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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 18, 1991 and MAY 2, 1991

IN THE

Supreme Court of Nebraska

VOLUME CCXXXVII

STEVEN R. SCHROEDER

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1992

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By Steven R. Schroeder, 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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DALE E. FAHRNBRUCH, Associate Justice

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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	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John P. Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	John P. Murphy Donald E. Rowlands II	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	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Joseph S. Troia	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn Philip R. Riley Richard W. Krepela	Neligh Creighton Madison
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
Eleventh	Hall and Howard	Richard E. Weaver David A. Bush	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Gerald R. Jorgensen	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
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	August F. Schuman Alan L. Brodbeck	Ainsworth O'Neill
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	James L. Macken G. Glenn Camerer	Gering Gering
Eighteenth	Gage and Jefferson	Steven Bruce Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas H. Dorwart C. G. Wallace	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith J. Kovanda Robert E. Wheeler	Burwell Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gerald E. Rouse Gary F. Hatfield Lyle Winkle	Columbus Central City Columbus

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APPELLATE DIVISION OF THE DISTRICT COURT CASES

Upon consideration by the Supreme Court of Nebraska of the records, briefs, and recommendations of the Appellate Division of the District Court, the judgments in the following cases were affirmed.

No. 88-457, filed March 8, 1991: **Kaiser v. Kaiser.** Appeal from the District Court for Douglas County: John E. Clark, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-998, filed February 22, 1991: **Black Water Divers, Inc. v. Northwestern Nat. Ins. Co.** Appeal from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Heard before Buckley, Davis, and Illingworth, District Judges. White, Judge, dissents.

No. 88-1002, filed March 29, 1991: **Grabowski v. Village of Daykin.** Appeal from the District Court for Jefferson County: William B. Rist, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 88-1007, filed February 22, 1991: **Peterson v. Parts Exch., Inc.** Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 88-1012, filed March 29, 1991: **Borosko v. Goetz.** Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 88-1028, filed March 29, 1991: **Eichenberger v. Brown Cty. Bd. of Equal.** Appeal from the District Court for Brown County: Edward E. Hannon, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

No. 89-019, filed February 15, 1991: **First Nat. Bank v. Wolff.** Appeal from the District Court for Stanton County: Richard P. Garden, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-103, filed February 22, 1991: **Roberson v. Evans.** Appeal from the District Court for Hall County: William H. Riley, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-199, filed March 29, 1991: **Shields v. South Ridge Bank.** Appeal from the District Court for Lancaster County: Earl J. Witthoff, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

No. 89-716, filed March 1, 1991: **State v. Rodriguez.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

No. 89-891, filed April 5, 1991: **State v. Mode.** Appeal from the District Court for Lancaster County: William D. Blue, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. BA-008: **In re Application of Salazar.** Order of the Nebraska State Bar Commission denying applicant's request to take bar examination affirmed.

No. BA-009: **In re Application of Williams.** By order of the court, decision of the Nebraska State Bar Commission affirmed in part, and in part reversed.

No. BA-010: **In re Application of Winner.** Action of the Nebraska State Bar Commission affirmed.

No. 86-1050: **State v. Thompson.** Motion of appellee for summary affirmance sustained with modification of credit for jail time served.

No. 86-1051: **State v. Thompson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-691: **Waite v. A. S. Battiato Co., Inc.** By order of the court, appeal dismissed.

No. 88-694: **Heine v. Sun Oil Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 88-695: **Heine v. Sun Oil Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 88-877: **Blinder, Robinson & Co., Inc. v. Barbee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1062: **County of York v. Galaway.** Motion of appellee for summary affirmance filed January 17, 1991, sustained; judgment affirmed; see Rule 7B(2).

No. 89-085: **In re Conservatorship of Wolfenden.** Stipulation allowed; appeal dismissed; each party to pay own

costs.

No. 89-167: **Wolfenden v. Wolfenden.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-409: **Farmers State Bank of Humphrey v. Alderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 89-744: **Turechek v. Burlington Northern RR. Co.** Stipulation allowed; appeal dismissed.

No. 89-906: **Williams Natural Gas Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-907: **Williams Pipeline Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-937: **Williams Telecomms. Group, Inc. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-938: **Dial-Net, Inc. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-939: **Clarks Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalizaton and Assessment for further proceedings.

No. 89-940: **Curtis Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-941: **Diller Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-942: **Great Plains Communications, Inc. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-943: **Hartington Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-944: **Keystone-Arthur Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-945: **Petersburg Tel. Co. v. State Bd. of Equal.**

Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-946: **Stanton Tel. Co. v. State Bd. of Equal.** Stipulation allowed; cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-948: **America West Airlines v. State Bd. of Equal.** By order of the court, cause remanded to State Board of Equalization and Assessment for further proceedings.

No. 89-958: **Glenwood Tel. Membership Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-959: **Henderson Coop. Tel. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-960: **Hershey Coop. Tel. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-961: **Northeast Neb. Tel. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-962: **Three River Telco v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-963: **Nucor Steel v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-964: **Vulcraft v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-972: **Opus III, VIII, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-973: **Baxter Chrysler-Plymouth v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-974: **Speedway Transp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-975: **Honeyman Rent-All v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-976: **First Nat. Bank of Bellevue v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-980: **Accent Servs. Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-981: **Omaha Center Inn, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-982: **Browning-Ferris Indus. of Neb. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-983: **Great Plains Packaging Co. v. State Bd. of**

Equal. Appeal dismissed. See Rule 7A(2).

No. 89-984: **N.P. Dodge Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-985: **KAMA v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-986: **Beef Am. Operating Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-987: **Dean Rawson Nissan, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-988: **Editech Post Prods., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-989: **First Data Resources, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-990: **Kelley Bean Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-992: **Lincoln Indus., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-993: **Metz Baking Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-994: **Nebraska Book Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-995: **Puritan Mfg., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-996: **Norwest Bank Neb., N.A. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-997: **Lindsay Mfg. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-998: **Nebco Distrib. of Omaha, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-999: **Dorsey Trailer Sales, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1000: **Pentzien, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1001: **Cassem, Tierney, Adams v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1002: **Travel & Transport, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1003: **Computer Management, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1013: **Conservative Sav. Bank v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1014: **Schuyler State Bank v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1016: **Theisen Bros., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1017: **Wilkinson Mfg. Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1018: **WOWT v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1019: **United States Check Book Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1020: **Fort Calhoun Stone Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1021: **Omeco Boss Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1022: **Bemis Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1023: **Pathology Center v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1024: **Olson Bros., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1025: **Douglas Cty. Bank & Trust Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1026: **Paul A. Willsie Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1027: **Champion Home Builders Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1028: **Reach Electronics, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1029: **Glass Contractors, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1030: **Radiology Consultants, P.C. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1031: **Omaha Printing Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1032: **Intersystems, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1033: **Jack Moritz Co. v. State Bd. of Equal.** Appeal

dismissed. See Rule 7A(2).

No. 89-1034: **J.M. Properties, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1035: **Malnove Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1036: **Flinn Paving Co., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1037: **Endicott Clay Prods. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1038: **Omaha Box Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1039: **First Nat. Bank of Wisner v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1040: **Bank of Papillion v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1041: **Farmers State Bank of Aurora v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1042: **First Nat. Bank of Osceola v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1043: **First Nat. Bank of Shelby v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1044: **Farmers Nat. Bank of Central City v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1045: **First United Bank of Verdigre v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1046: **First United Bank of Neligh v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1047: **Farmers State Bank of Lexington v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1048: **First Nat. Bank of Mitchell v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1049: **State Bank of Palmer v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1050: **Gretna State Bank v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1051: **Sunderland Bros. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1052: **Millard Mfg. Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1053: **DeRosa Pasta Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1054: **Plaza Printing, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1055: **McGregor Interests, Inc., Ltd. Part. IV v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1056: **McGregor Interests, Inc., Ltd. Part. V v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1057: **McGregor Interests, Inc., Crescent v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1058: **McGregor Interests, Inc., Dodge v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1059: **McGregor Interests, Inc., Piedmont v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1060: **McGregor Interests, Inc., Plaza 3000 v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1061: **McGregor Realty, Inc. Real Estate Fund v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1062: **McGregor Realty, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1063: **Westmark Planning Group, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1064: **Hahn v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1065: **Burgher v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1066: **Hofschire v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1067: **Alpha Am. Ltd. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1068: **Millard's, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1069: **Omaha Fixture Mfg., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1070: **Omaha Landmark Lodging Ltd. Part. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1071: **Omaha Livestock Market, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1072: **Harold Mangelsen & Sons, Inc. v. State Bd. of**

Equal. Appeal dismissed. See Rule 7A(2).

No. 89-1073: **Chicago Lumber Co. of Omaha v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1074: **Swanson Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1075: **Tyrex Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1076: **United A.G. Coop., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1077: **Woodmen Accident & Life Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1078: **Richman Gordman Dept. Stores, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1079: **Richman Gordman Stores, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1080: **Half Price Stores, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1081: **Omaha Steaks Intl., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1082: **Larson Cement Stone Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1083: **Rigel/Chex, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1084: **Marick Farms, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1085: **Rigel Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1086: **Scoular Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1087: **Scoular Grain Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1088: **Seaway Importing Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1089: **Pamida, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1090: **Pamida Transp. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1091: **Lozier Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1092: **IBP, inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1093: **Central States Health & Life Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1094: **Guarantee Mut. Life Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1095: **Mutual of Omaha Ins. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1096: **Meadow Gold Dairies, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1109: **Blue Cross & Blue Shield of Neb. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1110: **HMO Neb., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1111: **Camelot Village Dev. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1112: **Royalwood on the Green Apts. Ltd. Part. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1113: **Seldin Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1114: **Seldin Properties v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1115: **Southgate Apartments Ltd. Part. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1116: **John Markel, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1117: **Schemmer Assocs., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1118: **Sherrets & Smith v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1119: **Kellogg Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1121: **IBM Credit Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1122: **IBM Corp. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1123: **Capitol View Apartment v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1124: **Austin Realty, Inc. v. State Bd. of Equal.**

Appeal dismissed. See Rule 7A(2).

No. 89-1125: **Austin Realty Invs. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1126: **Austin Realty Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1127: **State Inv. Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1128: **Raintree, Ltd. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1129: **Delay First Nat. Bank & Trust Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1130: **FirsTier Fin., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1131: **FirsTier Bank, N.A. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1132: **FirsTier Mortgage Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1133: **US West Corp. Communications v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1134: **US West Direct Co. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1135: **US West Business Resources, Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1136: **US West Enters., Inc. v. State Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. 89-1196: **State v. Milenkovich.** After rehearing, *State v. Milenkovich*, 236 Neb. 42 (1990), affirmed.

No. 89-1317: **Schneckenberger v. County of Douglas.** Stipulation allowed; appeal dismissed.

No. 89-1318: **Schneckenberger v. County of Douglas.** Stipulation allowed; appeal dismissed.

No. 90-050: **Hayes v. Hayes.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 90-150: **Chappelear v. County of Douglas.** Stipulation allowed; appeal dismissed.

No. 90-238: **Ocander v. Ocander.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-269: **State v. Robinett.** Affirmed. See Rule 7A(1).

No. 90-294: **Zurich-American Ins. Co. v. Langrehr.**

Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-296: **State v. Gallion.** Remanded with directions.

No. 90-330: **Hiermeier v. Zuerlein.** Stipulation allowed; appeal dismissed.

No. 90-350: **Weidner v. Weidner.** Remanded for further proceedings; costs taxed to appellant.

No. 90-367: **State v. Duda.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-374: **State v. Stilen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-412: **Whitaker v. Garrett.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 90-426: **State v. Houchin.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-446: **State v. Roth.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-547: **State v. McPherson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 90-580: **Sorensen v. City of Omaha Police & Fireman's Ret. Sys.** Appeal dismissed. See Rule 7A(2).

No. 90-586: **State v. Bell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-622: **State v. Alcaraz.** Affirmed. See Rule 7A(1).

No. 90-640: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-654: **State v. Lutt.** Affirmed. See Rule 7A(1).

No. 90-661: **Vance v. Mulliken.** Stipulation allowed; appeal dismissed.

No. 90-669: **State v. Citron.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-687: **State v. Potter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-692: **State v. Chatman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-693: **State v. Chatman.** Motion of appellee for

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-694: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-705: **State v. Gutierrez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-707: **State v. Warnken.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-711: **First Fed. S. & L. Assn. v. Kirkland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-712: **State v. Norris.** Sentence, including all terms of probation, affirmed. See Rule 7A(1).

No. 90-713: **State v. Zuhlke.** Affirmed. See Rule 7A(1).

No. 90-739: **State v. Lanzendorf.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-744: **State v. Mahloch.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-746: **State v. Taylor.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-751: **State v. Richards.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-753: **Anderson Excavating & Wrecking Co., Inc. v. Modern Equip. Co.** Stipulation allowed; appeal dismissed.

No. 90-760: **State v. Smith.** Affirmed. See Rule 7A(1).

No. 90-787: **State v. Bell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-789: **Castaneda v. Ankony Shadow Isle Ranch.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-849: **Glenwood Tel. Membership Corp. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-850: **Hershey Coop. Tel. Co. v. State Bd. of Equal.**

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-924: **Fecht v. Quality Processing, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-925: **State ex rel. Slattery v. Green.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 90-929: **State v. Reese.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-930: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-935: **State v. Cervantes.** Affirmed. See Rule 7A(1).

No. 90-936: **State v. Cervantes.** Affirmed. See Rule 7A(1).

No. 90-937: **State v. Cervantes.** Affirmed. See Rule 7A(1).

No. 90-940: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-953: **State v. Robinson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-954: **State v. Bohrer.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-956: **State v. McMeekin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-960: **State v. Blankenfield.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-964: **State v. Pin.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-967: **State v. Phelps.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-968: **State v. Covington.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-972: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-973: **Kantor v. Board of Regents of Univ. of Neb.**

Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-851: **Northeast Neb. Tel. Co. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-852: **Three River Telco v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-853: **Nucor Steel v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-854: **Vulcraft v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-877: **State v. Burton.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-878: **State v. Sahs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-879: **State v. Morris.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-880: **State v. Morris.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-886: **State v. Anderson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-887: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 90-890: **State v. Ham.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-891: **State v. Bates.** Affirmed. See Rule 7A(1).

No. 90-894: **State ex rel. Miller v. Brown.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-895: **Lemburg v. T & L Trucking.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-903: **State v. Albrecht.** Stipulation allowed; appeal dismissed.

No. 90-916: **State v. Joubert.** Motion of appellee for

Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 90-977: **State v. Christensen.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-979: **State v. Gordon.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-989: **State v. Huestis.** Affirmed. See Rule 7A(1).

No. 90-990: **In re Interest of Flowers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-992: **State v. Bierman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-993: **State v. Stokebrand.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-997: **State v. Brhel.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1001: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1004: **Alvarez v. Orr.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1007: **Vance v. Mulliken.** Stipulation allowed; appeal dismissed.

No. 90-1012: **State v. Moser.** Affirmed. See Rule 7A(1).

No. 90-1015: **State v. Shepherd.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1016: **State v. Rockhold.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1019: **State v. Arkel.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1021: **State v. Waldner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1024: **State v. Smith.** Motion of appellee for

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1033: **State v. Alas.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1034: **State v. Sopcich.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1039: **State v. Railsback.** Affirmed. See Rule 7A(1).

No. 90-1042: **Nebraska Motel Developers, Ltd. v. Hall Cty. Bd. of Equal.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-1043: **State v. Davis.** Affirmed. See Rule 7A(1).

No. 90-1052: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1054: **Connecticut Mut. Life Ins. v. Schneider.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1057: **State v. Patterson.** Motion of appellee for summary dismissal sustained; appeal dismissed as moot.

No. 90-1059: **State v. Umstead.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1061: **Midwest Fed. S. & L. Assn. v. Pick.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1063: **Helter v. Williamson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1082: **State v. Hall.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1084: **State v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1086: **Federal Deposit Ins. Corp. v. Regier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1087: **State v. Drugsvold.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1098: **State v. Liles.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1101: **Gibson v. Coleman Powermate.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1104: **State v. Mercado.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1106: **Meahan v. Metromail Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1107: **State v. Shoemaker.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1108: **Bonaparte v. Fitzgibbons.** Appeal dismissed.

No. 90-1110: **State v. Ham.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1111: **State v. Dennis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1117: **State v. Green.** Affirmed. See Rule 7A(1).

No. 90-1119: **Atkinson v. Atkinson.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1122: **Snyder Industries, Inc. v. City of Lincoln.** Stipulation allowed; appeal dismissed.

No. 90-1123: **Rearick v. Larsen.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1125: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1127: **Cole v. Determan.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1128: **Tyler v. Administrative Bd. of Appeals for City of Omaha.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1130: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1134: **State v. Barber.** Stipulation allowed; appeal dismissed.

No. 90-1138: **State v. Foster.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1141: **State v. Hyche.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1142: **Coleman v. Coleman.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1146: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1151: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1154: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 90-1156: **State v. Manuel.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. 90-1158: **Tyler v. Nebraska Humane Soc'y.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1165: **In re Interest of Mejia.** Stipulation allowed; appeal dismissed.

No. 90-1169: **Dickey v. Ostrom.** Motion sustained; bankruptcy stay lifted; appeal dismissed.

No. 90-1170: **Ahlman v. Johnson Gear.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-1178: **State v. Jackson.** Appeal dismissed. See Rule 7A(2).

No. 90-1179: **State v. Jackson.** Appeal dismissed. See Rule 7A(2).

No. 90-1180: **State v. Masonbrink.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1184: **State v. Contreras.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1187: **Knudson v. Knudson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-1189: **In re Conservatorship of Douglas.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-1191: **Dieken v. Dieken.** Motion of appellant to

dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 90-1194: **Acceptance Ins. Co. v. Veskerna.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1207: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1209: **State v. Snider.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1211: **State v. Wredt.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1226: **Investment Fin. Management Co., Inc. v. Schmit Industries, Inc.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1227: **Nielsen v. Nielsen.** Stipulation allowed; appeal dismissed.

No. 90-1228: **McCartney v. FirsTier Bank.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-1244: **State v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1256: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1258: **State v. Richardson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1265: **Haberman v. Haberman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1269: **State v. Chaney.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-032: **Lubow v. Lubow.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-034: **State v. Hartley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-041: **Korslund v. Beermann.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-046: **Villwok v. Fremont Rural Fire Dist.** Stipulation allowed; appeal dismissed.

No. 91-062: **State v. Jacobo.** Stipulation allowed; appeal

dismissed.

No. 91-066: **State v. Russell.** Appeal dismissed. See Rule 7A(2).

No. 91-083: **Rother v. Leonard.** Stipulation allowed; appeal dismissed.

No. 91-089: **State v. Beeks.** Appeal dismissed. See Rule 7A(2).

No. 91-093: **State v. Mason.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-094: **State v. Mason.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-105: **Mata v. Western Valley Packing.** Stipulation allowed; appeal dismissed.

No. 91-128: **Farm Cred. Bank of Omaha v. Fischer.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 91-148: **State v. Barger.** Stipulation allowed; appeal dismissed.

No. 91-202: **State v. Britt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-256: **State v. Cruse.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

NEBRASKA STATE BAR FOUNDATION, APPELLANT, V. LANCASTER COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

465 N.W.2d 111

Filed January 18, 1991. No. 87-967.

1. **Taxation: Appeal and Error.** In an appeal from a district court's judgment on the question whether property is tax-exempt, an appellate court determines a tax exemption question de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
3. **Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption.
4. _____: _____. A property owner's exemption from federal income taxation does not determine whether the owner's property is tax-exempt under state law.
5. _____: _____. For tax-exempt status pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1984), property must: (1) be owned by a type of organization designated in § 77-202(1)(c); (2) be used exclusively for at least one of the purposes specified in § 77-202(1)(c), i.e., an educational, religious, charitable, or cemetery purpose; and (3) not be (a) owned or used for financial gain to the property owner or user, (b) used more than 20 hours per week for sale of alcoholic liquors, or (c) owned or used by an organization which, on the basis of race, color, or national origin, discriminates in membership or employment.
6. **Taxation: Charities: Words and Phrases.** "Operated exclusively," in reference to a "charitable organization" within Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1984), means an organization's primary or predominant activity.
7. _____: _____: _____. Regarding "mental" benefit of the public, as one of the requisite purposes of a "charitable organization" within Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1984), "mental" means "intellectual," which in turn means, among other things, "engaged in creative literary, artistic, or scientific labor."

8. _____: _____: _____. Relative to a "charitable organization" within Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1984), "an indefinite number of persons" means a group of persons with a common characteristic, that is, a class, uncertain in number and composed from the public at large or a community.
9. **Taxation: Appeal and Error.** Under Neb. Rev. Stat. § 77-1511 (Reissue 1990), an appeal to a district court concerning a decision by a county board of equalization is a trial de novo, but only the tax liability questions raised before the board of equalization are the questions for adjudication by the district court in its appellate jurisdiction.
10. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
11. _____: _____. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
12. _____: _____. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, the Supreme Court also lacks power to adjudicate the merits of the claim.
13. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.

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

James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Michael E. Thew, Deputy Lancaster County Attorney, for appellees.

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

SHANAHAN, J.

BACKGROUND FOR APPEAL

For the purpose of property taxation, the Nebraska State Bar Foundation (Bar Foundation) is the owner of real property designated as the "Roman Hruska Law Center" (Law Center) in Lancaster County, Nebraska. In its tax exemption application for 1984, the Bar Foundation asserted that 56.3 percent of the Law Center, that is, the part of the Law Center claimed to be used for educational and charitable purposes, was

exempt from property taxation. After the board of equalization for Lancaster County (county board) disapproved the application, the Bar Foundation appealed to the district court for Lancaster County and contended that part of the Law Center was tax-exempt, since the center was partially used for charitable and educational purposes and the foundation held the Law Center in trust for the Nebraska State Bar Association, which was "created by the Supreme Court of Nebraska by state action to serve the public purpose."

The district court found that the Bar Foundation was "not a charitable organization; that is to say, '. . . an organization operated exclusively for the purpose of the mental, social or physical benefit of the public or an indefinite number of persons.' " The court also found that the Bar Foundation was not an "educational organization" and that the Law Center was not "property of the state and its governmental subdivisions." Consequently, the court determined that the Bar Foundation was not entitled to a tax exemption for the Law Center and affirmed the county board's decision, which had denied the foundation's tax exemption application.

In its appeal, the Bar Foundation contends that part of the Law Center, as property used for "charitable" and "educational" purposes, is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1984) and that the Law Center, as governmental property, is tax-exempt in accordance with § 77-202(1)(a), all pertaining to the years 1984 to 1987, inclusive.

STANDARD OF REVIEW; TAXPAYER'S BURDEN OF PROOF

In an appeal from a district court's judgment on the question whether property is tax-exempt, an appellate court determines a tax exemption question de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381

N.W.2d 166 (1986). See, also, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *Immanuel, Inc. v. Board of Equal.*, 222 Neb. 405, 384 N.W.2d 266 (1986); *Matzke v. Board of Equalization*, 167 Neb. 875, 95 N.W.2d 61 (1959); Neb. Rev. Stat. § 77-1511 (Reissue 1990).

"[T]ax exemption provisions are strictly construed, and their operation will not be extended by construction. . . . Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation." *Bethphage Com. Servs. v. County Board, supra* at 889, 381 N.W.2d at 169. Accord *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987). "Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption." *Nucor Steel v. Leuenberger*, 233 Neb. 863, 867, 448 N.W.2d 909, 912 (1989); *Bethphage Com. Servs. v. County Board, supra.*

NEBRASKA'S STATUTE FOR TAX-EXEMPT PROPERTY

Originally, the constitutional provision for property tax exemption appeared in 1875 as article IX, § 2, of the Nebraska Constitution:

> The property of the state, counties and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law.

Hence, the initial statute for the charitable and educational exemptions from property taxation was Comp. Stat. § 4934 (1903), which provided in part: "The following property shall be exempt from taxes: First—All property of the state, counties, and municipal corporations. Second—Such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery and charitable purposes."

As the result of a constitutional amendment in 1920, the

genesis for property tax exemption is Neb. Const. art. VIII, § 2, which, pertinent to the present appeal, provides:

> The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.

Consequently, in 1921, the Legislature amended the property tax exemption statute to provide in part:

> The following property shall be exempt from taxes:
>
> (1) The property of the state and its governmental subdivisions.
>
> (2) Property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.

Comp. Stat. § 5821 (1922).

Insofar as questions in this appeal are concerned, Nebraska's Revised Statutes of 1943 retained the provisions of the 1921 statute:

> The following property shall be exempt from taxes:
>
> (1) The property of the state and its governmental subdivisions;
>
> . . . .
>
> (3) Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user . . . .

§ 77-202 (1943).

In 1980, § 77-202 was amended to provide:

> (1) The following property shall be exempt from taxes:
>
> (a) The property of the state and its governmental subdivisions;
>
> . . . .
>
> (c) Property owned *by educational, religious,*

> *charitable, or cemetery organizations* and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user . . . .

(Amendatory new language emphasized.) § 77-202(1)(a) and (c) (Reissue 1981).

The Legislature, in 1984, again amended § 77-202:

> (1) The following property shall be exempt from taxes:
>
> (a) The property of the state and its governmental subdivisions;
>
> . . . .
>
> (c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) *used for the sale of alcoholic liquors for more than twenty hours per week, or* (iii) *owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. For purposes of this subdivision, educational organization shall mean an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or a museum or historical society operated exclusively for the benefit and education of the public, and charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons . . . .*

(Amendatory new language emphasized.) § 77-202(1)(a) and (c) (Cum. Supp. 1984).

After the 1984 amendment, subparts (a) and (c) of § 77-202(1) have remained unchanged. See § 77-202 (Reissue 1990).

NEBRASKA STATE BAR FOUNDATION

Nature of Organization.

The Nebraska State Bar Foundation was incorporated in 1963 as a Nebraska nonprofit corporation to obtain gifts and

contributions for the purposes expressed in the foundation's articles of incorporation, namely:

> (a) To advance the science of jurisprudence;
>
> (b) To promote and improve the administration of justice;
>
> (c) To uphold high standards for the judiciary and for lawyers;
>
> (d) To facilitate understanding of and compliance with the law, and to promote the study of law, research therein, and the diffusion of knowledge thereof;
>
> (e) To cause to be published and to distribute addresses, reports, treatises and other literary works on legal subjects, and to acquire, preserve and exhibit rare books and documents, objects of art, and items of historical interest having legal significance or bearing on the administration of justice; and
>
> (f) To do and perform all acts and things which are legitimate and are reasonably calculated to promote the interests and carry out the purposes of this organization.

Also, the Bar Foundation's articles of incorporation provide:

> No part of the income or assets of this organization shall inure to the benefit of any member, officer or director, or private individual; and none of the activities, funds, property, or income of the Foundation may be used in carrying on any propaganda or political activity, directly or indirectly, or in attempting to influence legislation, either directly or indirectly, and neither the Foundation nor its officers or directors may, as such officers or directors of the Foundation, contribute to or otherwise support or assist any political party or candidate for elected public office.

To become a member of the Bar Foundation, one must be among the "active membership" of the Nebraska State Bar Association and must have contributed to the foundation. A 20-member board of directors elected from the foundation's membership conducts the foundation's activities and serves without compensation, although the foundation is authorized to pay reasonable compensation for services rendered by

persons other than the foundation's board of directors. Under I.R.C. § 501(c)(3) (1982), the Bar Foundation, as a "publicly supported organization," is exempt from federal income taxation. Also, contributions to the foundation are deductible as donations to a charitable organization.

Activities of Bar Foundation.

Among the Bar Foundation's early activities, and "one of the original goals" of the foundation, was fund raising for construction of a headquarters building for the Nebraska State Bar Association. Eventually, the Bar Foundation constructed the Law Center, in which law-related organizations occupy 56.3 percent of the center's usable floorspace, namely: the Bar Foundation occupies 13 percent; the Nebraska State Bar Association, 35.8 percent; and Nebraska Continuing Legal Education, 7.5 percent. The Nebraska State Bar Association and Nebraska Continuing Legal Education pay rent to the Bar Foundation for their floorspace in the Law Center. The remaining 43.7 percent of the Law Center's floorspace is leased to tenants unassociated with law-related activities.

Among its specific activities, the Bar Foundation has supplied "seed money" for Nebraska Continuing Legal Education, that is, initial funding for commencement of that educational corporation, and has made annual grants to Nebraska Continuing Legal Education since its inception. The Bar Foundation funded a "Student Legal Services Handbook" for the Association of Students of the University of Nebraska, a publication "[t]o provide students with general information on areas of law that most frequently concern them. [The handbook] is written to inform rather than advise, the hope being that students who have an awareness of their legal rights will seek the advice of an attorney regarding a specific legal problem." Also, foundation funding was used for the "Nebraska Annotations to the Restatement (Second) of Trusts" and the "Annotation and Restatement of Torts." Additionally, the Bar Foundation supplied or committed funds for a study of the Nebraska court system, the publication of a "Consumer's Guide to Nebraska Law," a conference of state Supreme Court justices and court administrators, and a writing contest in

Nebraska relative to the Bicentennial of the U.S. Constitution.

NEBRASKA STATE BAR ASSOCIATION

The Nebraska State Bar Association (NSBA) was incorporated as a Nebraska nonprofit corporation in 1976 and operates under supervision of the Supreme Court of the State of Nebraska. NSBA's purposes are

> to improve the administration of justice; to foster and maintain high standards of conduct, integrity, confidence and public service on the part of those engaged in the practice of law; to safeguard and promote the proper professional interests of the members of the Bar; to provide improvements in the education and qualifications for admission to the Bar, and for the study of the Science of Jurisprudence and Law Reform, and the continuing legal education of the members of the Bar; to improve the relations of the Bar with the public; to carry on a continuing program of legal research; and to encourage cordial relations among the members of the Bar; all to the end that the public responsibilities of the legal profession may be more effectively discharged.

Every lawyer licensed to practice in the State of Nebraska must be a member of NSBA, which also includes judges.

Located in the space rented by NSBA are offices for various bar-related activities or functions, for example, the Counsel for Discipline, who, in accordance with rules promulgated by the Supreme Court of the State of Nebraska, is involved in enforcement of the Code of Professional Responsibility for lawyers and the disciplinary process of lawyers; the Nebraska State Bar Commission, which offers recommendations to the Supreme Court of the State of Nebraska regarding applications to practice law in Nebraska and which is responsible for preparing and grading part of the bar examinations for admission to practice law in Nebraska; Legal Services, which affords some "pro bono" legal services to indigent clients and maintains a lawyer-referral program; Nebraska Lawyers Trust Account Foundation, or "IOLTA" (Interest on Lawyers Trust Accounts), which provides funds for legal services to indigents; and Law-Related Education, which informs the public about

"concepts of law."

NEBRASKA CONTINUING LEGAL EDUCATION

Nebraska Continuing Legal Education (NCLE) is a Nebraska nonprofit corporation which provides

> an educational program for the study, discussion and dissemination of information relating to the laws of the State of Nebraska, United States of America, the several States thereof, and governmental units and organizations inferior to or related to any of them, and international law, for members of the Nebraska State Bar Association and interested persons not members of such Association.

NCLE's board of directors reviews the "particular needs of the legal profession" regarding education and "the kinds of programs [that] would most benefit the legal profession." Thereafter, NCLE conducts seminars or lectures in areas "of importance to the legal profession." Although nonlawyers sometimes attend NCLE seminars of particular interest, for instance, a seminar on school law, seminar attendance by nonlawyers is "the exception rather than the rule."

FEDERAL TAX EXEMPTION

The Bar Foundation points to its federal tax exemption as a charitable organization under § 501(c)(3) of the Internal Revenue Code and suggests that the federal exemption is "highly relevant" to the question concerning property exemption under § 77-202(1)(c) (Cum. Supp. 1984). Brief for appellant at 20. A property owner's exemption from federal income taxation does not determine whether the owner's property is tax-exempt under state law. *New Canaan Academy v. Town of Canaan*, 122 N.H. 134, 441 A.2d 1174 (1982); *Ladies Club v Grand Rapids*, 409 Mich. 748, 298 N.W.2d 422 (1980); *Eyring Research Institute v. Tax Com'n of Utah*, 598 P.2d 1348 (Utah 1979); *Council Rock School Dist. v. G.D.L. Plaza*, 91 Pa. Commw. 176, 496 A.2d 1298 (1985); *NRA Spec. Contribution Fund v. Bd. of Cty. Com'rs*, 92 N.M. 541, 591 P.2d 672 (1979); *AWWA v. Board of Assessment Appeals*, 38 Colo. App. 341, 563 P.2d 359 (1976). Reasons for the preceding proposition are not only the different types of taxes levied, but also imposition of taxes by two distinct and autonomous

governmental authorities. Therefore, tax-exempt status of the Bar Foundation's property is determined by Nebraska law irrespective of federal law governing exemption from income taxation.

PROPERTY OF A CHARITABLE ORGANIZATION

As disclosed by the examination of Nebraska's earliest statute for tax-exempt property and subsequent exemptive statutes, legislation for tax-exempt property demonstrates a discernible and deliberate pattern of statutory evolution. Initially, only the property's exclusive use was the controlling factor in determining whether property was exempt. Comp. Stat. § 4934 (1903). In 1921, while a property's exclusive use for a charitable or educational purpose remained a factor in tax exemption, for the first time ownership of property became a determinant for tax exemption, although ownership was nondescript, since a particular nature, character, or status of the property owner was unspecified in either the 1921 amendment or the immediately subsequent § 77-202(3) (1943). Thus, property use was the focal point for exemption from property taxation. For that reason, this court, construing availability of the "charitable" and "educational" exemptions under § 77-202(3) (1943), commented that "in determining whether or not property is within a tax exemption provision, the use of the property and not the status or character of the owner of the property controls." *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall*, 166 Neb. 588, 598, 90 N.W.2d 50, 55 (1958). In consideration of § 77-202(1)(c) (Reissue 1971), this court stated: "It is the primary or dominant use, and not an incidental use, of the property which is controlling in determining whether property is exempt from taxation . . . ." *Bethesda Foundation v. County of Saunders*, 200 Neb. 574, 577, 264 N.W.2d 664, 666 (1978). Accord, *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965); *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961). Drawing from those preceding "use" decisions, the Bar Foundation maintains that under § 77-202(1)(c) (Cum. Supp. 1984), "the controlling factor is the primary or dominant use, not any incidental use." Brief for appellant at 13. Regarding the

Bar Foundation's decisional support for its "controlling factor" test, the precedential value of a decision containing judicial construction of a statute may, and probably does, diminish when the construed statute is subsequently amended in reference to the statutory language which was the subject of the prior interpretative decision. Cf. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989) (interpretative precode decisions may have little value in construing the Nebraska Criminal Code).

Continuing on our statutory trek through the charitable and educational exemptions from property taxation, in 1980, § 77-202 was amended, so that the specific nature, character, or status of the property owner became a factor in determining whether property was tax-exempt, that is, the property must be "owned by [an] educational, religious, [or] charitable" organization. § 77-202(1)(c) (Reissue 1981). Thus, through the 1980 amendment, a property owner's nature, character, or status became a determinative factor considered with the additional requirements that the property be used for statutorily specified purposes and not owned or used for financial gain or profit to the property's owner or user.

Notwithstanding the 1980 amendment of § 77-202(1)(c), there remained a question for courts: What is a "charitable organization" in reference to tax-exempt property?

In *Scottish Rite Building Co. v. Lancaster County*, 106 Neb. 95, 98, 182 N.W. 574, 575 (1921), this court characterized "charity" as that "actually done for the relief of the unfortunate and the alleviation of suffering, or in some work of practical philanthropy, as contrasted with the sentimental or ethical viewpoint." In *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105, 111, 182 N.W. 593, 595 (1921), "charity" was characterized as "something more than mere alms-giving or the relief of poverty and distress, and [as having] a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits." Accord *Lincoln Woman's Club v. City of Lincoln, supra.*

Still other definitions of "charity" are found in this court's decisions such as *United Community Services v. The Omaha*

Nat. Bank, 162 Neb. 786, 791, 77 N.W.2d 576, 582 (1956), wherein "charity" meant

> "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

(Quoting from 10 Am. Jur. *Charities* § 3 (1937).)

Eventually, in *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), this court indicated that the charitable exemption under § 77-202(1)(c) was based on a benefit to the public generally and elimination of services which the state would otherwise have to perform in response to its governmental duties. Cf. *St. Louis Union Trust Company v. United States*, 374 F.2d 427, 432 (8th Cir. 1967) (a reason for the charitable exemption is that "the favored entity performs a public service and benefits the public or relieves it of a burden which otherwise belongs to it").

One commentator has observed:

> Exemption of charitable property flows from the concept that property used for public activities and functions should not be taxed. Hence it follows that because charitable property renders a public service and is used for public functions it should be tax exempt. Formulated in terms of the so-called governmental theory of tax exemption, private charities perform functions that the state would be required to undertake and tax exemption is granted as a quid pro quo for the performance of these functions and services. Many courts expand the governmental doctrine into the humanitarian theory under which tax exemption is justified not only for the performance of functions which relieve the state of its burden but also for activities which further socially desirable objectives considered of benefit to the community. These differing theories of tax exemption of charitable property have, to a considerable extent, been responsible for the lack of uniformity which has

traditionally characterized the case law in this area.

E. Fisch, D. Freed & E. Schachter, Charities and Charitable Foundations § 787 at 602-03 (1974). As the court noted in *Child v. United States*, 540 F.2d 579, 583 (2d Cir. 1976):

> Relief of general tax burdens alone, in a society with some progressivity in its tax structure, cannot be deemed a single, inalienable mark of charity.
>
> Our view is that relief for the public fisc is more symptomatic than evidentiary regarding whether an activity is charitable: charity often results in an absorption of a burden otherwise falling upon the state, particularly where the social welfare is a principal purpose of the state. But this does not mean that activities lessening public expense in any of a myriad of areas of public interest are perforce charitable.

In an attempt to eliminate confusion or uncertainty in a definition or characterization of "charitable organization," the Legislature in 1984 amended § 77-202(1)(c) by providing: "[C]haritable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons . . . ." Therefore, for tax-exempt status pursuant to § 77-202(1)(c) (Cum. Supp. 1984), property must: (1) be owned by a type of organization designated in § 77-202(1)(c); (2) be used exclusively for at least one of the purposes specified in § 77-202(1)(c), i.e., an educational, religious, charitable, or cemetery purpose; and (3) not be (a) owned or used for financial gain to the property owner or user, (b) used more than 20 hours per week for sale of alcoholic liquors, or (c) owned or used by an organization which, on the basis of race, color, or national origin, discriminates in membership or employment. See, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *Immanuel, Inc. v. Board of Equal.*, 222 Neb. 405, 384 N.W.2d 266 (1986). We again note that § 77-202(1)(c) (Cum. Supp. 1984) is the same as the current tax exemption statute, § 77-202(1)(c) (Reissue 1990).

Thus, § 77-202(1)(c) contains a two-tier approach to tax exemption for property. At the first tier is the particular nature, character, or status of a property owner as an organization

which is one of the types designated in § 77-202(1)(c). At the second tier is use of the property, that is, the specific kinds and degrees of use which qualify or disqualify property concerning the charitable or educational tax exemptions available under § 77-202(1)(c). At the first tier, if an owner is not an organization of a type entitled to property tax exemption pursuant to § 77-202(1)(c), continuation to the second tier, namely, consideration of the property's use, is unnecessary, since the property owner has failed to qualify as an organization entitled to tax exemption for its property. In this manner, through a series of amendments to statutes authorizing tax exemption of property owned by certain types of organizations, the Legislature, by narrowing the definitions for "charitable organization" and "educational organization," has systematically and intentionally broadened the property tax base through limited availability of property tax exemption under § 77-202(1)(c).

Consequently, the next question is whether the Bar Foundation, as owner of the Law Center, is a charitable organization within § 77-202(1)(c), that is, an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons.

"Operated exclusively," in reference to a charitable organization within § 77-202(1)(c), means an organization's primary or predominant activity. See, *Bethphage Com. Serv. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986); *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965); *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932).

Regarding "mental" benefit of the public, as one of the requisite purposes of a charitable organization within § 77-202(1)(c), "mental" means "intellectual," see Webster's Third New International Dictionary, Unabridged 1411 (1981), which in turn means, among other things, "engaged in creative literary, artistic, or scientific labor." *Id.* at 1174.

Applying the preceding definition of "mental" to the Bar Foundation's primary or predominant activity, the Bar Foundation is not operated for generation of literary, artistic,

or scientific benefit to the general public.

However, might the Bar Foundation's primary or predominant activity relate to the mental benefit of "an indefinite number of persons"? Relative to a charitable organization within § 77-202(1)(c), "an indefinite number of persons" means a group of persons with a common characteristic, that is, a class, uncertain in number and composed from the public at large or a community. See, *Lynch v. Spilman*, 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967); *Am. Soc. for Test. & M. v. Bd. of Rev. of Taxes*, 423 Pa. 530, 225 A.2d 557 (1967); *Continental Illinois Bank v. Harris*, 359 Ill. 86, 194 N.E. 250 (1934); *Ancient and Accepted Scottish Rite v. Board of County Commissioners, supra*.

Generally, the public cannot, except in extremely limited situations, act as lawyers in Nebraska without a license to practice law. Therefore, if we assume that the Bar Foundation operates primarily or predominantly to provide a "mental benefit" to a class, the benefited class is not composed from the public at large or from a community. Rather, the class which benefits from the Bar Foundation's primary or predominant activity is the membership of the NSBA, a restricted group of persons with a common characteristic—a license to practice law in the State of Nebraska. The Bar Foundation's other operations are basically law-related activities such as providing grants for continuing education of lawyers and funding for legal publications, for example, "Nebraska Annotations to the Restatement (Second) of Trusts," activities which benefit a restricted class, namely, lawyers, and not a class composed from the public at large.

Since there is no evidence that the Bar Foundation's operations confer any social or physical benefit on the general public or an "indefinite number of persons," as that phrase is used in § 77-202(1)(c), we reach the same conclusion as that reached by the district court: The Bar Foundation is not a charitable organization within § 77-202(1)(c) (Cum. Supp. 1984).

EDUCATIONAL ORGANIZATION

Section 77-202(1)(c) also contains a definition or

characterization of an "educational organization," that is, "an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects . . . ." There is no evidence whatsoever that the Bar Foundation is an institution with the primary or predominant activity of offering regular courses with systematic instruction in academic, vocational, or technical subjects. Hence, we conclude, as did the district court, that the Bar Foundation is not an educational organization within § 77-202(1)(c).

TAX EXEMPTION CLAIM UNDER § 77-202(1)(c)

Therefore, since the Bar Foundation is neither a charitable organization nor an educational organization within the statutory definitions contained in § 77-202(1)(c), the Bar Foundation is not entitled to tax exemption of the Law Center pursuant to § 77-202(1)(c).

GOVERNMENTAL PROPERTY EXEMPTION UNDER § 77-202(1)(a)

The property of the State of Nebraska and its governmental subdivisions is exempt from property taxation. § 77-202(1)(a).

As the basis for another exemption of the Law Center, the Bar Foundation alleges:

> Section 77-202 further provides that the property of the state and its governmental subdivisions shall be exempt from taxes. The Nebraska State Bar Foundation holds title to the subject property in trust for the Nebraska State Bar Association which is an integrated state bar created by the Supreme Court of Nebraska by state action to serve the public purpose. The Nebraska State Bar Association and its trustee, the Nebraska Bar Foundation constitute a governmental instrumentality which is exempt from taxation.

In its application, filed with the county assessor and later heard before the county board, the Bar Foundation sought tax exemption for part of the Law Center under the charitable and educational exemptions of § 77-202(1)(c), that is, exemption of the Law Center's floorspace occupied by the Bar Foundation, NSBA, and NCLE, or exemption of 56.3 percent of the Law

Center.

At the hearing before the county board, much of the discussion and information related to whether the Law Center was used "exclusively for charitable and educational purposes" and whether NSBA was a "charitable organization." After receipt of information bearing on the Bar Foundation's application for tax exemption of the Law Center, the county board voted in October 1984 to "disallow the exemption application for the Nebraska State Bar Foundation for educational and charitable purposes," a decision which the Bar Foundation appealed immediately.

The Bar Foundation, in its amended petition filed in 1987, renewed its allegations about the "charitable" and "educational" aspects of the Bar Foundation, NSBA, and NCLE, but additionally alleged that the foundation held title to the Law Center in trust for "the Nebraska State Bar Association which is an integrated bar created by the Supreme Court of Nebraska by state action to serve the public purpose." In its appeal to this court, the Bar Foundation contends:

> It is the Nebraska State Bar Association that assists the Supreme Court in carrying out its responsibilities as a branch of government in Nebraska. There is no other State agency which assists the Supreme Court in carrying out these responsibilities. . . .
>
> The inescapable conclusion is that governmental functions are undertaken from within the Law Center building. The Supreme Court created the Bar Association to assist it in carrying out its judicial functions. This assistance requires office space and that necessary office space is in the Law Center.

Brief for appellant at 31.

The county board has never objected to the district court's considering whether the Law Center is governmental tax-exempt property, but maintains that the Law Center is not property owned by either the State of Nebraska or a political subdivision of the state.

