wife went into the trailer home. Trooper Hayes testified that after approximately 5 to 10 minutes the three got back into the car and drove away.

Trooper Hayes testified that on September 10, he observed the Hubers carrying bags from the farmhouse to the trailer home. The officers were able to see a stem protruding from the top of one of the bags. The Hubers then weighed the bags in a scale hanging from the open doorway. At approximately 4:30 that afternoon, the Andersons and Patton were again observed driving up to the Huber residence. Letha Anderson went into the trailer home, and the defendant, Patton, and Michael

Huber went into the farmhouse. When the defendant emerged from the farmhouse approximately 10 minutes later he was observed carrying a 4-foot plant which appeared to be a marijuana plant. Trooper Hayes testified that the defendant placed the plant in his car. The Andersons and Patton then drove away.

On September 11, the Andersons again drove up to the Huber residence. The defendant pulled a yellowish-tan plastic bag from the trunk of his car and carried it into the farmhouse. As they were leaving the Huber residence, the Andersons were arrested.

Pursuant to search warrants, officers seized two pairs of green-stained gloves which they discovered in the defendant's car. The stained substance was later analyzed and determined to be marijuana. At the trailer home, the officers found a 50-pound scale. Inside the closet in the living room, they found a pair of gloves. In one of the bedrooms, officers found several bags of wet or freshly picked marijuana. In the master bedroom, officers found four trash compactor bags, which had been taped shut, "full of some type of substance."

When the officers searched the farmhouse, they were confronted with "heavy smoke and a pungent odor of drying marijuana, suspected marijuana." In the farmhouse, officers found a space heater, which was running at the time the officers entered the farmhouse. The heater was protruding inside a homemade drying rack containing suspected dried marijuana. Officers also found the yellowish-tan plastic sack which the defendant had carried into the farmhouse. Inside the sack, officers found a new box of garbage bags and several trash compactor bags.

In the upstairs portion of the farmhouse, officers found gloves stained with a green substance and a trash compactor run by an extension cord powered from the trailer home. Inside the compactor, officers found suspected marijuana in a partially filled bag and in another bag apparently waiting to go into the trash compactor. The officers also found several trash compactor bags and a large pile of dried marijuana which had been swept into a corner of the farmhouse.

A total of 13 bags of suspected marijuana was confiscated

during the search of the trailer home and farmhouse. The contents of the 13 bags was later analyzed and determined to be marijuana.

Later that day, officers confiscated the stained blue jeans worn by the defendant following his arrest. The stained substance was analyzed and determined to be marijuana.

On September 12, officers searched the defendant's home, near Bruno, where they found an electrically operated forced air kerosene heater on the back porch. In the kitchen, officers found five boxes of garbage bags. These bags were the same brand of bags which defendant had carried into the farmhouse the day before. In the kitchen, officers found three pairs of gloves. In the defendant's bedroom, officers found four pairs of gloves, two rolls of masking tape, a 50-pound scale, and a bundle of trash compactor bags. On the defendant's bed, officers found a marijuana seed.

In his first assignment of error, the defendant argues that the district court erred in overruling defendant's attorney's motion to withdraw and that as a result, he was denied his constitutional right to effective assistance of counsel.

The record shows that on September 15, 1986, an attorney was appointed by the Butler County Court to represent both of the Andersons. On October 7, 1986, the Andersons and Patton were arraigned. At the arraignment, the attorney for the Andersons stated that he had no objection to combining the three cases for trial. The charges against Patton were dropped prior to trial.

On April 23, 1987, the Andersons' attorney, on behalf of Mrs. Anderson, filed a motion for a separate trial. On June 10, 1987, the attorney filed separate motions to withdraw on behalf of both defendants, asserting that "since the Joint Arraignment of Kenneth and Letha Anderson held on or about October 7, 1986, Letha Anderson's Motion for Separate Trial has been sustained" and that "counsel is informed that Letha Anderson has filed for a dissolution of her marriage to Kenneth Anderson. Further, that Letha Anderson has informed counsel that she will not appear to testify on behalf of Kenneth Anderson unless subpoenaed by the Court." The motions to withdraw were overruled on June 12, 1987. At trial, on June 23,

defendant's attorney explained that as a result of a telephonic conference regarding Mrs. Anderson's motion for a separate trial, he was under the mistaken understanding that the motion for a separate trial had been sustained. The record reflects, however, that no formal order sustaining her motion had been entered by the court. On June 23, on the motion for a separate trial, the court ordered as follows:

> Well, the Court finds that there is a unity of defendants, time, dates and charges and at least preliminarily finds that there would be no prejudice to either defendant being tried together. Should that become apparent for any reason during the trial, the Court may order the trials severed at that point in time, but at this point the Court finds that the motion for separate trials should be and is overruled and the matter will proceed then to the jury.