While each party in this appeal directs our attention to decisions which tend to support its respective position on tax exemption of governmental property, both the Bar Foundation

and the county board overlook an important and dispositive procedural point in this case.

An appeal from a decision by a county board of equalization is authorized by Neb. Rev. Stat. § 77-1510 (Reissue 1990) and is controlled by § 77-1511, which in part provides that "[t]he district court shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof." The foregoing statutes are verbatim successors to their prior statutory counterparts pertaining to appeals from a decision by a county board of equalization.

In *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987), Gordman Properties Company, as appellant in the district court, attempted to raise an issue concerning uniformity and proportionality of valuation regarding Gordman's property, an issue which was never raised before the county board of equalization, since the board considered only Gordman's tax protest to an increase in the actual value of Gordman's property. In *Gordman*, we not only recognized that the district court lacked jurisdiction to resolve any question involving uniformity and proportionality of valuation for Gordman's property, but also made some observations and statements worth repeating in the present appeal:

> Referring to a statutory predecessor substantially the same as the current § 77-1511, this court observed in *Reimers v. Merrick County*, 82 Neb. 639, 640, 118 N.W. 113, 114 (1908): "The legislature, in the section of the revenue law referred to, has seen fit to restrict the district court on such appeal to a consideration of the questions raised before said board, and the court is without power to adjudicate any other issue in that proceeding." See, also, *State Bank v. Seward County*, 95 Neb. 665, 146 N.W. 1046 (1914); *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545 (1915).
>
> This court has advanced two explanations or reasons for the restriction on issues or questions which can be tried

in the district court in a taxpayer's appeal from action of a county board of equalization.

In *Reichenbach Land & Loan Co. v. Butler County*, 105 Neb. 209, 211, 179 N.W. 1015, 1016 (1920), this court noted: "The local board had ample power in the first instance to correct any error in the official action of the assessor, and the question for review should have been pointed out in some form. In considering the interests of the taxpayers of an entire county and of the public at large, in examining numerous items and in determining the value of property in different forms for the purpose of taxation, the county board of equalization is entitled to a specific complaint, and should have an opportunity to pass on the question for ultimate decision before the public revenues become involved in protracted or vexatious litigation. On appeal to the district court the questions for review are limited to the questions presented to the county board of equalization. This is the public policy of the state. . . ."

The district court's restricted scope of inquiry in a taxpayer's appeal from action by a board of equalization was also discussed in *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, 407, 106 N.W. 471 (1906), where this court stated: "[T]he reason for the limitation is obvious. If a taxpayer could present a question to the board which was without merit, and, after a determination of that question against him, could appeal to the district court and there present another and different question, a meritorious one, which required a different ruling, he could always overturn the assessment, and thus escape taxation of his property altogether."

225 Neb. at 174-75, 403 N.W.2d at 370-71.

Thus, under § 77-1511 an appeal to a district court concerning a decision by a county board of equalization is a trial de novo, but only the tax liability questions raised before the board of equalization are the questions for adjudication by the district court in its appellate jurisdiction. *Gordman Properties Co. v. Board of Equal., supra*; *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545 (1915); *State Bank v.*

Seward County, 95 Neb. 665, 146 N.W. 1046 (1914); *Reimers v. Merrick County*, 82 Neb. 639, 118 N.W. 113 (1908).

From the record, it is as undeniable as it is eminently clear that the question whether the Law Center is tax-exempt governmental property was never presented to the county board of equalization and, therefore, was never part of the decision from which the Bar Foundation appealed to the district court.

> Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. . . . Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.

Glup v. City of Omaha, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986).

When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, the Supreme Court also lacks power to adjudicate the merits of the claim. *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987).

"Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). Accord, *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *Andrews v. City of Lincoln, supra*; *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986).

Although the district court had subject matter jurisdiction regarding the Bar Foundation's appeal from the county board's decision, the jurisdiction of the district court, as an appellate court, was restricted to questions raised before and decided by the county board. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987). While the district court had subject matter jurisdiction to adjudicate questions regarding charitable and educational exemptions under § 77-202(1)(c), since those questions were raised before the county board, the district court lacked subject matter

jurisdiction to adjudicate any question concerning the exemption of governmental property pursuant to § 77-202(1)(a), because the question whether the Law Center is governmental property was never raised before the county board. In view of the fact that the district court lacked power to adjudicate the question whether the Law Center is tax-exempt governmental property, we vacate the district court's judgment that the Law Center was not governmental property exempt from taxation pursuant to § 77-202(1)(a).

As a result of the district court's lack of power to determine whether the Law Center was tax-exempt governmental property, this court also lacks jurisdiction to decide whether the Law Center is exempt from taxation in accordance with § 77-202(1)(a).

TAX EXEMPTION FOR 1985 TO 1987

Although Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984) does provide a 4-year period of exemption from property taxation, "[s]ection 77-202.03 . . . in substance [provides] that, if property is exempted from taxation in any given year, such exemption may continue for each of the 3 successive years after grant of such exemption if the property owner annually and timely files the specified affidavit." *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 517-18, 412 N.W.2d 459, 464 (1987). Since the Law Center is not exempt from property taxation for the year 1984, we do not reach the question whether the center is tax-exempt for the years 1985 to 1987, inclusive.

CONCLUSION

We affirm the district court's judgment that the Bar Foundation's Law Center is not tax-exempt property under § 77-202(1)(c), but we vacate the district court's judgment concerning tax exemption for the Law Center under § 77-202(1)(a).

AFFIRMED IN PART, AND IN PART VACATED.

BOSLAUGH, J., dissenting.

This case appears to turn on the question of whether the Nebraska State Bar Foundation, the owner of the Nebraska Law Center building, is an educational and charitable

organization which owns and uses a part of the property for educational and charitable purposes. Under the Constitution and statutes, exemption of property because of educational and charitable use requires that the property be both owned and used for such purposes.

The Bar Foundation is a nonprofit corporation which was organized by the Nebraska State Bar Association (Bar Association) in 1963. One of the purposes of the Bar Foundation was to construct a Law Center and make it available to the Bar Association. The Law Center was designed to house the Bar Association and organizations relating to it.

The Bar Foundation has tax-exempt status under the Internal Revenue Code, which requires that the Bar Foundation be organized and operated exclusively for charitable and educational purposes. The revised articles of incorporation of the Bar Foundation provide:

ARTICLE III

Section 1. The exclusive purpose of this organization shall be to promote the following educational, literary, scientific and charitable purposes or any of them, both directly and by gifts or contributions to any other organization whose purposes and operations are exclusively educational, literary, scientific or charitable which is qualified as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 (or corresponding provision of any future United States Internal Revenue law), to be used exclusively for any of the following purposes:

(a) To advance the science of jurisprudence;

(b) To promote and improve the administration of justice;

(c) To uphold high standards for the judiciary and for lawyers;

(d) To facilitate understanding of and compliance with the law, and to promote the study of law, research therein, and the diffusion of knowledge thereof;

(e) To cause to be published and to distribute addresses, reports, treatises and other literary works on legal subjects, and to acquire, preserve and exhibit rare books

and documents, objects of art, and items of historical interest having legal significance or bearing on the administration of justice; and

(f) To do and perform all acts and things which are legitimate and are reasonably calculated to promote the interests and carry out the purposes of this organization.

No part of the income or assets of this organization shall inure to the benefit of any member, officer or director, or private individual; and none of the activities, funds, property, or income of the Foundation may be used in carrying on any propaganda or political activity, directly or indirectly, or in attempting to influence legislation, either directly or indirectly. . . .

. . . .

ARTICLE X

In the event of dissolution of this Foundation, any remaining assets shall be distributed to one or more organizations described in Section 501(c)(3) of the Internal Revenue Code (or corresponding provision of any future United States Internal Revenue Code).

The articles establish that the Bar Foundation was organized and intended to be a nonprofit charitable foundation, and it can only be such under its present articles.

Projects or grants of the Bar Foundation have included providing "seed money" for NCLE, publishing Nebraska Annotations to the Restatement (Second) of Trusts, financing the long-range planning conferences of the Bar Association, funding conferences on law-related education, providing grants to libraries of the University of Nebraska and Creighton Law Schools, and partially funding the meetings of law-related conferences such as the Conference of Chief Justices and the Conference of State Court Administrators.

The Bar Foundation holds the Law Center building in trust for the use of the Bar Association, which as an integrated bar association is an arm of this court. The Bar Association itself is unique among organizations in that it was created by the Supreme Court of Nebraska in 1937, pursuant to a petition for integration of the Bar Association, by rule of this court. See *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275

N.W. 265 (1937).

The purposes of its creation were stated by this court as follows:

> RULES CREATING, CONTROLLING AND REGULATING NEBRASKA STATE BAR ASSOCIATION.
>
> For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among members thereof, for the improvement of the service rendered to the public by the Bench and Bar, there is hereby organized, created and formed the Nebraska State Bar Association.

Id. at 291, 275 N.W. at 269.

After the promulgation and adoption of the Rules Creating, Controlling and Regulating the Nebraska State Bar Association by this court on September 20, 1937, the Bar Association ceased to be a voluntary association and became an integrated bar association.

As an integrated bar association, the Bar Association is under the control of this court and has no existence independent of this court. All lawyers admitted to practice in this state are required to be members of the Bar Association, and the Bar Association functions as an arm of this court in performing many functions necessary to the regulation and control of the practice of law in this state. The Bar Association maintains all of the records concerning the membership of the bar and collects the dues necessary to finance the operation of the Bar Association. None of the funds of the Bar Association from dues or proceeds from the sale of seminar materials are distributed to members, officers, or directors of the Bar Association. The examination and investigation of candidates for admission to the bar are handled by a commission composed of members of the bar appointed by this court for that purpose, which commission is assisted by employees of the Bar Association.

The discipline of members of the bar is under the direction of the Counsel for Discipline, who is employed by the Bar Association, but whose appointment and tenure are subject to

the approval of this court. All of the expense of the office and for employees of the Counsel for Discipline is paid by the Bar Association. The disciplinary process is aided by the Committees on Inquiry and the Disciplinary Review Board, the members of which are appointed for that purpose by this court.

The Bar Association performs many other services which are charitable or educational in nature and of benefit to the public.

The Bar Association aids this court in the administration of justice through the Legal Services Lawyer Referral Program, which solicits participation of lawyers to handle pro bono cases for members of the public. The persons who operate this program have their offices located in the Law Center.

Under the direction of this court, the Bar Association established an Interest on Lawyers' Trust Accounts program, which is operated by the Nebraska Lawyers' Trust Account Foundation. The trust foundation has its offices in the Law Center. The trust foundation is exempt from taxation under § 501(c)(3) of the Internal Revenue Code.

The Bar Association has various activities which are intended to educate the public, such as the "Ask a Lawyer" television program, publications furnished to the public regarding general matters of legal concern, and a law-related education program which devises curricula for the schools which are used to instill in students the values underlying our legal system. The Bar Association employs the director of Law-Related Education, and he and his staff are located in the Law Center.

The application which the Bar Foundation filed on September 1, 1984, sought exempt status for only the 56.3 percent of the property which is occupied and used by the Bar Foundation, the Bar Association, and NCLE. The Law Center was built with expansion space which was to be rented out until the Bar Association or related activities needed it. If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation. *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965). No claim of exempt status is made as to the part of the property which is leased to others.

In 1983, the Bar Foundation announced its intention to build a Nebraska Law Center building. The site was purchased in

January 1984, and construction started. The building was completed, and the Bar Foundation first occupied the building in May 1985.

The construction of the Nebraska Law Center building was financed by funds which were collected by the Bar Foundation from members of the bar, and other contributors were solicited on the bases that the funds would be used for the educational and charitable purposes of the Bar Foundation and the Bar Association and that the Law Center would be available for the use of the Bar Association on a fair rental basis. The evidence establishes that it would be a breach of trust to the donors to the Bar Foundation if the Law Center was not available for use by the Bar Association.

A gift to a charitable corporation is a gift to the objects and purposes for which the corporation was organized and is governed by the rules of law applicable to charitable trusts. *In re Estate of Harrington*, 151 Neb. 81, 36 N.W.2d 577 (1949). See, also, *Board of Trustees of York College v. Cheney*, 158 Neb. 292, 63 N.W.2d 177 (1954).

As to the use of the Law Center, the record shows that approximately 13 percent of the space in the Law Center is occupied and used by the Bar Foundation itself. The Bar Foundation does not pay for the space it occupies because it owns the building. The Bar Association performs many services for the Bar Foundation, in the way of secretarial service, recordkeeping, etc., for which the Bar Foundation pays $10,000 per year to the Bar Association.

The Bar Association occupies approximately 35 percent of the space in the Law Center, for which it pays an annual rental to the Bar Foundation determined on a fair market basis.

Approximately 8 percent of the space in the Law Center is occupied by NCLE. NCLE is a nonprofit corporation which was organized by the Bar Association in 1973 to provide continuing legal education services to the members of the bar and the public. The articles of incorporation of NCLE provide:

ARTICLE III
PURPOSES

The purposes for which the corporation is organized are:

A. To provide, through the facilities and personnel of

the corporation, and by financial support of other organizations as herein stated, an educational program for the study, discussion and dissemination of information relating to the laws of the State of Nebraska, United States of America, the several States thereof, and governmental units and organizations inferior to or related to any of them, and international law, for members of the Nebraska State Bar Association and interested persons not members of such Association.

B. To provide, similarly, a program for the study, discussion and dissemination of information relating to the practice of law, and the supplying of legal services in the State of Nebraska.

C. To provide research, debate, and evaluation in legal and paralegal subjects.

D. To organize and present information as to all matters referred to in the preceding paragraphs of this Article through lectures, seminars and programs in any form; to present such programs directly to the hearers, or by radio, television, or audio-visual means.

E. To publish educational materials in printed form, or as audible or visible recordings.

F. To provide centralized information, direction, and assistance, for continuing legal education programs in the State of Nebraska.

G. To carry out the educational purposes of the corporation directly or by the contribution of money, property, or services to organizations that qualify as exempt scientific, literary or educational organizations under the provisions of Section 501(c)(3) of the Internal Revenue Code of the United States, or any amendment thereto, and the regulations pertaining to said Section.

Notwithstanding any other provision of the Articles, the corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(3), or by an organization, contributions to which are deductible under Section 170(c)(2), of the Internal Revenue Code and regulations pertaining to such actions, as they now exist or

hereafter may be amended. . . .

. . . .

ARTICLE X
PROHIBITION OF PRIVATE BENEFIT:
LIMITATION OF ACTIVITIES

The corporation shall have no capital stock and shall declare no dividends. No part of the net earnings of the corporation or share in distribution of any of the corporate assets on dissolution of the corporation, shall inure to the benefit of any organization not qualified for tax exemption under Section 501(c)(3) of the Internal Revenue Code and regulations relating thereto, as they now exist or may hereafter be amended, nor to any member, director, officer of the corporation, or private individual (except that reasonable compensation may be paid for services rendered to or for the corporation affecting one or more of the purposes). No substantial part of the activities of the corporation shall be the carrying on of the propaganda or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributing of statements), any political campgain [sic] on behalf of any candidate for public office.

ARTICLE XI
DISSOLUTION

The corporation may be dissolved as provided by law. Upon dissolution or any winding up of the affairs of the corporation the assets of the corporation shall be distributed as the members shall direct, exclusively to scientific, literary, or educational organizations which would then qualify under the provisions of Section 501(c)(3) of the Internal Revenue Code and regulations pertaining thereto as the same then exist.

NCLE is an exempt organization under § 501(c)(3) of the Internal Revenue Code.

Although the programs and seminars conducted by NCLE are intended primarily for the continuing education of lawyers, NCLE programs are open to the public and many of the subjects involve areas of concern to laymen. No attempts are

made to limit or exclude nonlawyers.

NCLE offices and staff are located in the Law Center. NCLE pays rent to the Bar Foundation on a fair market basis. The Bar Foundation makes an annual grant to NCLE of $25,000 as a return of the rent.

The fact that the Bar Foundation leases space in the Law Center to the Bar Association and NCLE does not prevent the property from being used for educational or charitable purposes if the use made by the lessees qualifies as educational or charitable.

In *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), we held that the fact United Way of the Midlands leased a part of the space in the A. C. Nelson Center for Community Services to the Omaha Council of Campfire Girls and Greater Omaha Community Action did not prevent the property from being exempt from taxation. In that case, we said at 3-6, 337 N.W.2d at 105-07:

> Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant. *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the Legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. *Y.M.C.A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900).
>
> The policy in providing for tax exemptions for charitable uses is based on the principles that tax exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing. 84 C.J.S. *Taxation* § 215 (1954). See, also, *Y.M.C.A. of Omaha v. Douglas County, supra*.
>
> We first deal with the legitimacy of an exemption for the space leased to charitable organizations.
>
> Appellant attempts to dispose of the issue by contending that since United Way received income from

the property, it is "used for financial gain or profit to either the owner or the user" and therefore fails to meet the constitutional and statutory requirements for exemption from taxation. Brief of Appellant at 10.

It is true that in this case the difference between rentals received and cost of services furnished by United Way was $8,408. However, this does not alone disqualify the space from the exemption. See *House of the Good Shepherd v. Board of Equalization*, 113 Neb. 489, 203 N.W. 632 (1925).

Neb. Rev. Stat. §§ 21-1901 et seq. (Reissue 1977) make up the Nebraska Nonprofit Corporation Act. Section 21-1901(3) defines a not-for-profit corporation as a "corporation no part of the income of which is distributable to its members, directors or officers." As a Nebraska nonprofit corporation, United Way is burdened by that restriction on the distribution of its income, and there is no evidence that it has violated the statute in that respect. In *City of McAllen v. Ev. Luth. Good Sam. Soc.*, 530 S.W.2d 806 (Tex. 1975), the court said that the proscription against an institution's realization of "gain or profit" refers to gain or profit by private individuals or the accrual of distributable profits.

In *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961), the college rented college-owned faculty housing to faculty members at fair market rental rates. The college credited income from rentals after expenses to the endowment fund. This court denied exemption from property tax, having determined that the faculty housing was not exclusively used for educational purposes. However, we said that the evidence established that the faculty housing units were not owned or used for financial gain or profit to either the owner or user.

From the foregoing we deduce the rule to be that property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owner's or user's members, directors, or officers, or to private individuals. Applying the rule to the evidence in this case, it is clear that there was

no financial gain or profit to either the owner or users of the leased space.

Was the leased space owned and used exclusively for charitable purposes? While we have said that it is the exclusive use of property that determines its exempt status, *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965), the Constitution and statute also require that the property be owned for an exempt purpose. In our examination of the Constitution and the statute, we find no requirement that the ownership and use must be by the same entity. In fact, reference to "either the owner or user" in the last part of the sentence of the constitutional provision quoted indicates to us that ownership and use may be by separate entities.

In *Sisters of Charity, etc. v. County of Bernalillo*, 93 N.M. 42, 596 P.2d 255 (1979), the owner of the property, a charitable organization, leased a portion of its property to a wholly owned subsidiary which was also a charitable organization with the same purposes. The court granted exemption from taxes under those circumstances. The court said: "The recent trend in the United States is consistent with our holding. The notion that ownership and operation of the subject property must coincide in a single legal entity in order for property to qualify for a charitable exemption has been rejected in recent years in a number of other jurisdictions." (Citations omitted.) *Id.* at 45, 596 P.2d at 258.

Ownership by United Way, a charitable organization, is undisputed; therefore, the ownership test is met.

We have two "uses" in this case: the lessee charitable organizations' use of the leased space and United Way's use of the leased space for income. The exclusive use of the space for charitable purposes by Omaha Council of Campfire Girls and Greater Omaha Community Action is not questioned. The real issue is whether United Way's "use" of the leased space by leasing it to charitable corporations at substantially less than fair market rental rates is an exclusive use of that space for charitable

purposes by United Way.

There are no Nebraska cases on point. Leases of space for business purposes have resulted in a denial of exemption in such cases as *Y.M.C.A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900), and *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921). However, this court has also held inferentially that charges to teachers of a percentage of their salaries as rent for houses they occupied on or near school grounds did not defeat an exemption from taxes, because the property was used for school purposes. *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization, supra*. We determined in that case the dominant use of the houses was educational, because faculty members were required to live in their assigned residences and they used them for student meetings and counseling.

We conclude that the rental agreed to by the parties in this case shows the use of the property was not for a business purpose but, rather, for a charitable use. The result of the leases was financial assistance to the charitable organizations, which aided them in the performance of their charitable activities.

Exclusive use of property for exempt purposes is required, and it has been established in this case. That the use is by different entities is of no consequence.

The evidence further shows that the use of the Law Center by the Bar Association and NCLE is use for charitable or educational purposes.

In *Nebraska Conf. Assn. of Seventh Day Adventists v. County of Hall*, 166 Neb. 588, 598, 90 N.W.2d 50, 55 (1958), we said:

> This state is committed to the doctrine that in determining whether or not property is within a tax exemption provision, the use of the property and not the status or character of the owner of the property controls. In Academy of the Sacred Heart v. Irey, 51 Neb. 755, 71 N.W. 752, this court said: "It is the exclusive use of the property which determines its exempt character. If it is

> devoted exclusively to educational purposes, it is not liable to taxation, unless such use is not direct, but remote. * * * The sole constitutional and statutory requirement to create the exemption is that the property shall be devoted exclusively for school or some other specified exempt purpose * * *."

In *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 362-64, 133 N.W.2d 455, 459-60 (1965), we said:

> This court on many occasions has passed upon the specific tax exemption provisions with which we are here concerned. It is well settled that provisions exempting property from taxation are to be strictly construed; that their operation should not be extended by construction; and that the power and right of the state to tax are presumed and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the Legislature but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248.
>
> The theory that the rule requiring strict construction of a tax exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it would establish too severe a standard. A liberal and not a harsh or strained construction is to be given to the terms "educational," "religious," and "charitable" in order that the true intent of the constitutional and statutory provisions may be realized. The judicial interpretation of such statute should always be reasonable. Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N.W. 593, 34 A.L.R. 1060. The term "religious" has been held to require neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed. This court has said that education "may be particularly directed to either mental, moral or physical faculties, but in its broadest and best

> sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual, and physical." Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W. 93, 81 A.L.R. 1166.
>
> The word "charitable" has been held to mean something more than mere alms-giving or the relief of poverty and distress and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits. Young Men's Christian Assn. v. Lancaster County, *supra*.

In *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 890, 381 N.W.2d 166, 169-70 (1986), we said:

> In substance, the County contends that activities occurring at group homes are merely incidental to operation of the facilities as a dormitory or residence for disabled persons. We cannot agree with the County's myopic view of the educational function found in the group homes.
>
> Education should not be determined by some quantitative analysis of a formal curriculum but may be measurable in reference to training received as reflected in an individual's enhanced behavior. In its most basic sense education is simply development, as fully as possible, of an individual's given capacity, preferably for desirable qualities. Because they are special people, the residents of the group homes receive special training—education—for life beyond Bethphage. Thus, the activities at the group homes are educational within the meaning recognized by this court in *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, [122 Neb. 586, 241 N.W. 93 (1932)].

With respect to NCLE, the evidence shows that its use of the property is exclusively for educational purposes. It has no other purpose than to carry on a continuing legal educational program for the benefit of lawyers and members of the public. Its use of the property satisfies all of the requirements for

exemption from taxation.

With respect to the Bar Association, its use of the property is to some extent educational, but that is not its dominant use of the property. Its use of the property is, however, in many respects charitable. In *United Community Services v. The Omaha National Bank*, 162 Neb. 786, 791, 77 N.W.2d 576, 582 (1956), we said:

> [C]harity is . . . "a gift . . . for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or *otherwise lessening the burdens of government*."

(Emphasis supplied.)

Although many of the services of the Bar Association to the public are free, "charitable," as used in this situation, means that the Bar Association performs services at no expense to the state which the state would otherwise be required to perform. Prime examples of its charitable activities in this respect are the examination and investigation of candidates for admission to the bar and the system for discipline and regulation of the practice of law within the state. All of these activities are performed by the association at no expense to the state and under the direction of this court. Without the assistance of the Bar Association in these matters, the state would have to provide the necessary personnel and facilities to perform the same functions.

While there may be some activities of the Bar Association that are not educational or charitable, they are but incidental in nature and do not constitute the primary or dominant use of the Law Center by the Bar Association.

In my opinion, the record establishes that the application of the Bar Foundation for exempt status of the Law Center for that part used by the Bar Foundation, the Bar Association, and NCLE should have been granted.

WHITE and GRANT, JJ., join in this dissent.

J.D. KONCABA, PERSONAL REPRESENTATIVE OF THE ESTATE OF ADOLPH LEE KONCABA, DECEASED, APPELLEE, V. SCOTTS BLUFF COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, AND STATE OF NEBRASKA, APPELLANTS.

464 N.W.2d 764

Filed January 18, 1991. No. 88-692.

1. **Tort Claims Act: Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the State Tort Claims Act and the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
2. **Negligence: Words and Phrases.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions to dismiss.

Gary D. Denton, of Hancock & Denton, P.C., for appellant County.

Robert M. Spire, Attorney General, John R. Thompson, Douglas J. Peterson, and Lisa D. Martin-Price for appellant State.

Robert P. Chaloupka, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellee.

R. Collin Mangrum for amicus curiae Pat Brochtrup, and J. Michael Fitzgerald, of Carpenter, Rowen & Fitzgerald, for amicus curiae Ronald Maresh.

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

BOSLAUGH, J.

This is a wrongful death action against the State of Nebraska under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987), and Scotts Bluff County under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987).

The plaintiff's decedent, Adolph Lee Koncaba, died as the result of injuries sustained in a one-car accident. The accident occurred on September 27, 1986, at approximately 9 p.m., when the plaintiff's decedent was driving his automobile in an easterly direction on "Old Highway 26," a two-lane highway, at a point approximately 3 miles east of Scottsbluff, Nebraska. At the time of the accident, approximately 2 miles of the highway were undergoing asphalt resurfacing. At the point of the accident, the shoulders of the highway had not yet been raised to the level of the new asphalt overlay. As a result, there was a 6- to 10-inch dropoff from the pavement to the shoulder of the highway. The shoulder of the road was approximately 10 feet wide and consisted of a smooth, flat surface.

The plaintiff alleged that the dropoff between the surface of the pavement and the shoulder, at the point where the accident occurred, created an unreasonably dangerous and hazardous road condition which proximately caused the death of plaintiff's decedent. Specifically, the petition alleged that the defendant State was negligent in (1) drafting a highway construction contract without adequate safety considerations, (2) supervising the highway construction project without providing adequate safety considerations, and (3) failing to warn motorists of an unreasonably dangerous road condition created by the highway construction project. As to the defendant county, the plaintiff alleged that it was negligent in (1) helping to create an unreasonably dangerous road condition, (2) failing to correct an unreasonably dangerous road condition, and (3) failing to utilize reasonable methods of warning motorists of the unreasonably dangerous road condition.

The defendants' answers denied that they had been negligent and alleged that the proximate cause of the injuries sustained by the plaintiff's decedent and of his death was his contributory negligence, which was more than slight as a matter of law and sufficient to bar any recovery in this action. The State also alleged that the wording of the contract was a discretionary function.

The trial court found for the plaintiff and against both defendants and fixed the damages at $180,663.63.

Both defendants have appealed and have assigned as error the failure of the trial court to find that the negligence of the plaintiff's decedent was more than slight as a matter of law and sufficient to bar any recovery in this action.

For the purpose of this opinion, we assume that the trial court's finding that both defendants were negligent is supported by the record. We direct our attention to the finding of the trial court that

> Plaintiff's decedent was placed in a sudden emergency and position of danger which was not due to any negligence on his part and he is not held to the same accuracy of judgment as is required under ordinary circumstances. In judging the conduct of Plaintiff's decedent in light of the sudden emergency doctrine, the Court finds that he was guilty of slight negligence under the circumstances.
>
> . . . Any negligence of Plaintiff's decedent when compared to the negligence of the Defendants and each of them, was slight and the negligence of each Defendant when compared to any negligence of the Plaintiff's decedent was gross.

The findings of fact of the trial court in a proceeding under the State Tort Claims Act, §§ 81-8,209 et seq., will not be set aside unless such findings are clearly incorrect. *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985); *Shepard v. State of Nebraska*, 214 Neb. 744, 336 N.W.2d 85 (1983); *Wakenight v. State*, 212 Neb. 798, 326 N.W.2d 52 (1982). The same standard applies to the Political Subdivisions Tort Claims Act, §§ 13-901 et seq.—findings of the trial court will not be disturbed on appeal unless clearly wrong. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989); *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988).

Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d

309 (1984); *Mundy v. Davis*, 154 Neb. 423, 48 N.W.2d 394 (1951).

The record shows that the decedent's mother, Clara Fries, testified that while Old Highway 26 was under construction she had discussed the condition of the road with the plaintiff's decedent. Furthermore, Fries stated that she had warned the decedent of the dangerous dropoff at the edge of the road.

There was no direct evidence that the plaintiff's decedent had previously driven on Old Highway 26 while it was under construction. However, the accident occurred as the decedent was driving on the highway to his mother's house. Fries testified that during the 3 or 4 weeks preceding the accident, she cared for the decedent's children on weekends at her home in Minatare, Nebraska. She stated further that during this period, the decedent drove to her house in Minatare either Saturday night or Sunday morning to pick up his children. According to the testimony, the most direct route from the decedent's home to his mother's house was Old Highway 26.

A witness to the accident, Dorothy Steele, testified that she and her husband were proceeding westerly on the highway when they met the decedent's vehicle. Steele stated that as their vehicle approached the decedent's from the opposite direction, the decedent's vehicle was over the centerline by about a foot. In order to avoid a collision, her husband and the decedent steered their respective vehicles away from the centerline. According to Steele, the decedent, in returning to his lane of traffic, appeared to overcorrect, and his automobile drove off the pavement and onto the shoulder.

Dennis Richard, a Nebraska State Patrol sergeant who investigated the accident scene, testified that the right tires of the decedent's vehicle left the pavement at a point approximately 200 yards east of a sign indicating a sharp dropoff at the pavement edge. Nebraska State Trooper Thomas Parker, an investigating officer of the accident site who is an expert in the field of accident reconstruction, testified that the decedent's automobile was traveling at an estimated speed of 67 miles per hour when it left the pavement. Dr. Ronald Hensen, a consulting engineer and accident reconstructionist who testified on behalf of the plaintiff, estimated that the decedent's

automobile was traveling between 50 and 70 miles per hour when it left the pavement.

There was uncontroverted evidence that the decedent's vehicle traveled with its right wheels on the shoulder for a distance of 170 feet. The left wheels of his vehicle then left the pavement, and the decedent traveled another 217 feet with all four wheels on the shoulder. Then, instead of stopping to ascertain whether he could safely return to the pavement, and while, according to Officer Parker and Dr. Hensen, the decedent's automobile was proceeding at an estimated speed of 60 miles per hour, the decedent attempted to turn back onto the pavement. After proceeding another 95 feet while attempting to turn back onto the pavement one or two times, the decedent lost control of the automobile, and it then flipped over and rolled for 100 feet, where it began to roll down an embankment. It came to rest after rolling another 118 feet. According to Dr. Hensen, the decedent's automobile was going approximately 52 miles per hour when it started to flip over.

The foregoing evidence, which has been summarized, establishes that the plaintiff's decedent was guilty of contributory negligence which as a matter of law was more than slight when compared with the negligence of the defendants.

Neb. Rev. Stat. § 39-662 (Reissue 1984) provides:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Any person shall drive at a safe and appropriate speed when . . . special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

As stated in *Circo v. Transit Auth. of City of Omaha*, 217 Neb. 497, 501, 348 N.W.2d 908, 910 (1984), quoting from *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952), " 'The driver of a motor vehicle has the duty to . . . take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.' "

In this case, the evidence shows that the decedent had prior knowledge of the condition of the highway and of the sharp

dropoff along the edge of the pavement. The evidence also establishes that the decedent's automobile was traveling at approximately 50 to 67 miles per hour when it left the pavement. After his automobile had left the pavement, uncontroverted evidence establishes that the decedent traveled approximately 312 feet on the surface of the shoulder. According to the evidence, the decedent never attempted to bring his automobile to a stop. Instead, the decedent attempted to turn back onto the pavement while proceeding at an estimated speed of 60 miles per hour. As a result, he lost control of the automobile and flipped it over, which ultimately resulted in his death.

The reasonably prudent thing for the plaintiff's decedent to have done, after his automobile had been driven from the pavement and onto the shoulder, would have been to reduce his speed and, if necessary, stop so that he could determine whether it would be possible to safely drive back onto the pavement at that point. Instead, the decedent continued to drive at a relatively high rate of speed on the shoulder and attempted to turn back onto the pavement one or two times, with the result that he lost control of his automobile and was fatally injured.

In conclusion, the evidence establishes, as a matter of law, that the plaintiff's decedent was guilty of contributory negligence which was more than slight and was a proximate cause of the accident. The judgment of the trial court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., dissenting.

The majority has ignored our standard in reviewing a bench trial of a law action: " ' "[T]he Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party . . . ." ' " *Zeller v. County of Howard*, 227 Neb. 667, 670, 419 N.W.2d 654, 656 (1988), quoting *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). The trial court observed the demeanor of the witnesses, took into account their interests in the litigation, considered the corroborative value of their testimony, and weighed their credibility. The majority, by selecting pieces of

evidence and bits of testimony, uses these facts to find that the plaintiff's decedent was contributorily negligent as a matter of law. In so holding, the majority finds that the trial court was clearly wrong. I cannot agree.

Among the facts which the majority chooses to accept is the allegation that the plaintiff's decedent was aware of the conditions of the road because his mother testified that she discussed the road conditions with him. However, evidence also was presented which showed that the condition of the road and the placement of warning signs varied as construction proceeded from one phase to the next. The majority apparently believes that mere awareness of road construction can be construed as a factor in finding contributory negligence.

The majority has also chosen to believe the testimony of Nebraska State Patrol Sgt. Dennis Richard, who stated that the decedent's car left the pavement approximately 200 yards east of a sign indicating a sharp dropoff at the pavement edge. However, Sergeant Richard did not investigate the accident scene until the day following the accident. In accepting Richard's testimony, the majority overlooks the testimony of another driver, who reported that she saw no sharp dropoff signs before the accident, but did observe some the next day. Richard also observed the accident scene in the light of day, while other drivers and a highway superintendent reported that the new asphalt soaked up the light and made the pavement edge difficult to see at night.

The majority adopts the confusing testimony of Nebraska State Trooper Thomas Parker. While Parker testified that he saw no evidence of braking by the decedent, his testimony indicates that the decedent was traveling at 67 miles per hour when his car left the pavement. Parker also states that he agreed with the plaintiff's accident reconstruction expert that the decedent was traveling 52 miles per hour when his vehicle started to roll.

The majority gives little credence to the testimony of Ronald Hensen, the plaintiff's expert, who stated that a common reaction of the driver in a dropoff accident is to attempt reentry, since the driver is surprised and responds in fear. Hensen stated that reentry requires greater steering effort, and often the

vehicle will roll over or dart back across the road, spin around, and hit another car. Since most drivers have never experienced this type of accident, they are operating on adrenaline during such an accident, Hensen said.

The testimony of other drivers who had experienced dropoff accidents at the same site and of the witnesses who indicated the lack of warning signs is also disregarded by the majority.

The contributory negligence found by the majority relies on evidence which they interpret to indicate that the decedent was speeding, even though no evidence was presented which indicated that any advisory speed limit signs were posted in any part of the construction area.

The majority reaches a conclusion as to "[t]he reasonably prudent thing for the plaintiff's decedent to have done . . . ." It is mere conjecture for the court to determine what the decedent *should* have done. The entire accident took place in less than 7 seconds. As the trial court noted, the decedent was placed in a sudden emergency. The trial court's finding is not clearly wrong based on the evidence before us.

From this day forward, any individual who fails to react appropriately to a sudden emergency within a matter of seconds will be contributorily negligent. I cannot accept such a rule and would affirm the trial court's judgment for the plaintiff. I dissent.

SHANAHAN, J., joins in this dissent.

DUANE E. BRAESCH, APPELLANT, V. UNION INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLEE.

HELEN E. BRAESCH, APPELLANT, V. UNION INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLEE.

464 N.W.2d 769

Filed January 18, 1991. No. 88-772.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not

accept conclusions of the pleader.

2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. _____: _____. A court may not assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial.
4. **Actions: Insurance: Claims: Parties.** This state recognizes a cause of action for an insurer's bad faith in refusing to settle a claim with a third party.
5. **Insurance.** The business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto.
6. **Demurrer: Pleadings.** In ruling on a demurrer, documents attached to and made part of the petition may be considered.
7. **Actions: Insurance: Parties.** A first-party bad faith cause of action is based upon allegations that the insurer, in bad faith, refused to settle with its own policyholder insured, who thereby suffered some type of direct loss.
8. **Actions: Torts: Insurance: Claims.** An injured policyholder who is also a "covered person" or a policyholder who is also a beneficiary may bring a cause of action in tort against the policyholder's insurer for bad faith failure to settle the policyholder's insurance claim.
9. **Torts: Insurance: Claims: Proof: Intent.** To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The tort of bad faith is an intentional one.
10. **Actions: Mental Distress: Intent.** To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege that (1) there has been intentional or reckless conduct, (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. An extremely disabling emotional response is required.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, and J. Patrick Green for appellants.

Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee.

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

FAHRNBRUCH, J.

These appeals each involve two issues: (1) whether an insurer may be held liable in tort if the insurer acts in bad faith in refusing to settle a claim with its policyholders who are also entitled to receive benefits under the policy, and (2) whether each appellant's amended petition states a proper theory of recovery for intentional infliction of emotional distress.

The trial court sustained demurrers to each of the petitions and dismissed the appellants' lawsuits. In each appeal, we reverse the trial court on the first issue and affirm the trial court on the second issue.

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). A court may not assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial. *St. Paul Fire & Marine, supra.*

In this case, Duane E. and Helen E. Braesch, husband and wife, each brought identical actions against Union Insurance Company (Union), an insurance corporation.

In virtually identical amended petitions and attachments, the Braesches alleged in substance that Union issued to them as policyholders an insurance policy for valuable consideration; that under the policy's terms, Union agreed to pay all sums, up to the maximum of $100,000, which the insured or covered person was legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury; that on or about October 12, 1984, the plaintiffs' daughter, Lori J. Braesch, was the driver of an automobile which was covered by the policy; that she was involved in a collision with an uninsured motorist, David R. Brockhaus; that

as a result of the collision, Lori Braesch died; and that Brockhaus' negligence was the sole and proximate cause of Lori Braesch's death. Each of the Braesches further alleged that Duane E. Braesch, as special administrator of his daughter's estate, commenced an action against Union under the uninsured motorist provisions of the policy on behalf of the appellants; that on March 5, 1987, following a trial, judgment in the amount of $185,000 was entered in favor of the plaintiff Duane Braesch, as special administrator; and that on March 18, 1987, Union paid to the plaintiff as special administrator its policy coverage of $100,000.

In each of their first theories of recovery, the Braesches claim that Union's refusal to settle under the uninsured motorist provisions of Union's policy constituted the tort of bad faith. The Braesches alleged that each was a policyholder and that as a beneficiary of Union's insurance policy, each of them was owed a duty of good faith. It was further claimed that despite repeated efforts by the Braesches and their counsel to settle the suit on the uninsured motorist coverage, Union, in bad faith, refused to settle such litigation and never entered into serious negotiations, and engaged in only a perfunctory investigation and developed no defense. Each amended petition alleges that Union's refusal to settle was part of an effort to put psychological pressure on each of the Braesches to settle the wrongful death claim for sums considerably less than its value. The Braesches allege that because of Union's bad faith actions, each of them was forced to endure a trial in which each relived the death of their daughter, causing each of the appellants to suffer profound emotional distress.

Relying on the same facts alleged in their first theory of recovery, the Braesches alleged in their respective second theories of recovery that Union's actions under the circumstances constituted the tort of outrage. The Braesches alleged that Union knew or had reason to know that its bad faith refusal to settle the litigation brought by Lori Braesch's special administrator would cause each of the appellants severe emotional distress. The appellants contend that as a direct and proximate result of Union's conduct, each of them has been forced to suffer profound mental pain and suffering as a result

of reliving the death of their daughter in an unnecessary trial of the action.

Each of the Braesches asked for general damages.

Since the two amended petitions are substantially identical, our analysis will be equally applicable to both amended petitions. Attached to and made part of both amended petitions was a copy of Union's auto policy issued to both of the appellants, together with a copy of the special administrator's petition from the former action against Union.

Union demurred to both amended petitions on the ground that they did not state facts sufficient to constitute a cause of action. The trial court sustained Union's demurrer to each amended petition and dismissed them.

The plaintiffs' three assignments of error merge to allege that the trial court erred in failing to (1) recognize that a cause of action exists in Nebraska for a bad faith failure on the part of a first-party insurer to promptly pay a claim made by its policyholder, where litigation of the claim is not warranted, and (2) find that the claims for intentional infliction of mental distress were well pleaded.

I. BAD FAITH SETTLEMENT

This state recognizes a cause of action for an insurer's bad faith in refusing to settle a claim with a third party. In *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962), the insured collided with a bridge, and one of his passengers sustained injuries resulting in total and permanent disability. In the passenger's suit against the insured, the insurer refused to settle the claim with the passenger despite an offer to settle the claim for $10,000. The jury returned a verdict in the sum of $50,000 against the insured. Thereafter, the plaintiff, individually and as assignee of the insured, commenced suit against the insurer, asserting negligence and bad faith by the insurer in refusing to settle the passenger's claim for $10,000. This court held: "The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit." *Id.* at 379, 118 N.W.2d at 320-21. The rationale for the rule is that "[i]n the

event the insurer elects to resist a claim of liability, or to effect a settlement thereof on such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned." *Id.* at 379, 118 N.W.2d at 321.

Although the court in *Olson, supra*, did not explicitly couch its rationale in terms of a fiduciary relationship between the insured and insurer, that apparently is the theory underlying the liability. In *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976), a case again involving alleged bad faith in refusing to settle a third-party claim, this court cited with approval an instruction that the insurer had assumed a fiduciary position toward the insured. A number of courts ground liability on the theory of a fiduciary relationship. See, e.g., *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988); *Alt v. American Family Mut. Ins. Co.*, 71 Wis. 2d 340, 237 N.W.2d 706 (1976). See, also, 15A G. Couch, Cyclopedia of Insurance Law § 58:6 (rev. 2d ed. 1983). The appellants ask this court to extend the rule announced in *Olson, supra*, to an insurer's bad faith in refusing to settle a claim with its policyholder, otherwise known as a first-party claim, see 2 A. Widiss, Uninsured and Underinsured Motorist Insurance § 20.1 (2d ed. 1990).

The tort of bad faith refusal to settle a first-party insurance claim with a policyholder was first recognized in California. In *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973), an insured brought an action against his insurers and others, alleging bad faith and outrageous conduct in denying payment of three fire insurance policies. The California Supreme Court held:

> [I]n every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is immanent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

Id. at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

Disagreeing with the rationale of the *Gruenberg* court,

Union argues that there is a fundamental distinction between third-party and first-party claims. Union contends that in the context of a third-party claim, the fiduciary duty of an insurer to act in good faith rests on the reservation of the exclusive right to contest or negotiate the claim of liability brought against the insured, which reservation withholds from the insured the right to settle without consent of the insurer. Such agreements, Union claims, repose in the insurer the power to act for the insured, akin to authority a client vests in an attorney or a principal in an agent—each a relationship of inherent fiduciary obligation. In contrast, Union points out, under the uninsured motorist provisions, the insured seeks recovery from the insurer for the negligence of an uninsured motorist. Union maintains that in such a situation, the insured and the insurer become adversaries, not principal and agent who deal in trust. Union argues that there is not a tort of bad faith in the first-party situation because a fiduciary relationship is lacking. See, e.g., *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 611 P.2d 149 (1980); *Craig v. Iowa Kemper Mut. Ins. Co.*, 565 S.W.2d 716 (Mo. App. 1978). Distilled to its essence, Union's argument is that in the absence of a fiduciary relationship, there is no obligation flowing from the insurer to the insured. We find this view unpersuasive and conclude that the better view is expressed as follows in *Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565, 569 (7th Cir. 1978):

> Under third party liability coverage, when the insured is sued by a third party, the insurance company takes over the defense of the suit and the insured cannot settle the matter without the permission of the insurer. It is this control of the litigation by the insurer coupled with differing levels of exposure to economic loss which gives rise to the "fiduciary" nature of the insurer's duty. . . . In the uninsured motorist situation there is no element of "control" of the insured's side of the litigation by the insurance company which would give rise to a "fiduciary" duty. It does not necessarily follow that the insurer is completely free of any obligation of good faith and fair dealing to its insured, since the latter duty is based on the reasonable expectations of the insured and the unequal

bargaining positions of the contractants, rather than the insurance company's "control" of the litigation.