With regard to defendant's claim that he was denied effective assistance of counsel by the trial court's failure to permit his trial counsel to withdraw, we first note that multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel. *State v. Wilson*, 224 Neb. 721, 400 N.W.2d 869 (1987); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). There is a presumption of prejudice involving a defendant's right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). As we stated in *State v. Pope*, 213 Neb. 645, 648, 330 N.W.2d 747, 749 (1983), " 'Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. . . . It is necessary that the appellant show the conflict of interest actually existed.' "

In our review of the record, we find no actual conflict of interest proven by the defendant and, thus, no prejudice caused

by the joint representation. The record does not reflect that the codefendant wife was subpoenaed to testify on behalf of the defendant nor that she testified involuntarily. Defendant did not testify. Had the defendant testified at trial that he knew nothing of the Hubers' marijuana harvesting operations, as hypothesized in defendant's brief, that position would not have been in conflict with the testimony of his codefendant wife. At trial, Letha Anderson testified that neither she nor her husband knew anything about or participated in any marijuana harvesting operation. Defendant's first assignment of error is without merit.

In his second and third assignments of error, defendant claims that the district court erred in overruling defendant's motions for a directed verdict made at the end of the State's case and at the close of all the evidence and that the State failed to prove the defendant's guilt beyond a reasonable doubt.

We first note that in a criminal trial, the trial court will be justified in directing a verdict of not guilty only where (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character and lacking in probative value that a conviction based thereon cannot be sustained. *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988). In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988). Furthermore, circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988).

In regard to defendant's second assignment of error, there

was sufficient evidence to sustain the trial court's refusal to grant defendant's motions for a directed verdict. Defendant's second assignment of error is without merit.

Defendant was found guilty of aiding and abetting the crime of manufacturing a controlled substance, pursuant to §§ 28-206 and 28-416(1)(a), as charged in count I of the information. Section 28-206 provides as follows: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Section 28-416(1) provides in part as follows: "Except as authorized by this article, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance."

As stated in *State v. Schreck*, 224 Neb. 650, 651, 399 N.W.2d 830, 831-32 (1987):

> "Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient."

The evidence is undisputed that the Huber farmhouse was being used in a marijuana harvesting operation. There was testimony that the defendant was observed transporting bags to the Huber farmhouse which were similar to the bags containing marijuana found at the farmhouse. A large quantity of the same type of bags was later found at the defendant's home. There was testimony that the defendant was observed coming in and out of the farmhouse where the marijuana harvesting operations were taking place, and on one occasion, the defendant was observed placing a marijuana plant from the farmhouse into his car. In the defendant's car, on the day of his arrest, officers found two pairs of gloves stained with a green substance. These gloves were similar to the type found at the Huber trailer house. The substance on the gloves was evaluated and determined to be marijuana. Furthermore, on the day he was arrested, the defendant was wearing jeans stained with a

green substance which was later determined to be marijuana. There was sufficient evidence upon which the defendant could be found guilty of aiding and abetting the manufacture of a controlled substance.

In regard to count III of the information, the defendant was found guilty of conspiring to manufacture, distribute, deliver, or dispense a controlled substance in violation of §§ 28-202 and 28-416(1)(a). Section 28-202 provides in part as follows:

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

Circumstantial evidence may be sufficient to establish the existence of a conspiracy or the criminal intent necessary for the conspiracy. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975). In regard to the overt act requirement of § 28-202, we stated in *State v. Lafler*, 225 Neb. 362, 374, 405 N.W.2d 576, 584 (1987), as follows:

> "[A]n overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. . . . An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act."

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

In his brief, defendant contends that the State offered no evidence that the defendant acted with the requisite intent to commit the crime, as set out in § 28-202. We have held that intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct. *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988); *State v. Pence*, 227 Neb. 201, 416 N.W.2d 581 (1987).