An overwhelming majority of jurisdictions which have addressed the issue now recognize the tort of bad faith in first-party cases. See *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990), and cases cited therein. The theory underlying the tort is that the law implies a covenant of good faith and fair dealing. See, e.g., *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Gruenberg, supra*; *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988); *United States Fidelity v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983); *MFA Mut. Ins. Co. v. Flint*, 574 S.W.2d 718 (Tenn. 1978); *Arnold v. Nat. County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978). This court has acknowledged that there is an implied covenant of good faith and fair dealing under some contractual circumstances. See, *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962) (in the event the insurer elects to resist a claim of liability, or to effect a settlement thereof on such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned); *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986) (when contractual agreements guarantee that employees may not be fired without just cause, there is an implied covenant of good faith or fair dealing).

It has been argued that by creating a tort for a bad faith settlement of a first-party insurance claim, the floodgates will be opened for tort actions based upon a breach of any contract. See, e.g., *Kewin v Massachusetts Mutual*, 409 Mich. 401, 295 N.W.2d 50 (1980). Because of the nature of first-party insurance contracts, that concern is unfounded. The public interest in insurance contracts, the nature of insurance contracts, and the inequity of the bargaining power between the insurer and the policyholder all serve to distinguish insurance contracts from other types of contracts. Each of these three factors will be discussed in order.

It has been said that the insurance business is affected with a

public interest. *Nichols v. State Farm Mutual Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983); *McCullough v. Golden Rule Ins. Co., supra.* The veracity of that statement is plainly evidenced by the degree of regulation of the insurance industry. In fact, the Nebraska Legislature has declared:

> [T]he business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto . . . .

Neb. Rev. Stat. § 44-101 (Reissue 1988). Furthermore, the Legislature has mandated that no policy insuring against loss resulting from liability may be delivered or issued for delivery in this state unless coverage is provided for protection from uninsured motorists. See Neb. Rev. Stat. § 60-509.01 (Reissue 1988). In view of the statutory requirement that all automobile liability policies include coverage for uninsured motorists, the public interest is of the highest order in this case. See, *Escalante v. Sentry Insurance*, 49 Wash. App. 375, 743 P.2d 832 (1987); 2 A. Widiss, Uninsured and Underinsured Motorist Insurance § 20.3 (2d ed. 1990).

> Tort actions for breach of covenants implied in certain types of contractual relationships are most often recognized where the type of contract involved is one in which the plaintiff seeks something more than commercial advantage or profit from the defendant. When dealing with an innkeeper, a common carrier, a lawyer, a doctor *or an insurer*, the client/customer seeks service, security, peace of mind, protection or some other intangible. These types of contracts create special, partly noncommercial relationships, and when the provider of the service fails to provide the very item which was the implicit objective of the making of the contract, then contract damages are seldom adequate, and the cases have generally permitted the plaintiff to maintain an action in tort as well as in contract.

(Emphasis supplied.) *Rawlings v. Apodaca*, 151 Ariz. 149, 159, 726 P.2d 565, 575 (1986). Other courts have acknowledged that

the noncommercial aspect of insurance distinguishes it from other types of contracts for which a breach does not sound in tort. See, *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985) (an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure a commercial advantage); *Nichols v. State Farm Mutual Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (an insured does not contract to obtain any kind of commercial advantage but only to protect himself against the specter of loss).

Certainly, the inequity in the bargaining power of the insurer and insured differentiates the instant insurance contract from the run-of-the-mill contract. Parenthetically, it is noted that a number of courts have asserted that this sole factor supplies the rationale for creating a bad faith tort for a failure to settle a first-party claim. See, e.g., *Rawlings, supra*; *Dolan v. Aid Ins. Co.*, 431 N.W.2d 795 (Iowa 1988); *Nichols, supra*; *Arnold v. Nat. County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990). As discussed in *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 318 (R.I. 1980):

> [I]nsurers, backed by sufficient financial resources, are encouraged to delay payment of claims to their insureds with an eye toward settling for a lesser amount than that due under the policy. . . . The inequity of this situation becomes particularly apparent [when] the insured, often pursued by creditors and devoid of bargaining power, may easily be persuaded to settle for an amount substantially lower than that provided for in the insurance contract.

In relevant part, Neb. Rev. Stat. § 44-359 (Reissue 1988) provides, "In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any [insurance] company . . . doing business in this state, the court, upon rendering judgment against such company . . . shall allow the plaintiff a reasonable sum as an attorney's fee . . . ." Union argues that § 44-359 provides the necessary incentive for insurers to settle their claims in good faith, making other remedies superfluous.

Other courts have held contrary to Union's position. See, *Aetna Casualty & Surety v. Broadway Arms*, 281 Ark. 128, 664

S.W.2d 463 (1984) (neither a trade practices act nor a penalty-and-fees statute preempt area upon which tort of bad faith is founded); *Dolan v. Aid Ins. Co., supra* (statutory penalty provisions inadequate); *McCullough v. Golden Rule Ins. Co., supra* (attorney fees, as well as other statutory provisions, are inadequate because they do not provide the same scope of remedies as found in the good faith and fair dealing tort remedy).

In the case before us, attorney fees would do nothing to compensate the appellants for the mental suffering they have alleged in their amended petitions. Particularly, in extreme cases, an award of attorney fees falls far short of compensating a policyholder who may be disabled and hounded by creditors as a result of injuries suffered in a collision with an uninsured motorist.

It is further noted that prejudgment interest inadequately compensates a policyholder, since its award is dependent on an offer of settlement by a plaintiff. See Neb. Rev. Stat. § 45-103.02 (Reissue 1988). The offer of settlement of a lawsuit assumes that an action has been filed. The filing of the lawsuit may be preceded by months during which the policyholder is in dire straits. As is the case with attorney fees, prejudgment interest does nothing to compensate for mental suffering.

During oral argument, Union contended that the appellants never alleged that they made demand within the policy limits upon the insurer and that this was a fatal defect in the pleadings. However, in the petition from the former action, which was attached to and made part of the amended petitions, it was alleged that timely demand was made on Union or its agents for payment of the damages provided for under the terms of the insurance policy, but that Union refused payment of the sums demanded. In ruling on a demurrer, documents attached to and made part of the petition may be considered. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). This contention is without merit.

As recalled, a first-party bad faith cause of action is based upon allegations that the insurer, in bad faith, refuses to settle with its own policyholder insured, who thereby suffers some type of direct loss. See, e.g., *Dolan v. Aid Ins. Co., supra*. In

contrast, a traditional third-party bad faith claim arises when an insurer wrongfully fails to settle a claim by a third party against an insured. See, e.g., *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976).

In this case, the Braesches have not alleged in the amended petitions that as "covered persons" under the policy, they have directly suffered from Union's bad faith settlement of their claim. Rather, they maintain, in effect, that as the next of kin and as father and mother, respectively, of Lori Braesch, the "covered person" in this instance, they may assert a first-party bad faith claim based upon their status as policyholder beneficiaries under the insurance policy. Union contends that it would be unwise to extend first-party bad faith actions to policyholder beneficiaries because it would be beyond any reasonable expectations of the parties.

The cases denying a nonpolicyholder standing to assert a first-party bad faith claim have done so on the basis that a contractual relationship was lacking between the plaintiff and insurer. See, e.g., *Niemeyer v. U.S. Fidelity and Guar. Co.*, 789 P.2d 1318 (Okla. 1990); *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193 (1989). The reasoning in those cases is inapplicable here because the appellants are policyholders *and* beneficiaries, not strangers to the contract. As indicated, the theory underlying the tort of bad faith settlement of a first-party claim is that there is an implied covenant of good faith and fair dealing. This covenant is dependent upon a contractual relationship between the plaintiff and the insurer. In this case, the Braesches are not only beneficiaries, but are also policyholders and as policyholders are clearly contractual parties to the contract.

As to nonpolicyholder beneficiaries, there is merit to Union's argument. The following hypothetical demonstrates the problems engendered by allowing nonpolicyholders to bring a bad faith cause of action. Under the terms of the policy, a "covered person" includes any person occupying the Braesches' automobile. Assume that the car is loaned to a neighbor who is involved in an accident with an uninsured motorist. Unless the first-party claimant is limited to policyholders, the neighbor would be entitled to assert a

first-party action for the insurer's bad faith in failing to settle with him or her. This makes little sense, since the tort is based on the covenant of good faith and fair dealing which, in turn, is premised on a contractual relationship. In this hypothetical, a contractual relationship between the Braesches' insurer and their neighbor is absent.

For those reasons, we hold that only (1) an injured policyholder who is also a "covered person" or (2) a policyholder who is also a beneficiary may bring a cause of action in tort against the policyholder's insurer for failure to settle the policyholder's insurance claim. As policyholder beneficiaries, both of the appellants have standing to bring the causes of action for bad faith failure to settle each of the appellants' claims.

We next consider the standard of care required of an insurer in settling a claim with its policyholder. Our analysis begins with an examination of the standard of care expressed in the Nebraska third-party cases. In *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 382, 118 N.W.2d 318, 322 (1962) (quoting *Davy v. Public National Ins. Co.*, 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960)), we asserted, " 'Good faith implies honesty, fair dealing and full revelation. . . . Bad faith implies dishonesty, fraud and concealment. . . . Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith. . . .' " This court later declared that in *Olson, supra*, "the insurer was not liable for the excess because, although mistaken as to the question of liability, it had not acted in bad faith." *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 583, 239 N.W.2d 499, 503 (1976). We further held in *Hadenfeldt* that "[w]hile an insurer is obligated to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim, the ground for recovery in this state in this type of case is bad faith." *Id.* at 585, 239 N.W.2d at 504. From the foregoing, it is clear that something more than negligence is required in third-party cases; there must be some level of intentional wrongdoing.

Varying articulations of the standard of care have been announced by the courts which have addressed the issue. The leading case on the standard of care in first-party bad faith

actions is *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978). In *Anderson*, the court stated:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the [insurance] policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. "Bad faith" by definition cannot be unintentional.

Id. at 691, 271 N.W.2d at 376. A number of cases have followed the *Anderson* test. See, *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981); *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 795 (Iowa 1988); *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I. 1980). Other jurisdictions, while not specifically following *Anderson*, require some showing of intent. See, *Aetna Casualty & Surety v. Broadway Arms*, 281 Ark. 128, 664 S.W.2d 463 (1984) (the misconduct must be dishonest, malicious, or oppressive in an attempt to avoid liability under an insurance policy and cannot be based upon negligence or honest errors in judgment); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983) (bad faith embraces more than bad judgment or negligence; it imports conscious wrongdoing); *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988) (a claimant who asserts that a carrier has breached its duty of good faith and fair dealing by refusing to pay or delaying payment of a claim must establish (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy and (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim).

The Wyoming and South Carolina courts occupy a unique position. They seem to require negligence to enable the plaintiff to recover bad faith damages, but an element of intent is not mandatory unless punitive damages are also sought. See, *Nichols v. State Farm Mutual Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (holding that an insured can recover consequential damages by establishing bad faith or unreasonableness on the part of the insurer, but to recover

punitive damages, the insured is required to show that the insurer's actions were willful or in reckless disregard of the insured's rights); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990) (certifying that the test to determine bad faith is objective standard of whether validity of denied claim was not fairly debatable and award of punitive damages for bad faith requires proof of wanton or willful misconduct). Since punitive damages are not allowed in Nebraska, see *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960), this approach is unworkable, even if this court were prepared to accept a negligence standard.

Based on our existing precedent on the standard of care in the third-party cases, as well as on policy considerations, the standard of care set forth in *Anderson, supra*, is adopted. A requirement of intentional or reckless conduct arises from the commonsense notion that "[t]he insurer . . . must be accorded wide latitude in its ability to investigate claims and to resist false or unfounded efforts to obtain funds not available under the contract of insurance." *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985). We conclude that the *Anderson* standard of care strikes a proper balance between the respective rights of the insurer and the policyholder.

Applying the *Anderson* test to the amended petitions at hand, we conclude that they allege sufficient facts demonstrating the absence of a reasonable basis for denying benefits of the policy and Union's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The element of unreasonableness is satisfied by the allegations that Union denied its uninsured motorist coverage to the Braesches despite the fact that the uninsured driver's negligence was the sole and proximate cause of Lori Braesch's death. The allegations of bad faith regarding Union's tactics in refusing to settle meet the second prong of the test.

We next examine the measure of damages to be awarded for a bad faith settlement of a first-party insurance claim. The appellants alleged in their respective amended petitions that they were "forced to endure emotional pain and suffering." As the appellants have already recovered general damages in their prior contract action and have not pleaded special damages, we

concern ourselves with only the recovery for mental distress. Case law instructs that the appellants may recover damages for mental distress. See, *Chavers v. National Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I. 1980).

The foregoing authorities adhere to the tort principles regarding damages existent in this state. Damages for mental anguish are not, as a general rule, recoverable in actions for breach of contract unless the breach amounts in substance to willful or independent tort. *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955). As we have stated, the instant action is grounded in tort. Recovery for mental distress damages is permitted in cases involving other intentional torts, such as assault and battery, see *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984), and false imprisonment, see *Jensen v. Barnett*, 178 Neb. 429, 134 N.W.2d 53 (1965). Indeed, this court has recognized recovery solely for mental distress arising out of negligent conduct even though there is no physical injury. See *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). A recovery for mental distress in this action is in harmony with the general principle that the measure of recovery in all civil cases is compensation for the injury sustained. See *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978). Recognizing that damages must be proximately caused by the tortious conduct, see *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986), we further note that the amended petitions allege that the mental suffering was the direct and proximate result of Union's bad faith action in refusing to settle the claim. It is, therefore, proper for the appellants' amended petitions to allege mental suffering as a basis for recovery under the tort of bad faith.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In their second theory of recovery, the appellants allege that Union's actions constituted the tort of outrage. The tort of outrage is also known as the intentional infliction of emotional distress. See *Gall v. Great Western Sugar Co.*, 219 Neb. 354,

363 N.W.2d 373 (1985).

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege that (1) there has been intentional or reckless conduct, (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Id.* An extremely disabling emotional response is required. *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981).

The amended petitions do not allege conduct sufficiently outrageous, nor do they allege sufficiently severe emotional distress. See, *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906 (Iowa 1990); *Debolt v. Mutual of Omaha*, 56 Ill. App. 3d 111, 371 N.E.2d 373 (1978). The trial court properly dismissed those parts of the petitions that alleged intentional infliction of emotional distress.

The judgment is reversed and the cause remanded with directions to allow the plaintiffs to proceed upon their amended petitions as to their first theory of recovery.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CHESTER L. DOYLE, APPELLANT.

464 N.W.2d 779

Filed January 18, 1991. No. 89-859.

1. **Courts: Juvenile Courts: Jurisdiction: Waiver: Appeal and Error.** The applicable standard of review of an appeal from a denial of waiver to juvenile court is abuse of discretion.
2. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** A plea of guilty following an order overruling a motion to transfer to juvenile court does not waive the juvenile's right to challenge that ruling.
3. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** The general rule is that upon request, the district court shall transfer a juvenile case involving a crime to

the juvenile court unless a sound basis exists for retaining it.

4. **Courts: Juvenile Courts: Jurisdiction: Records: Appeal and Error.** The record must provide an adequate basis for a meaningful review by the Supreme Court as to whether the district court abused its discretion in refusing to grant a motion for transfer of a juvenile case to the juvenile court.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Remanded with directions.

James J. Regan, of Kelley, Kelley & Lehan, P.C., for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

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

PER CURIAM.

This is a criminal prosecution in which Chester L. Doyle, a minor, was charged with count I, theft by unlawful taking of property valued at $300 or more, but not over $1,000; count II, attempted robbery; count III, burglary; and count IV, burglary. A motion to transfer jurisdiction to juvenile court was denied after a hearing. Doyle entered guilty pleas to counts I and III in return for the dismissal of counts II and IV. Doyle was sentenced to imprisonment under the supervision of the Department of Correctional Services for 1 to 3 years on count I and 2 to 3 years on count III, the sentences to run consecutively. Doyle appeals the order retaining jurisdiction and the sentence imposed.

The applicable standard of review of an appeal from a denial of waiver to juvenile court is abuse of discretion. *State v. Phinney,* 236 Neb. 76, 459 N.W.2d 200 (1990) *(Phinney II)*; *State v. Nevels,* 235 Neb. 39, 453 N.W.2d 579 (1990).

On March 12, 1989, Chester Doyle, date of birth December 26, 1973, along with coperpetrator Robert Nutt, date of birth September 11, 1972, burglarized the Four Aces Pawn Shop in Omaha, Nebraska. They took four guns and some ammunition during the course of the burglary. Doyle kept one of the guns, but he did not have any ammunition for the gun. Nutt also retained one of the guns and some ammunition for that gun.

The two remaining weapons were given away.

On March 13, 1989, Nutt and Doyle were involved in the theft of a van from a parking lot in Omaha. They proceeded to the Crossroads shopping center. As they were leaving the shopping center and walking through the parking lot, Nutt pointed a loaded gun at Jane Baird in an effort to rob her of her vehicle. Doyle was with Nutt at the time.

Baird's statement, read in conjunction with the statements of Doyle, indicates that only Nutt had a weapon during the robbery attempt and only Nutt spoke to her.

Baird ran off, screaming for help. A security officer in a truck began to chase Doyle and Nutt, who were on foot. Nutt pointed a gun at the security officer, who then turned the truck away from Nutt. The security officer drove toward a deputy sheriff's truck, which was located nearby. Nutt and Doyle jumped into the stolen van and drove off.

Before entering his pleas of guilty, Doyle had filed a motion to transfer the matter to the separate juvenile court. A hearing, which was rather inconclusive as to the basis for the court's findings, was held, following which the district court denied the motion. In doing so, the court entered a "checklist" order as follows:

> THIS MATTER came on to be heard upon defendant's motion requesting waiver of the jurisdiction of this Court to the Juvenile Court for further proceedings.
>
> Evidence was adduced by and on behalf of both parties.
>
> UPON CONSIDERATION WHEREOF, the Court finds:
>
> X That the facilities for the treatment and rehabilitation best suited for the minor are available to the District Court.
>
> ___ That the facilities for the treatment and rehabilitation best suited for the minor are not available to the Juvenile Court.
>
> X That the alleged offense shows evidence of violence or that it was committed in an aggressive and premeditated manner.
>
> ___ That the previous history of the minor dictates that the present matter be adjudicated in District Court. Such

previous history includes:

_x_ Convictions of previous offenses ___ against the person
_x_ relating to property

_x_ Antisocial behavior

___ Patterns of physical violence

X That from a consideration of the minor's home, school activities, emotional attitude, desire to be treated as an adult, pattern of living, and previous contact with law enforcement agencies he or she possesses the sophistication and maturity to stand trial in District Court.

X That the minor's age and the age of others involved in the offense do not preclude the present case from being adjudicated in District Court.

X That the motivation for the commission of the offense warrants trial in District Court.

X That the best interest of the minor and the security of the public require that the minor continue in custody for a period extending beyond his minority.

IT IS, THEREFORE, ORDERED that the above-captioned defendant shall remain within the jurisdiction of the District Court.

DATED this 2nd day of May, 1989.

BY THE COURT:
/s/ JERRY M. GITNICK
Jerry M. Gitnick
District Judge

Doyle assigns as error that the trial court abused its discretion in failing to transfer the matter to juvenile court and in imposing an excessive sentence. We have previously held, in *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990) *(Phinney I)*, that a plea of guilty following an order overruling a motion to transfer to juvenile court does not waive the juvenile's right to challenge that ruling.

The general rule is that upon request, the district court shall transfer a juvenile case involving a crime to the juvenile court

unless a sound basis exists for retaining it. *Phinney II, supra.* It is apparent that the burden of proof in this regard is on the State.

The order in this case does not detail the findings made in support of the order of denial. As a matter of fact, it could only be more general if the court had simply stated that it had reviewed all the criteria in Neb. Rev. Stat. § 43-276 (Reissue 1988) and concluded not to transfer the case. Little evidence was introduced at the hearing touching on the basic needs of this juvenile in regard to rehabilitation. The oral findings of the district court were as follows:

> THE COURT: From my perspective, Juvenile Court exists to handle juvenile matters. I don't consider theft by unlawful taking and attempted robbery and burglaries juvenile matters, those are adult crimes. It is true he is 15, it is true he doesn't look like a person of great maturity, and it is true that he is rather open in the statement that he gave the police, which is commendable. But I don't think that that excuses him. Obviously, his mother doesn't have that much of an influence on him. Obviously, you, Mr. Regan, have not had that much influence on him, and God knows, the Separate Juvenile Court hasn't had any influence on him. If all of you would have had an influence on him, he wouldn't be here today. The fact is, he is here today, and he is here because he is involved with serious problems. He apparently doesn't have the strength of character to know when to stay away from certain people, he doesn't have the strength of character to know he shouldn't be breaking the law. That doesn't take a great deal of sophistication, that just takes a basic understanding of right and wrong, and I believe from what I have read, that he knows the difference between right and wrong. As far as I am concerned, he has committed adult crimes, the treatments for him are better available through the District Court than through the Juvenile Court. His past record indicates a history of difficulties and behavior that weigh against his being transferred to Juvenile Court, and the motion is denied.

> And you, young man, you better be careful, you are just heading down a road that is taking you to real difficulties.

Therefore, we must conclude that the record before this court does not provide an adequate basis for a meaningful review as to whether the district court abused its discretion in refusing to grant the motion for transfer. Accordingly, the cause is remanded to the district court with directions to review the record made on the motion to transfer to juvenile court and to set forth its findings in the matter as provided by Neb. Rev. Stat. § 43-261 (Reissue 1988). Such findings shall then be certified to this court for further consideration of the appeal. See *Phinney I, supra*.

It is not necessary for us to deal with the claim of excessiveness of the sentence at this time.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. DEAN, APPELLANT.
464 N.W.2d 782

Filed January 18, 1991. No. 90-196.

1. **Pleas.** The standard for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to the defendant.
2. _____. In order to support a finding that the plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, (1) the trial court must inform the defendant concerning the nature of the charge, the right to assistance of counsel, the right to confront witnesses against him or her, the right to a jury trial, and the right against self-incrimination, and must examine the defendant to determine that he or she understands the foregoing; additionally, (2) the record must establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she is charged.
3. **Homicide.** The essential elements of second degree murder are that the murder must be done purposely and maliciously.
4. **Homicide: Intent: Words and Phrases.** Malice, in the context of second degree murder, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.

5. **Homicide: Circumstantial Evidence: Intent.** The state of mind required for second degree murder may be inferred from the circumstantial evidence of the criminal act.
6. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he were the principal offender.
7. _____. 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.
8. **Pleas: Presentence Reports.** In reviewing a plea of guilty, this court need not rely solely upon the bill of exceptions, but may also consider matters contained in the defendant's presentence investigation in determining whether there is a factual basis for the defendant's plea of guilty.
9. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Pleas: Proof.** A criminal defendant has a constitutional right not only to counsel but to effective assistance of counsel. The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. To sustain a claim of ineffective assistance of counsel, a criminal defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense; that is, there must be a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
11. **Sentences: Evidence.** In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
12. **Sentences.** In imposing a sentence, a trial court should consider, among the other circumstances, the nature of the offense and the amount of violence involved in the commission of the crime. The seriousness of the offense is one of the important factors in setting a sentence.
13. **Sentences: Probation and Parole.** In considering probation in lieu of a sentence the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.
14. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be

disturbed on appeal unless there has been an abuse of discretion.

15. **Homicide: Plea Bargains.** Altering a charge from first degree murder to second degree murder is a substantial concession.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Richard L. Schmeling for appellant.

James L. Dean, pro se.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

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

FAHRNBRUCH, J.

The defendant, James L. Dean, entered a plea of guilty to aiding and abetting the homicide of 68-year-old Helen Wilson in Beatrice, Nebraska, and was sentenced to 10 years' imprisonment for second degree murder.

Acting pro se, Dean assigns as error that his plea should not have been accepted because he did not have full notice of the charge, that there was no factual basis for one element of the charge, i.e., intent to kill, and in substance that his counsel was ineffective. Through counsel, Dean also complains that his sentence is excessive. We affirm Dean's conviction and sentence.

Dean told law enforcement officers that approximately a week before February 5, 1985, the date on which Helen Wilson was robbed, raped, and murdered, that he, four other men, and a woman talked about robbing Mrs. Wilson and that two of the men talked about raping her. The primary focus of the scheme was to obtain money. Two of the men present at the original planning did not participate when the crimes were committed. On the night of February 5, the two men who talked of raping the victim, Dean, the woman who participated in planning the robbery, and a woman who gave the signal for the robbery to begin, together with the victim's grandniece, forced their way into Mrs. Wilson's apartment when the victim responded to a knock on her door. The victim was knocked down in her living

room, forcibly taken to her bedroom, and threatened and physically abused when she refused to tell the intruders the location of her money. After the victim was subdued, she was taken back to the living room while screaming and kicking and placed on the floor. One of the robbers, with his hand or a knife at the victim's throat, demanded that Mrs. Wilson reveal where she kept her money. Mrs. Wilson was held down by one of the women intruders while two of the men took turns raping and vilifying the victim. When one of the men was not raping the victim, he was also holding her down while the second man raped her. While this was transpiring, the woman attacker suffocated the victim with a pillow and at one point committed sexual acts on the victim while one of the men was committing rape. Following vaginal, anal, and cunnilingus sexual assaults, it appeared that Mrs. Wilson was either dead or near death. It was then that the intruders searched the apartment and found Mrs. Wilson's money. Both at the planning of the robbery and at the victim's apartment, Dean suggested places where the victim might keep her money.

In his interviews with law enforcement officers, Dean admitted that the planned crime was to be a robbery. In an apparent effort to distance himself from the element of intent to kill, Dean also claimed that he was led to believe that no one would be home at the Wilson apartment when the crime would take place. The trial court obviously was not convinced by Dean's claim that he thought no one would be home. In any event, by Dean's own account of the events, the minute Mrs. Wilson responded to the knock at her door, the robbers, including Dean, forced their way into Mrs. Wilson's apartment and demanded money. Dean, at that time, knew that the apartment was occupied. He saw Mrs. Wilson get slapped and fall to the floor. In view of Dean's statements that he watched his partners in the robbery inflict injury upon Mrs. Wilson while she struggled, that he heard what sounded like the breaking of a bone, and that he saw the victim raped and finally smothered, the trial court could find beyond a reasonable doubt that while all this was going on, the defendant was well aware that one or more of his partners in crime had the intent to kill Mrs. Wilson. When Mrs. Wilson's body was found, she had

a complete fracture through the left lower humerus, her hands were loosely tied with a towel, and a scarf was tightly wrapped around her head and tied. Even before the defendant and his companions forced their way into Mrs. Wilson's apartment, Dean heard one of the men, who at the planning stage of the robbery said he wanted to sexually assault an elderly woman, boast that if anyone got in the way he would take care of them. Mrs. Wilson "got in the way" and she was "taken care of" by being killed. From these facts and from all of the circumstances surrounding the crimes that were committed, the available physical evidence, and the reports of the experts in connection therewith, the court was justified in finding that at least one of the robbers had the intent to kill the victim. The evidence shows beyond a reasonable doubt that Dean knew of that intent, and yet, he continued to participate in the robbery, which was the primary purpose of entering Mrs. Wilson's apartment. Dean said he absented himself from Mrs. Wilson's apartment for a few minutes, but he was able to describe in detail how the victim was abused, raped, and murdered. Moreover, it was after Dean returned to the apartment that the search for money took place. The presentence report supports the fact that Dean suggested places for the intruders to search for money at the apartment.

After finding Mrs. Wilson's money, the intruders left the victim's apartment. The female lookout apparently returned to her own apartment, the victim's grandniece was taken home, and the remaining four robbers, including the defendant, drove to a truckstop restaurant, where they ate breakfast.

Although an intensive investigation into Mrs. Wilson's death was undertaken immediately when her body was discovered on February 6, 1985, it was not until 1989 that law enforcement officers were able to make an arrest in connection with the crimes committed upon Mrs. Wilson.

The defendant was originally charged with murder in the first degree in that he did aid, abet, procure, or cause another to kill Helen Wilson in the perpetration of or attempt to perpetrate any sexual assault in the first degree, robbery, kidnapping, or burglary, in violation of Neb. Rev. Stat. §§ 28-303 and 28-206 (Reissue 1989), which carries a penalty of life imprisonment or death. See Neb. Rev. Stat. § 28-105 (Reissue 1985).

Pursuant to a plea agreement with the county attorney, the defendant entered a plea of guilty to an amended information charging him with aiding, abetting, procuring, or causing another to cause the death of Helen Wilson intentionally, but without premeditation, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1989), which describes murder in the second degree, a Class IB felony carrying a penalty of not less than 10 years' up to life imprisonment. See § 28-105. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he were the principal offender. § 28-206.

In his plea bargain with the prosecutor, Dean agreed to plead guilty to aiding and abetting the murder of Mrs. Wilson if the State would reduce the charge from first to second degree murder. He also agreed to testify truthfully in any and all cases against other persons involved in the crimes against Mrs. Wilson and give total cooperation to the State of Nebraska regarding the Wilson homicide. After accepting Dean's guilty plea and following a presentence investigation, the district court for Gage County, on January 26, 1990, sentenced Dean to the statutory minimum term of 10 years' imprisonment, with credit for time served during the pendency of the action. Dean timely filed an appeal to this court.

In his pro se appeal brief, Dean claims the district court for Gage County erred (1) in accepting the defendant's plea of guilty when a critical element of the amended charge was lacking and when there was no factual basis given which indicated appellant had the specific intent necessary for prosecution and conviction on the charge alleged, and (2) in allowing the defendant to proceed to plea after his counsel had, inadvertently, made the court aware the reason for the defendant's plea to second degree murder was that the statute of limitations barred a plea to a lesser charge.

Through his lawyer, the defendant additionally claims that his sentence was excessive and that he should have received probation instead of a prison sentence.

Regarding Dean's first assignment of error, the standard for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to the defendant. See, *State v. Ponec*, 236 Neb.

710, 463 N.W.2d 793 (1990); *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981). In order to support a finding that the plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, (1) the trial court must inform the defendant concerning the nature of the charge, the right to assistance of counsel, the right to confront witnesses against him or her, the right to a jury trial, and the right against self-incrimination, and must examine the defendant to determine that he or she understands the foregoing; additionally, (2) the record must establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990) (quoting *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986)); *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989).

Regarding the first factor, Dean contends that he did not receive "real notice of the true nature of the charge against him" and the court "did not assure that the defendant possessed an understanding of how the elements of the crime are related to the facts." Pro se brief for appellant at 6. Specifically, Dean argues that there was no factual basis given which indicated that he had the specific intent necessary for his prosecution and conviction of second degree murder.

At his arraignment in district court, the judge informed Dean of the nature of the charge against him, his right to assistance of counsel, his right to confront witnesses against him, his right to a jury trial, and his right against self-incrimination. He also explained the various pleas the defendant could enter.

The element of "intent" was emphasized several times in colloquy between the court and Dean before the defendant entered his plea of guilty:

> THE COURT: All right. Mr. Dean, the laws of Nebraska say this: A person commits murder in the second degree if he causes the death of a person *intentionally* but without premeditation. . . .
>
> . . . .
>
> Now, the laws of Nebraska also provide that a person who aids, abets, procures or causes another to commit any

> offense may be prosecuted and punished as if he were the principal offender. And what that means is this: If you helped somebody or got somebody or caused somebody to commit this murder, and you are convicted of that, you are subject to punishment, the same as if you had been the person who actually did it. Do you understand what I'm saying?
>
> THE DEFENDANT: Yes, I do.
>
> . . . .
>
> THE COURT: Now, I want to call to your attention that this charge provides that second degree murder requires that she was *intentionally* killed. And so far as that is concerned, *the county attorney would have to show that you knew that the person who did the actual killing had that intent or that you had yourself when you encouraged this person to do it.* Do you understand what I'm saying to you?
>
> THE DEFENDANT: Yes, I do.

(Emphasis supplied.)

Dean told the court he understood the elements of the charge which the county attorney would have to prove to convict him.

> THE COURT: And do you understand that he's got to prove all of those things beyond a reasonable doubt in that regard to warrant a jury finding you guilty; and that if he failed to prove one or more of those beyond a reasonable doubt, that jury could not convict you. Do you understand that?
>
> THE DEFENDANT: Yes, I do.

Clearly, the trial judge properly informed Dean of the nature of the charge and his rights, and assured he understood them throughout the arraignment and during entry of his guilty plea.

Toward the second *Walker* factor, Dean contends that despite his pleading guilty, no factual basis existed for acceptance of the plea because "[a]t no time . . . did the appellant or his counsel indicate the appellant had intended to aid and abet a murder . . . ." Pro se brief for appellant at 7. This contention misrepresents the aiding and abetting statute. As previously stated, the statute provides, and the district court described, that the intent element applies to the aider and abettor *or* to the person who

actually commits the murder. See §§ 28-206 and 28-304.

The essential elements of second degree murder are that the murder must be done purposely and maliciously. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988). Malice, in this context, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986). The state of mind required for second degree murder may be inferred from the circumstantial evidence of the criminal act. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). 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. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987).

At the arraignment, the district court listened to the county attorney describe the nature of the evidence that would be adduced if the matter went to trial. This included a summary of an accomplice's statement which placed Dean at the crime scene and which indicated his entering of the apartment by force, his observing of the sexual assaults and homicide, and his suggesting of places to look for money; a summary of a statement Dean gave Deputy Sheriff Burdette Searcey which corroborates the accomplice's statement; and a report of what Dr. John F. Porterfield, the Gage County coroner's physician, found when he performed the autopsy on Mrs. Wilson's body.

In addition to pleading guilty, Dean also made a judicial admission that he actively participated in certain events outlined by the county attorney, including forcing entry into the victim's apartment and giving advice on where to look for money. After the county attorney outlined what he expected to prove in regard to the forced entry of the victim's apartment, the sexual assaults on the victim, her death, and the robbery, the court asked the defendant, "Did you participate in the events that the county attorney has outlined, Mr. Dean?" The

defendant answered, "Yes."

In reviewing a plea of guilty, this court need not rely solely upon the bill of exceptions, but may also consider matters contained in the defendant's presentence investigation in determining whether there is a factual basis for the defendant's plea of guilty. See, *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Loschen*, 221 Neb. 315, 376 N.W.2d 792 (1985).

Here, the presentence investigation contained numerous statements made by the defendant to law enforcement officers. Those statements were corroborated not only by the physical evidence found at the crime scene and the scientific examination of that evidence, but also by interviews with other people involved or intimately familiar with some details of the crimes against the deceased as heretofore related.

Dean participated in every step of the robbery scheme. He stated that he initiated the idea of a robbery; the planning occurred at his apartment; he agreed to the plan knowing of his companions' intent to rape the victim; he participated in stating a false plan in order to avoid suspicion by his girl friend; he suggested where to look for the money; the plan provided for him to search a portion of the apartment; he was the one who closed the door after the forced entry; he knew that if anyone got in the way of the robbery, one of his companions would kill the obstructor; he knew that Mrs. Wilson was dead or near death before the robbery was consummated; and at the apartment he suggested to his partners in crime where to search for Mrs. Wilson's money. These suggestions were made after Mrs. Wilson was fatally injured.

A woman who was at the scene described Dean's disposition while witnessing the assault. She told police: "[H]e had an attitude that he didn't care. Um he was watching everything and just liked it."

The foregoing demonstrates a clear factual basis from which a fact finder could find beyond a reasonable doubt that Dean assisted and encouraged others in the robbery and homicide of Mrs. Wilson. He was instrumental in planning the robbery, and he was at the crime scene and acted in concert with his coperpetrators in the robbery, knowing all the time that if

anyone got in the way, that person would be "taken care of." Since the trial judge also explained the penalties involved, Dean's first assignment of error is without merit.

The second assignment of error is at best confusing. It appears that Dean is claiming ineffective assistance of counsel. According to Dean, his counsel chose to minimize the risk of a more severe penalty by having Dean plead guilty to aiding and abetting second degree murder, but, again, Dean claims he had no intent to harm anyone. As twice before stated, the intent element is not limited to the aider and abettor. Dean's reliance on such an argument has no value.

> A criminal defendant has a constitutional right not only to counsel but to effective assistance of counsel. [Citation omitted.] The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. [Citation omitted.]
>
> To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense; that is, there must be a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. [Citations omitted.]

State v. Wakeman, 231 Neb. 66, 71, 434 N.W.2d 549, 554 (1989).

Obviously, Dean's misstatement of the law does not support his contention that his counsel acted improperly. A guilty plea otherwise voluntarily and intelligently made with competent counsel is not invalid because it was motivated by a desire to avoid the death penalty or obtain a lesser sentence. See *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The chance of Dean being convicted of aiding and abetting a first degree murder in the commission of specified felonies was most probable. The facts of the killing as heretofore related would support, beyond a reasonable doubt, a conviction of Dean for murder in the first degree, the murder having been consummated during the perpetration of both a

violent, forcible robbery and multiple first degree sexual assaults. The advice of Dean's counsel was well within the range of attorney competence. Moreover, at the arraignment Dean stated that he was properly represented and had no complaints concerning the representation. The second assignment of error is therefore without merit.

Finally, we address Dean's last assignment of error, which is the sole assignment in his attorney's brief. Dean argues that the sentence imposed was excessive because the statute of limitations barred any lesser charge to which he could plead. There is no showing that the State ever offered or was willing to offer Dean any lesser offense than second degree murder. The trial court imposed the minimum imprisonment sentence of 10 years for murder in the second degree and gave Dean credit for time served. The court's only other alternative was to sentence Dean to probation.

In an oft-stated rule, we have held that an order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Valdez,* 236 Neb. 627, 463 N.W.2d 326 (1990); *State v. Garza,* 236 Neb. 215, 459 N.W.2d 747 (1990). Since Dean received the statutory minimum of 10 years' imprisonment, the issue is whether the district court abused its discretion in not placing Dean on probation.

Dean, through his lawyer, contends that this court should exercise its discretion to reduce the sentence because it is unjust and excessive considering the age of, the prior record of, and advance planning by the defendant.

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. "A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider probation officer reports, police reports, affidavits, and other information,

including his own personal observations."

(Emphasis omitted.) *State v. Stranghoener*, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). See *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

Of particular importance in imposing a sentence, a trial court should consider, among the other circumstances, the nature of the offense and the amount of violence involved in the commission of the crime. The seriousness of the offense is one of the important factors in setting a sentence. *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989); *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989). In considering probation in lieu of a sentence the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law. See Neb. Rev. Stat. § 29-2260 (Reissue 1989).

However, the denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Contreras*, 236 Neb. 455, 461 N.W.2d 562 (1990); *State v. Pillard*, 235 Neb. 642, 456 N.W.2d 755 (1990).

The trial judge properly exercised his discretion in denying Dean probation and in imposing a prison sentence. As the judge declared, this is a murder case, and although Dean's role was limited, to grant probation would minimize the seriousness of the crime and be totally disproportionate to that seriousness. Dean himself admits, in his pro se brief, that probation in a murder case would be unrealistic. The fact that Dean was unable to plead to a lesser charge does not equate with injustice. Altering a charge from first degree murder to second degree murder is a substantial concession. See *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986). The final assignment of error is without merit. The judgment of the district court is affirmed.

AFFIRMED.

GORDON R. POORE, APPELLANT, V. CITY OF MINDEN, NEBRASKA, A MUNICIPAL CORPORATION, AND COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEES.

464 N.W.2d 791

Filed January 18, 1991. No. 90-279.

Employment Security: Public Officers and Employees. Under Neb. Rev. Stat. § 48-628(b) (Reissue 1988), conduct of a governmental employee which evinces a conscious and intentional disregard of standards of behavior which his or her governmental employer would have a right to expect from such employee constitutes misconduct in connection with the employee's employment, where continued employment would create a genuine threat to the integrity of the governmental employer and reflect unfavorably upon the governmental employer in the eyes of the general public.

Appeal from the District Court for Kearney County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Michael E. Sullivan, of Helmann & Sullivan, P.C., for appellant.

Thomas G. Lieske, of Lieske and Kristensen, for appellee City of Minden.

Laureen Van Norman and John F. Sheaff for appellee Commissioner of Labor.

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

HASTINGS, C.J.

Gordon R. Poore, a former employee of defendant City of Minden, has appealed from an order of the district court which affirmed an order of the Nebraska Appeal Tribunal. The Nebraska Appeal Tribunal had affirmed the determination of a claims deputy denying Poore unemployment compensation benefits and canceling all wage credits earned prior to the discharge of Poore by the City of Minden.

Poore was an employee for the City of Minden from 1976 to May 19, 1989. He was a sanitation worker managing a sanitation truck and route for the City of Minden. He never collected the garbage fees, billed the garbage fees, read the electrical or water meters, billed the electrical or water

customers, or inspected the service lines.

In April 1989, Rick Bienhoff, the city water superintendent, discovered that unmetered water service was being provided to a building owned by Poore. Poore had not paid for water service to that building. It was also discovered that unmetered electrical service was being provided to the building. Poore acknowledged that he had been receiving both water and electrical services without paying for them despite the fact that he knew the procedure needed to initiate and terminate service to the property.

The previous owner of the building had paid minimum charges for water service because the water was not metered. The bills were not sent to Poore after he purchased the property. There was testimony that purchasers of property have to notify the city of the purchase so that the bills will be sent to the new owners.

There was also some testimony that Poore was involved in a lawsuit with the City of Minden concerning a drainage problem. There was another confrontation with the City of Minden concerning a storm sewer. This testimony was offered on a limited basis to show that there may possibly have been other reasons for the termination rather than the use of services without paying for the services.

On April 19, 1989, Austin Dodge, the mayor; Thomas Kenney, the city administrator; and Poore met to discuss the unmetered services. The city submitted a bill for $1,196 to Poore based on a minimum charge for both water and electrical services to the building for more than the preceding 10 years. Poore immediately wrote a check for the amount and gave it to the two city officials. Mayor Dodge then terminated Poore's employment with the City of Minden, giving Poore 30 days' notice.

Poore applied for unemployment benefits on May 24, 1989. The Nebraska Department of Labor claims deputy determined that Poore's conduct, using the water and electrical services without paying for the services, constituted gross misconduct, and canceled all wage credits earned prior to the date of termination. Poore appealed the decision to the Nebraska Appeal Tribunal and the district court for Kearney County. The

appeal tribunal affirmed the decision of the claims deputy, and the district court affirmed the appeal tribunal's decision.

The sole error assigned by Poore on appeal to this court is that the district court erred in determining that Poore's use of utility services without payment therefor constituted gross misconduct connected with his work.

Because the petition on review was filed in the district court after July 1, 1989, we review the case for errors appearing in the record. See Neb. Rev. Stat. § 84-918 (Cum. Supp. 1990). However, the facts are not in dispute; therefore, only questions of law are presented. In reviewing the law, this court has an obligation to reach a decision independent of the district court's.

The basis for the determination by the Department of Labor that Poore was not entitled to benefits was that his conduct constituted gross misconduct pursuant to Neb. Rev. Stat. § 48-628 (Reissue 1988). That section provides in part as follows:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (b) For the week in which he or she has been discharged for misconduct connected with his or her work . . . except that if the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

"Misconduct," as referred to in § 48-628(b), has been defined by this court in the following manner:

> While the term "misconduct" is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Stuart v. Omaha Porkers, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983).

The term "gross" is defined by Webster's Third New International Dictionary, Unabridged 1002 (1981) as "b(1) glaringly noticeable: FLAGRANT . . . (2): OUT-AND-OUT, COMPLETE, UTTER, UNMITIGATED, RANK."

It seems quite apparent that one's obtaining electrical and water services from his or her employer for a period of 10 years without paying for them constitutes gross misconduct. Poore concedes as much in his brief when he states that he "engaged in an unacceptable course of conduct over a period of time that ran parallel with his employment with the City of Minden." Brief for appellant at 9. The real question is whether this is conduct "connected with his . . . work."

Apparently, there are no Nebraska cases directly on point on this issue. There are many cases which have dealt with the matter of misconduct which was more directly connected with the employee's job.

In *Caudill v. Surgical Concepts, Inc.*, 236 Neb. 266, 460 N.W.2d 662 (1990), this court held that falsifying receipts constitutes misconduct. The employee had submitted a receipt for a business lunch that she did not have. Further, the employee had failed to make calls upon certain areas within her sales territory.

Tuma v. Omaha Public Power Dist., 226 Neb. 19, 409 N.W.2d 306 (1987), is a case in which the employee was terminated after she did not show up for work. The employee knew that a doctor's letter was required in situations such as hers, but did not get the letter. This court held that the actions of the claimant were misconduct. An employer expects its employees to show up for work. Failure to show up for work creates a problem for the employer in running the employer's business.

In *O'Keefe v. Tabitha, Inc.*, 224 Neb. 574, 399 N.W.2d 798 (1987), this court once again dealt with absence from work. In that case, the employer set forth an absentee plan. Employees missing too many days were terminated. Claimant missed too many days and was terminated pursuant to the plan. This court concluded that excessive absence from work was harmful to the

employer, the actions of the employee were misconduct, and the benefits were properly denied.

In the case of *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986), this court found that the claimant's actions were misconduct. In that case, the claimant logged in fraudulent addresses of places to which he claimed to have made repairs or calls. The employer warned claimant to refrain from logging in fraudulent addresses. The claimant again logged in fraudulent addresses. The employer dismissed the claimant. This court concluded that the claimant's actions were misconduct and that the benefits were properly denied.