The facts of the present case, as set out above, presented sufficient evidence upon which the jury could find that the

defendant intentionally conspired with the Hubers to manufacture, distribute, deliver, or dispense a controlled substance. Defendant's third assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LETHA K. ANDERSON, APPELLANT.

427 N.W.2d 770

Filed August 5, 1988. No. 87-803.

Convictions: Appeal and Error. A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed and dismissed.

John H. Sohl 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.

This is an appeal from the district court for Butler County. The defendant, Letha K. Anderson, was tried jointly in a jury trial with her codefendant husband, Kenneth R. Anderson. See *State v. Anderson, ante* p. 427, 427 N.W.2d 764 (1988). The defendant was charged by information in three counts, identical with the charges against Kenneth Anderson: count I, aiding and abetting the manufacture of marijuana; count II, aiding and abetting the crime of possession of marijuana with the intent to manufacture, distribute, deliver, or dispense a controlled substance; and count III, conspiring to manu-

facture, distribute, deliver, or dispense a controlled substance. During the course of the trial, the court dismissed the charge against the defendant contained in count II of the information. The jury found the defendant not guilty of the aiding and abetting charge and guilty of the conspiracy charge. On the conspiracy charge, the defendant was sentenced to 1 year in the Nebraska Center for Women.

Defendant appeals, contending (1) that the district court erred in overruling defendant's attorney's motion to withdraw; (2) that the district court erred in overruling defendant's motion for a directed verdict at the close of the State's case in chief and again at the close of defendant's case in chief; (3) that the State failed to establish the guilt of the defendant beyond a reasonable doubt; and (4) that the sentence imposed was an abuse of discretion. We reverse and dismiss.

The facts of this case have been set out in *State v. Anderson, supra*, and need not be repeated here. The defendant was found guilty of conspiring to manufacture, distribute, deliver, or dispense a controlled substance in violation of Neb. Rev. Stat. §§ 28-202 (Reissue 1985) and 28-416(1)(a) (Cum. Supp. 1986). As we noted in *State v. Anderson, supra*, conspiracy requires the proof of an overt act which tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. Intent may be inferred from the words or acts of the circumstances surrounding the incident.

A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. George*, 228 Neb. 774, 224 N.W.2d 350 (1988); *State v. Schon*, 227 Neb. 482, 418 N.W.2d 242 (1988).

In regard to defendant's alleged participation in the conspiracy, Trooper Thomas Hayes testified as follows:

> Q. At any time during your surveillance of the Huber farmstead, did you observe Letha Anderson enter the old house?
>
> A. No, I did not.
>
> Q. At any time during your surveillance of the Huber residence, did you observe Letha Anderson handle any trash bags?

A. No.

Q. At any time during your surveillance of the Huber residence, did you observe Letha Anderson weigh what appeared to be marijuana?

A. No.

Q. At any time during your surveillance of the Huber residence, did you observe either Ken or Letha Anderson pick any marijuana?

A. No.

The evidence showed that the defendant was seen arriving at the farmhouse, determined to be a place where marijuana was possessed, in a car driven by her husband. On one occasion defendant was observed riding as a passenger in the car driven by her husband after her husband had placed a plant which appeared to be a marijuana plant in the rear portion of the car. There was no testimony that defendant was ever seen driving the car to or from the farmhouse area, or at any other time. There was evidence that the jeans worn by defendant's husband had marijuana stains on them. There was also testimony that a marijuana seed was later found on the bed which the defendant shared with her husband. There was no evidence, however, that the defendant was observed entering the farmhouse, nor that the defendant committed any overt act manifesting an intent to commit the crime charged. There was evidence that defendant lived with her husband of 1 month. The evidence was so lacking in probative force that it was insufficient as a matter of law.

In view of this disposition, we need not reach the other questions presented by defendant Letha Anderson, including whether she was prejudiced by her representation by the same attorney who represented her husband.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH V. BEERBOHM, APPELLANT.

427 N.W.2d 75

Filed August 5, 1988. No. 87-961.

1. **Motions to Suppress: Appeal and Error.** The Nebraska Supreme Court will uphold a trial court's findings of fact on a motion to suppress unless those findings are clearly wrong.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Nebraska Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion.
3. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
4. _____: _____: _____. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle.
5. **Appeal and Error.** Irrespective of the scope of its review, the Nebraska Supreme Court has the obligation to reach an independent conclusion on questions of law.
6. **Statutes.** In construing a statute, the Nebraska Supreme Court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
7. **Implied Consent: Blood, Breath, and Urine Tests.** A refusal to submit to a chemical test occurs within the meaning of Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986) when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.
8. _____: _____. The choice of whether one's blood or urine shall be tested for determination of alcohol content belongs to the licensee; a licensee who, upon request of a law enforcement officer to do so, refuses to specify which fluid he or she will produce for such testing has refused to submit to a chemical test in violation of Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986).

Appeal from the District Court for Platte County: WILLIAM H. NORTON, Judge. Affirmed.

Frank J. Skorupa for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

PER CURIAM.

Defendant-appellant, Kenneth V. Beerbohm, was charged in the county court with driving while under the influence of alcohol in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986), and with refusing to submit to chemical testing in violation of Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986). The jury found him not guilty of the first charge, but guilty of refusing to submit to testing. The county court adjudged and sentenced him accordingly, whereupon Beerbohm appealed to the district court, which affirmed the conviction but modified the sentence imposed by the county court. In his appeal to this court Beerbohm asserts the district court erred in failing to find error appearing on the record, in that the county court erred in (1) finding probable cause to arrest him and (2) finding Beerbohm refused to submit to chemical testing. The State has not cross-appealed; thus, we do not concern ourselves with the propriety of the district court's modification of the sentence imposed by the county court, and affirm the judgment of the district court.

Beerbohm moved the county court to suppress all evidence obtained after his arrest, claiming that there was no probable cause to arrest him. At the suppression hearing, Columbus Police Officer James Lippstreu testified that while on duty at approximately 1 o'clock on the morning of October 9, 1986, he was informed by radio that a blue pickup truck bearing license number 10-194 had "scraped the railing on the viaduct" and then headed north. Lippstreu subsequently observed a blue pickup bearing license number 10-Dealer-194 at the intersection of 19th Street and 33d Avenue, heading north on 33d Avenue. Lippstreu followed and observed the pickup, in the course of its travels north on 33d Avenue, weave three or four times from the centerline of the extra-wide northbound lane into those areas which were free of parked cars along the curb.

Lippstreu also testified that as he followed the pickup, he observed it properly negotiate stoplights at the intersections of 33d Avenue and 23d Street and 33d Avenue and 27th Street, properly make a left turn and a right turn, and make what Lippstreu considered an improper left turn at 33d Avenue and 23d Street.

After observing the weaving progress of the pickup, Lippstreu activated his emergency lights, and the pickup pulled into a driveway. Lippstreu found Beerbohm to be the driver.

On the basis of this evidence the county court denied Beerbohm's motion.

At trial, Lippstreu, over Beerbohm's objections, testified as he had at the suppression hearing in all material respects, adding that as he followed the pickup, Lippstreu himself had not found it necessary to weave across the northbound lane of 33d Avenue as he passed the parked cars.

Lippstreu further testified that as he approached the pickup after it had stopped, the driver emerged, his breath smelled strongly of alcohol, and he "had to support himself with his hands against the door and the bed of the pickup at that time." Upon inquiry, Beerbohm told Lippstreu that he had had two beers. Lippstreu then asked Beerbohm to perform two field sobriety tests: to walk heel-to-toe and to touch his nose starting with head back and arms outstretched. Beerbohm was unable to perform either test, nearly falling each time. Lippstreu then placed Beerbohm under arrest. Upon subsequent examination at the scene, Lippstreu discovered that the pickup had "a slight scratch on the right front fender . . . the molding part."

Lippstreu transported Beerbohm to the police station, where Lippstreu read Beerbohm an "Implied Consent Form," which advises the suspect that he is under arrest for driving "while under the influence of alcoholic liquor," informs the suspect that he is required to submit to a chemical test of blood, breath, or urine, warns the suspect that refusal to submit to such a test constitutes a crime, and outlines the penalties involved. The form, which is apparently designed to be read to suspects by a police officer, also states, "If I direct that the test shall be of your breath, the test shall be of your breath. If I direct that the test shall be of your blood or urine, you may choose whether the test shall be of your blood or urine." Lippstreu testified, "We do not have a breath machine, so the defendant had an option whether to take [a] blood or urine [test]." The form in evidence carries a notation that "I hereby direct that the test shall be of your blood-urine."