In *Barada v. Sorensen*, 222 Neb. 391, 383 N.W.2d 799 (1986), this court held that the failure to elect an option for a retirement plan was misconduct. The employee retirement plan was switched over to a new plan. There were several options available to the employees, but the choice of retaining the same plan was not one of the options. The employees had a time limit to elect an option for a retirement plan. Claimant refused to elect an option for a retirement plan. This court held that her actions in refusing to select an option were misconduct. Unemployment benefits were denied because of her misconduct.

The case of *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983), deals with absence from work. This court concluded that the employee's having too many unexcused absences constituted misconduct.

In *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981), the claimant cut the hides of cattle in the process of removing the hides. The claimant was continually told to refrain from cutting the hides. Further, the claimant knew that the hides were used for clothing and thus by cutting the hides he was reducing the possible use of the hides. This court held that his conduct was willful and intentional misconduct and denied the claimant's unemployment benefits.

There are at least two rather recent cases which have held that the employee's actions did not constitute misconduct. In *Great Plains Container Co. v. Hiatt*, 225 Neb. 558, 407 N.W.2d 166 (1987), this court held that an employee's wages being excessively garnished was not misconduct connected with the

employee's work which would result in the denial of unemployment benefits. This court noted that the actions could be misconduct so as to result in termination, but not misconduct which would preclude the claimant from receiving unemployment benefits.

In an earlier case, *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 321 N.W.2d 77 (1982), Otto violated a company policy by associating with a former employee. This court held that there was no misconduct by Otto which would result in the denial of unemployment compensation benefits.

There are several cases from other jurisdictions which bear on this problem. The New York Supreme Court Appellate Division has consistently held that conduct similar to Poore's conduct is misconduct connected with work. In the case of *Matter of Markowitz*, 94 A.D.2d 155, 464 N.Y.S.2d 262 (1983), the claimant was convicted of giving gratuities to a public official, a felony not directly related to his employment. Claimant's duties included reviewing and developing budget proposals, formulating policies and procedures for funding of community programs, and monitoring grants and expenditures by his agency. The felony was bribing a public official on immigration matters. The court found that he was a civil servant with a public trust. The court stated that employees of the taxpayers must maintain the highest standard of integrity and incorruptibility. Thus, the court found that the claimant's conduct evinced an intentional and conscious disregard of the standard of behavior which an employer expects of an employee.

A second case out of the New York Supreme Court Appellate Division is *Matter of McCallum*, 126 A.D.2d 833, 510 N.Y.S.2d 322 (1987). In that case, claimant, a former highway repairman, was discharged for conduct "reasonably related" to his employment. The claimant owed $1,495 in outstanding New York City parking tickets. When the claimant failed to make the required good faith effort to pay off the tickets, he was fired. His application for unemployment benefits was denied. The claimant argued that his failure to pay overdue parking tickets was not reasonably related to his employment and thus was not misconduct under the labor law. The court stated that it has

held as a matter of law that an employee's conduct evincing a conscious and intentional disregard of the standard of behavior expected of a governmental employee constitutes misconduct in connection with his employment, where the employee's continued employment would threaten the integrity of the government and reflect unfavorably on the government in the eyes of the public. Thus, the employee was denied unemployment benefits because of misconduct.

In the case of *Kobusky v. Com., Unemployment Compensation Bd. of Review*, 46 Pa. Commw. 613, 406 A.2d 1226 (1979), the court found that claimant's benefits were properly denied on the grounds of willful misconduct. Claimant was an employee in the hosiery department of K Mart. She removed a new pair of shoes from a display in the shoe department, cut off the sales ticket, and wore the shoes for about a half hour. She then took them off and placed them under her counter, which was in violation of a rule that prohibits employees from keeping shoes under their counters. Claimant testified that she had bought the shoes several days earlier, but there was no record of such a transaction.

The court affirmed the denial of benefits, concluding that removing the shoes from the display and placing them underneath her counter was in direct violation of company policy. This exhibited a deliberate disregard of the standard of behavior expected by her employer. See, also, *Osborn v. Rev. Bd.*, 178 Ind. App. 22, 381 N.E.2d 495 (1978) (denying unemployment benefits to an employee dismissed for "just cause," pursuant to a statute. The employee, a cocktail waitress, while off duty, tinkered with a fire extinguisher at a bar where she worked); *Danko v. Com., Unemployment Comp. Bd. of Rev.*, 40 Pa. Commw. 387, 397 A.2d 489 (1979) (finding that employee was guilty of willful misconduct when he removed tires from his employer's warehouse, despite the fact that criminal charges were not prosecuted); *Green v. Com., Unemployment Compensation Bd.*, 87 Pa. Commw. 176, 486 A.2d 1052 (1985) (concluding that the denial of unemployment compensation was proper when the claimant, a nurse at an institute for the mentally retarded, made false statements to obtain public assistance and defrauded her employer by

accepting welfare payments after she began working. The court found that the claimant's conduct demonstrated an unacceptable standard of behavior and directly related to the claimant's ability to handle her duties because an employee owes an employer both loyalty and honesty); *Texas Employment Commission v. Ryan*, 481 S.W.2d 172 (Tex. Civ. App. 1972) (holding that a forklift operator discharged for taking an oxygen bottle from his employer during off-duty hours was in violation of company policy and was disqualified from unemployment compensation benefits).

In the following cases the courts held that the actions were performed outside of work and thus did not constitute misconduct in connection with work. In *London v. Unemp. Comp. Bd. of Review*, 111 Pa. Commw. 132, 533 A.2d 792 (1987), an employee of G.T.E. of Pennsylvania was denied unemployment compensation benefits by the Office of Employment Security and the referee. That decision was affirmed by the Unemployment Compensation Board of Review. The Commonwealth Court of Pennsylvania reversed.

The claimant prepared the employer's telephone directories. She obtained telephone service by using the middle and last names of her son and husband and by using her son's Social Security number. At the time, claimant had five outstanding accounts, with a total past due amount of $867.47. The court concluded that claimant's misconduct was not in connection with her work. Claimant's misconduct was connected with the employer only as a consumer. The court noted that while the misconduct might have been grounds for termination, it was not grounds for denial of unemployment compensation.

In *Jones v. Emp. Sec. Comm.*, 4 Mich. App. 300, 144 N.W.2d 795 (1966), an employee that kept excess change obtained from a vending machine located at his workplace was not guilty of misconduct connected with his employment. The court stated that while the employee's conduct in not returning the excess change may not have met the employer's standards and thus such breach may have entitled an employer to discharge the employee, such behavior was not misconduct connected with the employee's work disqualifying him from receiving unemployment compensation. See, also, *Beaty v.*

City of Idaho Falls, 110 Idaho 891, 719 P.2d 1151 (1986) (holding that a garbage collector who was convicted of possession of marijuana and stolen property and discharged 3 days later for violation of the city employment code of conduct because of the felony convictions should not be denied unemployment benefits, because the misconduct was not in connection with his employment). *Giese v. Employment Division*, 27 Or. App. 929, 557 P.2d 1354 (1976) (concluding that the actions of a state-employed university professor discharged for conspiring to explode devices in federal buildings to damage or destroy the buildings did not constitute misconduct connected with his work and thus unemployment benefits were properly allowed. We note that the buildings the claimant attempted to damage or destroy were not the buildings of his employer, the state; the buildings were federal government buildings); *Nelson v. Employment Security*, 98 Wash. 2d 370, 655 P.2d 242 (1982) (finding that the claimant, a cashier, should not be denied unemployment benefits after she was discharged from her employment for shoplifting at another store. The court concluded that the misconduct was not in connection with her employment).

The case law in other jurisdictions appears to lean toward finding misconduct in cases where the employees obtained goods or services from their employers. The courts are even more inclined to find misconduct in cases where the employee is a government employee.

We believe that general misconduct totally divorced from an employee's job or not in any way related to his or her employer is not misconduct justifying denial of all benefits.

However, the misconduct in this case was not like that found in *Beaty, supra*, where the employee was discharged for convictions of possession of marijuana and stolen property not connected with his employment; in *Giese, supra,* where a university professor was discharged for conspiring to explode devices in federal buildings not connected with his employment; or in *Nelson, supra*, where the employee was discharged for shoplifting from a store other than the one where she was employed. Rather, the actions in this case were more in line with those in *Kobusky v. Com., Unemployment Compensation Bd.*

of Review, 46 Pa. Commw. 613, 406 A.2d 1226 (1979), where an employee of the hosiery department in K Mart stole merchandise from another department, or in *Ryan, supra*, where a forklift operator was discharged for taking an employer's oxygen bottle during off-duty hours.

It goes without saying that Poore's employment had nothing to do with his taking electrical and water services from the employer over a period of 10 years without paying for them; i.e., the same improper and unlawful acts could have been accomplished no matter for whom he worked. However, to say that one who does take things unlawfully from a governmental employer over this extended period of time has not done something connected with his employment overlooks the relationship existing between a governmental unit and its citizens. Toleration of such conduct by a governmental employer would reflect unfavorably upon the employer in the eyes of the public. Such an unacceptable standard of behavior by the employee in this instance was directly related to the employee's ability to handle his duties because he owed his employer both loyalty and honesty. See *Green v. Com., Unemployment Compensation Bd.*, 87 Pa. Commw. 176, 486 A.2d 1052 (1985).

We hold as a matter of law that a governmental employee's conduct that evinces a conscious and intentional disregard of standards of behavior which one's governmental employer would have a right to expect from such employee constitutes misconduct in connection with the employee's employment, where continued employment would create a genuine threat to the integrity of the governmental employer and reflect unfavorably upon the governmental employer in the eyes of the general public. See *Matter of McCallum*, 126 A.D.2d 833, 510 N.Y.S.2d 322 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

There is absolutely no question that applicant, Gordon R. Poore, was guilty of unlawful, gross, flagrant, and willful misconduct such as to warrant the termination of his employment with the City of Minden; this notwithstanding that

it seems impossible his thefts could have continued without discovery for a whole decade without at least one other agent of the good citizens of Minden being less than diligent.

Nonetheless, I must dissent because the question is not whether Poore should have been fired, but whether the law disqualifies him from receiving unemployment benefits. The majority concedes that in order for him to be so disqualified, the misconduct must have been connected with applicant's work. See *Great Plains Container Co. v. Hiatt*, 225 Neb. 558, 407 N.W.2d 166 (1987). Indeed, Neb. Rev. Stat. § 48-628(b) (Reissue 1988) provides that an applicant is disqualified for benefits

> [f]or the week in which he or she has been discharged *for misconduct connected with his or her work* . . . and for not less than seven weeks nor more than ten weeks which immediately follow such week . . . except that if . . . such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits . . . .

(Emphasis supplied.) Thus, all misconduct disqualifications are dependent upon a work connection; the nature of the misconduct affects only the period of disqualification.

The majority acknowledges that Poore's "employment had nothing to do with his taking electrical and water services," as he could have done the same thing "no matter for whom he worked." It then declares a rule which requires public employees to be worthier of esteem than the citizens he or she serves and makes all public employee behavior which "evinces a conscious and intentional disregard of standards of behavior which [the] governmental employer would have a right to expect" work-connected misconduct. Although such a rule may well be appropriate when considering the behavior of a judge, mayor, or other public servant in whom citizens justifiably repose special trust and confidence, there is nothing in § 48-628 which makes such a rule applicable to a garbage collector who seeks unemployment benefits while he adjusts to his newfound status in life.

While the majority opinion may be emotionally satisfying, it is not legally defensible. Accordingly, I would reverse the

judgment of the district court and direct the award of appropriate benefits.

GRANT, J., dissenting.

I respectfully dissent. Neb. Rev. Stat. § 48-628 (Reissue 1988) provides, in pertinent part, "An individual shall be disqualified for benefits: . . . (b) For the week in which he or she has been discharged for misconduct connected with his or her work . . . ." The later reference to "gross" misconduct in that statute has only to do with the fact that the commissioner may *totally* disqualify an employee for gross misconduct, rather than disqualify the employee "for not less than seven weeks nor more than ten weeks" for lesser misconduct. Any misconduct, gross or other, must be, under the plain words of the statute, "connected with [the employee's] work."

Appellant's misconduct was not connected with his work. As far as the record shows, he was an exemplary, laboring garbageman. His conduct was wrongful in his actions as a landowner. It is not determinative, of course, but it is hard for me to think appellant's actions were more wrongful than the actions of the City of Minden were negligent—if one can compare apples and oranges.

The City of Minden had every right to fire appellant, but no one should be able to deprive him of unemployment benefits, unless such deprivation is authorized by statute.

I would reverse.

ED BLOOMFIELD, APPELLANT, V. NEBRASKA STATE BANK, APPELLEE.

465 N.W.2d 144

Filed January 25, 1991. No. 88-757.

1. **Motions to Dismiss: Appeal and Error.** In reviewing the evidence on a motion to dismiss, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

2. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
3. **Contracts: Intent.** To have an implied contract there must be evidence of mutual intent; without such evidence there cannot be an implied contract.
4. **Debtors and Creditors: Words and Phrases.** A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.
5. **Debtors and Creditors.** In a debtor-creditor relationship, superiority alone does not create a fiduciary duty.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

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

Daniel L. Hartnett, of Crary, Huff, Clem, Raby & Inkster, for appellee.

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

HASTINGS, C.J.

Plaintiff, Ed Bloomfield, has appealed from an order dismissing his petition at the close of plaintiff's case. We affirm.

The petition alleged two causes of action against the defendant, Nebraska State Bank (NSB), arising out of financial relations between Bloomfield and the bank—one claiming a breach of contract by the bank to renew Bloomfield's operating line of credit, and one claiming breach of the bank's fiduciary duties in terminating Bloomfield's operating credit, accelerating Bloomfield's operating loan, and compelling Bloomfield to sell his livestock and other income-producing assets in a commercially unreasonable manner.

Bloomfield has farmed since 1971 and has land in Dixon and Dakota Counties. He began banking with NSB in January 1982, and according to NSB's loan file notes, Bloomfield had promissory notes renewed on May 10, 1982, January 24, 1984, and December 24, 1984. The note renewal of December 24 concerned the note which is one of the subjects of this lawsuit.

In January 1985, Bloomfield had three outstanding loans with NSB. The first note was due on February 1, 1985, in the

amount of $115,000. The second note was due on November 14, 1985, in the amount of $43,500. The remaining note was due on January 15, 1986, in the amount of $30,000. The security for these notes was Bloomfield's farm products, livestock, and equipment.

Bloomfield testified that on January 29, 1985, a loan officer for the bank stated that Bloomfield had been a good customer and that there would be no problem in extending him credit. However, the loan officer did not promise to extend Bloomfield's loan or issue new loans. There was testimony that NSB's records indicate that Bloomfield's loan rating had dropped to a six. A six rating indicates that the loan repayment is classified as doubtful or a possible loss. This low rating was a substantial drop from Bloomfield's previous high ratings in 1984. Additionally, NSB sent Bloomfield a letter to arrange for a farm visit to verify collateral, in response to which Bloomfield was uncooperative.

Bloomfield testified that he had signed several notes with NSB during the time he did business with the bank and that there were a lot of them that did not get paid when due. He would get the notes extended, usually for a term of 6 months. In order to obtain additional financing he would make out financial statements for the bank. This would be approximately an annual event. Bloomfield had signed notes for NSB of $30,000, due January 15, 1986; for $43,500, due November 14, 1985; and for $115,000, due December 1, 1984.

Bloomfield testified that on December 14, 1984, he paid the interest on the $115,000 note, which was then overdue, so the bank extended the due date to February 1, 1985. On January 29, 1985, Bloomfield signed a new security agreement, for the reason, as he put it, "We did that about every year." It was at that time, Bloomfield claimed, that Jeffrey Gebauer, representing the bank, told him that he, Bloomfield, had always been a good customer and that there would be no problem extending credit for another year.

However, Bloomfield received a letter from Gebauer dated January 31, 1985, which in effect told Bloomfield that due to the deterioration in his current financial position, it was necessary for the bank to make a visit to the farm operations to

observe livestock on hand and take an inventory of equipment. The letter asked that Bloomfield cooperate in contacting the bank to arrange a date for the visit. Bloomfield testified that although it did not make any difference to him whether the bank wanted to make a visit, still, it made him mad, and he just was not going to go with the bank representative.

Bloomfield testified that it was his intention to pay the operating note that came due on February 1, 1985, but that there would have been a little carryover. He told the bank that the carryover would amount to probably $50,000. He also said that he expected to borrow some more money on top of that.

In February 1985, Bloomfield learned that the bank was calling his loan. He thought that he had been told by Gebauer of this fact, but in any event he did receive a letter dated February 22, 1985, signed by Gebauer, which advised that the bank had assigned Bloomfield's certificates of deposit and savings account, totaling $59,319.16, to his existing debt. The amount of $2,381.32 was applied to Bloomfield's overdrawn checking account, and $2,528.44 was applied to the accrued interest on the $115,000 note and $54,409.40 to the principal, leaving a balance remaining and due of $49,590.60 on that particular note as of February 22, 1985. Bloomfield said that he also got information from talking to Gebauer that the bank was not going to renew his note. As a matter of fact, the bank filed a replevin action against Bloomfield, seeking to obtain his equipment, cattle, and grain to pay off the indebtedness. However, Bloomfield arranged for a private sale, the proceeds of which were used to pay off the bank in its replevin action except for approximately $10,000 of a note that was not due until January 15, 1986, which the bank consented to "leave in place" until that date.

Bloomfield then testified as to some land that he claimed he had to sell, apparently because NSB would not loan him operating capital, and also as to crops he could not raise for the same reason. He said that he went to several other banks seeking financing, but was unable to obtain any credit.

Bloomfield attempted to prove loss of profits by testifying in rather vague terms as to production he obtained from certain farms in 1986. This was in support of his claim for damages.

On cross-examination Bloomfield admitted that Gebauer, of NSB, made no promise to him about extending credit for 1985 and beyond, and there was no discussion between the two of them about the amount of money the bank might loan Bloomfield, what the interest rate would be, the size of any possible loan, the nature or amount of collateral that would be required to be pledged, or the term of any such possible loan.

Bloomfield offered the deposition testimony of Gebauer. Gebauer testified that on February 19, 1985, he received a call from Lincoln Grain indicating that Bloomfield had requested that Lincoln Grain issue a check in the name of Bloomfield's nephew, Aaron Nelson, which represented the proceeds from the sale of some of Bloomfield's grain. Gebauer said that he became concerned because NSB had an all-inclusive security agreement filed on Bloomfield's property.

Although Bloomfield had testified that the check from Lincoln Grain was for grain that his nephew had earned as part of an agreement with Bloomfield for helping him farm, there was pretrial deposition testimony by Bloomfield that he had never told the bank about giving Nelson 100 acres of corn for his labor.

Bloomfield then offered the testimony of Roy Yaley, president of NSB. He testified that the bank became concerned when it found out about the check from Lincoln Grain because this would mean that Bloomfield was selling grain out of trust; i.e., the bank had a lien on all of Bloomfield's property, this particular grain was deposited with Lincoln Grain as Bloomfield's property, and the proceeds from the sale of that property were going to someone else. Yaley went on to testify that the bank had reviewed Bloomfield's line of credit periodically and the bank knew that there had been a problem getting an inspection of Bloomfield's property. According to Yaley, the decision to call Bloomfield's loan was made on February 20, 1985. As Yaley testified: "Here we got a loan past due, we got a loan that we can't make an inspection on, and we have got a loan where the customer is trying to sell mortgage property out of trust. We don't have any other choice."

Also introduced into evidence by Bloomfield were the bank's comments in the loan file, a journal-like document that shows

every transaction which occurred and memos made reflecting activity in the loan file. An entry dated January 24, 1985, discloses checks of Bloomfield's making payments on notes to the Federal Land Bank and Norwest Bank. Bloomfield's debts of $30,495.75 to the Federal Land Bank and $9,754 to Norwest Bank, previously unknown to NSB, were thereby discovered.

In reviewing the evidence on a motion to dismiss,

> the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

Tiede v. Loup Power Dist., 226 Neb. 295, 299, 411 N.W.2d 312, 316 (1987). In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Tiede v. Loup Power Dist., supra.*

The express terms of the note for $115,000 which was called provided that "[i]f the note is not paid when due or if holder believes itself insecure, the entire note will become due and collectible at once . . . ." There was no question but that the note was overdue and in default, and the bank was entitled to call it.

The only questions with which we must deal are whether, as alleged in plaintiff's petition, the bank breached a contract arising from a course of dealing with Bloomfield of providing Bloomfield with operating capital from year to year as he needed it and whether the bank breached a fiduciary duty which, it was alleged, existed between Bloomfield and the bank to give Bloomfield adequate notice of its intention of terminating his credit.

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Neb. U.C.C. § 1-205(4) (Reissue 1980). We have previously referred to the express terms of the contract which gave the

bank the right to call the loan when Bloomfield was in default of payment. By not meeting his obligation on the due date of February 1, 1985, Bloomfield had defaulted on his loan.

Bloomfield argues that the course of dealing between the parties made it reasonable for him to expect that the past-due promissory note would be renewed if he could not make payment in full at the time of maturity. A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. § 1-205(1).

This amounts to a claim that there was an implied contract between Bloomfield and NSB to continue to renew notes without payment so long as Bloomfield desired credit. However, to have an implied contract there must be evidence of mutual intent; without such evidence there cannot be an implied contract. *Alward v. United Mineral Products Co.*, 197 Neb. 658, 250 N.W.2d 623 (1977).

Bloomfield began banking with NSB in January 1982, and according to NSB's loan file notes, Bloomfield had promissory notes renewed on May 10, 1982, January 24, 1984, and December 24, 1984. The note renewal of December 24, 1984, however, concerned the note at issue, and thus there were only two previous note renewals while Bloomfield banked with NSB. Two note renewals over a 3-year period of doing business can hardly establish a course of dealing to automatically renew mature promissory notes without payment. A promise or mutual intent to indefinitely renew Bloomfield's promissory notes cannot be inferred from the parties' course of conduct in this instance.

Bloomfield maintains that NSB's decision not to renew his line of credit and to accelerate his notes was a breach of a covenant of good faith. Neb. U.C.C. § 1-203 (Reissue 1980) states that every contract within the code encompasses an obligation of good faith in its performance or enforcement. The good faith obligation can exist in a debtor-creditor relationship. See *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985).

However, *Yankton Prod. Credit Assn.* is distinguishable

from the case at bar in the first instance because it was decided on a motion for summary judgment; whereas here, the plaintiff was permitted to introduce all his evidence. In *Yankton Prod. Credit Assn.* there was evidence introduced in the summary judgment proceedings that the lending agency approved a request for a loan of $821,982.37, a note was signed, and thereafter the lending institution "refused to loan the Larsens the remainder of the previously committed $570,000 for livestock inventory." *Id.* at 613, 365 N.W.2d at 432.

In the present case there was no evidence from which it could be inferred that there was a continuing agreement to furnish Bloomfield money regardless of the circumstances. The most that Bloomfield would say was that the bank told him his chances for a loan did not look too bad. As set forth above, Bloomfield testified that there was never any promise on the part of the bank to extend his credit, no discussion as to any amount that might be loaned, and no discussion as to interest rate or term of a loan. There simply is no credible evidence from which it could be inferred that there was an implied contract to continue Bloomfield's line of credit based on previous dealings.

Bloomfield cites three cases from other jurisdictions on the issue of a good faith obligation on the part of NSB: *State Nat. Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 (Tex. App. 1984); *Pecos Const. Co. v. Mortgage Invest. Co. of El Paso*, 80 N.M. 680, 459 P.2d 842 (1969); and *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985). Those cases are all factually different from the case at bar. In each of those cases there was an existing written and signed contract extending loans or promising money to debtors. Here, there is no such contract. Additionally, in *State Nat. Bank* the debtor was not in default at the time the creditor accelerated the loan repayment and the creditor was attempting to run the company.

Bloomfield asserts that NSB breached its fiduciary duty. "[A confidential] relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind." *Boettcher v. Goethe*, 165 Neb. 363, 378, 85 N.W.2d 884, 892 (1957). Accord *Schaneman v. Schaneman*, 206 Neb. 113, 291 N.W.2d 412 (1980). Bloomfield contends that NSB has a fiduciary duty

(confidential relationship) because NSB was in complete control of Bloomfield's financing ability. NSB maintained a lien on pledged collateral; thus, Bloomfield could not use this collateral to obtain additional financing. It is apparent from its position as a bank that NSB did possess superior bargaining position; however, superiority alone does not create a fiduciary duty. There must be an opportunity to influence. *Schaneman v. Schaneman, supra.* Bloomfield offered no evidence that in this debtor-creditor relationship there was an opportunity to influence. Furthermore, at trial, Bloomfield offered no evidence relating to the disparity of bargaining power between the parties, whether a special relationship existed between the parties (besides that of debtor-creditor), or whether NSB advised Bloomfield on his farming operation. Viewing the evidence most favorably to Bloomfield, we find that the trial court did not err in concluding that Bloomfield failed as a matter of law in establishing a breach of any fiduciary relationship.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN A. CORTIS, APPELLANT.
465 N.W.2d 132

Filed January 25, 1991. Nos. 89-660, 89-661.

1. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question for appeal.
2. **Constitutional Law: Search and Seizure.** Capacity to claim the protection of the fourth amendment depends upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
3. _____: _____. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.
4. **Search and Seizure: Standing.** Whether an accused has asserted an interest in the

property seized is a factor in determining whether he or she has standing to challenge a search under which that property has been seized.

5. **Pretrial Procedure: Motions to Suppress: Standing: Testimony.** At a suppression hearing, a defendant may testify as to an interest in property such as to give him standing, and his or her testimony cannot be used against him at trial.
6. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly wrong.
7. **Search and Seizure: Standing: Case Overruled.** The holding in *State v. Schrader*, 196 Neb. 632, 244 N.W.2d 498 (1976), that one charged has automatic standing to contest a search and seizure where an element of the crime charged is possession, is overruled.
8. **Arrests: Warrants: Probable Cause: Affidavits: Proof.** To invalidate an arrest warrant on the grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with a reckless disregard for the truth. Even if the foregoing is met, the arrest may be upheld if after the offending material is disregarded, there remains sufficient content in the affidavit to support a finding of probable cause.
9. **Arrests: Warrants: Probable Cause: Affidavits.** In determining whether probable cause exists for the issuance of an arrest warrant, the issuing magistrate is to make a commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of the persons supplying the hearsay information, there is a fair probability that the defendant was implicated in the crime.
10. **Warrants: Probable Cause: Affidavits: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.
11. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
12. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
13. **Witnesses: Impeachment: Prior Statements.** A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertions about those facts. A witness' prior inconsistent statement may be used to impeach the witness only on matters relevant to and otherwise admissible on some issue in the case tried.
14. **Trial: Evidence: Appeal and Error.** A trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion.
15. **Criminal Law: Controlled Substances: Intent.** It shall be unlawful for any

person knowingly or intentionally to possess with intent to manufacture, distribute, deliver, or dispense a controlled substance.

16. **Criminal Law: Conspiracy: Intent.** A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony, he or another person with whom he conspired commits an overt act in pursuance of a conspiracy.
17. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
18. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
19. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt.
20. **Conspiracy: Circumstantial Evidence: Proof.** A conspiracy need not be established by direct evidence of acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished.
21. **Conspiracy.** A person can be found guilty of conspiracy when his or her sole coconspirator has not been charged with conspiracy.
22. _____. When a conspiracy has been proved, a conspirator's acts and declarations in furtherance of the conspiracy are the acts and declarations of all conspirators.
23. **Criminal Law: Intent: Circumstantial Evidence: Proof.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Robert B. Deck for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

FAHRNBRUCH, J.

Steven A. Cortis appeals his bench trial convictions in the

Dakota County District Court for possession with intent to manufacture a controlled substance and for conspiracy. We affirm.

Cortis' four assignments of error combine to assert that the trial court erred in (1) failing to suppress certain evidence obtained as a result of improper search and arrest warrants, (2) limiting impeachment of a witness, and (3) finding that the evidence was sufficient to convict the defendant of the offenses charged.

An unidentified person telephoned the Dakota County sheriff's office on May 21, 1988, and spoke with Doug Johnson, a Nebraska State Patrol narcotics investigator. The informant, later determined to be Colene Barker, informed Johnson that she had knowledge that someone was growing marijuana in Dakota County, that this individual was not acting alone, and that the informant was concerned about the individual "getting into trouble." Barker had never previously acted as a confidential informant.

On May 23, 1988, Barker met with the Dakota County Attorney regarding a problem she was having with neighbors. At that time, she informed the county attorney that one Nancy Brown was growing marijuana. On that same day, Barker also spoke to Johnson, at the South Sioux City Police Department. Barker told Johnson that Brown, who resided in Homer, Nebraska, in a rented house, had several marijuana plants growing in her home and that Brown's boyfriend, Steve, was the "brains" behind the operation. Barker was a coworker and friend of Brown's. It was later discovered that Steve Cortis, the defendant, was Brown's boyfriend. Barker provided Johnson with a map of Brown's residence and information on the location where the dried marijuana was being stored and how it was being stored. Johnson did not investigate Barker's background and had no further contact with her prior to serving the search warrant on the Brown residence.

Based upon the information provided by Barker and independent knowledge possessed by Johnson, an affidavit and complaint for a search warrant was sworn to before a clerk magistrate. A search warrant for Brown's home was obtained and executed at 2:45 p.m. on May 23, 1988.

At the time of the search, Brown was home alone. A strong odor of marijuana pervaded the house. In a room adjacent to Brown's bedroom, law enforcement officers discovered plastic buckets containing 12 growing marijuana plants arranged beneath a grow light, a timing device to operate the grow light, chemicals used for growing plants, a fan, an incubator for starting immature marijuana plants, and a sprayer. The windows in the room in which the growing marijuana plants were discovered were covered by blankets. In another room, officers discovered processed marijuana in a bucket and cut marijuana in plastic and burlap bags. Testing performed at the Nebraska State Patrol Criminalistics Laboratory verified that the evidence seized was, in fact, marijuana. Officers also discovered a book entitled "Cannabis Alchemy" in Brown's bedroom.

Two spiral notebooks were also seized from Brown's dwelling. When Brown was not at home, the notebooks were kept on the porch for Brown and visitors to leave messages for one another. Several incriminating messages in the notebooks were signed by either "Nancy" or "Steve."

Johnson believed that the "Steve" to whom Barker referred was a Steve R. He was thought to be involved in the use and sale of controlled substances. The affidavit in support of the search warrant reflects Johnson's belief that Steve R. was involved in growing marijuana with Brown. When Brown was questioned at her home regarding Steve R., she informed Johnson that the only "Steve" she knew was Steve Cortis, her boyfriend. At that time, Cortis lived on a farm near Walthill, Nebraska.

Thereafter, the Dakota County Attorney swore out an affidavit in support of a warrant for Cortis' arrest, which was granted. Cortis was arrested, and his *Miranda* rights were explained to him. No issue has been raised in this court regarding his *Miranda* rights.

By separate informations, the defendant was charged with possession with intent to manufacture a controlled substance (marijuana), in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), and with conspiracy to commit the foregoing, in violation of Neb. Rev. Stat. § 28-202 (Reissue 1989), both of which are Class III felonies, §§ 28-416(2)(b) and

28-202(4). A Class III felony is punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Cortis pled not guilty to each charge. The cases were consolidated for trial, and a jury trial was waived.

Cortis filed separate motions to suppress (1) evidence seized pursuant to the search warrant executed at Brown's residence, (2) statements made by Cortis after his arrest, and (3) physical identifying characteristics obtained as a result of his arrest. The district court overruled all three motions. The defendant was found guilty on both counts and sentenced to a term of imprisonment of 6 to 10 years on each charge, the sentences to run concurrently.

I. SEARCH WARRANT

As stated, Cortis' motion to suppress the evidence seized pursuant to the search of Brown's home was overruled. At trial, Cortis unsuccessfully renewed his objections to the admission into evidence of a videotape of the search, photographs of the evidence seized in Brown's house, the book entitled "Cannabis Alchemy," and the two notebooks containing correspondence between Brown and Cortis. Thus, Cortis has preserved any alleged error in regard to these items for appeal. See *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990) (in a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question for appeal).

Barker, the confidential informant, had previously been twice convicted of forgeries which occurred 8 or 9 years prior to trial and had sought counseling in 1976 when her mother died and again in 1983 after she lost three children in a fire. She testified that on occasion when she visited Brown's residence, she smoked marijuana.

Cortis argues that Barker was not a reliable informant. He asserts that Johnson should have made a simple check into Barker's background to determine if she had a criminal or psychiatric history and if she was under the influence of drugs

or alcohol at the time of her observations.

The parties stipulated that the searched premises were leased solely to Brown beginning on February 1, 1988. The question necessarily arises as to whether Cortis has standing to attack the search of Brown's home.

In *Minnesota v. Olson*, ____ U.S. ____, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), the police suspected Robert Olson of driving a getaway car involved in a robbery-murder. Olson, who resided elsewhere, spent the night of the robbery on a floor of a duplex with the occupants' permission. He had a change of clothes with him there. Olson was never given a key to the duplex. On the day following the robbery-murder, without seeking permission and with weapons drawn, officers entered the duplex at 3 p.m., found Olson in a closet, and arrested him. Olson later sought to suppress inculpatory statements made to the police after his arrest. The threshold issue was whether Olson had standing to attack a warrantless entry into the duplex where he was an overnight guest to effect his arrest. In analyzing the issue, the Court explained:

> Since the decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it has been the law that "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). A subjective expectation of privacy is legitimate if it is " 'one that society is prepared to recognize as "reasonable," ' " *id.*, at 143-144, n. 12, 99 S.Ct., at 430, n. 12, quoting *Katz, supra*, at 361, 88 S.Ct., at 516 (Harlan, J., concurring).

Olson, supra at 110 S. Ct. at 1687. See, also, *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990) (standing to assert fourth amendment violation premised on person claiming the protection of the amendment having a legitimate expectation of privacy in the invaded place); *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989).

Applying the foregoing test, the *Olson* Court held, "We need go no further than to conclude, as we do, that Olson's status as

an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Olson, supra* at 110 S. Ct. at 1688.

Brown and Cortis both testified that Cortis stayed overnight "[a] couple times" at Brown's house in Homer. They further testified that at the time of Brown's arrest, they had not seen each other in 2 or 3 weeks.

In significant contrast to *Olson, supra*, Cortis was not a current overnight guest at the time of the police intrusion. Indeed, the two had not seen each other for 2 to 3 weeks preceding the search of Brown's house. On that basis, it cannot be said that Cortis had an expectation of privacy in Brown's home which society is prepared to recognize as reasonable. Any other conclusion would result in an overnight guest's having a permanently protected fourth amendment interest in a place in which he or she once stayed, no matter how remote in time.

It could be argued that despite the fact that Cortis was not an overnight guest at Brown's at the time of the search, he nevertheless had a legitimate expectation of privacy in Brown's residence. See, generally, 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.3(c) (West 1987).

In *Harms, supra*, Michael Harms challenged a seizure of a notebook from a portable shed placed on Dennis Jurgens' property. We began our analysis there by noting that "the capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." *Harms, supra* at 887, 449 N.W.2d at 5. This court further asserted that ownership and possessory rights in "places" are still important in determining whether a particular person has a legitimate expectation of privacy in a particular place.

A number of factors not present here led this court to conclude that the defendant in *Harms, supra*, had standing to assert a fourth amendment challenge to the search of the shed. The shed was built by Jurgens and Harms. Both of them stored tools and personal property in the shed. The shed was kept locked, and only Harms and Jurgens had keys to the lock.

In *State v. Gonzalez*, 211 Neb. 697, 320 N.W.2d 107 (1982), *cert. denied* 459 U.S. 1039, 103 S. Ct. 454, 74 L. Ed. 2d 607, the Omaha police, on the basis of confidential, reliable information, placed a residence located on Frederick Street under surveillance. Police officers followed a man leaving that residence to a duplex located on Jackson Street. A short time after the man left the duplex, the police observed the defendant and three other people leave the Jackson Street residence. The defendant and another individual were arrested a short time later after departing the scene in a Cadillac. A large amount of money was seized from the automobile. Police further discovered cocaine and money in the Jackson Street duplex. The defendant moved to suppress any items seized or derived from a search of that residence.

This court concluded that the defendant did not have standing to question the search of the duplex. We reasoned, "There was no showing whether the defendant was, in fact, ever residing at the Jackson Street address, had a key for entry to that address, rented or owned the property, exercised any type of control over the property, or kept any clothing or personal belongings at the property." *Id.* at 703, 320 N.W.2d at 111.

As stated in Cortis' case, the premises were rented solely to Brown. During the time Brown lived at her house in Homer, the defendant resided on a farm near Walthill, Nebraska. Brown testified that Cortis did not have a key to her house and that she did not give him a key or hide one for his access. Cortis testified that he occasionally had access to Brown's home when she left the door unlocked.

While the record reflects that Cortis took to Brown's home a variety of garden plants for her to tend, Brown testified that these plants were kept on an enclosed porch. The porch was locked on only one or two occasions. There was no evidence that Cortis kept any clothing or personal belongings at Brown's house. Brown testified that while she resided in Homer, there were times she did not see Cortis for weeks.

Moreover, Cortis never asserted an interest in the property seized. Whether an accused has asserted an interest in the property seized is a factor in determining whether he or she has standing to challenge a search under which that property has

been seized. *State v. Barajas*, 195 Neb. 502, 238 N.W.2d 913 (1976); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied* 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977). See, also, *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (holding that petitioners did not have standing because they did not assert either a property or possessory interest in the place searched nor an interest in the property seized). Any argument that by asserting an interest in the property seized, Cortis would be faced with the dilemma that his admission could be used against him at trial has been foreclosed. At a suppression hearing, a defendant may testify as to such an interest as to give him standing, and his or her testimony cannot be used against him at trial. *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly wrong. *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990). See, also, *U.S. v. Rubio-Rivera*, 917 F.2d 1271 (10th Cir. 1990) (controverted facts under standing issue reviewed under clearly wrong standard); *U.S. v. McBean*, 861 F.2d 1570 (11th Cir. 1988) (trial court's finding that a defendant has a subjective expectation of privacy may not be reversed unless clearly erroneous). While the trial court did not set forth its findings of fact in overruling Cortis' motion to suppress, it cannot be said that the court was clearly wrong in overruling the motion. Cortis never resided in Brown's home, which was rented solely to her; he did not have a house key or access to one; he did not exercise control over the premises; other than the garden plants which were kept on an unlocked porch, Cortis had no personal property at the home; and he claimed no interest in the items seized.

Cortis was charged with possession with intent to manufacture a controlled substance. This court is aware that it has previously held that where possession is an element of the offense charged, the one charged has automatic standing to contest the search and seizure. See *State v. Schrader*, 196 Neb. 632, 244 N.W.2d 498 (1976). *Schrader, supra*, relies on *Jones v.*

United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), for that holding. Since *Jones, supra*, was overruled in *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), it follows that the holding in *Schrader, supra*, that one charged has automatic standing to contest a search and seizure where an element of the crime charged is possession, is no longer controlling and is hereby overruled.

Because Cortis lacked standing to attack the search of Brown's home, we need not reach the question of the sufficiency of the search warrant. This assignment of error is without merit.

II. ARREST WARRANT

In an affidavit in support of Cortis' arrest warrant, the Dakota County Attorney stated in paragraph 3 that "Defendant, Nancy K. Brown upon being interrogated indicated that she had been cooperating with another individual in growing said marijuana and processing said marijuana and identified said individual as Steve Cortis."

Johnson stated that he alone interrogated Brown and that Brown never told him that Cortis was involved in growing marijuana. Brown testified that she did not at any time inform law enforcement officers that Cortis was involved in growing marijuana with her.

Cortis contends that without the allegedly false statement in paragraph 3 of the affidavit, an arrest warrant would never have been issued. If he had not been arrested, Cortis maintains, the State would have been unable to obtain his fingerprints and handwriting exemplar, which were used to his detriment at trial.

Before proceeding to an analysis of this issue, we note that while Cortis filed a pretrial motion to suppress statements made to law enforcement officers after his arrest on the basis that he was unconstitutionally arrested, he has not pursued this contention on appeal. Although we need not reach the issue regarding Cortis' postarrest statements, see *State v. Thomas*, 236 Neb. 568, 462 N.W.2d 618 (1990) (Supreme Court will consider only those errors assigned and discussed), Cortis' assignment of error respecting his fingerprints and handwriting samples necessarily raises the question of the constitutionality

of his arrest.

To invalidate an arrest warrant on the grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with a reckless disregard for the truth. *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989); *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983). Even if the foregoing is met, the arrest may be upheld if after the offending material is disregarded, there remains sufficient content in the affidavit to support a finding of probable cause. *Cullen, supra*; *Williams, supra*. It is assumed arguendo, for purposes of analysis, that paragraph 3 contains deliberate falsehoods or statements made with a reckless disregard for the truth.

Excluding allegedly deliberate falsehoods and statements made with a reckless disregard for the truth, the arrest warrant affidavit, dated May 26, 1988, discloses in substance that a search warrant was obtained for Brown's home; that the warrant was based on confidential information that the home was being used to grow and manufacture marijuana; that a search of Brown's home in Homer, Nebraska, on May 23, 1988, yielded 3 large containers of processed marijuana and 12 plastic buckets in which marijuana plants were growing; and that information obtained at the scene indicated that Brown and Cortis had cooperatively raised and processed the marijuana together in the home and had been doing so for some time.

In determining whether probable cause exists for the issuance of an arrest warrant, the issuing magistrate is to make a commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of the persons supplying the hearsay information, there is a fair probability that the defendant was implicated in the crime. *Williams, supra*. "A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner." *Cullen, supra* at 60, 434 N.W.2d at 549. "The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate

had a substantial basis for concluding that such existed." *Id.*

Disregarding the allegedly offending statements in the affidavit in support of Cortis' arrest warrant, we conclude that the remaining material in the affidavit sufficiently demonstrates a fair probability that Cortis was implicated in the marijuana growing operation. The magistrate had a substantial basis for finding that there was probable cause to arrest Cortis.

III. IMPEACHMENT

On cross-examination, Barker testified that on occasion she smoked marijuana while visiting Brown's home. She further testified that she was never under the influence of any other drug when she visited Brown's house. The court sustained the State's objection when Cortis' attorney asked Brown's brother, "Did Colene Barker ever take any other type of drugs?" Cortis argues that because Barker's credibility was crucial, the district court committed prejudicial error by not allowing him to impeach her on this point.

Cortis never made an offer of proof as to what Brown's brother would have testified if so permitted. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); Neb. Rev. Stat. § 27-103 (Reissue 1989). Even if it is assumed that the error was preserved for appeal on the basis that the substance of the evidence to be offered by the testimony was apparent from the context in which the question was asked, this assignment of error is without merit.

As this court declared in *McCune v. Neitzel*, 235 Neb. 754, 760, 457 N.W.2d 803, 808-09 (1990): "A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertions about those facts. A witness' prior inconsistent statement may be used to impeach the witness *only* on matters relevant to and otherwise admissible on some issue in the case tried." See, also, Neb. Rev. Stat. § 27-608(2) (Reissue 1989) (specific instances of the conduct of

a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Neb. Rev. Stat. § 27-609 (Reissue 1989), may not be proved by extrinsic evidence). The fact that Barker may have used drugs other than marijuana was irrelevant to whether Cortis was guilty of the offenses charged. Her drug use was not a matter which Cortis could show absent her impeachment. The district court did not abuse its discretion in excluding this evidence. See *State v. Baltimore,* 236 Neb. 736, 463 N.W.2d 808 (1990) (a trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion).

IV. SUFFICIENCY OF THE EVIDENCE

Section 28-416(1) provides in relevant part that "it shall be unlawful for any person knowingly or intentionally: (a) To . . . possess with intent to manufacture, distribute, deliver, or dispense a controlled substance . . . ." Marijuana is a controlled substance. See Neb. Rev. Stat. §§ 28-404 and 28-405 (Reissue 1989). "A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony . . . [h]e or another person with whom he conspired commits an overt act in pursuance of a conspiracy." § 28-202. In his final assignment of error, Cortis argues that the evidence was insufficient to convict him of either charge.

> In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

State v. Badami, 235 Neb. 118, 126, 453 N.W.2d 746, 751 (1990).

> "On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as

unsupported by evidence beyond a reasonable doubt." *State v. Zitterkopf*, 236 Neb. 743, 747, 463 N.W.2d 616, 620 (1990). One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt. *Badami, supra.*

Barker testified that she had been in Brown's residence in Homer many times and had seen Cortis in the growing room on at least five occasions. She further testified that she observed Cortis caring for and spraying the marijuana plants.

Barker related that on one occasion, Cortis became upset with Brown when she forgot to lock the door of the growing room and that a key to the padlock for the growing room door was kept on Brown's dresser. She testified that a disagreement had arisen between Brown and Cortis regarding marijuana cuttings, that Brown was worried that Cortis would seize all the cuttings, and that Cortis took only his cuttings.

Both Cortis and Brown testified that they would leave notes for one another in notebooks. Although the confiscated notebooks did not contain any specific reference to a marijuana growing operation, there are a number of entries in the notebooks demonstrating Cortis' involvement in the operation.

For example, Cortis wrote, "Where's the key to the Room!" (Emphasis in original.) Barker testified that Brown misplaced the key to the padlock which was attached to the growing room door and that the note refers to that incident.

In another entry, Cortis recorded, "Don't put them in grow room until they're sprayed! Hey you, if you can keep these alive there's lots more to come—if they die, that's it! . . . I opened the door, hot as hell in there." The growing room was the room in which the marijuana plants were kept. As there was evidence that the grow light increased the heat in the room, it can reasonably be inferred that the language regarding opening the door refers to the door of the growing room. Another note signed by "Steve" also refers to opening the door to allow heat to escape.

Cortis stated in another note, "Please move shorter plants to center, taller ones to outside!" As the growing marijuana plants were arranged in a circle beneath the grow light, the court could

reasonably have inferred that the reference is to those plants.

There are a number of other notes which refer to the care and maintenance of plants. Although Cortis and Brown raised a number of plants in Brown's house, the trial court, as the finder of fact, could and reasonably did conclude that the references were to the marijuana plants.

A fingerprint examiner supervisor testified that Cortis' fingerprints were found on several pages in the two notebooks and on the grow light. She declared that she was positive in her identification. A handwriting expert employed by the Nebraska State Patrol testified that Cortis made a number of entries in the two notebooks seized from Brown's house.

Cortis worked as a landscaping foreman, installing plant material, putting in edging, and pruning plants. The defendant testified that he had taken a course in plant propagation and had horticultural experience. He worked in a greenhouse while attending school and admitted that he could propagate a marijuana plant from a cutting. Hence, it is plainly evident that Cortis had the knowledge and experience to participate in a marijuana growing operation.

A conspiracy need not be established by direct evidence of acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. *State ex rel. Douglas v. Associated Grocers*, 214 Neb. 79, 332 N.W.2d 690 (1983). Barker's testimony regarding her observations of Cortis' tending to the marijuana plants in Brown's house, the notes between Cortis and Brown making references to the marijuana growing operation, and the physical evidence seized from Brown's residence, together with the reasonable inferences drawn therefrom, are sufficient to show beyond a reasonable doubt that Cortis conspired with Brown to possess with the intent to manufacture marijuana.

Cortis argues that he cannot be convicted of conspiracy because Brown, his sole alleged coconspirator, was acquitted of conspiracy by the same court which convicted him of that charge. As a matter of fact and law, Cortis is mistaken.

Brown was never acquitted of, as she was never charged with, conspiracy. Even if Brown had been so charged and

acquitted, this would not automatically result in a reversal of Cortis' conviction on the conspiracy charge. In *Platt v. State*, 143 Neb. 131, 142-43, 8 N.W.2d 849, 855 (1943), this court held: "It seems to us that reason and sound logic do not support the rule where one of two conspirators is convicted in a separate trial, that he shall be discharged because the second may be acquitted for a multitude of reasons having nothing to do with his guilt." It follows that if a person can be found guilty of conspiracy when his or her sole coconspirator has been acquitted, a person can be found guilty of conspiracy when his or her sole coconspirator has not been charged with conspiracy. There can be any number of reasons for the failure to charge a coconspirator. Cortis has no reason to complain, as the State was still required to prove at his separate trial the existence of a conspiracy between himself and Brown beyond a reasonable doubt.

Based upon Barker's testimony that she observed Cortis tending the marijuana plants; the references in the notebooks to a marijuana growing operation; and the testimony of the law enforcement officers who discovered plastic buckets containing 12 growing marijuana plants arranged beneath a grow light, a timing device to operate the grow light, chemicals used for growing plants, a fan, an incubator for starting immature marijuana plants, and a sprayer, the finder of fact could reasonably infer that Cortis knowingly or intentionally possessed with an intent to manufacture marijuana.

Cortis next asserts that he could not possess the marijuana because he was not renting or living at the house or even on the premises when the contraband was found. However, Brown, who was Cortis' coconspirator, did possess the marijuana. See *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990) (constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance). When a conspiracy has been proved, a conspirator's acts and declarations in furtherance of the conspiracy are the acts and declarations of all conspirators. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). See, also, *U.S. v. Lewis*, 902 F.2d 1176 (5th Cir. 1990)

(accused can be found guilty of possessing cocaine if a coconspirator had possession of the cocaine in furtherance of the conspiracy). As stated, there was sufficient evidence to prove the Brown-Cortis conspiracy beyond a reasonable doubt; therefore, Brown's acts are imputed to Cortis.

Cortis further complains that there was no showing of his intent to manufacture the marijuana. When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence. *Zitterkopf, supra.* A review of the evidence clearly shows that Cortis' criminal intent was proved beyond a reasonable doubt.

Taking the view most favorable to the State, there is sufficient evidence to support the district court's finding that Cortis was guilty beyond a reasonable doubt of the offenses charged. This assignment of error is without merit.

The judgments and sentences of the district court for Dakota County are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. SHERROD, APPELLANT.

464 N.W.2d 809

Filed January 25, 1991. No. 89-1481.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

A jury convicted James E. Sherrod of first degree sexual assault, a Class II felony under Neb. Rev. Stat. § 28-319(2) (Reissue 1989), which was Sherrod's second conviction for first degree sexual assault. Pursuant to § 28-319(3), the district court sentenced Sherrod to a term of imprisonment of 25 to 30 years, to be served consecutively to Sherrod's current terms of imprisonment and without eligibility for parole.

Sherrod claims that the evidence is insufficient to sustain his conviction and that the sentence imposed is an abuse of discretion.

> "In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict."

State v. Zitterkopf, 236 Neb. 743, 746-47, 463 N.W.2d 616, 619 (1990).

> "On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt."

State v. Zitterkopf, supra at 747, 463 N.W.2d at 620.

We have reviewed the record in Sherrod's case and determine that the evidence is sufficient to sustain Sherrod's conviction for first degree sexual assault, in violation of § 28-319. Also, no plain error is evident from a review of the record in Sherrod's case. An opinion with further reiteration of existing law in Nebraska and a detailed statement of facts underlying Sherrod's conviction would serve no useful purpose and would have no precedential value. Therefore, Sherrod's conviction is affirmed.

Regarding Sherrod's claim that the sentence imposed is excessive, under the circumstances and in view of all the

appropriate information presented in reference to sentencing Sherrod, the district court did not abuse its discretion in the sentence imposed on Sherrod. See *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989). Therefore, the sentence imposed on Sherrod is affirmed.

AFFIRMED.

IN RE INTEREST OF J.M.N., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

464 N.W.2d 811

Filed January 25, 1991. No. 90-146.

1. **Minors: Juvenile Courts: Words and Phrases.** The Department of Social Services is not a parent within the meaning of Neb. Rev. Stat. § 43-290 (Reissue 1988).
2. **Actions: Final Orders.** A final order is an order affecting a substantial right in an action. Neb. Rev. Stat. § 25-1902 (Reissue 1989). An order which directs the Department of Social Services to pay for the costs of treatment is a final order for purposes of § 25-1902.
3. **Minors: Juvenile Courts: Words and Phrases.** A parent is defined under the Nebraska Juvenile Code as one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition.
4. **Statutes.** Statutory language should be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning.
5. **Statutes: Legislature: Intent.** A legislative act will operate prospectively and not retrospectively, unless there is a clearly disclosed legislative intent and purpose that it should operate retrospectively.
6. **Minors: Juvenile Courts: Statutes: Time.** The amendment to Neb. Rev. Stat. § 43-290 (Reissue 1988) providing that "[i]f the juvenile has been committed to the care and custody of the Department of Social Services, the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parents" applies only where the court orders such services after the effective date of the amendment, August 25, 1989.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, GERALD E. ROUSE, Judge. Judgment of District Court reversed, and cause remanded with directions.

Robert M. Spire, Attorney General, and Royce N. Harper for appellant.

William D. Kurtenbach, Platte County Attorney, and Richard A. Fedde for appellee.

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

FAHRNBRUCH, J.

The Nebraska Department of Social Services (DSS) appeals a district court order affirming a juvenile court order finding DSS to be a "parent" and therefore liable for the cost of alcohol treatment for one of its wards.

As a matter of law, DSS is not a "parent" within the meaning of Neb. Rev. Stat. § 43-290 (Reissue 1988). We, therefore, reverse the order of the district court for Platte County, which affirmed the order of the Platte County Court, juvenile division, requiring DSS to pay $4,203.96 for alcohol treatment for one of its wards.

The parties are in agreement on the following facts: On February 10, 1984, the Colfax County Court, pursuant to Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 1982), after hearing, found J.M.N., a juvenile, to be a dependent and neglected child and made him a ward of DSS. On August 23, 1985, the same court terminated the parental rights of J.M.N.'s biological parents and continued the juvenile's placement with DSS. At all times relevant herein, the child had yet to be adopted or released from his placement with DSS.

If the Platte County Court somehow attempted to order DSS to obtain and pay for alcohol treatment for J.M.N. because he was a neglected, dependent child and ward of DSS, the court had no authority to do so, since there was no such case pending before it.

Two petitions were filed in the Platte County Court, alleging that J.M.N. was a law violator. One petition was filed on May 12, 1989, alleging that J.M.N. had committed criminal trespass in the first degree. A petition filed on March 29, 1989, alleged that he had failed to appear as ordered by the court. Both the trespass and failure to appear charges are misdemeanors under

the Nebraska Criminal Code and, as to juveniles, fall within the purview of the Nebraska Juvenile Code, under Neb. Rev. Stat. § 43-247(1) (Reissue 1988). Apparently, the Platte County Court entered some type of order on June 22, 1989. Neither the bill of exceptions nor the transcript contains that order, although in the matter presently before this court, the trial court took judicial notice of the order. The statement of facts in the brief of DSS refers to an adjudicative order of May 31, 1989, but again, that order is not disclosed in either the bill of exceptions or the transcript. If J.M.N. was not adjudicated to be a law violator, then it follows that the Platte County Court had no jurisdiction to order alcohol treatment for the juvenile, let alone order DSS to pay for the treatment.

Again, although it does not appear in the transcript, apparently, a deputy county attorney for Platte County filed a motion for support in the Platte County Court. At the hearing on the motion, the juvenile court judge stated: "This is an issue where the — *Platte County* [sic] is asking for the State of Nebraska since they have custody and jurisdiction over the juvenile to pay for his treatment/support." (Emphasis supplied.) In his order after the hearing, the juvenile court judge declared that the "*state's motion* [sic] to require the Nebraska Department of Social Services to pay the appropriate amount for the treatment [of J.M.N.] at the Valley Hope Alcoholism Treatment Center pursuant to this Court's order of June 22, 1989 is hereby sustained." (Emphasis supplied.) In its ruling on the motion, the Platte County Court made seven specific findings: (1) The case was filed under § 43-247(1); (2) J.M.N. is a ward of DSS; (3) *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988), was not applicable; (4) DSS was responsible for paying for the treatment because J.M.N. was a ward of DSS; (5) pursuant to § 43-290, the treatment program was needed; (6) under § 43-290, a parent, guardian, or custodian cannot fail to pay treatment ordered by the court on the grounds that the juvenile refuses to accept treatment; and (7) DSS is responsible for the juvenile, since the parental rights were terminated, even though he became a law violator.

The court then concluded that pursuant to § 43-290, DSS is

the same as any other parent, guardian, or custodian and is required to pay for the treatment.

Upon appeal by DSS, the district court for Platte County affirmed the order of the county court. DSS appealed to this court.

The Supreme Court has jurisdiction only to hear appeals from final orders. *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989). A final order is "[a]n order affecting a substantial right in an action . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1989). An order which directs DSS to pay for the costs of treatment is a final order for purposes of § 25-1902. *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989).

The sole issue before this court is whether DSS is a parent for purposes of § 43-290, which provides in pertinent part:

> It is the purpose of this section to promote *parental responsibility* and to provide for the most equitable use and availability of public money.
>
> Pursuant to the petition filed by the county attorney . . . in accordance with section 43-274, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a *parent* for the juvenile . . . .
>
> At such proceeding . . . the court may order and decree that the *parent* shall pay, in such manner as the court may direct, a reasonable sum that will cover in whole or part the support, study, and treatment of the juvenile, which amount ordered paid shall be the extent of the liability of the *parent*.

(Emphasis supplied.)

The juvenile court determined that DSS was a "parent" for purposes of the statute. Despite the juvenile court judge's finding, a guardian or custodian is not encompassed within the wording of § 43-290.

A "parent" is defined under the juvenile code as "one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition." Neb. Rev.

Stat. § 43-245(1) (Reissue 1988). Statutory language should be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990).

It is undeniable that at the time the Platte County Court entered its order requiring DSS to pay for J.M.N.'s alcohol treatment, "parent," as defined in the juvenile code, was clear and unambiguous. DSS, not being a parent, could not be required to pay for J.M.N.'s alcohol treatment under § 43-290. The juvenile court judge's order requiring DSS to pay for J.M.N's alcohol treatment was void from its inception.

We are not unmindful that § 43-290 was amended effective August 25, 1989, to provide in part that "[i]f the juvenile has been committed to the care and custody of the Department of Social Services, the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent." § 43-290 (Cum. Supp. 1990).

Here, J.M.N. had previously been committed to the care and custody of DSS. However, the amendment falls within the general rule that a legislative act will operate prospectively and not retrospectively, unless there is a clearly disclosed legislative intent and purpose that it should operate retrospectively. *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989). No such intent was clearly expressed by the bill amending § 43-290. See 1989 Neb. Laws, L.B. 182. We hold that the amendment to § 43-290 providing that "[i]f the juvenile has been committed to the care and custody of the Department of Social Services, the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parents" applies only where the court orders such services after the effective date of the amendment, August 25, 1989. In this case, the juvenile court ordered, and J.M.N. received, alcohol treatment before the amendment became effective.

The order of the district court for Platte County, affirming the order of the Platte County Court requiring DSS to pay for

J.M.N.'s alcohol treatment, is reversed, and the district court is directed to reverse and vacate the order of the Platte County Court, juvenile division, in this matter, and direct the Platte County Court judge to dismiss the motion filed by the deputy county attorney for Platte County.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. MICHAEL E. BOURKE, APPELLEE.

464 N.W.2d 805

Filed January 25, 1991. No. 90-177.

1. **Constitutional Law: Criminal Law: Words and Phrases.** As used in the terroristic threats statute, Neb. Rev. Stat. § 28-311.01 (Reissue 1989), the phrase "reckless disregard of the risk of causing such terror or evacuation" is not unconstitutionally vague.
2. **Criminal Law: Words and Phrases.** A reckless act, as defined in Neb. Rev. Stat. § 28-109(19) (Reissue 1989), involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another or with knowledge which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.
3. _____: _____. The phrase used in Neb. Rev. Stat. § 28-311.01(1)(c) (Reissue 1989), "reckless disregard of the risk of causing such terror or evacuation," is sufficiently definite and provides ascertainable standards of guilt to inform individuals as to what conduct will render them liable for punishment.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Exception sustained, and cause remanded for further proceedings.

Charles W. Campbell, York County Attorney, for appellant.

Mark M. Sipple, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellee.

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

WHITE, J.

This case comes to us as an appeal by the State pursuant to

Neb. Rev. Stat. § 29-2315.01 (Reissue 1989) of an order entered by the district court for York County, Nebraska, which sustained in part the defendant's motion to quash the information charging him with terroristic threats. The court's order declared that part of the state terroristic threats statute is unconstitutional. We find that the statute is constitutional, sustain the exception to the court's ruling, and remand the cause to the district court for further proceedings.

Although it is possible that this issue is not appealable as a final order at this time, we consider it, since in its posture it could evade review at a later time. As the U.S. Supreme Court has stated, "[T]he matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not 'affect, or . . . be affected by, decision of the merits of this case.' " *Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

The defendant, Michael E. Bourke, was charged by information with violation of Neb. Rev. Stat. § 28-311.01 (Reissue 1989), terroristic threats, a Class IV felony. The information was filed on November 7, 1989, alleging that he did "threaten to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror." On December 26, Bourke filed a motion to quash the information, asserting that the terroristic threats statute "is unconstitutionally vague and overbroad on its face in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, and Sections 1, 3 and 5 of Article I of the Nebraska Constitution."

After a hearing on the motion, the trial judge issued an order on January 26, 1990, finding that § 28-311.01(1)(a) and (b) is not unconstitutionally vague and overbroad, but that § 28-311.01(1)(c) is unconstitutionally vague. The court ordered the last section of the information, "or in reckless disregard of the risk of causing such terror," to be quashed and stricken from the information.

The State filed this appeal on February 9, asserting that the district court erred in determining that the statute is

unconstitutionally vague and that the defendant failed to show that he had standing to raise the constitutional challenge. The question of standing was not raised in the appellant's brief and will not be addressed.

Section 28-311.01 reads:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.
>
> (2) Terroristic threats is a Class IV felony.

The district court found only subsection (1)(c) to be unconstitutional, and the defendant did not file a cross-appeal. He thereby waives his right to object to subsections (1)(a) and (1)(b). We address only subsection (1)(c).

As the State points out in its brief, the district court did not explain its finding, nor did it identify any specific portion of the statute as vague. It appears that the court believed that the phrase "reckless disregard of the risk" was so "uncertain that an ordinary person cannot intelligently choose in advance what course of conduct is lawful or unlawful under that section."

We note first that "reckless" has been defined repeatedly in statute and case law. Neb. Rev. Stat. § 28-109(19) (Reissue 1989) defines recklessly as

> acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element 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, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

We have held that in the context of assault,

> [a] reckless act [as defined in § 28-109(19)] involves a conscious choice in a course of action, made with

> knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.

State v. Hoffman, 227 Neb. 131, 139, 416 N.W.2d 231, 237 (1987). With guidance from these sources, there should be no misunderstanding as to the meaning of reckless, and it is not unconstitutionally vague.

The current terroristic threats statute was passed after we held its predecessor to be unconstitutional in *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983). The previous statute stated: " '(1) A person commits terroristic threats if: (a) He threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person . . . .' " *Id.* at 695, 340 N.W.2d at 398. We held that the statute was vague and uncertain as to what constitutes a threat because the statute did not "define the term [or] describe how or to whom, if anyone, the threat must be made." *Id.* at 697, 340 N.W.2d at 399.

We later held that "[t]he underlying rationale of *Hamilton* is that the statute left uncertain both what constituted a threat and what constituted the likely result required." *In re Interest of Siebert*, 223 Neb. 454, 457, 390 N.W.2d 522, 524-25 (1986). The current law provides no additional guidance as to what constitutes a threat, but because only subsection (1)(c) was held to be unconstitutional, we address only the issue of "reckless disregard of the risk."

In *Hamilton*, we noted that the previous Nebraska law differed from the Model Penal Code and that the

> language of the Model Penal Code is certainly much clearer than that adopted by the Nebraska Legislature. An actor violates the Model Penal Code when he or she threatens to commit any crime of violence, with the intent to terrorize another, regardless of what the outcome of the act will be or of how the victim receives the threat. The Model Penal Code seems to be fairly definite, and not speculative as is the statute in question.

Hamilton, supra at 698-99, 340 N.W.2d at 399-400.

Under the current Model Penal Code,

> [a] person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

Model Penal Code § 211.3 at 127 (1962).

When the Nebraska law was revised in 1986, the wording of the Model Penal Code was adopted almost verbatim. Subsection (1)(c) of § 28-311.01 defines the crime with enough certainty to meet the requirements of *Hamilton* and its progeny " 'with sufficient definiteness and . . . ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. . . .' " *Hamilton, supra* at 695, 340 N.W.2d at 398, quoting *State v. Huffman*, 202 Neb. 434, 275 N.W.2d 838 (1979).

We hold that § 28-311.01(1)(c) is constitutional and sustain the exception to the finding of the district court to the contrary. This cause is remanded to the district court for further proceedings.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., dissenting.

While I agree with the majority's analysis that the phrase used in Neb. Rev. Stat. § 28-311.01(1)(c) (Reissue 1989) is not unconstitutionally vague, I must dissent on the basis that no final order was entered by the trial court, and, therefore, the State's appeal is not properly before us.

> The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal to the Supreme Court with reference to the rulings or decisions of which complaint is made. . . . Such application shall be presented to the trial court within twenty days after the *final order* is entered in the cause . . . . The county attorney shall then present such application to the Supreme Court within thirty days from

the date of the *final order.*

(Emphasis supplied.) Neb. Rev. Stat. § 29-2315.01 (Reissue 1989).

Although no party in this appeal has raised the issue of jurisdiction, "[t]his court has a duty to determine issues of jurisdiction which are apparent from the record." *J.L. Healy Constr. Co. v. State,* 236 Neb. 759, 762, 463 N.W.2d 813, 816 (1990).

We have dismissed proceedings for lack of jurisdiction under quite similar circumstances because there was no final, appealable order. In *State v. Hutter,* 145 Neb. 312, 16 N.W.2d 176 (1944), at the conclusion of all the testimony, the trial court dismissed the charges against Charles Hutter as to murder in the first and second degree, but submitted a manslaughter charge to the jury. After the jury was unable to reach a verdict, it was discharged and the cause continued for further proceeding. Thereafter, Hutter's plea in bar as to first and second degree murder was sustained, and he was ordered to be tried on the charge of manslaughter. At that point, the State filed error proceedings in this court pursuant to the statutory antecedents of Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1989), see Comp. Stat. §§ 29-2314 to 29-2316 (1929), contesting the partial granting of the plea in bar.

By motion, the question was raised whether a final order must be entered in the court below before proceedings could be brought in the Supreme Court. Section 29-2314 (1929), the statutory predecessor of § 29-2315.01 (Reissue 1989), was silent as to any requirement of a final order. Nonetheless, this court held that "a final order or judgment completely disposing of the case shall have been entered below before we will decide any questions therein presented, unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the bill was taken." *Hutter, supra* at 315, 16 N.W.2d at 177. See, also, *State v. Linn,* 192 Neb. 798, 224 N.W.2d 539 (1974) (under the terms of § 29-2315.01, the right of a county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered); *Huffman v. Huffman,* 236 Neb. 101, 459 N.W.2d 215 (1990) (generally, when multiple

issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all of the issues is an interlocutory order and is not a final order for purposes of an appeal). In applying that rule, this court in *Hutter, supra*, dismissed the appeal because the decision might have reversed or affected the action still pending in the trial court.

In *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965), a county attorney brought error proceedings pursuant to §§ 29-2315.01 to 29-2316 after a defendant's motion for a new trial had been sustained. The cause was dismissed because there was no final order. This court's explanation bears repeating:

> By their terms, these statutes do not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. Such an interpretation would permit piecemeal review, create chaos in trial procedure, and destroy the orderly and expeditious trial of criminal cases. The statute provides for a determination of such questions on appeal to this court after a "final order" has been entered by the trial court. . . . To hold otherwise would be to hold that the Legislature intended that a succession of appeals could be granted in the same case to secure advisory opinions to govern the further action of the trial court.

Taylor, supra at 45, 136 N.W.2d at 181.

Hutter, supra, is directly on point. Like the defendant in *Hutter*, Bourke still has charges pending. As the district court clearly stated in its order of January 26, 1990, it remains to be determined whether Bourke committed terroristic threats under § 28-311.01(1)(a). Any decision by this court would affect the case in which the appeal was taken. As policy considerations support a result opposite the majority's decision, I can see no reason to depart from precedent set nearly 50 years ago.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT, V. RANDAL G. MAYO, APPELLEE.
464 N.W.2d 798

Filed January 25, 1991. No. 90-178.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Exception sustained, and cause remanded for further proceedings.

Charles W. Campbell, York County Attorney, for appellant.

James H. Truell for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Pursuant to Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1989), the York County Attorney has filed error proceedings in this court, taking exception to the determination of the district court for York County that Neb. Rev. Stat. § 28-311.01(1)(c) (Reissue 1989) is unconstitutionally vague and uncertain. We sustain the exception and remand the cause to the district court for further proceedings.

Section 28-311.01 provides:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.
>
> (2) Terroristic threats is a Class IV felony.

It was alleged by information that on or about October 10, 1989, in York County, Nebraska, Randal G. Mayo threatened to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror. Mayo filed a motion for declaration of unconstitutionality requesting that the statute be declared unconstitutional "for the reason that it is vague, over-broad, and does not set standards upon which an individual may be

properly informed of the commission of a crime." On January 26, 1990, the district court entered an order declaring, "Section 28-311.01 (1) (c) is unconstitutionally vague and is so uncertain that an ordinary person cannot intelligently choose in advance what course of conduct is lawful or unlawful under that section." The court further struck the language "or in reckless disregard of the risk of causing such terror" from the information. Section 28-311.01(1)(a) was found to be constitutional by the court. On that portion of the statute, the court set the matter for arraignment on February 27, 1990, and for trial to a jury on March 19, 1990.

Under authority of § 29-2315.01, on February 7, 1990, the York County Attorney filed an application with the district court for York County for leave to file error proceedings in this court. It was and remains the county attorney's position that the district court erred in finding § 28-311.01(1)(c) unconstitutional. The district court found that the application was timely presented, that it was in conformity with § 29-2315.01, and that the part of the record which the county attorney proposed to present to this court was adequate for proper consideration of the matter. Thereafter, the application was timely presented to this court.

This identical issue was today considered in *State v. Bourke, ante* p. 121, 464 N.W.2d 805 (1991). In *Bourke*, we held that as used in § 28-311.01(1)(c), the phrase "reckless disregard of the risk of causing such terror or evacuation" is not unconstitutionally vague. That case is controlling and disposes of the sole issue in this case. This cause is remanded to the district court for further proceedings.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired, dissent for the reasons stated in the dissent to *State v. Bourke, supra.*

STATE OF NEBRASKA, APPELLEE, V. ROBERT A. TOPPING, APPELLANT.

464 N.W.2d 799

Filed January 25, 1991. No. 90-266.

1. **Ordinances: Presumptions: Judicial Notice: Appeal and Error.** Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, and this court will not otherwise take judicial notice of the ordinance.
2. **Ordinances: Presumptions: Evidence: Appeal and Error.** When the applicable municipal ordinance is not in the record, this court will presume that the evidence supports the findings of the trial court.

Appeal from the District Court for Douglas County, JOHN E. CLARK, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

FAHRNBRUCH, J.

Robert A. Topping appeals the affirmance of his disorderly conduct conviction in the Douglas County Court.

In his appeal to this court from the district court for Douglas County, which affirmed his disorderly conduct conviction, Topping only assigns as error that the evidence is insufficient to support his conviction. We affirm.

The complaint filed against Topping in the county court is included in the transcript. It alleges that the defendant, by his conduct, violated a specific city of Omaha ordinance. The record before us does not include the ordinance.

In *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987), the defendant, who had been convicted under four specified Omaha municipal ordinances, in his assignments of error claimed, inter alia, that the evidence was insufficient to

support his conviction of indecent exposure. The indecent exposure ordinance was not in the record. This court held, citing *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986), that where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, and this court will not otherwise take judicial notice of the ordinance. See, also, *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985).

When the applicable municipal ordinance is not in the record, this court will presume that the evidence supports the findings of the trial court. See *Cottingham, supra*. That being true, and since the ordinance in Topping's case is not in the record before us, the order of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

TINA L. KIRCHMANN, APPELLEE, V. TERRY A. KIRCHMANN, APPELLANT.
464 N.W.2d 800

Filed January 25, 1991. No. 90-425.

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

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

Richard Register for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an action in which respondent husband, Terry A. Kirchmann, has appealed from an order denying his application to modify the divorce decree entered between the parties on July 11, 1988, by removing the physical custody of

his son from the petitioner-appellee wife, Tina L. Kirchmann. The application to modify was filed September 22, 1989. The trial court found that the appellant had "failed in his burden to show a substantial change of circumstance warranting change of physical custody of the minor child."

We have examined the record in our de novo review and agree with the findings and order of the trial court. If anything, the situation has improved slightly in that appellee has now married the man with whom she had been living.

AFFIRMED.

JACEY YARNS, APPELLEE, V. LEON PLASTICS, INC., APPELLANT.
464 N.W.2d 801

Filed January 25, 1991. No. 90-448.

1. **Workers' Compensation.** A workers' compensation claimant with a preexisting condition must persuade the Workers' Compensation Court that the injury arising out of and in the course of employment combined with the preexisting condition to produce disability.
2. _____. Although whether an employee has reached maximum medical improvement or recovery is a question of fact to be determined by the Workers' Compensation Court, when an employee has reached such recovery, the remaining disability is, as a matter of law, permanent.
3. _____. While a disabled employee may not be required to undergo surgery, an unreasonable refusal to submit to surgery, taking into account the risk involved to the employee, the nature of the surgery, and the likelihood of improving the condition, may result in the forfeiture or reduction of compensation benefits, as may be appropriate.
4. _____. Total disability exists when an injured employee is unable to earn wages in either the same or similar kind of work he or she was trained or accustomed to perform, or in any other kind of work which a person of the employee's mentality and attainments could perform.
5. _____. Permanent total disability cannot be said to exist in the absence of evidence that in addition to the inability to perform the work to which the employee had been accustomed, the employee is incapable of performing other work of a similar nature or work which he or she could be trained to perform.

Appeal from the Nebraska Workers' Compensation Court. Award vacated, and cause remanded for further proceedings.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

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

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The award of the Workers' Compensation Court ordered the defendant-appellant employer, Leon Plastics, Inc., to pay the plaintiff-appellee employee, Jacey Yarns, permanent total disability payments of $160 per week, reasonably necessary future medical and hospital expenses, and certain other benefits not relevant to this appeal. The employer assigns as error, in summary, the compensation court's findings that (1) Yarns' condition is work related and (2) she is presently permanently and totally disabled. We vacate the award and remand for further proceedings.

Yarns, who has a congenital low back defect (specifically, an anomalous bilateral fusion of the fifth lumbar vertebra), suffered an accident on July 11, 1987, which arose out of and in the course of her employment as a machine operator when she slipped and fell, whereupon she experienced immediate pain in her lower back and right leg. Following the mishap at work, she was involved in an automobile accident and on another occasion experienced increased back pain and numbness down both of her legs while tucking one of her children into bed.

Yarns completed the 11th grade and has obtained a general equivalency diploma. She had been employed at the same job for approximately a year and was 20 years old and pregnant at the time of the work accident. The job required that she stand throughout the day while she removed plastic parts from the various machines which fabricated them and then trimmed and placed them in boxes. She had to lift as much as 30 pounds at a time.

She has undergone a conservative course of treatment, including bed rest, medication, physical therapy treatments, and attendance at a "work hardening" program. One physician prescribed a course of home exercise, which Yarns abandoned

after a couple of weeks. According to this physician, the subject accident produced a 5-percent permanent partial impairment of Yarns' body as a whole. As a consequence, she is, in this physician's view, incapable of lifting more than 25 pounds and should not engage in frequent or continuous bending, twisting, or stooping.

A second physician opined that while Yarns' congenital back defect increased her risk of sustaining back injury, she presently suffers a 25- to 30-percent impairment as a result of the work-related accident. He is of the further opinion that Yarns has improved as much as is possible with conservative treatment; that low back surgery to fuse the fifth lumbar and first and second sacral vertebrae is reasonable and necessary; that because the surgery is intended to improve her condition, she has not yet reached maximum medical improvement; and that it could take up to a year following surgery to determine whether she would have any residual permanent disability. It is also this second physician's opinion that Yarns is not now able to return to her previous work and is limited to employment which would allow "judicious amounts of sitting, standing and walking, and probably lifting not much more than in the range of 20 to 25 pounds, and certainly not on a repetitive basis."

Yarns is now the mother of two children, almost 3 and 8 years old, respectively, continues to complain of back and leg pain, and has not been gainfully employed since the work accident. She explains that because of the continuous standing required, her present condition prevents her from returning to the job she had when she fell. She also testified that she has not undergone the surgery recommended by the second physician because her compensation benefits had stopped, but that she would be willing to have the surgery if the employer would pay for it because she has "tried everything else."

In connection with the first summarized assignment of error, the employer recognized at oral argument that in view of our recent holding in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the evidence supports the compensation court's finding that Yarns' injury and resultant disability, if any and whatever it may be, were proximately caused by the work accident irrespective of the preexisting

condition, subsequent automobile accident, and postwork accident exacerbation of discomfort Yarns experienced while putting one of her children to bed.

Heiliger clarified that our past pronouncement that the presence of a preexisting condition enhances the degree of proof required to establish that an injury arose out of and in the course of employment means nothing more than that a workers' compensation claimant with a preexisting condition must persuade the compensation court that the injury arising out of and in the course of employment combined with the preexisting condition to produce disability. Although our earlier language addressed the matter in terms of an enhanced degree of proof, it in reality referred to the degree of persuasion required.

That leaves us with the second summarized assignment of error, the analysis of which must begin with the recognition that although whether an employee has reached maximum medical improvement or recovery is a question of fact to be determined by the compensation court, *Heiliger v. Walters & Heiliger Electric, Inc., supra*, when an employee has reached such recovery, the remaining disability is, as a matter of law, permanent. See, *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987), *after remand* 230 Neb. 234, 430 N.W.2d 550 (1988).

With that precept in mind, we turn to a study of the relevant recitations in the compensation court's award. It declares that although the "evidence suggests that [Yarns] is still undergoing medical treatment and possible future surgery, [she] has received ratings of her permanent impairment [and f]or this purpose . . . is permanently and totally disabled subject to any modification which may be warranted under" Neb. Rev. Stat. § 48-141 (Cum. Supp. 1990); that she is unable to perform work for which she has previous training or experience; that she "will continue to be totally disabled for an indefinite future period of time"; and that if she and the second physician conclude that surgery is advisable, the employer "should pay" for it. (The relevant portions of § 48-141 provide that an award which is payable periodically may be modified by agreement of

the parties, if approved by the compensation court, or, in the absence of such agreement, upon application to the compensation court at any time after 6 months from its entry "on the ground of increase or decrease of incapacity due solely to the injury . . . .")

By describing Yarns' present condition as one rendering her totally disabled for "an indefinite future period" and requiring "possible future surgery" which, according to the evidence, is intended to improve her condition, the compensation court's award ascribes to the condition inconsistent attributes of both temporariness and permanency. Logic tells us that a given condition cannot at one and the same time be both temporary and permanent.

Nor may the determination as to whether to undergo surgery be left entirely to Yarns without consideration of the appropriate consequences of such a decision on her part. Neb. Rev. Stat. § 48-120 (Reissue 1988) provides, in relevant part, that if an injured employee

> unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, except [under circumstances not presently at issue], the employer shall not be liable for an aggravation of such injury due to such refusal and neglect and the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

Thus, while a disabled employee may not be required to undergo surgery, an unreasonable refusal to submit to surgery, taking into account the risk involved to the employee, the nature of the surgery, and the likelihood of improving the condition, may result in the forfeiture or reduction of compensation benefits, as may be appropriate. See, *Lange v. Department of Roads and Irrigation*, 141 Neb. 167, 3 N.W.2d 194 (1942) (fact that employee offered to subject himself to surgery which might reduce his disability and that employer refused to pay for same could be considered in assessing the extent of disability); *Simmerman v. Felthauser*, 125 Neb. 795, 251 N.W. 831 (1934) (although holding that particular refusal was not unreasonable, suggests that refusal of a simple and safe

operation reasonably certain to effect a cure would be unreasonable and would affect the payment of compensation benefits); *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, 190 N.W. 208 (1922) (disagreement among physicians as to nature of surgery required and likely outcome supported finding that refusal was not unreasonable). See, also, *Joyce Western Corp. v. W.C.A.B.*, 518 Pa. 191, 542 A.2d 990 (1988); *Muse v. W.C.A.B.*, 514 Pa. 1, 522 A.2d 533 (1987); *Avondale Mills, Inc. v. Tollison*, 52 Ala. App. 52, 289 So. 2d 621 (1974); *Castile v. H. E. Wiese, Inc.*, 231 So. 2d 406 (La. App. 1970); *Gennett Lumber Company v. Sizemore*, 441 S.W.2d 429 (Ky. 1969); *Dillon v. Lloyd's of London*, 178 F. Supp. 164 (E.D. La. 1959); *Lesh v. Illinois Steel Co.*, 163 Wis. 124, 157 N.W. 539 (1916).

Finally, total disability exists when an injured employee is unable to earn wages in either the same or similar kind of work he or she was trained or accustomed to perform, or in any other kind of work which a person of the employee's mentality and attainments could perform. *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988). See, also, *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). In the absence of evidence that in addition to her inability to perform the work to which she had been accustomed Yarns is incapable of performing other work of a similar nature or work which she could be trained to perform, it cannot be said the record supports a finding of permanent total disability.

Accordingly, the award of the compensation court is vacated and the cause remanded for further proceedings in accordance with law.

AWARD VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

JAMES TULLOCH ET AL., APPELLANTS, RONALD STEELE, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLEES.

465 N.W.2d 448

Filed February 1, 1991. No. 88-798.

1. **Criminal Law: Insanity: Probable Cause.** When an individual is acquitted of a crime on grounds of insanity, a probable cause hearing is held to determine whether the individual is dangerous, as demonstrated by an overt act or threat. If the court finds probable cause, the individual may be committed to a regional center or other facility for up to a 90-day evaluation period, during which a treatment plan is developed. Neb. Rev. Stat. § 29-3701(1) (Reissue 1989).
2. **Insanity: Evidence: Proof.** Prior to the end of the evaluation period provided for in Neb. Rev. Stat. § 29-3701(1) (Reissue 1989), the court shall conduct an evidentiary hearing, and shall commit a person for treatment if the evidence of dangerousness is clear and convincing. Neb. Rev. Stat. § 29-3702 (Reissue 1989).
3. **Insanity: Public Health and Welfare.** The trial court shall conduct an annual review of a committed person's condition, after which the individual may be unconditionally released, or may be returned for further treatment consistent with public safety. Neb. Rev. Stat. § 29-3703 (Reissue 1989).
4. **Constitutional Law: Insanity: Right to Counsel.** A committed individual is entitled to counsel and other constitutional rights for each hearing conducted under Neb. Rev. Stat. § 29-3702 (Reissue 1989). Neb. Rev. Stat. § 29-3704 (Reissue 1989).
5. **Mental Health: Insanity: Evidence.** The Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987), which governs civil commitments, and the statutes governing persons acquitted on grounds of insanity, Neb. Rev. Stat. §§ 29-3701 et seq. (Reissue 1989), each require the court or mental health board to find, based on evidence of an overt act or threat, that the individual is dangerous to himself or herself or to others, or that the individual will be dangerous in the foreseeable or near future.
6. **Constitutional Law: Mental Health: Insanity.** The terminology used in the Nebraska Mental Health Commitment Act and the acquitted persons statutes is not identical, but the meaning is the same, and the acquitted persons statutes do not violate an individual's constitutional rights.
7. **Insanity.** While the acquitted persons statutes do not guarantee a free, independent expert evaluation for indigents, the law provides for additional expert evaluation upon the motion of the individual. The evaluation shall be at the person's expense unless otherwise ordered by the court. Neb. Rev. Stat. § 29-3701(6) (Reissue 1989).
8. **Insanity: Proof.** The burden to prove by a preponderance of the evidence that an individual is not responsible by reason of insanity is on the defendant. Neb. Rev. Stat. § 29-2203 (Reissue 1989).
9. **Criminal Law: Insanity: Proof.** A person acquitted on grounds of insanity is held pursuant to civil commitment growing out of a criminal action. Therefore, the civil commitment standard of "clear and convincing" evidence is appropriate.

10. **Criminal Law: Equal Protection: Insanity: Legislature.** A rational basis exists for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently from other mentally ill dangerous persons. Equal protection requires only that a distinction drawn by the Legislature between individuals has a relevant purpose.
11. **Criminal Law: Mental Health.** The acquitted persons statutes are intended to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts, and this past history of dangerous criminal behavior provides a rational basis for the classification.
12. **Constitutional Law: Legislature: Statutes: Presumptions.** A presumption exists that all acts of the Legislature are constitutional, and all reasonable doubts are resolved in favor of constitutionality.
13. **Equal Protection: Statutes: Proof.** The burden is on the parties attacking a statute to establish that it violates equal protection and that no rational basis exists for treating the classes differently.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

James Tulloch and J.C. Jenkins, pro se.

Robert M. Spire, Attorney General, and Vanessa Jones for appellees State et al.

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

WHITE, J.

James Tulloch and J.C. Jenkins are incarcerated at the Lincoln Regional Center pursuant to state law as persons acquitted on grounds of insanity. See Neb. Rev. Stat. §§ 29-3701 et seq. (Reissue 1989). On October 27, 1987, Tulloch, Jenkins, and Ronald Steele filed a petition questioning the constitutionality of the law, naming as defendants the State of Nebraska, Dr. Klaus Hartmann, superintendent of the Lincoln Regional Center, and Dale Johnson, director of the Department of Public Institutions. Steele has since been released from incarceration and is no longer a party to the suit.

The district court sustained the defendants' demurrer, which alleged lack of jurisdiction, improper joinder of causes of action, and failure to state a cause of action. Following the filing of an amended petition, the defendants' second demurrer was sustained, and the amended petition was dismissed. The district court found that the amended petition did not state

facts sufficient to constitute a cause of action. This pro se appeal followed.

The appellants assign as error the district court's failure to rule that the law regarding persons acquitted on grounds of insanity is unconstitutional because it violates the equal protection clause of the 14th amendment to the U.S. Constitution. They find defect with the law because the civil mental health commitment act defines "mentally ill and dangerous person" and guarantees free, independent evaluation for indigents, while the acquitted persons law does not. The appellants contend that the acquitted persons law is unconstitutional because it uses "clear and convincing" as the evidentiary standard, even though it is a criminal law and the appropriate standard is "beyond a reasonable doubt." The appellants also assert that § 29-3703 is vague and ambiguous, in violation of the due process clauses of the state and federal Constitutions, and that the district court erred in granting the defendants' demurrer.

We find no merit to the appellants' assignments and affirm the order of the district court dismissing the appeal.

Nebraska statutes provide for special procedures in the case of persons acquitted of a crime on grounds of insanity. When an individual is acquitted on these grounds, a hearing is held to determine "whether there is probable cause to believe the person is dangerous to himself, herself, or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act or threat." § 29-3701(1). If the court finds probable cause, the individual may be committed to a regional center or other facility for up to a 90-day evaluation period, during which a treatment plan is developed. The court shall specify all conditions of the individual's confinement during this period.

Before the end of the evaluation period, the court shall conduct an evidentiary hearing regarding the person's condition, and if the evidence is clear and convincing that the person is dangerous, the court shall commit the person for treatment to one of the regional centers or other appropriate facility. § 29-3702. The statute calls for an annual review by the original trial court of the individual's status, and if it is found

that the individual is no longer dangerous, the court shall order the individual unconditionally released. § 29-3703. If continued dangerousness is found, the person may be returned for further treatment and may be placed in a less restrictive setting if that placement is consistent with public safety. § 29-3703(2). The individual is entitled to counsel and other constitutional rights for each hearing conducted under the statute. § 29-3704.

We turn first to the appellants' contention that the acquitted persons statutes violate equal protection because, unlike the civil mental health commitment act, they do not define "mentally ill and dangerous."

The Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987), which governs civil commitments, defines a "mentally ill dangerous person" as

> any mentally ill person, alcoholic person, or drug abusing person who presents:
>
> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
>
> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

§ 83-1009.

The acquitted persons statutes define one who shall be subject to them as a person who "is dangerous to himself, herself, or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act or threat." § 29-3701(1). The same definition is repeated in §§ 29-3701(3) and 29-3702.

Both the civil commitment and acquitted persons statutes require the court or mental health board to find, based on evidence of an overt act or threat, that the individual is dangerous to himself or herself or to others, or that the individual will be dangerous in the foreseeable or near future.

While the statutes do not use identical terminology, the meaning is the same, and we find no constitutional violation in the wording of the acquitted persons statutes.

The appellants also argue that the acquitted persons statutes violate equal protection because they do not provide for a free, independent evaluation for indigents, as does the civil commitment act. They refer us to § 83-1052, which provides that the subject of a mental health petition shall have the right to employ a physician or clinical psychologist for an independent evaluation of the subject's mental condition. If the subject is indigent, only one expert may be employed, unless leave is obtained of the mental health board.

The acquitted persons statutes do provide for evaluation and development of a treatment plan by mental health professionals, following the probable cause hearing. § 29-3701(1). If the individual wants an additional evaluation, "he or she may file a motion with the court requesting an evaluation by one or more qualified experts of his or her choice. Such evaluation shall be at the person's expense *unless otherwise ordered by the court.*" (Emphasis supplied.) § 29-3701(6). It is true that the acquitted persons statutes do not guarantee a free, independent evaluation for indigents, but it is also clear that such an evaluation may be obtained upon the individual's motion. The appellants have not demonstrated that they sought such an evaluation and were denied it by any court. We find no constitutional violation in the procedures for evaluation as provided in the acquitted persons statutes, and the appellants' assignments of error claiming such violations are meritless.