Although Lippstreu did not recall ever warning Beerbohm

that a refusal to choose between a blood or urine test would be considered a refusal to submit to any test, Lippstreu testified that after he read the foregoing consent form to Beerbohm, he

> asked Mr. Beerbohm which test he would like, and he said, I'll leave that up to you. Whichever's best.
>
> . . . .
>
> . . . Then he was asked a second time which test he would prefer, blood or urine? He said, you choose for me. I said, I will not choose for you. I'm not going to choose which test you will take. That's your choice. And I asked him a third time and he said he wanted to talk to his attorney. . . .
>
> . . . .
>
> . . . I told Mr. Beerbohm that he did not have the right for an attorney at this point.
>
> . . . .
>
> . . . Then I asked Mr. Beerbohm again which test he preferred and he said he would not take either test.

In considering Beerbohm's first assignment of error, that the county and district courts erred in finding probable cause to arrest him, we remind ourselves that this court will uphold a trial court's findings of fact on a motion to suppress unless those findings are clearly wrong. *State v. Price, post* p. 448, 427 N.W.2d 81 (1988); *State v. McCurry*, 228 Neb. 841, 424 N.W.2d 364 (1988); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988). Moreover, in determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion. *State v. McCurry, supra*; *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988).

In several recent cases this court has set out clear guidelines for investigatory stops by police officers in this state. We have observed that an investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity. *State v. Dail, supra*; *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). A police

officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *State v. Dail, supra*; *State v. Thomte, supra*. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, § 39-669.07. *State v. Thomte, supra*.

Fulmer v. Jensen, 221 Neb. 582, 379 N.W.2d 736 (1986), recently presented a factual situation remarkably similar to that of the present case. In *Fulmer*, the arresting officer was informed by radio that a "white El Camino-type vehicle" bearing a certain license number had been involved in a theft and was last seen traveling north on Central Avenue. *Id.* at 583, 379 N.W.2d at 738. Shortly thereafter, the officer observed a vehicle matching that description some 50 feet from the highway on private property. On this basis alone, the officer approached the vehicle, contacted the driver, Fulmer, and asked him to accompany her to the scene of the theft. Following Fulmer in her patrol car as he drove to the indicated location, the officer noted that the driver operated the car "very slowly and appeared not to know where he was going." *Id.* at 584, 379 N.W.2d at 738. At this point the officer stopped the vehicle, and subsequent investigation indicated that Fulmer appeared to be intoxicated. This court, quoting *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), noted that

> "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." Acknowledging the elusive nature of the concept of cause sufficient to justify a stop, the Court outlined certain guidelines: "But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal

> activity." [Citations omitted.] In this case, it is clear that Officer Martin, acting on the facts learned through the radio dispatch, together with her own observations that Fulmer's vehicle was parked with its lights on near the road it was last seen traveling on after the theft, had a particularized and objective basis for suspecting that Fulmer was involved in the theft.

Fulmer, supra at 588, 379 N.W.2d at 740-41. See, also, *Wietjes v. Jensen*, 221 Neb. 579, 379 N.W.2d 734 (1986).

It is noteworthy that Lippstreu did not stop Beerbohm's automobile as soon as he located it, based solely upon the information relayed to him by radio. Compare *Brewer v. Wolff*, 529 F.2d 787 (8th Cir. 1976), and *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), *cert. denied* 434 U.S. 833, 98 S. Ct. 117, 54 L. Ed. 2d 93. Instead, Lippstreu followed the suspect vehicle and observed evidence of improper and possibly intoxicated operation with his own eyes. See, e.g., *Fulmer v. Jensen, supra*. The evidence is such that the trial court could properly find, as is implicit in its rulings, that Lippstreu had the requisite "articulable basis or reasonable suspicion," "justified by an objective manifestation," *State v. Thomte, supra* at 662-63, 413 N.W.2d at 919, and that his stop of Beerbohm was appropriate in the circumstances. Beerbohm's first assignment of error is therefore without merit.

Beerbohm next asserts that the county and district courts erred in finding that he refused to submit to a chemical test to determine the alcohol content of his blood.