Next, the appellants suggest that § 29-3703 violates the due process clause of the Constitution and is vague and ambiguous because it applies the civil weight of evidence standard, that of "clear and convincing evidence," rather than the criminal weight of evidence standard, "beyond a reasonable doubt." They argue that the statute is a criminal law, and as such the criminal standard should be applied.

The only evidentiary standard in the acquitted persons statutes is found in § 29-3702, which defines the requirements for an evidentiary hearing prior to the expiration of the

evaluation period. At that hearing, the court must find by "clear and convincing evidence" that the individual remains dangerous. Section 29-3703 also calls the annual review an evidentiary hearing. While no burden is identified, we interpret the statute to mean that the burden is on the State to prove by clear and convincing evidence that the individual remains dangerous.

The appellants seem to argue that because the acquitted persons statutes are found in chapter 29, criminal procedure, of the Nebraska statutes, the burden of proof must always be beyond a reasonable doubt. Yet, the statutes provide that the burden to prove that an individual is not responsible by reason of insanity is on the defendant "by a preponderance of the evidence." Neb. Rev. Stat. § 29-2203 (Reissue 1989).

In an earlier action which sought an acquitted person's release through the use of habeas corpus, we noted that the acquitted person "is now being held pursuant to *civil commitment* growing out of a criminal action . . . ." (Emphasis supplied.) *Mayfield v. Hartmann*, 221 Neb. 122, 125, 375 N.W.2d 146, 149 (1985). Tulloch and Jenkins were acquitted of the criminal charges filed against them after asserting the insanity defense. Subsequently, they were committed civilly to the regional center for treatment. The civil commitment standard of "clear and convincing" evidence is appropriate.

As to the vagueness of the required review proceedings under § 29-3703, we note that the law requires a full panoply of constitutional rights for the individual throughout the various hearings. § 29-3704. Any court can clearly determine the rights to which the individual is entitled, and we do not find that the statute is vague in that respect.

The constitutionality of the acquitted persons statutes has been previously attacked and was upheld by this court. In *State v. Simants*, 213 Neb. 638, 640, 330 N.W.2d 910, 912 (1983), we found that a rational basis existed for

> treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. Sections 29-3701 et seq., insofar as they apply only to persons acquitted of a crime by reason of insanity, are

> constitutional and do not violate the constitutional right of equal protection of the laws.

We stated that even if acquitted persons and committed persons are similarly situated for equal protection purposes,

> a mere difference in treatment between the two classes, standing alone, does not invalidate the statutes nor render them constitutionally defective. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made.

Id.

The purpose of the acquitted persons statutes is "to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity. Such past history of dangerous criminal behavior provides a rational basis for the classification." *Id.*

A rational basis for treating acquitted persons differently from other mentally ill dangerous persons has been upheld by other courts. See, *United States v. Ecker*, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied* 429 U.S. 1063, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977); *Powell v. State of Florida*, 579 F.2d 324 (5th Cir. 1978).

When a statute is challenged for its constitutionality, we must reaffirm the "presumption that all acts of the Legislature are constitutional with all reasonable doubts resolved in favor of constitutionality." *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 849-50, 443 N.W.2d 566, 570 (1989). The burden is on the parties attacking a statute to establish that it is violative of equal protection and that no rational basis exists for treating the classes differently. *Id.*

This appeal has raised no unique constitutional questions about the validity of the acquitted persons statutes, and we find the claims to be nonmeritorious. The district court was correct in sustaining the defendants' demurrer and in dismissing the petition of the appellants, and that decision is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TWO IGT VIDEO POKER GAMES, MODEL FA180, ET AL., APPELLEES, SCHMIT INDUSTRIES, INC., APPELLANT.

465 N.W.2d 453

Filed February 1, 1991. No. 88-885.

1. **Penalties and Forfeitures: Equity.** Actions for forfeiture are generally considered to sound in equity.
2. **Penalties and Forfeitures: Equity: Appeal and Error.** In an equitable action in rem to transfer the title of allegedly unlawful items from the owner to the State, the Nebraska Supreme Court applies the usual rule that equity actions are reviewed de novo on the record and reaches its own conclusion independent of the findings of the trial court; provided, however, where credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another.
3. **Constitutional Law: Standing: Statutes.** In order to have standing to challenge the constitutionality of a statute under either the federal or state Constitution, the challenger must be one who is, or is about to be, adversely affected by the statutory language in question and must show that as a consequence of the alleged constitutional violation the challenger is deprived of a protected right.
4. **Appeal and Error.** Errors which are assigned but not discussed will not be considered by the Nebraska Supreme Court.
5. **Constitutional Law: Statutes.** Unlike a vagueness challenge, which questions the clarity of statutory language, an attack based on the overbreadth of a statute asserts that the questioned language impermissibly infringes upon some constitutionally protected right.
6. _____: _____. A statute may be unconstitutionally overbroad on its face only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
7. **Legislature: Courts: Statutes: Public Policy.** It is not the function of the judiciary to second-guess the wisdom, policy, or expediency of legislative enactments.
8. **Statutes: Penalties and Forfeitures.** Statutes which impose forfeitures are subject to strict construction.
9. **Constitutional Law: Standing: Statutes.** One who is engaged in conduct which is clearly within a statutory prohibition cannot complain that that prohibition is vague when applied to the conduct of another.
10. **Intent: Circumstantial Evidence: Proof.** The existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence.

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

John H. Albin, of DeCamp Legal Services, P.C., and Clarence E. Mock, of Johnson and Mock, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, and Michael G. Heavican, Lancaster County Attorney, and John A. Colborn for appellee State.

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

PER CURIAM.

This is an appeal from a judgment forfeiting the defendant-appellee IGT Video Poker Game, Model FA180, machines owned by defendant-appellant, Schmit Industries, Inc., to plaintiff-appellee, State of Nebraska.

We begin by noting that actions for forfeiture are generally considered to sound in equity. See, e.g., *In re Forfeiture of $30,632.41*, 184 Mich. App. 677, 459 N.W.2d 99 (1990); *Sturm v. Crowley*, 131 W. Va. 505, 48 S.E.2d 350 (1948); *Robinson Cadillac Motor Car Co. v. Ratekin*, 104 Neb. 369, 177 N.W. 337 (1920). This therefore being an equitable action in rem to transfer the title of the allegedly unlawful machines from the owner to the State, see Neb. Rev. Stat. § 28-1111 (Reissue 1989), we apply the usual rule that this court reviews equity actions de novo on the record and will reach its own conclusion independent of the findings of the trial court; provided, however, where credible evidence is in conflict on a material issue of fact, we will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); Neb. Rev. Stat. § 25-1925 (Reissue 1989).

Schmit Industries has assigned 19 errors, which combine to claim that (1) the statutes upon which the forfeitures are based violate various provisions of the federal and state Constitutions, and (2) the district court erred in concluding that the machines were gambling devices possessed in violation of Neb. Rev. Stat. § 28-1107 (Reissue 1989).

This case was submitted to the district court on stipulated

facts, which reveal that in exchange for a 25-cent payment, the machines grant the player five simulated poker hand replay credits. The player can wager one to eight replay credits per hand played, and the machines will award replay credits if the player obtains a winning hand. The machines are equipped with meters which make a permanent record of the number of replay credits awarded. Accumulated replay credits can be discharged by tripping a reset switch.

On January 26, 1987, an officer of the Lincoln Police Department saw one of the machines at the Cellar Bar in Lincoln, Lancaster County, Nebraska. An unspecified number of individuals were observed playing the machine, and 92 free replay credits had been accumulated on it. The officer seized the machine, which was later found to contain $133 in quarters.

On that same day, the officer saw a second machine in Lincoln at the Spigot Tavern. A single individual was observed playing this machine, and a total of 21 free replay credits had been accumulated on it. This machine was also seized, and found to contain $140.25 in quarters.

There was no evidence or allegation that money had been given to any players of either machine in exchange for the replay credits they had accumulated.

At the time they were seized, both machines were registered and licensed with the Lancaster County assessor's office and had affixed to them mechanical amusement device stickers from the Nebraska Department of Revenue.

Schmit Industries challenges the constitutionality of Neb. Rev. Stat. § 28-1101(1) and (3) through (6) (Reissue 1989), § 28-1107, and § 28-1111, by asserting that these statutes are vague and overbroad and violate due process, contrary to the federal and state Constitutions; that they violate Schmit Industries' right to the pursuit of happiness, as guaranteed by Neb. Const. art. I, § 1; and that they impair or deny rights retained by the people under Neb. Const. art. I, § 26.

In order to have standing to challenge the constitutionality of a statute under either the federal or state Constitution, the challenger must be one who is, or is about to be, adversely affected by the statutory language in question and must show that as a consequence of the alleged constitutional violation the

challenger is deprived of a protected right. *State v. Fellman,* 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Crowdell,* 234 Neb. 469, 451 N.W.2d 695 (1990).

The challenged statutes provided the basis for the forfeiture of the two machines Schmit Industries owned, and its property rights were terminated through application of the statutes. Therefore, Schmit Industries has standing to present its challenges.

Although the assignments of error mention both vagueness and overbreadth, the discussion in Schmit Industries' briefs is limited to a claim of overbreadth. Since errors which are assigned but not discussed will not be considered by this court, *Horst v. Johnson, post* p. 155, 465 N.W.2d 461 (1991), and *State v. Cortis, ante* p. 97, 465 N.W.2d 132 (1991), we address only the overbreadth question.

Unlike a vagueness challenge, which questions the clarity of statutory language, an attack based on the overbreadth of a statute asserts that the questioned language impermissibly infringes upon some constitutionally protected right. See, e.g., *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). The right involved here is the due process right to own and use property. See, *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917); *Hibben v. Smith*, 191 U.S. 310, 24 S. Ct. 88, 48 L. Ed. 195 (1903). We begin our analysis by recalling that a statute may be unconstitutionally overbroad on its face only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *State v. Kipf, supra*; *Osborne v. Ohio*, ____ U.S. ____, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

The focus of Schmit Industries' overbreadth challenge is the definition of "gambling device," as contained in § 28-1101(5). Such an item is defined as "any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling . . . ." As Schmit Industries correctly points out, numerous articles of

personal property are usable for engaging in gambling, articles which more often than not are innocently possessed. However, § 28-1101(5) is merely definitional; innocent possession of such articles is not prohibited. In order to trigger criminal liability or subject the article to forfeiture, the article must be possessed or employed "knowing that it shall be used in the advancement of unlawful gambling activity." § 28-1107(1).

As both the district court and the State point out, the challenge is comparable to one addressed in *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied* 455 U.S. 1005, 102 S. Ct. 1642, 71 L. Ed. 2d 874 (1982). In *Casbah*, the U.S. Court of Appeals for the Eighth Circuit rejected a similar challenge to a statute prohibiting the use, sale, and manufacture of drug paraphernalia. The appellant in that case claimed that the statute was overbroad because innocent items fell within the statutory definition of prohibited drug paraphernalia. The *Casbah* court recognized that the statutory definition incorporated an intent requirement, so that an article could only be considered drug paraphernalia if there existed the requisite intent to use it with a controlled substance. This intent requirement prevented the statute from being overbroad. Here, while the definition of gambling device does not expressly contain an intent element, possession of articles which meet the definition is not prohibited absent knowledge that the articles will be used in the advancement of illegal gambling activity. Thus, the situation now before us is the same as that presented in *Casbah*. Innocent possession of an item is not prohibited; only items meeting the definition and possessed with the requisite mental state fall within the prohibitions. Consequently, Schmit Industries' overbreadth challenge is without merit.

The remaining constitutional challenges are merged into Schmit Industries' contention that forbidding the possession of its machines is not rationally related to any legitimate governmental purpose. When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate governmental purpose. See *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989). While Schmit Industries

appears to concede that prohibiting gambling is a legitimate exercise of the State's police power, it argues that absent a showing of monetary payoffs, there is no rational basis for connecting the use of its machines with gambling.

The position is based upon a faulty and unwarranted assumption, i.e., that in order for there to be gambling, money must be bet against money. The Legislature, however, has seen fit to define gambling so as to include wagering for the extension of services or entertainment. See § 28-1101(6). The Legislature has thus determined that the ills associated with gambling are present whether the stake is entertainment, services, or cash, and it is not the function of the judiciary to second-guess the wisdom, policy, or expediency of legislative enactments. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989); *Arant v. G.H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988).

Prohibiting gambling is a legitimate government purpose under the police power. See, *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986); *Pegasus of Omaha, Inc. v. State*, 203 Neb. 755, 280 N.W.2d 64 (1979). Prohibiting the possession or use of gambling devices is rationally related to preventing gambling; providing for the forfeiture of prohibited gambling devices likewise is rationally related to that purpose. Therefore, the statutes in question are a valid exercise of the State's police power.

The next question is whether the statutes were properly applied in this case. Statutes which impose forfeitures are subject to strict construction. *County of Merrick v. Beck*, 205 Neb. 829, 290 N.W.2d 642 (1980). Section 28-1111 provides that any gambling device which is possessed in violation of article 11 of chapter 28 "shall be forfeited to the state."

We are called upon to determine whether the machines described above are gambling devices which were possessed in violation of § 28-1107. We first must determine whether the machines are gambling devices and then determine whether they were possessed in violation of the statute.

As defined in § 28-1101(5), a gambling device includes "any . . . video gaming device which has the capability of awarding something of value, [or] free games redeemable for something

of value . . . except as authorized in the furtherance of parimutuel wagering." According to § 28-1101(4):

> A person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election . . . but a person does not engage in gambling by:
>
> (a) Entering into a lawful business transaction;
>
> (b) Playing an amusement device or a coin-operated mechanical game which confers as a prize an immediate, unrecorded right of replay not exchangeable for something of value;
>
> (c) Conducting or participating in a prize contest; or
>
> (d) Conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise conducted in accordance with the Nebraska Bingo Act, the Nebraska Pickle Card Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Small Lottery and Raffle Act, the Nebraska County and City Lottery act, or section 9-701.

A gambling device is therefore a device which is used or usable by a person to bet something of value on the outcome of a future event, which outcome is determined by an element of chance and which does not fall within one of the exceptions contained in § 28-1101(4). There is no question but that the outcome of the poker hands played on the machines in question is a future event determined by an element of chance, nor does Schmit Industries appear to deny this. Cf. *Indoor Recreation Enterprises, Inc. v. Douglas*, 194 Neb. 715, 235 N.W.2d 398 (1975) (poker and bridge are games of chance).

Thus, the question becomes whether the player bets something of value on the outcome.

> Something of value shall mean any money or property, any token, object, or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service or entertainment.

§ 28-1101(6).

The 25 cents used to activate the machines is clearly something of value. The free replay credits awarded by the machines are a credit or promise involving extension of a service or entertainment and are therefore something of value. See, also, *Baedaro v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953) (holding that free games on pinball machines are things of value for purposes of gambling statutes); *Score Family Fun Center v. San Diego Cty.*, 225 Cal. App. 3d 1217, 275 Cal. Rptr. 358 (1990) (reward of extended play on video machine is a "thing of value" within meaning of California Penal Code). The player of the game is betting his or her 25 cents (or accumulated replay credits) on the outcome of the play, while the machine is betting an extension of entertainment. Both parties are therefore betting something of value on the outcome, which is determined by an element of chance. Thus, unless the activity falls within one of the exceptions listed in § 28-1101(4), playing the machines is engaging in gambling, and the machines are gambling devices within the meaning of the statute.

The first exception, contained in § 28-1101(4)(a), is for entering into a lawful business transaction. It is possible, as Schmit Industries suggests, that this provision may be, in some cases, unconstitutionally vague; however, one who is engaged in conduct which is clearly within a statutory prohibition cannot complain that that prohibition is vague when applied to the conduct of another. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Whatever the lawful business transaction exception may include, it is at least clear that it does not include games and amusement devices. Otherwise, there would be no need for the more specific exceptions covering limited types of such devices found in §§ 28-1101(4)(b) and 28-1107, both of which are discussed below.

The second exception, found in § 28-1101(4)(b), is for "[p]laying an amusement device or a coin-operated mechanical game which confers as a prize an immediate, unrecorded right of replay not exchangeable for something of value." While the machines may qualify as amusement devices, the rights to replay which they award are not unrecorded, and, thus, the machines do not fall within this second exception.

The third exception, set forth in § 28-1101(4)(c), is for

"[c]onducting or participating in a prize contest." One of the characteristics of a prize contest, as defined in § 28-1101(7), is that the value of the awards does not depend upon either chance or the amount of consideration paid to participate in the contest. Here, the number of replays awarded is dependent upon the number bet and upon the nature of the hand dealt. Clearly, playing these machines does not qualify as a prize contest.

The final exception, established in § 28-1101(4)(d), is for "[c]onducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise conducted in accordance with" specified statutes. Schmit Industries does not contend that the machines fit within this exception.

Having determined that the machines are gambling devices within the meaning of § 28-1101, we must determine if they were possessed in violation of § 28-1107. That section was amended after the machines were seized, see 1987 Neb. Laws, L.B. 523, and Schmit Industries raises a question as to which version should be applied, that which was in effect when the machines were seized or that which was in effect when the State filed its petition in the district court. Since the result under either version would be the same, we need not and do not reach this question.

Both versions of § 28-1107 provide:

> A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

Both versions provide an exception for coin-operated games which award free replays. Under the earlier version of the statute, such games would fall within the exception only if they (1) could not accumulate more than 15 free replays at a time, (2) could not be discharged of accumulated replays except by playing an additional game for each replay accumulated, and (3) made no permanent record, either directly or indirectly, of the free replays they award. § 28-1107 (Reissue 1985). The later version of the section did away with the 15-replay limit. See

§ 28-1107 (Reissue 1989).

Because the machines are equipped both with reset switches and with meters which make a permanent record of the replays awarded, they fail to fit within the exception under either version of § 28-1107. Therefore, if the machines were possessed with the requisite knowledge, they were possessed in violation of § 28-1107 and thus subject to forfeiture under § 28-1111.

The existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence. *State v. Ayres,* 236 Neb. 824, 464 N.W.2d 316 (1991); *State v. Meyer,* 236 Neb. 253, 460 N.W.2d 656 (1990); *State v. Masur,* 230 Neb. 620, 432 N.W.2d 815 (1988).

Under the statutory scheme, playing these machines qualifies as engaging in gambling activity. As the district court said:

> Model FA180 video poker machines are "gambling devices" as defined by 28-1101(5) and can be used for no other purpose. [Schmit Industries] knew the machines would be used or played, as evidenced by the fact they were located in bars and contained a substantial number of quarters when they were seized. Clearly, [Schmit Industries] knew that these machines, having no other purpose except as gambling devices, were used in gambling activity.

We agree with the reasoning of the district court that the evidence establishes the machines were possessed with the knowledge that they would be used to engage in gambling activity.

In closing, we note that Nebraska does not stand alone in its determination that video poker machines equipped with meters and reset switches are gambling devices. See, e.g., *Gotsch v. City of Burbank*, 203 Ill. App. 3d 271, 560 N.E.2d 1183 (1990); *U.S. v. 294 Various Gambling Devices*, 718 F. Supp. 1236 (W.D. Pa. 1989); *Com. v. Twelve Video Poker Machines*, 517 Pa. 363, 537 A.2d 812 (1988).

AFFIRMED.

JAMES K. HORST, APPELLANT, V. KEVIN W. JOHNSON, APPELLEE.
465 N.W.2d 461

Filed February 1, 1991. No. 88-1069.

1. **Appeal and Error.** Errors assigned but not discussed in an appellant's brief are not considered by this court.
2. **Directed Verdict.** In considering a motion for a directed verdict, the court resolves the controversy as a matter of law and may sustain the motion only when the facts are such that reasonable minds can draw but one conclusion.
3. _____. In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
4. **Motor Vehicles: Negligence.** Under the range of vision rule, a motorist is generally deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision.
5. _____: _____. An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible.
6. **Negligence: Words and Phrases.** Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.
7. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.
8. **Evidence: Negligence.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.

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

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Susan Jacobs, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, James K. Horst, challenges the dismissal pursuant to verdict of the suit he brought following a collision between the pickup truck he was operating and an automobile driven by defendant-appellee, Kevin W. Johnson. The first three of Horst's five assignments of error combine to assert the district court erred in (1) failing to grant the motion he made at the close of all the evidence for a directed verdict in his favor against Johnson on the issue of liability and (2) submitting to the jury the issue of his contributory negligence. The remaining two assigned errors claim that the verdict is contrary to law and not supported by the evidence and that the district court erred in failing to set aside the verdict and grant him a new trial, but they are not discussed in his brief. Errors assigned but not discussed in an appellant's brief are not considered by this court. *State v. Two IGT Video Poker Games, ante* p. 145, 465 N.W.2d 453 (1991); *State v. Cortis, ante* p. 97, 465 N.W.2d 132 (1991); *State v. Contreras,* 236 Neb. 455, 461 N.W.2d 562 (1990); *State v. Bradley,* 236 Neb. 371, 461 N.W.2d 524 (1990); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). We thus concern ourselves only with the first two summarized assignments and refer to the issues presented by the claimed but undiscussed errors only to the extent those issues are subsumed in the first two summarized assignments. The record failing to sustain the first two summarized assignments of error, we affirm.

At approximately 2 a.m. on October 18, 1986, Johnson left Omaha, Nebraska, in his automobile, destined for Hastings, Nebraska, where he was to begin certain U.S. Naval Reserve training at 7 a.m. He had concluded 7 consecutive days of work when he, on October 17, 1986, finished a 12-hour shift which ended at 7 p.m. Johnson spent at least 1 1/2 hours after work during that same evening in a bar, where he consumed two or three beers before returning home to rest; he, however, did not sleep prior to leaving for Hastings. Johnson testified that while on Interstate 80 between Omaha and Lincoln, Nebraska, he became tired but was not dozing off.

Horst, driving a dark-green pickup truck, left Lincoln at approximately 3:30 a.m. on October 18, 1986, bound for Clay

Center, Nebraska, also via the Interstate. Horst testified that his headlights and taillights were working at the time.

As Johnson passed Lincoln on the Interstate, he became even more tired, such that he rolled down the windows of his automobile and played the radio loudly. Johnson testified that he then decided to look for a place to exit the Interstate due to his weariness. There was some ground fog in the lowlands at this point, and Johnson was traveling at approximately 55 miles per hour. No vehicle passed Johnson after he left Lincoln, the Interstate being "virtually abandoned." Johnson did notice two taillights in front of him from time to time, but he could not gauge their distance from him. Although they disappeared from his view from time to time because of the ground fog and hills, Johnson maintained a relatively constant distance between himself and the taillights. At this point the Interstate was newly paved, or blacktopped. Johnson traveled in the right-hand lane, focusing on the illuminated taillights ahead of him and the newly painted solid white line to his right and the dashed centerline of the Interstate to his left.

As Horst traveled westward, he also saw lighted taillights ahead of him. He began to get cool because a window in his pickup was rolled down, and he decided to pull off the Interstate to roll it up. He testified that he turned on his right turn signal, looked in his rearview mirror, and noticed a vehicle's headlights one-half to 1 mile behind him. According to Horst, he then pulled completely off the Interstate, took his pickup truck out of gear and his foot off the clutch, applied his emergency brake, and leaned over in his pickup to roll up the open passenger window. Horst's pickup was struck from behind as he began to roll up the window.

On direct examination by Horst, Johnson testified that he did not see the pickup until a split second before the collision and that he did not see lighted taillights on the pickup prior to the impact. He also testified on his own cross-examination that the rear portion of Horst's pickup extended 12 to 14 inches over the white line into the driving lane.

The collision occurred at approximately 4:15 a.m. on October 18, 1986, at a site approximately 800 feet below and beyond, as the vehicles moved west on the Interstate, the crest

of a hill. In daylight, the collision site was visible from the crest of the hill.

A Nebraska State Patrol trooper was the first investigating officer at the accident scene. The trooper found Horst's pickup on the right shoulder of the Interstate, with its front portion in the right-hand ditch. Johnson's automobile was found sideways on the driving surface, straddling the centerline of the westbound Interstate lanes. The trooper testified that Johnson told him at the accident scene that he was very sleepy and that the first he knew of the accident was when he hit Horst's pickup. The trooper smelled alcohol on Johnson's breath, but a preliminary breath test conducted at the scene showed that Johnson was not intoxicated.

The trooper took measurements from which he made an illustration of what was in his opinion a reconstruction of the collision. The trooper's testimony essentially corroborated Horst's contention that he had stopped his pickup completely off the traveled portion of the highway and was wholly within the shoulder of the Interstate.

A Lincoln Police Department lieutenant testified as Johnson's accident reconstruction expert. It was the lieutenant's opinion, based upon the trooper's measurements and illustration of the vehicles' postcrash positions, that Horst's pickup was parallel with and straddled the white line separating the right-hand driving lane from the shoulder, with approximately one-half of the pickup extended into the driving lane at the time of the collision. The lieutenant further opined that if Johnson's first sighting of Horst's pickup was a split second before impact, Johnson was not maintaining a proper lookout.

We begin our analysis by noting that when considering a motion for a directed verdict, the court resolves the controversy as a matter of law and may sustain the motion only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is

made, the case may not be decided as a matter of law. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990); *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990).

Horst places great reliance on the range of vision rule. Under this rule, which has been recognized in Nebraska since at least 1928, a motorist is generally deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision. See, *Edgerton v. Lawry*, 235 Neb. 100, 453 N.W.2d 743 (1990); *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989); *Roth v. Blomquist*, 117 Neb. 444, 220 N.W. 572 (1928). Johnson's admission that he could not avoid colliding with Horst's pickup once he saw it would, at first glance, seem to fit within the rule.

However, an exception to or exoneration from the range of vision rule exists "when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible." *Edgerton, supra* at 102, 453 N.W.2d at 744; *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989).

The cases applying this exception commonly involve a nighttime collision with a stationary unlighted vehicle similar in color to the roadway. See, e.g., *Converse, supra*; *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973); *Haight v. Nelson*, 157 Neb. 341, 59 N.W.2d 576 (1953). Not unexpectedly, only one Nebraska case which has applied the exception to the range of vision rule has involved a collision with a stationary lighted vehicle. See *Fick v. Herman*, 159 Neb. 758, 68 N.W.2d 622 (1955). Although this court has never announced a rule to the effect that the exception is not to be applied in cases where the stationary vehicle is lighted, even *Fick* does not lend strong support for generally allowing the exception to be considered in such situations. The *Fick* court noted that the stationary lighted truck involved was so dirty that the lights, though lit, might not have been so noticeable as to disallow application of the exception to the range of vision rule. Therefore, *Fick*

notwithstanding, the exception to the range of vision rule is generally not available where the stationary vehicle is lighted.

The initial question thus becomes whether there was any evidence that Horst's vehicle was such that it could be brought under the exception to the range of vision rule. If there was, keeping in mind the standard of review, the district court did not err in denying Horst's motion.

Horst claims that since the parties stipulated in a pretrial order that Horst's "exterior vehicle lights were illuminated," the color of his pickup is irrelevant because the exception to the range of vision rule does not apply to a lighted stationary vehicle. However, the pretrial order recites only that Johnson "will stipulate" that at the time of the collision Horst's "exterior vehicle lights were illuminated and his right turn signal was flashing." The record establishes neither that Johnson was asked to enter into such a stipulation nor that the parties in fact entered into such a stipulation and made the jury aware of it. Indeed, the very testimony Horst himself elicited from Johnson, that Johnson did not see lighted taillights on Horst's pickup prior to impact, supports an inference that the taillights were not lit at the time of the collision. Thus, it cannot be said that the question of whether the exterior lights of Horst's pickup were illuminated was undisputed.

The significance of the possibility that the exterior lights on Horst's pickup were not illuminated lies in the dark-green color of the vehicle and the fact that the Interstate at the location of the accident was newly paved. These circumstances create a fact question as to whether the pickup was virtually indiscernible and thus whether the exception to the range of vision rule should apply in this case. Thus, a directed verdict on the issue of liability could not properly lie.

Horst next contends that the district court nonetheless committed reversible error in submitting the issue of his contributory negligence to the jury because, as a matter of law, Johnson's negligence was the sole proximate cause of the collision. Not only did Horst not object to the instructions given, but his contention is otherwise without merit.

Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law

imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *Koncaba v. Scotts Bluff County, ante* p. 37, 464 N.W.2d 764 (1991). See, also, *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422 N.W.2d 797 (1988); *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984); *Mundy v. Davis*, 154 Neb. 423, 48 N.W.2d 394 (1951).

An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990), citing *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989).

Horst urges that his pickup was merely a condition and not a concurrent proximate cause of the collision. In support of this claim, Horst cites us to *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977). However, this case is distinguishable from *Vrba*, wherein during a severe snowstorm, the appellant's vehicle became stuck in a snowdrift about 90 feet below the crest of a hill. After unsuccessful attempts to dig the vehicle free, appellant left it on his right side of the highway and proceeded to his home on foot. He did not place flares, leave his lights on, or give other warning of the location of the vehicle. Later that night, a county road maintainer cleared a path approximately 10 feet wide in the center of the road. The following morning, the appellee, while driving down the hill, collided with appellant's vehicle, causing damage to the left front corner of each vehicle, that being the area of impact. The *Vrba* court refused to consider the appellee's defense of contributory negligence, which was based on the appellant's alleged violation of Neb. Rev. Stat. § 39-670(1) (Reissue 1988), which prohibits the leaving of a vehicle on a highway. In so concluding, the court noted it had

> previously held . . . . that such statutory requirements do not apply to disabled vehicles. Appellant's vehicle was disabled . . . . It could not be moved further from its

> position and it is immaterial whether the cause of such immobility was a mechanical malfunction or the presence of drifted snow. The appellant did comply with the requirements of the statute so far as possible; the vehicle was stopped as far to the right as possible; there was an unobstructed space, the width of a maintainer blade opposite; and weather conditions rendered it impossible for the appellant or anyone else to provide a clear view of the vehicle for 200 feet in either direction. The evidence was not sufficient to support a finding of any negligence on the part of the appellant, but shows rather that the location of the appellant's vehicle was only a condition and could not operate as a concurrent cause of the collision.

Vrba at 726-27, 255 N.W.2d at 271.

Unlike *Vrba*, this case does not involve a disabled vehicle. Therefore, Horst's contention that his pickup was merely a condition is misplaced. Because there was evidence that Horst violated Neb. Rev. Stat. §§ 39-6,138 and 39-670.01 (Reissue 1988) (which require in pertinent part that taillights be illuminated at night) and § 39-670 (which requires in pertinent part that vehicles not be parked on a freeway), there was evidence that he was contributorily negligent. See, e.g., *Fleischer v. Rosentrater*, 190 Neb. 219, 207 N.W.2d 372 (1973) (violation of traffic statute evidence of contributory negligence). This point is emphasized by the following language from *Fleischer, supra* at 223, 207 N.W.2d at 374:

> The evidence clearly supports . . . that the Fleischer vehicle was standing and stopped in the main-traveled portion of the roadway. Our court has consistently held that such facts constitute a prima facie violation of the statute sufficient to make a jury question and that it is incumbent upon the person charged to show the existence of facts which take him out of the scope of the statute.

This case falls squarely within the rule that where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations. *Gatewood v. City of Bellevue*, 232 Neb. 525,

441 N.W.2d 585 (1989). Therefore, the question of contributory negligence was properly submitted to the jury.

AFFIRMED.

WHITE, J., dissenting.

Today, we affirm a verdict in favor of the defendant, a motorist who collided with the rear of a lighted parked vehicle. We approve the submission of his negligence to the jury, our cases to the contrary concerning negligence as a matter of law notwithstanding.

The defendant stipulated in a pretrial proceeding that the plaintiff's vehicle was illuminated. The issue of illumination should never have been submitted to the jury, and a directed verdict should have been granted to plaintiff.

STATE OF NEBRASKA, APPELLEE, V. KIM M. BRITT, APPELLANT.
465 N.W.2d 466

Filed February 1, 1991. No. 89-1170.

1. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction action seeking relief on the basis of ineffective assistance of counsel, either at trial or on appeal, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
2. _____: _____: _____. 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.
3. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call or not to call witnesses, made by counsel as a matter of trial strategy, will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Mark A. Weber, of Sherrets & Smith, for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

GRANT, J.

This is a postconviction action filed pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). Defendant was convicted, after a jury trial, of the crimes of possession with the intent to deliver heroin and possession with the intent to deliver marijuana. His convictions were affirmed in this court on his direct appeal. See *State v. Britt*, 228 Neb. 201, 421 N.W.2d 791 (1988). On August 16, 1988, defendant, pro se, filed a motion to vacate and set aside his conviction. On March 28, 1989, an amended motion for postconviction relief was filed by an attorney appointed by the trial court to represent defendant. Both motions alleged that defendant had been denied effective assistance of counsel.

A hearing was held on defendant's amended motion. On August 9, 1989, an order was entered generally denying defendant's motion for postconviction relief, but granting defendant an additional 58 days of credit for time served, because improper credit was inadvertently granted at the time of sentencing.

Defendant timely appealed to this court, and a different attorney was appointed to represent defendant on his appeal to this court for postconviction relief. In this court, defendant assigns three errors, which may be consolidated into two as follows: The trial court erred in finding that defendant was not deprived of effective assistance of counsel (1) at trial and (2) on defendant's original appeal to this court. We affirm.

The underlying facts are set out in the case deciding defendant's original appeal to this court. See *State v. Britt, supra*. The bill of exceptions was made an exhibit in this postconviction case, and further factual references are made in this opinion.

The substantive and procedural law controlling this appeal is settled. A defendant seeking postconviction relief has the burden of establishing the basis for such relief, and the findings

of the trial court will not be disturbed unless they are clearly erroneous. *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990); *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990).

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

The standard of review on a claim of ineffective assistance of counsel is set out in *State v. El-Tabech*, 234 Neb. 831, 833-34, 453 N.W.2d 91, 94 (1990), quoting from *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989):

> " ' " '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.' " ' " . . .
>
> . . . " '[T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' "

Defendant contends his trial counsel erred during the trial and his appellate counsel erred on his original appeal in a total of eight respects. First, defendant alleges that his trial court counsel erred in failing to call seven witnesses, identified in defendant's testimony at the postconviction hearing. According to affidavits signed by the prospective witnesses and produced by defendant, four of these witnesses would have testified to the

fact that defendant "got drugs from Gorum in the past," and one, Shelia Lee, the mother of defendant's child, would have testified that "on different ocassions [sic] Donald Gorum brought drugs for Kim [defendant] and picked-up money from Kim" and that "Kim sold drugs for Donald Gorum." The other two witnesses had no testimony of consequence. Of the seven witnesses, one had at least four prior felony convictions, one had three, and two had one. How these witnesses would have aided defendant at trial is not known to this court.

We have stated that the decision to call or not to call witnesses, made by counsel as a matter of trial strategy, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. El-Tabech, supra*; *State v. Jones, supra*. In the case before us, the decision of defendant's counsel not to call such witnesses cannot be said to be the basis for a charge of ineffective counsel. Defendant's contention in this regard is without merit.

Defendant's second contention is that defendant's trial counsel failed "to object to the marijuana that was seized in the residence . . . ." Brief for appellant at 4. An objection to such evidence would not have been sustained. There was evidence from a witness, Donald Gorum, that defendant was staying at the residence in question at the time of his arrest. Defendant did not testify, but produced two witnesses that testified that he did not live at the residence in question when the marijuana was seized. There was a factual question on this issue, and defendant's counsel presented witnesses in support of defendant's position that he did not live in the residence where the marijuana was seized.

Gorum also testified that defendant had possession of a certain canister which contained small bags of marijuana and that defendant had been in possession of the contents, both at the residence where marijuana was seized in this case and at another residence. Any objection would have been overruled, and the objection would only have highlighted evidence which defendant's counsel knew was harmful to defendant's case. Such an approach by counsel could not be said to have constituted ineffective counsel. Defendant's contention on this point is without merit.

Defendant then contends that his counsel was ineffective "[i]n failing to contest standing on the search of the residence on appeal." *Id.* It is difficult to tell if defendant contends that his counsel erred in seeking to establish standing, or in not seeking standing. In any event, defendant's counsel did contest standing at a hearing on a motion in limine to suppress the evidence in question on the basis that defendant had nothing to do with the residence, and therefore any evidence of alleged drugs in the residence was immaterial, as the drugs would not belong to defendant. The trial court overruled the motion, and defendant's counsel did not object to the evidence at the trial—again for the obvious reason that the motion would not have been successful and, again, would only have highlighted the evidence. Defendant's contention on this point is without merit.

Defendant then contends that his counsel was ineffective "[i]n failing to contest the validity of the search warrant to search the residence . . . ." *Id.* Defendant's counsel could hardly contest the validity of the search warrant, unless he placed defendant in the position of having standing to contest the warrant. If defendant admitted standing, he could not then deny that he had no possessory interest in the house and thus continue to deny that he owned the marijuana seized in the residence. This contention is frivolous.

Defendant then contends that his trial counsel was ineffective "[i]n failing to contest the Defendant's standing on the warrant for the search of Britt's belongings found in Co-Defendant Gorum's automobile on appeal" and "[i]n failing to argue the warrant for the search of Gorum's automobile on appeal." *Id.* The premise for each of these contentions is wrong. There was no warrant for the search of Gorum's automobile, but, rather, a consent to search that automobile was given to police officers by Gorum, the admitted owner of the automobile. These contentions are without merit.

Defendant then contends that his appellate counsel erred "[i]n failing to argue the wrongful admission of evidence during the trial concerning the dismissed witness tampering charge at the time of appeal." *Id.* The short answer to the particular error assigned is that the issue could not have been raised on appeal

because no objection was made at trial, although defendant's counsel had filed a motion in limine on the issue. We have held that a motion for postconviction relief cannot be used as a substitute for an appeal. *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990).

If this contention is enlarged to contend that defendant's trial counsel was ineffective in not objecting to such evidence, the contention is still without merit. No testimony was adduced at the trial concerning any arrest of defendant or anyone for witness tampering. There was testimony concerning a confrontation between Gorum and defendant and defendant's brother as to whether Gorum lied when he testified that defendant's brother had "kicked" defendant out of the brother's residence. This testimony was relevant to the issue of defendant's residence, and failure to object to it was not ineffective. This contention is without merit.

Defendant's last contention is that defendant's counsel erred "[i]n failing to file a timely motion for a new trial." Brief for appellant at 4. Again, defendant's factual premise is wrong. Examination of the transcript of plaintiff's original trial shows that defendant's motion for new trial was overruled on the date of defendant's sentencing. This contention is frivolous.

Despite all the allegations made in this appeal, defendant has not shown that either his trial attorney or his attorney on his original appeal failed to perform as well as lawyers with ordinary training and skill in the criminal law in the area. Further, defendant has not shown that he was prejudiced in the defense of his case as a result of any of his attorneys' actions or inactions. Defendant's rights under the U.S. Constitution and the Nebraska Constitution were neither denied nor infringed so as to render his convictions void or voidable. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. HALL, APPELLANT.
465 N.W.2d 150

Filed February 1, 1991. No. 89-1439.

1. **Motions to Suppress: Appeal and Error.** Findings of fact on a motion to suppress will not be overturned by the Supreme Court unless those findings are clearly erroneous.
2. **Confessions: Evidence: Proof.** The State must show that the statement, admission, or confession of the accused was given freely and voluntarily and was not the product of any promise or inducement, direct or implied, no matter how slight, before it will be admitted into evidence.
3. **Confessions: Appeal and Error.** Voluntariness is determined by the totality of the circumstances, and a determination by the trial judge that a confession was made voluntarily will not be overturned on appeal absent an abuse of discretion.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Robert M. Spire, Attorney General, and Melanie J. Whittamore-Mantzios for appellee.

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

GRANT, J.

Defendant, Michael L. Hall, appeals from his convictions in the Lancaster County District Court of four felony offenses: count I, first degree sexual assault; count II, use of a weapon to commit the felony offense of first degree sexual assault; count III, robbery; and count IV, use of a weapon to commit the felony of robbery. After a jury trial, defendant was convicted. He was determined not to be a mentally disordered sex offender and, after a presentence investigation, was sentenced to a term of 15 to 18 years' imprisonment on count I, 5 to 10 years' imprisonment on count II, 5 years' imprisonment on count III, and 5 years' imprisonment on count IV. Credit was given to defendant for 470 days spent in custody. Each term was to be served consecutively and consecutive to any other prison term

or terms being served.

Defendant timely appealed to this court. He assigns four errors on this appeal, which may be summarized into three. Defendant contends that the district court erred in failing to sustain defendant's motion to suppress statements made to a Lincoln police officer and in admitting those statements, two of which were confessions, as evidence at trial, in that (1) the statements were obtained "in violation of his rights under the Due Process clause of the United States Constitution" and (2) the statements "were involuntarily obtained." Defendant also contends that the sentences imposed were excessive. We affirm.

The record shows as follows: On September 2, 1988, a 76-year-old woman was sexually assaulted and robbed at knife point while staying with her five grandchildren at her daughter's home in Lincoln, Nebraska. The victim testified that the electricity in the home had been shut off earlier in the day because her daughter had failed to pay the electric bill and that consequently, the children had gone to bed fairly early. At approximately 1 a.m. on September 2, the victim retired to bed in a room shared by two of her grandsons. She awoke to find a man standing in the doorway between the living room and bedroom, but because of the darkness she was unable to identify him with particularity. The victim further testified:

> He [the man] had the knife in his left hand and I had ahold of his hand and the knife and he had ahold of my wrist with his right hand . . . and we struggled and I kept calling [for] my grandson . . . . I kept calling . . . but he didn't answer. We kept struggling and finally I started praying out loud . . . .

The man traced her face and throat with the knife blade, hit her in the chest, and then forced her to have vaginal, oral, and anal sex with him. The man then asked the victim for money and put the point of the knife at her back as she went to get her purse. Although she could not see her assailant, she testified that she could feel his facial hair as he was assaulting her and that she could tell he was "very heavy chested, stocky built." She further stated that he was wearing gloves with part of the fingers cut off and a cap that fit tightly over his head, "like a swimming cap would fit." Eventually, the man left the premises with a

television set, a radio, and the money he took from the victim. The victim's 10-year-old grandson corroborated his grandmother's testimony, stating that he heard her yell his name and then heard his grandmother start to pray. The child testified that he did not answer because he was too frightened.

The victim's daughter arrived home at approximately 3:15 a.m., found her mother in a state of shock, and used a neighbor's phone to call the police. The Lincoln police arrived and began an investigation of the incident.

Det. James J. Breen, an officer with the Lincoln Police Department, reviewed the initial reports and discussed the case with the investigating officers. On September 5, 1988, Detective Breen received a telephone call from two anonymous informants regarding defendant's involvement in a sexual assault and robbery at the residence of the victim's daughter in Lincoln. The information that Breen received from the informants was consistent with known information in the ongoing investigation of the incident, and led Detective Breen to believe that evidence of the crimes could be recovered from defendant's residence. Lincoln police obtained a search warrant for defendant's residence at 1405 Washington Street in Lincoln and went to defendant's residence about 3 a.m. on September 6, 1988. Breen did not immediately advise defendant of the search warrant, but asked defendant if he would go down to the police station and discuss the sexual assault case. Defendant agreed and went to the police headquarters with Breen. Defendant and Detective Breen sat at a large conference table. Breen told defendant that defendant was free to leave, that he was not under arrest, and that Breen wanted to talk to the defendant about defendant's possible involvement in the case. Defendant made no admissions at this time.

After Breen and defendant left defendant's residence, other officers executed the search warrant at defendant's residence and found the stolen television set and radio, a knife, a pair of gloves with the fingers cut off, and a nylon stocking cap. At 4:20 a.m., the other officers contacted Detective Breen and told him of the items found. Detective Breen placed defendant under arrest and at this point advised him of his *Miranda* rights. Defendant answered each of the questions on the rights

advisory form affirmatively, indicating that he understood that by doing so he waived his right to remain silent and to have an attorney present for any further questioning, as well as his other *Miranda* rights.

Defendant then asked "what the next step in the process was," and Detective Breen explained that defendant would have to go to the hospital for certain blood and saliva tests. Detective Breen then handcuffed defendant and began to walk with him toward the front door of the police station to transport him to the hospital for these tests, when defendant stopped and "kind of leaned up against the wall, and said . . . 'I need some help. I've needed help ever since I was a little kid.' " Detective Breen asked defendant if he wished to discuss the matter further, escorted defendant back to the investigations area, removed the handcuffs, and discussed the incident with defendant. Defendant was quite emotional at this time, and Detective Breen told defendant that "we would, if he needed help, try to see that he got it." It was at this time that defendant first admitted his involvement in the crimes against the victim, stating, as Breen testified, that

> he had been in the house and had been walking through the residence and was essentially startled or surprised by finding this woman who he thought was elderly . . . . He said he had intercourse with her and he said he was aggressive during the intercourse . . . . He said that he never had any intentions of physically hurting her . . . .

Based on this oral admission, Detective Breen taped a second conversation between himself and defendant wherein defendant again was given his *Miranda* rights and again admitted his involvement in the crimes.

Detective Breen was the only witness at the suppression hearing. He testified at the suppression hearing and again at trial that he did not make any promises or use any force or coercion to obtain defendant's confession and that defendant was cooperative and freely, voluntarily, and intelligently made statements to him regarding the crimes.

Defendant's first assignment of error is that the district court erred in failing to sustain his motion to suppress the statements that he made to Detective Breen during his interview. The court

denied this motion after a pretrial hearing which also served to determine the voluntariness of defendant's statements, as required by *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Defendant timely objected during trial to the admission of his unrecorded and recorded statements. The objections were overruled, Detective Breen was allowed to testify regarding the unrecorded confession, and the taped statement was received into evidence. Thus, defendant has preserved the question for review by this court. See, *State v. Walker*, 236 Neb. 503, 461 N.W.2d 755 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

Defendant was given his *Miranda* rights twice, and twice waived them. His first contention on this appeal is not specifically that his *Miranda* rights were violated, but, rather, that his due process rights under the 14th amendment to the U.S. Constitution were violated "when his confession was allowed into evidence," brief for appellant at 12, since it was the product of coercion and inducement and not freely and voluntarily given. We have examined the record and determine that defendant was fully advised of all his rights under *Miranda* before making any incriminating statements.

Insofar as the voluntariness issue is concerned, defendant contends that Detective Breen coerced and induced him into admitting his involvement in the attack on the victim by subjecting defendant to an extensive interrogation "prior to defendant's arrest, and after handcuffs had been placed upon [him]," brief for appellant at 13, by using "threatening overtones" during questioning, and by promising to obtain help for defendant. Specifically, defendant alleges that Detective Breen was threatening when he told defendant the judge would not look favorably on a defendant who expressed no remorse for his crimes and that Breen induced defendant to confess by promising to get defendant some help.

Findings of fact on a motion to suppress will not be overturned by this court unless those findings are clearly erroneous. *State v. Walker, supra*; *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990). Whether a defendant's statement results from an officer's promise is a question of fact. *State v. Cody*, 236 Neb. 69, 459 N.W.2d 195 (1990). In determining

whether these findings are clearly wrong, we take into consideration that the trial court observed the witnesses testify during the hearing. *Walker, supra.*

The State must show that the statement, admission, or confession of the accused was given freely and voluntarily and was not the product of any promise or inducement, direct or implied, no matter how slight, before it will be admitted into evidence. *Walker, supra*; *Porter, supra.*

Voluntariness is determined by the totality of the circumstances, and a determination by the trial judge that a confession was made voluntarily will not be overturned on appeal absent an abuse of discretion. *Walker, supra.*

Detective Breen was the only witness who testified at the suppression hearing. Defendant did not testify at either the hearing or the trial. The record of the suppression hearing shows that defendant was cooperative during the initial questioning, that Detective Breen told defendant he was not under arrest at that time, and that defendant was free to leave at any time during the conversation. At this time, defendant maintained his innocence and made no admissions, stating, as Breen testified, that "even if he had done this he knew enough not to admit his involvement."

The record further shows that after defendant was placed under arrest, he was twice given his *Miranda* rights and twice knowingly waived those rights.

After defendant's arrest, when defendant stated that he "needed help," Detective Breen did tell defendant that he would try to get defendant some help. However, he did not indicate or imply to defendant that help would be forthcoming only in exchange for a confession.

Considering the totality of the circumstances, we cannot say that Detective Breen's statements to defendant were coercive or an improper inducement to confess. Nor can we say that the trial court abused its discretion in finding that defendant's statements were voluntarily made and in overruling defendant's motion to suppress his statements. Defendant's first two assignments are without merit.

Defendant's final assignment of error is that his sentences were excessive. It is well settled in Nebraska that a sentence

imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Harris,* 236 Neb. 783, 463 N.W.2d 829 (1990). Defendant was sentenced on four counts. Counts I and III are Class II felonies, with a possible sentence of 1 to 50 years' imprisonment. Counts II and IV are Class III felonies, with a possible sentence of 1 to 20 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 1985). On count I, first degree sexual assault, the court found that defendant caused serious personal injury to the victim, and he was sentenced to a term of 15 to 18 years' imprisonment. On count III, robbery, a sentence of 5 years was imposed. Defendant received a sentence of 5 to 10 years' imprisonment on count II, and 5 years' imprisonment on count IV. All terms are to run consecutively and consecutive to a 25-year term for aggravated rape imposed by a Texas court. Defendant was on parole from that latter charge when he committed the crimes in this case. Credit was given for time previously served. Defendant's sentences were well within the statutory limits.

The presentence investigation report also shows that defendant, age 36, has had a long history with the criminal justice system in Nebraska, beginning with juvenile offenses. He was convicted of three counts of burglary in 1972 and was sentenced to prison at that time.

In light of the serious nature of the crimes and the background of defendant, as reflected in the presentence investigation report, we cannot say that the trial court abused its discretion in sentencing defendant. The convictions and sentences of defendant are affirmed.

AFFIRMED.

LEWIS KIDD, APPELLEE, V. WINCHELL'S DONUT HOUSE AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, APPELLANTS.

465 N.W.2d 442

Filed February 1, 1991. No. 90-083.

1. **Workers' Compensation: Appeal and Error.** A decision by the workers' compensation court after rehearing has the same force and effect as a jury verdict, and findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, the Supreme Court determines that those findings are clearly erroneous.
2. **Workers' Compensation.** When a work-related injury combines with a preexisting condition to create a disability, recovery may be had even if in the absence of the preexisting condition no disability would have resulted.
3. **Workers' Compensation: Proof.** In a workers' compensation case, claimant must prove by a preponderance of the evidence that the claimant's work-related injury combined with his preexisting condition to cause a compensable disability.
4. **Trial.** Ordinarily, the trier of fact determines causation.
5. **Workers' Compensation: Subrogation.** Upon the filing of a notice of subrogation under Neb. Rev. Stat. § 68-716 (Reissue 1990), in a workers' compensation case, the Department of Social Services and any third party liable to the department are entitled to a determination of the subrogation interest.
6. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-120 (Reissue 1988), the Workers' Compensation Court may allow an employee to recover the reasonable value of necessary home nursing care furnished by the employee's spouse.
7. _____. The Workers' Compensation Court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part remanded.

Joe P. Cashen and Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellants.

James E. Harris, of Harris, Feldman, Stumpf Law Offices, for appellee.

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

GRANT, J.

Winchell's Donut House (Winchell's) and National Union Fire Insurance Company of Pittsburgh, defendants herein,

appeal from an award on rehearing by the Nebraska Workers' Compensation Court in favor of plaintiff-appellee, Lewis Kidd. One member of the panel dissented in part. We affirm as modified.

In this court, defendants assign the following errors in the actions of the Workers' Compensation Court, contending that the court erred (1) in finding that plaintiff sustained an injury due to a work-related accident, (2) in ordering defendants to reimburse the Nebraska Department of Social Services in an unspecified amount, (3) in finding that plaintiff was temporarily totally disabled during the time in question, and (4) in finding that plaintiff's wife was entitled to benefits for her home nursing care services.

The record, viewed in the light most favorable to plaintiff-appellee, the successful party, as required by *Elwood v. Panhandle Concrete Co.*, 236 Neb. 751, 463 N.W.2d 622 (1990), shows that plaintiff, born May 22, 1957, has suffered from diabetes since 1974 and has had diabetic retinopathy since at least January 1988. From the time plaintiff quit college after his junior year until January 1988, he held several jobs and had no diabetes-related vision problems at any of them. In January 1988, plaintiff began to experience problems related to his diabetes, but had no vision problems. At that time he was diagnosed as having background diabetic retinopathy, or hemorrhaging from normal blood vessels in the eye, as opposed to proliferative diabetic retinopathy, which is marked by the "growth of new blood vessels [which] would lead to marked hemorrhaging in the eye, such as a vitreous hemorrhage."

Plaintiff was first employed by Winchell's in July 1983 in Lubbock, Texas. He later moved to Omaha, Nebraska, in May 1987, where he was employed by Winchell's in various supervisory capacities up to the time of the accident.

On June 1, 1988, at 4 a.m., plaintiff was making doughnuts at a Winchell's store in Omaha, when he turned suddenly and struck the bony portion of the orbital rim above his right eye on a fry screen. Neither the right eyeball itself nor his left eye was struck. The incident did not "bother" plaintiff. He finished his shift, went home, and went to bed.

Upon waking, plaintiff "saw a big red splotch in about the

middle of [his] field of vision." His sight was impaired. He was examined by his personal physician, Dr. Marc Rendell, that afternoon. Rendell referred plaintiff to Dr. Ira Priluck. On June 2, 1988, Priluck examined plaintiff and determined that plaintiff's diabetic retinopathy was proliferative at that time and scheduled him for laser treatments for the right eye the following week. Later that day, plaintiff "started to see some blood in [his] left eye," similar to the problem he had experienced the previous day in his right eye. Plaintiff contacted Priluck and on June 3, 1988, went to see him for a "laser treatment on one of [his] eyes."

Plaintiff underwent a series of laser treatments on both eyes. Plaintiff testified that his vision had improved enough for him to go back to work for Winchell's from the end of July 1988 through the middle of August 1988. At that time he had a vitrectomy. From mid-August 1988 through March 1989, his vision "varied considerably." Apparently, plaintiff was not employed again until he took a telemarketing job in late May 1989. He held this job for approximately 2 weeks, at which time he took a leave of absence to have a second vitrectomy. After this surgery, he continued to have difficulty with his vision and could see only 4 to 5 inches in front of his face at the time of the rehearing. He was legally blind in both eyes at this time.

The scope of our review of a workers' compensation case is settled. A decision by the Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, we determine that those findings are clearly erroneous. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

In defendants' first assignment of error, they allege that in light of plaintiff's preexisting condition and the subjective nature of his injury, the Workers' Compensation Court erred in finding that plaintiff had a work-related accident which caused hemorrhages in both of plaintiff's eyes. Defendants contend that plaintiff failed to meet the "enhanced burden of proof" required under these circumstances. In *Heiliger, supra* at 468, 461 N.W.2d at 572, we expressly "disapprove[d] of language in

this court's previous decisions . . . [citations omitted] which has imposed an enhanced degree of proof by an employee prosecuting a claim under the Nebraska Workers' Compensation Act." We further set out that under Neb. Rev. Stat. § 48-151(2) (Reissues 1968 & 1988), a "claimant's burden of proof and the preponderance of evidence standard have remained unchanged in the Workers' Compensation Act." *Heiliger, supra* at 467, 461 N.W.2d at 571. Thus, the evidence necessary to meet the burden of proof may vary depending on the facts of the case, but the burden remains the same. As we stated in *Heiliger, supra* at 468, 461 N.W.2d at 572:

> Although a claimant with a preexisting disability or condition may face various obstacles . . . and must satisfy the statutory requirements for an award under the Nebraska Workers' Compensation Act, an enhanced degree of proof, establishing a cause-and-effect relationship between a work-related injury and consequent disability, is not among a claimant's burdens for obtaining an award under the Nebraska Workers' Compensation Act.

This court held in *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989), that when a work-related injury combines with a preexisting condition to create a disability, recovery may be had even if in the absence of the preexisting condition no disability would have resulted. Thus, to receive an award, plaintiff in the instant case was required to prove by a preponderance of the evidence that his work-related accident combined with his preexisting condition to cause a compensable disability. Ordinarily, the trier of fact determines causation. *Spangler, supra*; *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990).

The record in this case shows conflicting medical testimony as to causation. Dr. Priluck testified that background diabetic retinopathy is not necessarily the precursor of proliferative diabetic retinopathy and that the trauma to plaintiff's right orbital rim was the proximate cause of the hemorrhaging in both of plaintiff's eyes. Dr. D. Francis Arkfeld examined plaintiff on September 15, 1988, at plaintiff's request, and concluded "based on reasonable medical probability that

Lewis's problems with his vision are not related to the alleged injury."

When the testimony of expert witnesses conflicts, the trier of fact must weigh the evidence and resolve the contradiction. *Heiliger, supra.* Even if there is a contradiction in testimony from the same expert witness, " '[a] good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.' " *Vredeveld v. Gelco Express*, 222 Neb. 363, 369, 383 N.W.2d 780, 783 (1986). In the instant case, there is evidence in the record to support the Workers' Compensation Court's finding on causation, and we cannot say that it was clear error for that court to accept one expert's testimony over another's. Defendants' first assignment of error is without merit.

In defendants' second assignment of error, they contend that "[t]he court erred in ordering reimbursement to the Nebraska Department of Social Services in the absence of any evidence relating thereto. The court further erred in not making a final determination with respect to specific charges, and determining whether [they were] properly chargeable and whether the same were reasonable." Defendants are correct in this contention, and while the compensation court's order in this regard may not be reversed and dismissed, the cause must be remanded for further proceedings on this part of the order.

The record before us on this issue shows the following: Plaintiff filed his petition in the Workers' Compensation Court on October 25, 1988. This petition alleged that plaintiff had suffered a compensable injury on June 1, 1988. The original award indicates the defendants filed an answer, but that answer is not in the transcript, and we do not know the contents of the answer or the date it was filed.

On December 14, 1988, the Nebraska Department of Social Services (DSS) filed a "Notice Of Right to Subrogation" in plaintiff's case before the compensation court. This notice began, "COMES NOW the Nebraska Department of Social Services, subrogee to Lewis W. Kidd, and informs the court as follows: 1. That on the 31st day of May, 1988 [applicant not stated] applied for Medical Assistance benefits for Lewis W. Kidd . . . ." The notice further stated that by December 5, 1988,

DSS had provided $9,510.82 of "Medical Assistance benefits to Lewis W. Kidd, as listed in the above-captioned case," and that "pursuant to Nebraska Revised Statutes, Section 68-716," an application for such benefits "shall give a right of subrogation to [DSS]." The notice also stated that DSS had received additional bills of $10,693.73, which bills remained unpaid "pending the decision of the Court." The notice did not ask for any relief. A certificate of service showed that a copy of the notice was served on each of the defendants, defendants' claims adjustor (but not defendants' attorney), plaintiff, plaintiff's attorney, and the clerk of the compensation court.

Neb. Rev. Stat. § 68-716 (Cum. Supp. 1988) provided:

> An application for medical assistance benefits shall give a right of subrogation to the Department of Social Services. Subject to sections 68-1038 to 68-1046, subrogation shall include every claim or right which the applicant may have against a third party when such right or claim involves money for medical care. The third party shall be liable to make payments directly to the Department of Social Services as soon as he or she is notified in writing of the valid claim for subrogation under this section.

A one-judge award was entered on March 1, 1989. This award ordered defendants to pay the sum of $9,510.82 to DSS "for medical services rendered to and on behalf of the plaintiff through December 5, 1988 under its right of subrogation pursuant to Nebraska Revised Statute 68-716" and further ordered defendants to "continue to reimburse said department for any further medical services paid on behalf of the plaintiff since that date that are fair and reasonable and related to the accident of June 1, 1988."

Defendant timely filed an "Application For Rehearing" from this award. On March 20, 1989, DSS filed another "Notice Of Right to Subrogation" with the compensation court. This notice was identical with the earlier DSS filing except the 1989 notice stated that DSS had provided $9,918.60 of benefits to plaintiff as of March 14, 1989, and that $11,260.98 of other medical bills had been received by DSS but not paid and were "forwarded directly to the Winchell [sic]

Donut House and Workers' Compensation Court for consideration and payment." In the award on rehearing, so far as it concerns this issue, the court ordered that "[t]he defendant reimburse [DSS] those charges incurred in connection with the compensable accident and paid by the welfare system."

This casual approach by the parties, DSS, and the compensation court to this issue of reimbursement of this not insignificant sum of approximately $10,000 results in a great deal of confusion. DSS has claimed it has a right of subrogation based on an application for medical benefits, filed by someone not identified, 1 day before an allegedly compensable accident. The amount claimed by DSS as subrogee has increased slightly as the case has proceeded. The compensation court has, in effect, ordered defendants to pay medical bills "incurred in connection with the compensable accident," without informing defendants or DSS what bills were so incurred and what bills are "reasonable." We are mindful that "when an employee presents evidence of medical expenses resulting from a work-related injury, the employee has presented prima facie proof of fairness and reasonableness for the expenses . . . ." *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 546, 451 N.W.2d 910, 916 (1990). The problem in the instant case is that DSS, in its notices of right to subrogation, has asked for lump sums, and it is unclear whether the total amounts listed in the notices reflect payments made by DSS for medical expenses which were "expenses resulting from a work-related injury." Each of the notices states that on May 31, 1988, the day before the accident occurred, someone applied for medical assistance benefits for the plaintiff. If correct, this would indicate that plaintiff incurred prior medical expenses unrelated to the accident. We note that the Workers' Compensation Court, on rehearing, did consider the reasonableness of other medical expenses in evidence before it because the court sharply reduced Priluck's fee and eliminated all charges for services of Rendell except those rendered on the day of the accident.

It can readily be seen that defendants have been ordered to pay an unspecified amount, insofar as defendants or DSS is concerned. In the absence of other considerations, it would be appropriate to determine, as defendants contend, that

defendants need not pay any amount to DSS. There is, however, a controlling other consideration.

Section 68-716 (Reissue 1990) provides that an application for medical benefits "shall give a right of subrogation" to DSS, and that the subrogation "shall include every claim or right which the applicant may have against a third party . . . ." The statute concludes: "The third party shall be liable to make payments directly to [DSS] as soon as he or she is notified in writing of the valid claims for subrogation under this section." It is clear that DSS has given notice of its claimed subrogation rights, but the record does not show that there was any hearing on that issue. We hold that upon the filing of a notice of subrogation under § 68-716, in a workers' compensation case, DSS and any third party liable to DSS are entitled to a determination of the subrogation interest. DSS and defendants are entitled to notice and hearing on the issue of the claimed right of DSS to, and the amount of, subrogation. The cause is remanded for disposition of this issue.

Defendants' remaining two assignments of error relate to factual findings. Based on evidence in the record we cannot say that those findings are clearly wrong.

Defendants contend that since plaintiff's vision in his right eye improved for a period of time from the end of December 1988 to the middle of June 1989, such that he was able to work, the Workers' Compensation Court erred in awarding total disability during this time. We disagree. Although an employee may be capable of returning to work, or does actually return to work, this "does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 471, 461 N.W.2d 565, 574 (1990). Thus, although plaintiff's corrected vision in the right eye did improve from 20/70 to 20/50 during this time, and plaintiff would not be blind on this basis, the vision in his left eye remained less than 20/400, and we cannot say that the compensation court erred.

Finally, defendants allege that there was insufficient evidence for the court to find that plaintiff's wife provided home health

care enough to warrant an award of $70 per week. Under Neb. Rev. Stat. § 48-120 (Reissue 1988), the Workers' Compensation Court "shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished." This generally includes home nursing care. See *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). In this case, the evidence shows that plaintiff's wife draws his insulin shots, checks his sugar levels, cuts his pills in half, puts drops in his eyes, lays out his clothes, drives for him, and reads to him. An injured employee may recover the reasonable value of necessary home nursing care furnished by his wife. *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). The Workers' Compensation Court did not err in determining that plaintiff's wife was entitled to reimbursement for her home health care services.

In his brief in this court, plaintiff contends that he is entitled to reasonable attorney fees of $67,536.79 under Neb. Rev. Stat. § 48-125 (Reissue 1988), based primarily on the contingent fee contract between plaintiff and his counsel and calculations made on the basis of plaintiff's possible compensation. We do not agree.

The awarding of attorney fees in compensation actions has been statutorily devised to be awarded in segments in accord with the result of appeals to a higher panel or to this court. There is no statutory authorization for an overall fee in this court to compensate plaintiff's attorney strictly on his contingent fee contract. We note that, in any event, there is no compliance with the provisions of Neb. Rev. Stat. § 48-108 (Reissue 1988).

The Workers' Compensation Court on rehearing found that there was a "reasonable controversy and that the defendant ha[d] secured a reduction in the original award in terms of medical expense and the calculation of the average weekly wage" and did not award attorney fees to plaintiff. Under § 48-125, when an employer applies for a rehearing before the compensation court and at such hearing obtains a reduction in the amount of the original award, the employee is not entitled to attorney fees. When an employer appeals to this court from a decision on rehearing and fails to obtain a reduction in the

amount of the award, the employee is entitled to a reasonable attorney fee for services of his attorney in this court.

Defendants in the case at bar have failed to obtain a reduction in the award on this appeal. The remand herein is only for the purpose of determining precise amounts of payments, and the remand cannot be construed to support any reduction in the award. Plaintiff is awarded $2,500 to be applied toward the fee due his attorney.

AFFIRMED IN PART, AND IN PART REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RICKY J. WEAVER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. CHARLES L. WEAVER, APPELLANT.
465 N.W.2d 470

Filed February 1, 1991. Nos. 90-169, 90-227.

1. **Verdicts: Appeal and Error.** In determining whether the evidence is sufficient to sustain a finding or verdict in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition.
2. **Criminal Law: Evidence: Appeal and Error.** Determinations of factual issues in a criminal trial are for the finder of fact, and those findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
3. **Theft: Value of Goods: Juries.** The determination of the value of property stolen, upon a conviction of theft, is a question of fact to be determined by the jury.
4. **Theft: Value of Goods.** The value of property stolen is not an element of the crime of theft and is important only in determining the penalty.

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

Nile K. Johnson for appellants.

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

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

These are consolidated criminal prosecutions of two defendants, Charles L. Weaver and Ricky J. Weaver, for the offenses of theft of property belonging to Tage Christensen on April 20, 1989, contrary to Neb. Rev. Stat. § 28-511 (Reissue 1989).

Both defendants were found guilty, and by its verdicts the jury determined the value of the property taken to be $300. The trial court sentenced the defendants to indeterminate terms of imprisonment of not less than 20 months nor more than 5 years, with credit for jail time served.

The defendants assign as error the insufficiency of the evidence to sustain the finding of value of the property taken and the failure of the trial court to instruct on a lesser-included offense. We affirm.

Section 28-511 provides in part that "(1) [a] person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Neb. Rev. Stat. § 28-518 (Reissue 1989) states that "(2) [t]heft constitutes a Class IV felony when the value of the thing involved is three hundred dollars or more, but not over one thousand dollars." The maximum term of imprisonment for a Class IV felony is 5 years.

In determining whether the evidence is sufficient to sustain a finding or verdict in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. *State v. Thomas*, 236 Neb. 568, 462 N.W.2d 618 (1990); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Determinations of factual issues in a criminal trial are for the finder of fact, and those findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. See *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). The determination of the value of property stolen, upon a conviction of theft, is a question of fact to be determined by the

jury. *State v. Culver, supra.*

Jeff Christensen, the son of the owner of the property, described the property as consisting of a closed toolbox, a Skil Saw, a drill, and a chain saw. A picture taken by the authorities shows a closed toolbox, a circular saw, a drill, and a chain saw. There was testimony by the owner of the property, as well as by an independent appraiser who qualified as an expert, that the property was of the value of at least $300. The evidence fully supported the finding by the jury of the value of the property. There is no merit to the defendants' first assignments of error.

In their second assignments of error the defendants claim that the court should have instructed their jury on a lesser-included offense. They argue that there was evidence indicating that the value of the property was less than $300, which would reduce the charge from a Class IV felony to a Class I misdemeanor. The expert witness, who testified as to a $300 value, stated on cross-examination that his appraisal could be off by as much as 10 percent.

However, the defendants overlook the fact that the value of the property stolen is not an element of the crime and is important only in determining the penalty. *State v. Culver, supra.* The trial court instructed the jury that the elements of the crime necessary for conviction were that the defendants did exercise control over movable property of the victim, with the intent to deprive the victim thereof, and that the property had value. There is no lesser-included offense involved, only the one offense of theft. The defendants had the benefit of an instruction to the jury that if it found the defendants guilty, it must fix a value on the property stolen. It is by that finding that the sentencing court must determine the grade of the offense committed, and to that extent the defendants were given the opportunity of being found guilty of "a lesser-included offense."

The judgments of the district court are affirmed.

AFFIRMED.

KEYSTONE RANCH COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT AND CROSS-APPELLEE, NEBRASKA PUBLIC POWER DISTRICT, APPELLEE AND CROSS-APPELLEE.

465 N.W.2d 472

Filed February 8, 1991. No. 88-408.

1. **Summary Judgment: Final Orders: Appeal and Error.** An order overruling a motion for summary judgment is an interlocutory order, not a final order from which an appeal can be taken.
2. **Summary Judgment.** A trial court, in its discretion, may permit the renewal and resubmission of a motion for summary judgment which has previously been overruled.
3. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the court before an order on such a motion may be reviewed.
4. **Judgments: Records: Presumptions: Evidence: Appeal and Error.** In the absence of a record of the evidence considered by the court, it is presumed that the order of the trial court was supported by the evidence and was correct.
5. **Judgments: Appeal and Error.** In reviewing a judgment in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence.
6. **Trial: Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.
7. **Actions: Damages: Prejudgment Interest.** If the right to damages is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Affirmed as modified.

Michael C. Klein and Bruce A. Peterson, of Anderson, Klein, Peterson and Swan, for appellant.

James E. Schneider, of Schneider & Griffin, P.C., for appellee Keystone Ranch.

Gary L. Scritsmier and Frankie J. Dawson, of Kelley, Scritsmier, Moore & Byrne, P.C., for appellee NPPD.

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

BOSLAUGH, J.

The plaintiff, Keystone Ranch Company, commenced this action in the winter of 1978 for damage to its land, pursuant to article I, § 21, of the Nebraska Constitution. The defendants are the Central Nebraska Public Power and Irrigation District (hereinafter Central District) and Nebraska Public Power District (hereinafter NPPD).

The plaintiff is the owner of 251 acres of accretion land located along the south bank of the North Platte River, in Keith County, Nebraska, approximately 4 miles east of Kingsley Dam in Keith County.

In 1937, the Central District constructed and presently operates Kingsley Dam and Lake C.W. McConaughy, and also operates Lake Ogallala, a small reservoir located immediately below Kingsley Dam. Lake McConaughy has approximately 2 million acre-feet of storage capacity. Its primary purpose is to store water for irrigation and hydroelectric power purposes.

The third amended petition, filed in 1982, alleged that the plaintiff had been damaged in the amount of $241,900 by the operation of Kingsley Dam by the Central District. The plaintiff contended that Kingsley Dam impeded the flow of the North Platte River and altered the silt-carrying capacity of the water as it was released from Kingsley Dam and Lake McConaughy reservoir, which was created by construction of the dam. The plaintiff further alleged that in 1971 and 1973, the Central District released excessive quantities of water from Kingsley Dam; that the excessive release of these waters degraded the North Platte River channel and caused the deepening of the riverbed adjacent to the accretion land by 8 to 10 feet; that the deepening of the North Platte River bed caused an 8- to 10-foot lowering of the adjacent water table under plaintiff's 251 acres of accretion land; that the lowering of the water table under plaintiff's accretion land deprived the trees and vegetation thereon of access to moisture and caused the trees and vegetation on the plaintiff's 251 acres of accretion land to die; and that by reason of the deepening of the riverbed,

the lowering of the water table, and the death of the trees and vegetation, the value of the plaintiff's 251 acres of accretion land was diminished.

I. THE MOTIONS FOR SUMMARY JUDGMENT

Both defendants filed motions for summary judgment. On March 1, 1983, the district court sustained the Central District's motion for summary judgment. Thereafter, the plaintiff filed a motion for new trial, which was sustained by the district court on June 28, 1983, and the summary judgment in favor of the Central District was vacated. The Central District attempted to appeal the June 28, 1983, order of the district court, but this court dismissed that appeal on September 14, 1983. See *Keystone Ranch Co. v. Nebraska Public Power & Irrigation District*, 215 Neb. xxvi (case No. 83-568, Sept. 14, 1983). See, also, *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960).

The motion for summary judgment filed by NPPD on November 1, 1984, was overruled on December 1, 1985. At the pretrial conference held on November 30, 1987, the trial court announced that, on its own motion, it was "reconsidering the Motion for Summary Judgment filed by the defendant, Nebraska Public Power District," which matter was taken under advisement. On December 7, 1987, the trial court reversed its previous ruling, sustained the motion of NPPD, and dismissed the action as to NPPD.

The Central District has assigned as its first assignment of error the ruling of the trial court on the plaintiff's motion for new trial, and the plaintiff has cross-appealed from the order sustaining the motion for summary judgment filed by NPPD.

The plaintiff argues that the trial court could not reverse its ruling on the motion filed by NPPD because the term of court had expired. An order overruling a motion for summary judgment is an interlocutory order, not a final order from which an appeal can be taken, so the contention that the trial court could not reconsider the motion of NPPD because the term had expired is without merit. See, *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989); *Krueger v. Zarley*, 229 Neb. 203, 425 N.W.2d 893

(1988); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984); *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983); *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983); *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962); *Otteman v. Interstate Fire & Cas. Co., Inc., supra*; *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953).

The plaintiff argues that it was error for the trial court to reconsider the previous ruling on NPPD's motion. In *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978), we held that a trial court, in its discretion, may permit the renewal and resubmission of a motion for summary judgment which has previously been overruled. In the *Bringewatt* case we said at 738, 272 N.W.2d at 38-39:

> Plaintiff contends that it was error for the court to allow the renewal of motions without an additional showing of facts. The previous order overruling the motions was not a final order and was not appealable. Pressey v. State of Nebraska, 173 Neb. 652, 114 N.W.2d 518. The order was interlocutory and none of the issues considered and decided by the court at the hearing became res judicata. The trial court has discretion to determine whether and under what circumstances a motion may be renewed. No abuse of that discretion has been shown. The procedure followed by the court was proper and the assignment of error is overruled.

In this case the parties have failed to preserve and present a record which will permit a review of the order overruling the motion of the Central District or the order sustaining the motion of NPPD. Since there is no bill of exceptions concerning the evidence which may have been offered at the hearing on the motion for summary judgment or at the hearing on the motion for new trial, there is nothing to review, and this court cannot determine whether error occurred. Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the court before an order on such a motion may be reviewed. *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959); *Brown v. Shamberg*, 190 Neb. 171, 206 N.W.2d 846

(1973).

In the absence of a record of the evidence considered by the court, it is presumed that the order of the trial court was supported by the evidence and was correct. *Peterson v. George, supra*. Consequently, the assignments of error relating to the motions for summary judgment are without merit.

After various delays, continuances, and motions by other parties, the case was finally tried to a jury against only the Central District on December 14 to 17, 1987. The jury returned a verdict of $12,550 for the plaintiff. Judgment was entered on the verdict, and the plaintiff was awarded interest on the judgment from June 1, 1975, the date the damage allegedly occurred. Motions for new trial were filed by the Central District and by the plaintiff and overruled by the district court on April 12, 1988.

II. SUFFICIENCY OF THE EVIDENCE

The Central District's second assignment of error alleges that the evidence was insufficient to support a finding that the operation of Kingsley Dam by the Central District caused the damage to the trees and vegetation on plaintiff's 251 acres of accretion land.

The Central District contends that it is not liable for the damage the plaintiff claims because the large quantities of water released from Lake McConaughy and Kingsley Dam in 1971 and 1973 were waters that would have flowed past the plaintiff's land in any event because of the large snowmelt and precipitation which occurred above Lake McConaughy during those years.

Frank Dragoun, the general manager of the Central District, testified that Kingsley Dam was built primarily to store water for irrigation purposes and not for flood control. According to Dragoun, the only reservoir on the North Platte River designed for flood control is the Glendo Reservoir in Wyoming. He noted that during certain periods Glendo Reservoir is operated by the Army Corps of Engineers but that generally it is operated by the Bureau of Reclamation. The significance of this fact is that the waterflow into Lake McConaughy is controlled by federal agencies. Therefore, the flow of water in the North

Platte River past the plaintiff's accretion land is controlled in part by the federal agencies operating Glendo Reservoir. In essence, the operators of Lake McConaughy must handle the waters as they are released from the upstream reservoirs.

The basis of the plaintiff's claim is that because of the dam, the water passing the plaintiff's land was "clean" water which picked up large amounts of silt and sand and caused the degradation of the bed of the river.

In reviewing a judgment in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence. *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990); *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

Taking the view of the evidence most favorable to the plaintiff, we find that the record shows that prior to the damage allegedly caused by the defendant Central District, the accretion land provided an ideal place to winter cattle. Eugene Feltz, the president of Keystone Ranch Company, testified, along with several of his neighbors, that the abundance of grass, trees, and undergrowth on the accretion land provided the cattle with feed and protection from the winter conditions. In its petition, the plaintiff contends that the defendants' actions caused the death of the trees and vegetation on the accretion land and that, as a result, the value of the land was diminished in value by $900 per acre.

Edward Soucek, a civil engineer who specializes in hydraulic structures, testified in support of the plaintiff's theory that the operation of Kingsley Dam by the Central District caused the damage to the plaintiff's accretion land. He testified that the release of large volumes of water in 1971 and 1973 from Kingsley Dam and Lake McConaughy caused the deepening of the riverbed and that the deepening of the riverbed in turn caused the lowering of the water table under the plaintiff's accretion land.

Soucek testified that to a considerable extent, Kingsley Dam controls the volume of water flowing in the natural channel of the North Platte River as it courses along the area of the

plaintiff's 251 acres of accretion land. Photographs made in 1939 and in 1965 which were received in evidence show the progressive constriction of the river's channel. From these photographs, Soucek testified that in 1939 the North Platte River opposite the Keystone Ranch property was flowing as a braided channel, that is, there were a large number of small channels which joined and separated and rejoined. By 1965, however, the river was confined to a single channel about 100 feet wide. According to Soucek, the progressive constriction of the river to a single channel was in part due to the presence of Kingsley Dam.

Soucek also testified that Kingsley Dam altered the silt-carrying capacity of the North Platte River. The North Platte River is a sediment-carrying river, in that its waters carry a substantial amount of sand as the waters move within the river's banks. However, like all such rivers, when its waters are impounded behind a dam, the North Platte River loses the capacity to transport sediment due to the reduced current. As a result, the water released from Kingsley Dam is clear water; that is, it contains no sediment.

Soucek testified that when clear water is released into the river it has a natural tendency to pick up sediment from the riverbed. Soucek testified further that when water picks up sediment from the riverbed, the bed is lowered by a process called degradation. According to Soucek, the process of degradation is directly influenced by the volume and velocity at which water is flowing. In other words, when the volume and velocity of the water increase, so too does the rate at which degradation of the riverbed occurs, causing the lowering of the riverbed. Soucek testified that the bed of the North Platte River has been lowered approximately 10 feet since the construction of Kingsley Dam.

According to Soucek, the 10-foot lowering of the North Platte River bed was substantially caused by the large increase in water releases from Kingsley Dam during 1971 and 1973. He stated that the increase in the amount, and duration of the increase, of released water in 1971 and 1973 caused an increase in the process of degradation. The increased degradation, according to Soucek, caused an increase in the lowering of the

riverbed. Soucek concluded by stating that the lowering of the North Platte River bed substantially caused the lowering of the water table under the plaintiff's accretion land.

Soucek made an investigative trip to the Keystone Ranch properties along the North Platte River to see firsthand what effect Kingsley Dam had had on the plaintiff's accretion land. Through a series of profiles—graphs showing the elevation of the surface of the ground at various points along a line—Soucek determined that the river level on August 7, 1984, was approximately 10 feet lower than the area in which the braided channel flowed in 1939. Soucek also made observations as to the location of the bed of the river in 1984 compared to what it would have been in 1939. He estimated that the difference in height between the level of the bed in 1984 and that in 1939 was approximately 10 feet.

Soucek introduced hydrographic charts to show that in 1971 and 1973, large amounts of water were released from Kingsley Dam. Exhibit 146 shows that between May 11 and June 30, 1971, the daily discharge of water reached over 7,000 cubic feet per second (cfs) for 18 days. Exhibit 147 shows that between May 6 and June 25, 1973, the daily discharge of water reached over 6,000 cfs for 18 days. Prior to 1971 and 1973 and subsequent thereto, the peak discharge of water rarely reached 4,000 cfs. According to Soucek, these figures are instructive as to the erosive power of the river, i.e., the ability of the river to cause degradation.

In sum, Soucek testified that the dramatic increase in water released from Kingsley Dam during 1971 and 1973 increased the degradation process in the river. The increased degradation caused a lowering of the riverbed, and the lowering of the riverbed caused the lowering of the water table under the plaintiff's accretion land.

Soucek testified that based upon his experience as an engineer, his field examination of Keystone Ranch, and his examination of aerial photos, hydraulic records, and the bed of the North Platte River adjacent to the Keystone Ranch properties, he believed that the water table under the plaintiff's accretion land was lowered as a result of the process of degradation which occurred in 1971 and 1973.

Philip Marvin, a plant pathologist who testified on behalf of the plaintiff, stated that the lowering of the water table under the plaintiff's accretion land caused the trees thereon to die. During his inspection of the Keystone Ranch properties, Marvin observed that the root system of the dead trees was very shallow. He noted that there was once a sufficient amount of moisture near the surface of the ground, which eliminated the necessity for a deep root system. Consequently, when the water table beneath the accretion land was lowered, the trees were left without a water supply, and they subsequently died.

James Harris, a real estate appraiser, provided testimony as to how the death of the trees, grass, and other vegetation affected the market value of the plaintiff's accretion land. Harris stated that there was an $87,000 diminution in the value of the accretion land as a result of the loss of trees, grass, and other vegetation.

As we view the record, the plaintiff's evidence presented questions for the jury as to whether the plaintiff's land had been damaged, whether the defendant Central District had caused the damage, and the amount of the damages.

III. THE ADEQUACY OF THE VERDICT

The jury returned a verdict in favor of the plaintiff in the amount of $12,550. By cross-appeal, the plaintiff contends that the amount of the recovery was too small and that the verdict was contrary to the evidence.

Although the plaintiff produced expert testimony that the damages were greater than the amount of the verdict, John Childers, a farm and ranch real estate appraiser who testified on behalf of the Central District, stated that the value of the plaintiff's accretion land was not affected by the presence or absence of trees on the property. Childers testified that although the presence or absence of trees on property may affect a ranching operation, the market value of the property is not impacted by the presence or absence of trees.

The jury was not required to accept the testimony of any of the expert witnesses, including the testimony of Soucek. Triers of fact are not required to take the opinions of experts as binding upon them. *Briggs v. Consolidated Freightways*, 234

Neb. 410, 451 N.W.2d 278 (1990).

Although Kingsley Dam was constructed in 1937, apparently it caused no damage to the plaintiff's property until the floods of 1971 and 1973. Presumably, the degradation process was continuous since the dam was constructed, although not necessarily at a uniform rate.

There was other evidence that suggested the change in ground water levels may have been due to other causes. Ralph Knepper, the Central District's hydraulic engineer, testified that two wells on the plaintiff's property showed that the ground water level had actually risen and that the ground water levels north of the river had shown a gradual decline, probably due to extensive drilling of irrigation wells.

Also, on cross-examination, Eugene Feltz testified that there has been no change in the use of the property since the trees died.

From our review of the record we conclude that the evidence supports the verdict and it was not contrary to the evidence.

IV. PREJUDGMENT INTEREST

The trial court awarded the plaintiff interest on the verdict from June 1, 1975. The Central District's third assignment of error alleges that the plaintiff should not recover any prejudgment interest because there was a reasonable controversy as to both the right to recover and the amount of the recovery.

In *Smith v. Platte Valley Public Power and Irrigation District*, 151 Neb. 49, 36 N.W.2d 478 (1949), the plaintiff claimed that his land had been damaged by seepage from the defendant's canal. The issues before the court were causation and damages, as they are in the present case. The jury returned a verdict for the plaintiff in the amount of $9,000, and the trial court denied prejudgment interest on the verdict from the date of the damage. The plaintiff's cross-appeal raised the question of the date from which the interest should have been computed. This court held at 56, 36 N.W.2d at 482-83:

> We said in Missouri, Kansas & Texas Trust Co. v. Clark, 60 Neb. 406, 83 N.W. 202: "Regardless of the character of the action, interest is recoverable in all cases for the use or

destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values." See, also, Parkins v. Missouri P. Ry. Co., 76 Neb. 242, 107 N.W. 260.

However, here not only the amount is unliquidated but the liability, if any, must first be ascertained. Under these circumstances we think the following statement from Wittenberg v. Mollyneaux, 59 Neb. 203, 80 N.W. 824, is applicable: "If the right to damages for breach of a contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount." See Gee v. City of Sutton, 149 Neb. 603, 31 N.W.2d 747.

In view of the substantial controversy in this case as to both the right to recover and the amount of the recovery, we conclude that the plaintiff should not recover prejudgment interest.

The judgment is affirmed in all respects except as to the recovery of prejudgment interest. The judgment is modified by deleting the allowance of prejudgment interest, and as so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. HENRY E. PATTERSON, APPELLANT.

465 N.W.2d 743

Filed February 15, 1991. No. 89-1390.

1. **Prisoners: Moot Question: Sentences: Time: Appeal and Error.** A prisoner's appeal is not moot if he has fully served his sentence before his appeal reaches the court and there was no way the prisoner, using all reasonable methods, could have brought his case to the court before expiration of his sentence, or if the prisoner may suffer future state or federal penalties or disabilities as a result of the judgment.

2. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. In determining whether the court's ruling was erroneous, this court takes into consideration that the trial court has observed the witnesses testifying.
3. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause: Arrests.** When a police officer suspects that criminal activity may be afoot, he may approach a person for purposes of investigating criminal behavior, even though there is no probable cause to make an arrest. The investigatory stop must be justified by a determination that the person stopped has been, or is about to be, engaged in criminal activity. Consideration must be given to the totality of the circumstances in determining whether there is sufficient cause to stop the individual.

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

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

Robert M. Spire, Attorney General, and Barry Waid for appellee.

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

WHITE, J.

Henry E. Patterson appeals his conviction for possession of cocaine. Patterson was initially charged with unlawful possession with intent to deliver a controlled substance, pursuant to Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), but was convicted by a jury on September 7, 1989, of the lesser-included offense of possession of a controlled substance. Patterson was sentenced to a term of 320 days in the Douglas County Correctional Center. He has served his sentence and has been released free of restriction.

On April 27, 1989, Omaha Police Officer Mark Langan received information from a confidential informant that Patterson was selling cocaine in the north Omaha area. The informant had supplied information to the police for several years and, in the weeks before the arrest of Patterson, had supplied information which resulted in the arrest of at least two persons on drug-related charges. The informant also made several controlled "buys" of cocaine for police. The informant

was paid for all information supplied in Patterson's case.

The informant advised Officer Langan that he had purchased cocaine from Patterson on several occasions in the past. The informant also told the officer that Patterson drove a black Ford Escort and that he knew Patterson's telephone number, but not his address. The informant told the officer he had seen Patterson with cocaine in the Escort within the last 24 hours. Half an hour later, the informant called Langan back and said he had just spoken to Patterson and that Patterson would be leaving his house that night in the Escort to sell cocaine from the vehicle in the north Omaha area. The informant said that Patterson told the informant he would be able to buy cocaine from Patterson that night.

The police verified that the telephone number furnished by the informant was assigned to S.V. Patterson of 3839 Parker Street and that a black Ford Escort was registered to Patterson at that address. Patterson later testified that he lived with his mother at that address. At 7 p.m. on April 27, an Omaha police officer saw the Escort pull up to 3839 Parker and a black male enter the house. At 7:28 p.m., the same individual left the house and departed in the same vehicle. The black male driving the Escort matched the description of Patterson given by the confidential informant.

Officer Langan and another police officer, in an unmarked vehicle, attempted to stop the black Escort as it drove away, by pulling in front of it at a stop sign. The officers were wearing jackets that identified them as police officers, but were otherwise dressed in civilian clothes. Officer Langan shouted to the driver of the Escort that he was a police officer and instructed the driver to turn off the car. Instead of stopping, the driver of the vehicle pulled away from the scene and drove through a field. Langan testified that he then began to run alongside the Escort, yelling, "[P]olice," and instructing the driver to stop the car. After the driver failed to stop, Langan returned to the police cruiser and began to pursue the Escort. The officers pursued the vehicle for three or four blocks, at which time the driver stopped the car of his own accord. The driver of the vehicle was later identified as Patterson.

Officer Langan ordered Patterson out of the car and advised

him that he was under arrest for obstructing the administration of law and for possession of a controlled substance. Patterson's car was driven, with his permission, to a carwash bay, where it was searched without a warrant. A small bag of marijuana was found during the search. Patterson was taken to the police station and strip searched. A baggie of crack cocaine was found in his underwear. After being given a *Miranda* warning, Patterson admitted his intent to sell a portion of the crack cocaine. At the trial, Patterson testified that he did use cocaine and that the cocaine found in his underwear belonged to him, but denied intending to sell the cocaine.

Prior to trial, Patterson moved to suppress the cocaine as the fruit of an illegal arrest under the fourth amendment to the U.S. Constitution. The district court overruled the motion, and evidence of the cocaine was admitted at trial over objection. Patterson assigns as error the district court's decision to admit evidence of the cocaine, as well as statements he made to police following his arrest.

Patterson has served his 320-day sentence at the Douglas County Correctional Center and has been released free of restriction. Therefore, we must consider first whether his direct appeal to this court is now moot.