Section 39-669.08(4) provides:

> Any person arrested as provided in this section may, upon the direction of a law enforcement officer, be required to submit to a chemical test of his or her blood, breath, or urine for a determination of the alcohol content. Any person who refuses to submit to a chemical blood, breath, or urine test required pursuant to this section shall be . . . guilty of a crime . . . .

Neb. Rev. Stat. § 39-669.09 (Reissue 1984) provides in relevant part:

> The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08

> may direct whether the test shall be of blood, breath, or urine; *Provided*, that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine.

In essence, Beerbohm's argument is that the language of § 39-669.09 requires that if the officer determines the test is to be of anything other than of the breath, he or she must offer the licensee the choice of submitting a sample of either blood or urine. At that point the licensee may elect to take one test or the other or say that either test is acceptable. In the latter event the officer is to make the selection. Thus, Beerbohm presents a question of statutory interpretation, a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determinations made by the courts below. *Monahan v. School Dist. No. 1, ante* p. 139, 425 N.W.2d 624 (1988); *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988).

It is a well-established rule that in construing a statute, this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984). The obvious import of the statute is to leave the ultimate choice of whether it is the blood or urine which is going to be tested to the suspect. It would be absurd indeed to read § 39-669.09 so as to require that an officer must first make a choice, which the suspect then has a right to overrule, but not permit the suspect to make the choice in the first instance. We decline to do so.

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it. *State v. Clark, ante* p. 103, 425 N.W.2d 347 (1988); *State v. Richter*, 225 Neb. 871, 408 N.W.2d 324 (1987); *Pollard v. Jensen*, 222 Neb. 521, 384 N.W.2d 640 (1986). The result of Beerbohm's refusal to make the choice which is his alone to make, to specify whether he preferred to produce a blood or

urine sample, amounted, as a matter of law, to a refusal to submit to the testing required by § 39-669.08(4). Thus, there is no merit to the second assignment of error.

Accordingly, the judgment of the district court is correct and is therefore affirmed.

AFFIRMED.

CAPORALE, J., dissenting in part.

I certainly agree that there was ample probable cause to arrest defendant, Kenneth V. Beerbohm, and that his first assignment of error is therefore without merit. However, while the majority correctly cites the rules of statutory construction, it, in my judgment at least, misapplies them and therefore comes to the mistaken conclusion that Beerbohm refused to submit to chemical testing in violation of Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986), and thus erroneously rejects Beerbohm's second assignment of error.

The precise statement of the question presented by Beerbohm's second assignment of error is: What is the meaning of the word "may," as used in the phrase "such person may choose whether the test shall be of his blood or urine," in Neb. Rev. Stat. § 39-669.09 (Reissue 1984)? In this instance, as Beerbohm correctly points out, the Legislature has provided clear guidance in Neb. Rev. Stat. § 49-802 (Reissue 1984), which reads in relevant part:

> Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows:
>
> (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed.

The word "may" in a statute will generally be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by application of that meaning. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986); *Buhrmann v. Sellentin*, 218 Neb. 288, 352 N.W.2d 907 (1984).

There is nothing in the present case to indicate that the intent of the Legislature would be defeated by construing the word

"may" in the portion of § 39-669.09 cited in the majority opinion in its ordinary, permissive, and discretionary sense. In fact, the appearance of the word in close proximity with the word "shall" in § 39-669.09 leaves but one possible conclusion: that a licensee who must submit to either a blood or urine test under § 39-669.08(4) has discretionary power, granted by the Legislature in § 39-669.09, to select, or refrain from selecting, which of the two alternative test samples he or she will provide.

As noted by the majority, a refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself or herself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he or she was being asked to submit to a test and manifested an unwillingness to take it.

Beerbohm's actions manifested no unwillingness to take a test; he, in effect, said, "I'll take any test you want to give me," thereby leaving it to the officer to choose whatever test the officer found more convenient. To hold that under such a circumstance Beerbohm refused to take either a blood or urine test flies in the face of both logic and the relevant statutory language.

While I concede that the holding of the majority has the virtue of making the administration of §§ 39-669.08(4) and 39-669.09 easier, it does so at the expense of the plain meaning of the words used by the Legislature and violates the very rules of statutory construction upon which the rationale of the majority opinion rests. If the Legislature did not mean what it said, it is within its province to change its words so as to say what it does mean. This court, however, possesses no license to invade the Legislature's bailiwick, which is precisely what it has done.

Accordingly, I would reverse.