In *St. Pierre v. United States*, 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943), the U.S. Supreme Court held that because the petitioner had fully served his sentence before his appeal reached the Court, the case had become moot because there no longer existed a subject matter on which judgment of the Court could be found. The Court in *St. Pierre* stated that "reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served." 319 U.S. at 42-43. However, the Court recognized that if the petitioner was able to show that further penalties or disabilities could be imposed on him as a result of the prior judgment, then the case was not moot. *St. Pierre, supra.*

In *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), the Supreme Court again dealt with the issue of whether or not the petitioner's appeal was moot because he had completely served his sentence. The Court stated that mere

release of the prisoner does not automatically foreclose consideration of the merits of the case by the Court, provided the case falls under one or both of the exceptions to the "doctrine of mootness" recognized by the Court in *St. Pierre, supra*. First, the Court held that the State may not effectively deny the prisoner access to the appellate courts until he has been released and then argue that his case has become moot. The Court stated that there was no way Sibron could have brought his case before the Court during the pendency of his 6-month sentence due to the overcrowding of the court system in New York, despite the fact that he took all steps to perfect his appeal in a prompt, diligent, and timely manner. He was also precluded by statute in New York from posting bail pending appeal. The Court stated that if Sibron were unable to have his case heard simply because he received a short sentence, then he would be rendered remediless and defenseless against unconstitutional conduct.

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where the petitioner may suffer future state or federal penalties or disabilities as a result of the judgment. This exception has been expanded to include a wide array of "penalties or disabilities." See, *Fiswick v. United States*, 329 U.S. 211, 67 S. Ct. 224, 91 L. Ed. 196 (1946) (case was not moot because the petitioner might later be subject to deportation for committing a crime of moral turpitude); *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954) (petitioner's case was not moot because subsequent convictions might carry heavier penalties and civil rights might be affected); *Pollard v. United States*, 352 U.S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957) (the mere possibility of consequences collateral to the imposition of sentence is enough to justify hearing the merits of the case); *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (the possibility that the appellant's license to engage in the luncheonette business might be revoked because of a criminal conviction was enough to bring the case within this second exception).

The Court in *Sibron, supra*, held that a criminal case is moot only if it is shown that there is no possibility that any collateral

legal consequences will be imposed on the basis of the challenged conviction. Since Sibron's credibility as a witness would be subject to impeachment by use of the conviction and the conviction might be considered by a court in sentencing in the future, the Court concluded that Sibron would suffer future penalties and disabilities and his case was not moot under *St. Pierre*.

Nebraska has adhered to the rules announced in *St. Pierre, supra*, and *Sibron, supra*. *State v. Myles*, 187 Neb. 105, 187 N.W.2d 584 (1971).

On September 7, 1989, Patterson was convicted of a violation of § 28-416(3), possession of a controlled substance. He was sentenced on October 31, 1989, to serve a term of 320 days in the Douglas County Correctional Center and was given credit for 139 days served prior to trial. Patterson filed his notice of appeal timely on November 21. However, Patterson did not file his brief to this court until March 9, 1990, after requesting and receiving a 30-day extension for filing time. There is no indication in the record that Patterson made a motion for release on bail pending his appeal to this court. Because Patterson did not make a motion to be released on bail and attempt to delay serving his sentence until his appeal was heard, he has not taken all possible steps in which to expedite his appeal to this court before his sentence was fully served. Combined with this is the evident lack of urgency shown by his request for additional time in filing his brief before this court. We realize that even if he had filed his brief timely, it is possible his case would not have been heard before expiration of his sentence. However, it is his effort that is crucial under *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). Patterson did not make all possible efforts to have his case heard before the termination of his sentence. Therefore, he does not fit within this *St. Pierre* exception. However, we do believe that because of his conviction Patterson may suffer future penalties or disabilities, and therefore his case falls within the second exception to the mootness doctrine discussed in *St. Pierre*.

Patterson was convicted of a Class IV felony and sentenced to a term of less than 1 year. He is not subject to future

additional punishment under Neb. Rev. Stat. § 29-2221 (Reissue 1989), the Nebraska habitual criminal statute. However, under Neb. Const. art. VI, § 2, Patterson may no longer vote in any state election because he was convicted of a felony. Additionally, Patterson's credibility may be subject to impeachment by use of his felony conviction, and a judge may consider it when imposing sentence for a subsequent offense. Certainly, these are "disabilities and penalties" under *Sibron*. Because Patterson will be subject to the various collateral consequences outlined above, his case falls within the second *St. Pierre* exception, and his appeal is not moot. We now consider the merits of his claim.

In support of his assigned error, Patterson claims that the cocaine found on his person in a postarrest search, as well as his confession, was the fruit of an illegal arrest under the fourth amendment.

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Caples*, 236 Neb. 563, 462 N.W.2d. 428 (1990); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court takes into consideration that the trial court has observed the witnesses testifying. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990).

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court held that when a police officer suspects that criminal activity may be afoot, he may approach a person for purposes of investigating criminal behavior even though there is no probable cause to make an arrest. Nebraska has adopted this standard for investigatory stops. See, *State v. Caples, supra*; *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982). In *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983), we repeated our statement in *State v. Nowicki*, 209 Neb. 640, 645, 309 N.W.2d 89, 92 (1981):

> [A]n investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole

picture — must be taken into account.

In this case, the information that led the Omaha police to suspect that Patterson was involved in criminal activity was supplied to them by a confidential informant. Patterson claims that because the informant was paid by police for his information, the informant was unreliable and his information could not serve as a basis for stopping and arresting Patterson. We disagree.

In *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the U.S. Supreme Court addressed the issue of whether information supplied by a confidential informant was sufficient to provide probable cause to support issuance of a search warrant. In finding that information supplied in an anonymous letter later corroborated through observation of the defendants was sufficient to constitute probable cause for the warrant, the Court rejected the strict two-pronged *Aguilar-Spinelli* test previously used to determine if probable cause existed based on an informant's tip. Instead, the Court adopted the "totality of the circumstances" test. In considering the totality of the circumstances, the issuing magistrate should consider elements of the old two-pronged test, such as the informant's veracity, reliability, and basis for knowledge. The magistrate should then make a commonsense determination whether, given all the facts and circumstances, probable cause exists to issue a warrant.

In Patterson's case, it is not necessary that we decide the issue of whether the informant's information was sufficient to provide probable cause for a warrant, since Patterson was legally stopped and arrested under the lesser *Terry* standard. However, we find the *Gates* standard useful in determining whether the informant's information provided sufficient "reasonable belief" under *Terry* to justify the stop.

The confidential informant twice provided the Omaha police with information regarding Patterson's drug activities on April 27, 1989. The informant described Patterson; described the vehicle he was driving, in which he was later apprehended; and also provided a telephone number, which was later confirmed as belonging to Patterson's mother. Additionally, the informant was known to have provided accurate, reliable information to

the police in the past, which led to drug-related arrests, and had participated in two "controlled buys" for the police. All the information provided by the informant about Patterson was later corroborated through police record checks and observation on the night of April 27. The police saw a man matching the description of Patterson drive up to the address matching the telephone number provided by the informant. The individual was driving the same black Ford Escort described by the informant. When the police attempted to stop the vehicle as it drove away from the house, the individual driving the Escort attempted to flee the area.

When looking at the totality of the information provided by the informant, together with corroboration of this information by police, the officers had sufficient reasonable suspicion under *Terry* to stop Patterson after he left his home that evening, in order to investigate possible drug activity. The fact that the informant was paid for his information is inconsequential given that all his information was later determined to be accurate. When Patterson failed to pull over as instructed by the officers, but instead fled from the scene, probable cause to believe Patterson was engaged in illegal drug activity arose, and the police were entitled to place him under arrest. The search of Patterson's person, whereby the cocaine was discovered in his underwear, was reasonable under the fourth amendment as a search incident to arrest. See, *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). The cocaine was properly admitted into evidence. Patterson was also given a *Miranda* warning prior to any questioning at the police station and waived all his constitutional rights at that time. His confession was also properly admitted into evidence by the trial court. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT G. LONNECKER, APPELLANT.

465 N.W.2d 737

Filed February 15, 1991. No. 89-1399.

1. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).
2. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
3. **Trial: Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989).
4. **Trial: Rules of Evidence: Appeal and Error.** A ruling pursuant to Neb. Evid. R. 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion.
5. **Rules of Evidence: Words and Phrases.** In the context of Neb. Evid. R. 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis.
6. **Controlled Substances: Intent.** A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance.
7. **Controlled Substances: Evidence: Proof.** A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Glenn A. Shapiro, of Gallup & Schaefer, and, on brief, Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

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

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

SHANAHAN, J.

A jury convicted Robert G. Lonnecker of intent to deliver

marijuana which was in his possession, a violation of Neb. Rev. Stat. §§ 28-405(c)(10) [Schedule I] (Reissue 1989) and 28-416(1) (Cum. Supp. 1988), which is a Class III felony under § 28-416(2). Lonnecker claims that inadmissible evidence was used in his conviction, that the evidence is insufficient to sustain his conviction, and that the sentence imposed is excessive.

Pertinent to Lonnecker's case, § 28-416(1) provides that "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 [marijuana] . . . ."

PROOF OF THE CHARGE

Lonnecker and Rick Brau have known each other since 1975 and lived together from 1984 to 1987 in a house identified as 4540 North 65th Avenue in Omaha. In the spring of 1988, Brau occupied the house, but Lonnecker moved into a schoolbus parked at 4510 North 65th Avenue, and on occasion showered and slept at the house where Brau lived. However, on April 12, 1989, Lonnecker delivered $200 to the landlord for the Brau house, and the landlord issued a rent receipt to "Bob Lonniker & Rick" for the period from April 10 to May 10, 1989. Lonnecker's driver's license, which was issued June 22, 1987, and bore an October 16, 1990, expiration date, listed 4540 North 65th Avenue as Lonnecker's current address.

As adduced at trial, an informant contacted Sheriff's Deputy William H. Jackson on April 15, 1989, and stated that marijuana was being cultivated and distributed at the 4540 North 65th Street residence. On April 18, Deputy Jackson obtained a search warrant for "4540 N. 65 Av., Omaha, Douglas County, Nebraska." Deputies executed the search warrant on the evening of April 18.

While securing the grounds around the house, a deputy encountered Brau and detained him outside the dwelling. Other deputies involved in the prospective search of the house were confronted by Brau's "pit bull on a chain by the front door" of the house. The dog chased a deputy involved in the search, but the animal was restrained at "the end of the chain," which prevented the dog's reaching the front door of the house. After

maneuvering around the pit bull, deputies entered the residence as one deputy yelled, "Sheriff's office; we have a search warrant." Deputies then proceeded to search for occupants on the first floor. When they found none on the first floor, the deputies proceeded to the second floor of the house and, arriving at a closed bedroom door which had been barricaded from within, heard someone moving around inside the bedroom. Deputies entered the bedroom, which contained a bed, bedding, and men's clothing and noticed that a wall panel was ajar. After the deputies removed the panel and entered a crawl space, they found Lonnecker hiding in the crawl space between the house's rafters and its ceiling for the first floor.

In the house's basement, deputies discovered that half the basement had been partitioned into two rooms with Styrofoam walls covered with reflective material. In one room, there were mature marijuana plants, while the other room contained marijuana seedlings and small marijuana plants. The basement rooms also contained lamps with automatic timers, fans, plant food, a water hose, a sprayer, 350 to 400 marijuana plants, and cut marijuana leaves drying on a screen.

Deputies then searched the rest of the house, which had two bedrooms, and found "marijuana being dried in every room in the house" and various drug-related items and paraphernalia, including a book entitled "Indoor Marijuana Horticulture," a scale, a magnifying glass, sandwich bags, and a smoking pipe. Also, in the house were several firearms, namely, a .22-caliber rifle, a .22 revolver, and a sawed-off .410 shotgun. Nothing indicated that the weapons belonged to Lonnecker. At trial and over Lonnecker's objection (relevance), a deputy sheriff testified about finding the firearms in the house. During presentation of Lonnecker's case, Brau, who had a serious leg injury, testified that he had some of the firearms to protect himself, since the house had been "broken into." One of the firearms had been given to Brau as a gift.

As the search proceeded, deputies, accompanied by Lonnecker, went to the kitchen. Meanwhile, the pit bull had broken its chain outside, darted into the house, ran to the kitchen, and was about to attack the deputies, who had drawn their weapons to shoot the dog, when Lonnecker yelled: "I will

take care of the dog . . . . Let me take care of the dog." After Lonnecker had calmed the dog, he took the animal outside and chained it to a truck. Over Lonnecker's objection (relevance), a deputy testified about the pit bull event inside the house.

Lonnecker was arrested and subsequently convicted of the controlled substance charge previously mentioned in this opinion.

EVIDENTIAL QUESTIONS

Lonnecker argues that evidence of the pit bull incident in the kitchen is irrelevant or, if relevant, should have been excluded, since its probative value is substantially outweighed by the danger of unfair prejudice. As Lonnecker characterizes the situation, "the evidence concerning the dog and the weapons had no probative value, and the only thing the State accomplished by adducing the evidence was to cast [Lonnecker] as a vicious person who owned a vicious dog and surrounded himself with loaded weapons." Brief for appellant at 6.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989). Neb. Evid. R. 402 permits the admission of relevant evidence only. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985). To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided. *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990); *State v. Robertson, supra.*

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). A ruling pursuant to Neb. Evid. R. 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion. *State v. Baltimore, supra.* In the context of Neb. Evid. R. 403, "unfair prejudice" means an undue tendency to suggest a decision on an

improper basis. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

An issue in Lonnecker's case is his relationship to or association with the house where the marijuana cultivation was located.

The actions of Brau's pit bull outside the house displayed the dog's reaction toward intruders into its territory. When the dog entered the house, Lonnecker's intervention and ability to calm the pit bull as it was about to attack the deputies indicate Lonnecker's established and amicable relationship with the riled dog. Without that relationship through prior contact with the pit bull, it is improbable that Lonnecker would have risked coming between the deputies and the dog and, moreover, highly unlikely that Lonnecker would have been able to handle the dog as he did. The canine episode reflected Lonnecker's tie with a dog which was associated with the premises. In Lonnecker's case, reactions by "man's best friend" tended to provide some information for an answer to the question concerning Lonnecker's presence and connection with the premises. Hence, we are unable to conclude that the pit bull incident lacked a rational relationship as proof to establish Lonnecker's involvement or connection with the premises where deputies found the cultivated marijuana. Also, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Hence, there was no abuse of discretion in the trial court's refusal to exclude the evidence in question.

However, we are unable to discern any probative value in the State's evidence concerning the firearms found inside the house. Because the State's firearm evidence lacks probative value, that evidence is irrelevant, see Neb. Evid. R. 401, and, consequently, is inadmissible, see Neb. Evid. R. 402.

"In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). See, also, *State v. Baltimore, supra*; *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

Error in admitting the State's firearm evidence was rendered harmless through Brau's acknowledgment that he owned the firearms and his explanation for the presence of the firearms. We conclude that the State's firearm evidence, although erroneously admitted, was, nevertheless, harmless beyond a reasonable doubt.

SUFFICIENCY OF EVIDENCE

> "In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict."

State v. Zitterkopf, 236 Neb. 743, 746-47, 463 N.W.2d 616, 619 (1990). Accord, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Loveless*, 234 N.W.2d 463, 451 N.W.2d 692 (1990); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

> "On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt."

State v. Zitterkopf, supra at 747, 463 N.W.2d at 620. Accord, *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *State v. Reynolds, supra*; *State v. Loveless, supra*.

Lonnecker recognizes that "[w]hile it is true that a large amount of marijuana was found in the house, the issues are whether Defendant possessed marijuana and, if so, what his intentions were with respect to the marijuana." Brief for appellant at 8. According to Lonnecker,

> [t]he record in this case is void of any evidence that Lonnecker possessed marijuana or that he intended to manufacture and/or deliver marijuana. . . .
>
> . . . In this case, the State can point to no conduct of the Defendant, no language of the Defendant, and no

> circumstances which linked the Defendant to the business of growing and selling marijuana. All the State can say in this case is that the Defendant was in the house two floors above the area where the marijuana was found.

Brief for appellant at 6-7.

" 'A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.' " *State v. Oldfield*, 236 Neb. 433, 444, 461 N.W.2d 554, 562 (1990) (quoting *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989)). Accord *State v. Zitterkopf, supra.*

"When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987). Accord, *State v. Oldfield, supra*; *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

> "Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field."

State v. Oldfield, supra at 445, 461 N.W.2d at 562 (quoting *State v. Turner*, 192 Neb. 397, 222 N.W.2d 105 (1974)). Accord *State v. Zitterkopf, supra.*

A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance. See, *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983); *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance. See, *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989); *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988); *State v. Britt*, 228

Neb. 201, 421 N.W.2d 791 (1988); *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980).

Without reiterating all the evidence in Lonnecker's case, we note that salient facts include the description of activities on the premises before execution of the search warrant, a quite obviously longstanding and large-scale cultivation of marijuana, the rent receipt issued to Lonnecker and Brau, Lonnecker's address shown on his driver's license, and his use of the premises. From all the circumstances, the jury could infer that Lonnecker rented or controlled the premises where the marijuana was being cultivated.

Also, after deputies identified themselves and shouted their presence inside the house, the deputies discovered Lonnecker, who was hiding in the upstairs crawl space. As this court noted in *State v. Clancy*, 224 Neb. 492, 499, 398 N.W.2d 710, 716 (1987):

> Referring to conduct as evidence of guilt, Wigmore has expressed: "No one doubts that the state of mind which we call 'guilty consciousness' is perhaps the strongest evidence . . . that the person is indeed the guilty doer; nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence." 2 J. Wigmore, Evidence in Trials at Common Law § 273(1) at 115 (J. Chadbourn rev. 1979). "There are two processes or inferences involved—from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed." 1A J. Wigmore, *supra* § 173 at 1840.

Although *Clancy* involved evidence of the defendant's attempted intimidation or actual intimidation of a State's informant or witness, evidence which was admissible under Neb. Evid. R. 404(2) ("other acts"), the rationale for "conscious guilt" evidence is equally applicable in Lonnecker's case.

Lonnecker's hiding in the crawl space was evidence of his "conscious guilt" concerning the marijuana located on the premises which were under his control, that is, a conscious guilt concerning possession and cultivation of marijuana as a controlled substance. Cf. *State v. Swigart, supra* at 519, 446 N.W.2d at 219 (arresting officers discovered defendant,

" 'holding a tub of potato salad,' " in a residential bathroom).

After our review of the record in Lonnecker's case, we conclude that the evidence sustains the verdict and Lonnecker's conviction. For that reason, we affirm the judgment on the jury's verdict that Lonnecker was guilty as charged.

EXCESSIVE SENTENCE

Lonnecker argues that the district court abused its discretion by imposing an excessive sentence, namely, imprisonment for a term of 2 to 4 years. The statutorily authorized penalty for Lonnecker's conviction of a Class III felony is imprisonment for a term of 1 to 20 years, a $25,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

"A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). Accord, *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Regarding Lonnecker's claim that the sentence imposed is excessive, under the circumstances and in view of all the appropriate information presented in reference to sentencing Lonnecker, the district court did not abuse its discretion in the sentence imposed on Lonnecker. Therefore, the sentence imposed on Lonnecker is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TINA BIERNACKI, APPELLANT.
465 N.W.2d 732

Filed February 15, 1991. No. 89-1484.

1. **Tape Recordings: Immunity.** A grant of immunity to a party consenting to the sound recording of a conversation does not render the consent involuntary.
2. **Pleas.** In accepting a guilty plea, a court is not required to advise the defendant of possible defenses.
3. _____. Before accepting a plea of guilty, the court must inform the defendant of

(1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront adverse witnesses, (4) the right to trial by jury, and (5) the privilege against self-incrimination. The court must examine the defendant in order to determine whether she or he understands that information. The record must also establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

4. **Criminal Law: Right to Counsel.** A criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented.
5. **Constitutional Law.** One who has been informed of her or his constitutional rights need not be reinformed of them on each subsequent court appearance.
6. **Evidence: Records: Appeal and Error.** A party who claims the evidence is insufficient to support a finding must present a bill of exceptions which contains all the evidence relevant to the questioned finding.
7. **Effectiveness of Counsel: Proof.** In order to prove ineffective assistance of counsel and obtain a reversal of her or his conviction, a defendant must show that her or his trial counsel's performance was deficient and that this deficiency prejudicially affected the outcome of the case.
8. _____: _____. One seeking to establish that her or his counsel was ineffective has the burden to present a record which affirmatively supports the claim.
9. **Pleas: Waiver: Indictments and Informations.** A voluntary and valid plea of guilty embodies a waiver of all defenses to the charge—procedural, statutory, and constitutional—except for the defense that the information or complaint is insufficient to charge a criminal offense.
10. **Records: Appeal and Error.** The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review.
11. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court; evidence which is not made part of the bill of exceptions may not be considered.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Sandra Frantz and Mary T. Kloeckner for appellant.

Robert M. Spire, Attorney General, and Barry Waid for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant-appellant, Tina Biernacki, pled guilty to a charge of distributing marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989), and was so adjudged. Her assignments of error merge to claim, in sum, that (1) her plea

was neither voluntary nor valid, (2) the plaintiff-appellee State withheld exculpatory evidence or information, (3) she was entrapped, (4) she was the victim of gross and unconscionable overreaching by the State, (5) there were unspecified violations of the 9th and 10th amendments to the Constitution of the United States, (6) her counsel was ineffective, and (7) she is, in any event, innocent. We affirm.

As the result of an undercover operation, Biernacki was arrested and charged with two counts of the aforedescribed crime. In accordance with a plea bargain, the State dismissed one count, and Biernacki, who was then represented by appointed counsel, pled guilty to the other. Her appointed counsel filed a notice of appeal; after the notice was filed and the bill of exceptions ordered, appointed counsel withdrew in favor of retained counsel.

Biernacki's arguments are dependent on the allegations that the State sent an informer to her home on several occasions to attempt to purchase cocaine and marijuana, that she told the informer she neither had nor knew where to obtain those substances, and that the State then sent another "agent-informant" to her home in order to supply her with the marijuana later purchased by the first informer.

These assertions are not supported by any citations to the record. In that connection, we refer Biernacki to Neb. Ct. R. of Prac. 9D(1)f (rev. 1989), which requires that briefs contain appropriate references to the record. We also note that Biernacki's briefs exceed the page limitation imposed by Neb. Ct. R. of Prac. 9B(5) (rev. 1989), and caution that the failure of a party to submit a brief which complies with our rules may result in our treating the case as one in which no brief has been filed by that party. See *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982). The fact that we have on this occasion conducted our own unassisted review of the short record in this case and have ignored the violation of the page limitation is not to be taken as an indication that we shall do so in future cases.

Biernacki claims the State acted illegally in making a sound recording of the drug sale. The bill of exceptions contains a few passing references to this recording, but the only information we have regarding its acquisition is contained in the presentence

investigation and in the unsubstantiated assertions made by Biernacki. According to the presentence investigation, recordings were made during two controlled buys via a transmitter carried by the purchaser, an unnamed "cooperating individual." It is Biernacki's position that this recording violates 18 U.S.C. §§ 2510 et seq. (1988), Neb. Rev. Stat. §§ 86-701 through 86-707 (Reissue 1987), and a Wyoming statute, Wyo. Stat. § 7-3-602 (Cum. Supp. 1990). The federal and Nebraska statutes govern interception of oral and wire communications and prohibit the use of illegally intercepted communications. Biernacki does not enlighten us as to why she thinks the Wyoming statute should be given extraterritorial effect. Perhaps it is somehow related to her claim that Nebraska violated the 10th amendment, more about which is written later.

Both the federal and Nebraska statutes cited by Biernacki are inapplicable where one of the parties to the communication consents to its interception. 18 U.S.C. § 2511(2)(c); § 86-702(2)(c); *State v. Manchester*, 220 Neb. 41, 367 N.W.2d 733 (1985). The information contained in the presentence investigation indicates that the cooperating individual consented to the interception and was a party to the communications recorded.

Biernacki also asserts that the purchaser was coerced into wearing the transmitter. Our review of the record does not reveal any indication of coercion. Although the presentence investigation reveals that unnamed misdemeanor charges against the informer were to be reduced or dropped in return for his assistance, such action by the government is insufficient to vitiate his consent, for a grant of immunity to a party consenting to the sound recording of a conversation does not render the consent involuntary. See, *United States v. Horton*, 601 F.2d 319 (7th Cir. 1979), *cert. denied* 444 U.S. 937, 100 S. Ct. 287, 62 L. Ed. 2d 197 (only evidence of coercive threats or activities to overbear participant's will can vitiate consent for purposes of 18 U.S.C. § 2511(2)(c)); *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982), *overruled on other grounds, U.S. v. Zolin,* 842 F.2d 1135 (9th Cir. 1988), *vacated in part* 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (grant of immunity in return for consent not coercive).

Next, Biernacki asserts that her guilty plea was not voluntary because she

> was deprived of the information that the tape recordings and all evidence derived therefrom were mandatorily prohibited by an act of the Congress of the United States to be introduced or used in any proceeding . . . and, was deprived of the knowledge of the defenses available to her which included the gross and unconscionable overreaching of the government, the defense of entrapment and the defense [of] challenging the constitutionality of the statue [sic] as it is written and as it is applied to the Appellant.

Brief for appellant at 10. It is unclear whether Biernacki is contending that the arraigning court should have given her this information or whether trial counsel should have done so.

If Biernacki is asserting that the arraigning court had a duty to give her this information, she essentially is taking the position that it is a court's duty to perform defense counsel's job. None of the cases cited by Biernacki support such a proposition. Indeed, the rule is that in accepting a guilty plea, a court is not required to advise the defendant of possible defenses. *State v. Enfield*, 223 Neb. 870, 394 N.W.2d 667 (1986).

The arraigning court's duty in determining the voluntariness of a guilty plea was set out by this court in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Before accepting a plea of guilty, the court must inform the defendant of (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront adverse witnesses, (4) the right to trial by jury, and (5) the privilege against self-incrimination. The court must examine the defendant in order to determine whether she or he understands that information. Finally, the record must establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *State v. Ponec*, 236 Neb. 710, 463 N.W.2d 793 (1990); *State v. Irish, supra*. See *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (voluntariness of guilty plea cannot be presumed from silent record).

At her arraignment Biernacki was informed of, and

examined regarding, the waiver of her rights to confront adverse witnesses and to present witnesses in her favor, to subpoena witnesses, to trial by jury, and to the privilege against self-incrimination. She was also informed of the minimum and maximum penalties she could face if convicted. Although at this stage she was not informed of her right to counsel, she was represented by appointed counsel. A criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented. We have held that where the record reflected that a criminal defendant at all times in every proceeding was in fact represented by counsel and that defendant repeatedly acknowledged before the trial court that defendant fully understood the proceedings, the effects of the pleas, and the rights defendant was waiving, guilty pleas were knowingly and intelligently entered notwithstanding the fact that the court did not advise defendant of the right to counsel. *State v. Neal*, 216 Neb. 709, 346 N.W.2d 218 (1984), *cert. denied* 469 U.S. 1110, 105 S. Ct. 788, 83 L. Ed. 2d 782 (1985). Moreover, it appears from the transcript that Biernacki was informed of her right to counsel at an earlier appearance on the same matter, after which counsel was appointed, and that this earlier appearance was not made part of the bill of exceptions. As recently reaffirmed in *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990), one who has been informed of her or his constitutional rights need not be reinformed of them on each subsequent court appearance, and an appellant who claims the evidence is insufficient to support a finding must present a bill of exceptions which contains all the evidence relevant to the questioned finding. What the record does show is that the trial court asked Biernacki if she was happy with her counsel's performance, and she stated that she was.

The bill of exceptions reveals that Biernacki was read the charges against her, and the plea arrangement worked out with the prosecutor was also discussed. After a discussion of the rights she would be waiving if she were to plead guilty, the following colloquy took place:

> THE COURT: This charge, Tina Biernacki, shows and alleges that on September 12th, you delivered marijuana, distribution of marijuana, in Scotts Bluff County. How do

you plead to that charge, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. Tell me what your situation was in this.

THE DEFENDANT: Well, when [the police informer] came out to buy marijuana, I was just there, you know, and I took the money.

THE COURT: You took the money?

THE DEFENDANT: Yes.

THE COURT: That was your part, you knew what was going on?

THE DEFENDANT: Yes, I knew what was going on.

Even though she was never directly asked whether she understood the nature of the charge against her, unquestionably the better practice, the foregoing colloquy nonetheless demonstrates that Biernacki understood the nature of the charge and that she understood what actions on her part gave rise to it.

The statements recounted above also demonstrate that there was a factual basis for the plea. The record therefore supports the arraigning court's determination that Biernacki freely, voluntarily, and intelligently entered her plea of guilty.

Biernacki also claims that her trial counsel was ineffective, thus rendering her guilty plea involuntary. In order to prove ineffective assistance of counsel and obtain a reversal of her conviction, Biernacki must show that her trial counsel's performance was deficient and that this deficiency prejudicially affected the outcome of her case. See, *State v. Britt, ante* p. 163, 465 N.W.2d 466 (1991); *State v. Keithley,* 236 Neb. 631, 463 N.W.2d 329 (1990); *State v. Thomas,* 236 Neb. 553, 462 N.W.2d 862 (1990); *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Biernacki's claim of ineffective assistance of counsel consists of three parts: (1) Counsel failed to investigate the case; (2) counsel failed to interview witnesses; and (3) counsel "withheld evidence [from her], refused to permit [her] to see or listen to the tapes, failed to investigate the defenses available to [her] and told [her] that [she] had no choice but to plead guilty." Brief for appellant at 31-32. The record quite simply does not contain

evidence which supports these claims. It is Biernacki's burden as the appellant to present a record which affirmatively supports her claim to ineffective assistance of counsel. See, *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989); *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981). Biernacki has not met her burden.

The remaining assignments of error, i.e., the withholding of exculpatory evidence or information, her entrapment, the gross and unconscionable overreaching by the State, the unspecified violations of the 9th and 10th amendments to the federal Constitution, and the claimed overlooking of Biernacki's asserted innocence, must be rejected.

First, these remaining assignments of error are merely assertions of defenses to the crime charged. A voluntary and valid plea of guilty embodies a waiver of all defenses to the charge—procedural, statutory, and constitutional—except for the defense that the information or complaint is insufficient to charge a criminal offense. *State v. Edwards*, 236 Neb. 445, 462 N.W.2d 93 (1990). Therefore, these alleged errors were waived by Biernacki when she entered her plea.

Second, these errors are all dependent on facts which are not contained in the record presented to us. The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. Neb. Rev. Stat. § 25-1140 (Reissue 1989); *State v. Schaneman*, 235 Neb. 655, 456 N.W.2d 764 (1990); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986); Neb. Ct. R. of Prac. 5A(2) (rev. 1989). A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court; evidence which is not made part of the bill of exceptions may not be considered. *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982). Therefore, even if the assigned errors had not been waived, absent a bill of exceptions which supports them, we would be forced to conclude that they are without merit.

The record failing to sustain any of Biernacki's summarized assignments of error, we affirm.

AFFIRMED.

OMAHA PROCESSORS AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLEES AND CROSS-APPELLEES, V. DONALD BLOOMQUIST, APPELLANT AND CROSS-APPELLEE, NEBRASKA SECOND INJURY FUND, APPELLEE AND CROSS-APPELLANT.

465 N.W.2d 731

Filed February 15, 1991. No. 90-123.

Workers' Compensation: Appeal and Error. 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 and will not be set aside on appeal unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Peter J. Hoagland for appellant.

Kathleen C. Vance, of Schmid, Mooney & Frederick, P.C., for appellees Omaha Processors and Liberty Mutual.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee Second Injury Fund.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from an order of the Workers' Compensation Court which denied appellant's claim for temporary disability benefits which had been discontinued by the employer.

An award was entered in this case on January 21, 1988, finding that appellant had suffered injuries to his head and cervical spine as a result of an accident arising out of and in the course of his employment. The award was not appealed. Benefits were paid, and medical and hospital expenses reimbursed. However, benefits were terminated effective July 5, 1988.

In response to appellant's claim for additional compensation, the employer, Omaha Processors, impleaded the Nebraska Second Injury Fund. The Second Injury Fund objected in the Workers' Compensation Court, and in this court, to the joinder, arguing that since essential issues, e.g.,

causation, were decided in the initial hearing to which it was not a party, the joinder is prohibited by *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). In view of our disposition, we do not reach that issue.

The assignments of error are addressed to the points that the court erred in reversing the order of the single judge, in finding no disability, and in failing to order certain rehabilitation payments. "In our review, 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 and will not be set aside on appeal unless clearly wrong." *Yager v. Bellco Midwest,* 236 Neb. 888, 893, 464 N.W.2d 335, 339 (1991).

On our examination of the record, there is evidentiary support for the court's finding of no disability. Thus supported, the factual resolution by the compensation court is binding on us. We have no choice but to affirm.

Since there is no judgment adverse to the Second Injury Fund, we do not rule on their objection to joinder.

AFFIRMED.

CAPORALE, J., not participating in the decision.

FERN BENISH KAUFMAN, APPELLANT, V. CONTROL DATA AND TRAVELERS INSURANCE CO., APPELLEES.

465 N.W.2d 727

Filed February 15, 1991. No. 90-133.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. Whether an injured worker is totally disabled is a question of fact to be determined by the compensation court, whose finding may be reversed on appeal only if it is clearly wrong.
3. **Workers' Compensation: Words and Phrases.** Total disability exists when an injured employee is unable to earn wages in the same or similar kind of work he

or she was trained or accustomed to perform, or in any other kind of work which a person of the employee's mentality and attainments could perform.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

E. Terry Sibbernsen, of Welsh & Sibbernsen, for appellant.

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

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

WHITE, J.

Fern Benish Kaufman appeals from the judgment of the Workers' Compensation Court on rehearing. Benish Kaufman, in the compensation court, claimed that as a result of a work-related injury she sustained February 1, 1982, she was totally disabled and is entitled to benefits under the Nebraska workers' compensation laws. The court found that Benish Kaufman was only partially disabled and suffered a 50-percent loss of earning capacity.

Benish Kaufman disputes the compensation court's findings that she was partially disabled and suffered a 50-percent loss of earning capacity. She claims that she continues to be temporarily totally disabled because she suffers emotional problems stemming from her back pain and that only when she, through a pain-management program, has learned to deal with the emotional side effects of her injury can the extent of her injury be evaluated. We disagree and affirm the decision of the compensation court on rehearing.

The findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990). As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*; *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Martinez v. Nebraska Dupaco*, 235 Neb. 720,

457 N.W.2d 285 (1990). Whether an injured worker is totally disabled is a question of fact to be determined by the compensation court, whose finding may be reversed on appeal only if it is clearly wrong. *Mata v. Western Valley Packing, supra.*

As she was leaving work at Control Data on February 1, 1982, Benish Kaufman slipped and fell in the parking lot used by Control Data employees. At the time of the injury, Benish Kaufman suffered pain in her lower back and buttocks. She consulted Dr. Martin Mancuso, her family doctor, who diagnosed her as suffering a lumbar strain injury. Benish Kaufman returned to work the next day and continued to work until June 21 of that year, when her back pain became too severe to allow her to continue. She returned to work for 11 weeks, from October 5 to December 20, on a part-time basis. She returned to work again on January 4, 1983, and continued to work until March 5, 1985, when she stopped working because of the increasing pain of her injuries. In 1983, Dr. Mancuso referred her to an orthopedic surgeon, who diagnosed her as suffering from a herniated disk. During this same time period she was undergoing physical therapy and taking pain medication as prescribed by Dr. Mancuso. Benish Kaufman has not worked since March 1985.

In 1985, Mancuso referred her to a neurosurgeon, Dr. Daniel McKinney, who performed surgery on Benish Kaufman on March 18, 1985, for removal of the herniated disk. The surgery did little to relieve Benish Kaufman's pain, and a second surgery was performed on October 23, 1985, to correct a recurrent herniated disk in the same area. The second surgery did not eliminate Benish Kaufman's symptoms, and she continued to suffer pain in her lower back and left leg.

In September 1986, Benish Kaufman was involved in a car accident for which she sought treatment from Dr. Mancuso. Benish Kaufman is presently involved in litigation concerning the accident and gave deposition testimony regarding injury to her back and lower body. In her deposition, she stated that her pain sensation was much worse after the accident, and she experienced pain in her right back and leg that she did not have before the accident. In April 1989, she also suffered a heart

attack and at the time of this action was undergoing cardiac rehabilitation under the direction of Mancuso.

In July 1988, Travelers Insurance Co. requested that Benish Kaufman see Dr. Frank LaMarte for an evaluation as to her suitability for a low back rehabilitation program offered at Back Care, Inc. LaMarte examined Benish Kaufman, performed various tests on her, and determined that she would benefit from the program. Benish Kaufman then began a 10- to 12-week isokinetic rehabilitation program at the end of July 1988. Benish Kaufman continued in the program until about September 7, 1988, at which time LaMarte terminated her participation in the program because she had missed several sessions, and LaMarte felt she was not making sufficient effort toward her rehabilitation. Benish Kaufman claimed the treatment was very painful and made her symptoms worse. At the present time Benish Kaufman continues to be treated by Dr. Mancuso for her heart condition and undergoes periodic evaluation of her back injury.

The appellees have paid Benish Kaufman's medical expenses in the amount of $37,626.09. They have also paid temporary total disability benefits at the rate of $180 per week for the following periods: June 21 to October 4, 1982; December 21, 1982, to January 4, 1983; and March 5, 1985, to November 14, 1988, inclusive, equaling 210 1/7 weeks, in the total amount of $37,825.71. Appellees have also paid temporary partial disability benefits for the period between October 5 and December 20, 1982, totaling $1,214.40, and permanent partial disability benefits at the rate of $33.26 per week from November 15, 1988, to the present time.

Five expert witnesses testified by deposition following rehearing. Dr. Mancuso testified on behalf of the appellant that in his opinion, Benish Kaufman had reached a stable level and would not significantly improve with physical therapy. He said that her symptoms were a direct result of her February 1, 1982, accident at Control Data and that she sustained a 35- to 40-percent permanent disability to the body as a whole due to that injury. He also testified that she is temporarily and totally disabled due to the accident and will be restricted from performing any work that requires lifting, stooping, prolonged

standing or sitting, or bending. Mancuso also testified that Benish Kaufman may benefit from physical therapy, and possibly surgery in the future if her back condition changed. Mancuso stated that following Benish Kaufman's car accident in September 1986, she experienced an exacerbation of the symptoms she had previously been experiencing and that it was approximately 12 months before she returned to "base line," or the condition she was in before the accident. He testified that her inability to work during this period was not due to any additional or permanent injury she suffered as a result of the car accident, but that the accident merely made her already existing symptoms worse.

Dr. McKinney, testifying on behalf of the appellant, concluded that Benish Kaufman's herniated disk was caused by her February 1, 1982, fall. He stated in his opinion that she sustained a permanent partial disability of 25 percent of the body as a whole and that she would be restricted from activities that require anything more than moderate lifting; a great deal of walking, standing, or sitting; and bending or stooping. He also stated that she would need further medical treatment in the form of physical therapy to help her be more comfortable and that if her condition remained static, he would continue seeing her on a yearly basis only. He did not anticipate any further surgical procedures.

Alfred Marchisio, a vocational rehabilitation counselor, also testified on behalf of the appellant. He concluded that Benish Kaufman would not be able to return to her prior job because of the medical restrictions placed on her. He stated that she had functional limitations and that she had not regained the necessary physical functioning required to return to gainful employment. He also testified that she had sustained a permanent impairment to her earning capacity of approximately 40 percent. He also testified that Benish Kaufman was a candidate for vocational rehabilitation in the form of direct placement or on-the-job training.

Dr. LaMarte, a specialist in occupational medicine, testified on behalf of the appellees. LaMarte concluded that Benish Kaufman's condition could improve if she made more effort toward rehabilitation, but if she does not, then she has reached

a point of maximum medical improvement. LaMarte also testified that she would be able to return to employment subject to restrictions on lifting, standing, sitting, twisting, and bending. He concluded that she sustained an 11-percent permanent partial disability to the body as a whole.

Hugh Irwin, a rehabilitation consultant testifying on behalf of the appellees, determined that it was possible for Benish Kaufman to return to work subject to her doctors' restrictions. He stated that specific positions such as cashiering, entry-level clerical, and light industrial would fit within her restrictions. He also stated that there was a fairly strong job market for these positions in the Omaha area. He said that the salary ranges for these positions would start at minimum wage to $4.50 per hour. He stated that given the extent of her injury, she had sustained a 45- to 55-percent loss of earning capacity.

Total disability exists when an injured employee is unable to earn wages in the same or similar kind of work he or she was trained or accustomed to perform, or in any other kind of work which a person of the employee's mentality and attainments could perform. *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988).

In this case, the expert testimony concerning the extent of Benish Kaufman's injuries is generally in accord. Her primary care physician, Dr. Mancuso, and her surgeon, Dr. McKinney, agreed that her injuries have become to some degree stable and that she would need some future medical treatment in the form of physical therapy to help her be more comfortable. The doctors agreed that she would probably not benefit from future surgery or medical treatment other than physical therapy. The doctors also agreed that she has sustained permanent partial disability to the body as a whole in the range of 25 to 40 percent and that she would be restricted from performing any work that required prolonged standing or sitting, stooping, or bending. Neither doctor testified that she would be precluded from working provided the work fell within the restrictions placed on her. Dr. LaMarte stated that Benish Kaufman's condition might have improved if she had made a greater effort during isokinetic therapy, but since she did not make the effort, her condition had reached a level of maximum medical

improvement. He also agreed with Mancuso's and McKinney's work restrictions.

Both vocational rehabilitation experts concluded that Benish Kaufman had suffered a loss of earning capacity in the 40- to 55-percent range and would be subject to the work restrictions outlined above. However, one expert testified that she was a good candidate for vocational rehabilitation in the form of direct placement or on-the-job training. The other expert also determined that it was possible for Benish Kaufman to return to work under restriction and that there were jobs available in the Omaha area that would fit within these restrictions at a starting salary of minimum wage to $4.50 per hour. While these jobs are not identical to the position Benish Kaufman held prior to her injury, they are not the type of piecemeal, odd-job positions Benish Kaufman claims are the only positions available to her. Benish Kaufman alleges that her ability to obtain employment is "problematic at best" and that the permanency and compensation for the positions outlined by the rehabilitation experts is trivial. Consequently, she claims her disability is total. We agree that the compensation for the available positions is not at the level of her former job, but that is because Benish Kaufman has suffered a substantial loss of earning capacity for which she will be compensated under the Nebraska workers' compensation laws. We are unable to determine how Benish Kaufman has concluded that her ability to obtain any one of the available positions is problematic when there is no evidence in the record that she has, at any time since 1985, sought employment. Benish Kaufman's employment history is generally one of manual, unskilled labor. The available positions testified to by the rehabilitation expert fit within this category.

Any future medical treatment for Benish Kaufman will be in the form of physical therapy to make her more comfortable, not to improve her injuries themselves. We interpret this to mean that Benish Kaufman's injuries have become permanent. The rehabilitation experts agreed that she was and is able to return to work subject to the doctors' restrictions and that she has suffered a permanent *partial* disability to the body as a whole. Neither the medical experts' nor the rehabilitation

experts' testimony supports Benish Kaufman's claim that she continues to be temporarily totally disabled. There is no evidence in the record that Benish Kaufman suffers from emotional difficulties resulting from her back pain, or that these difficulties, if they exist, have exacerbated her injuries. The compensation court's decision to declare her permanently partially disabled with a 50-percent loss of earning capacity is in agreement with the evidence in this case. The judgment of the court is affirmed.

AFFIRMED.

KATHLEEN K. LABENZ, APPELLEE, V. JOHN EDWARD LABENZ, APPELLANT.
465 N.W.2d 726

Filed February 15, 1991. No. 90-182.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed as modified.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

James S. Jansen, of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellee.

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

PER CURIAM.

This is an appeal from the judgment of the district court in a proceeding to dissolve the marriage of appellant husband and appellee wife. The husband appeals, claiming the district court erred in awarding custody of the parties' children to the wife, incorrectly valuing and dividing the marital estate, determining each party's responsibility for the couple's indebtedness, awarding alimony to the wife, and preserving temporary support in favor of the wife.

> "In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Huffman v. Huffman, 236 Neb. 101, 104, 459 N.W.2d 215, 219 (1990). Accord, *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court. We note, however, that the dissolution decree erroneously ordered the wife to pay $1,173 on a nonexistent Visa credit card account. The decree should be modified, and hereby is modified, by striking any reference to the Visa debt and by ordering the wife to pay $1,173 of the parties' Sioux Falls, South Dakota, MasterCard debt.

We decline to award an attorney fee in this appeal.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JULIAN RIOS, JR., APPELLANT.
465 N.W.2d 611

Filed February 15, 1991. No. 90-244.

1. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
2. _____. Where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Sentences: Appeal and Error.** A sentence within the statutory limits will not be disturbed upon appeal absent an abuse of discretion.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

David R. Uher for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Julian Rios, Jr., pled guilty to the delivery of a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988). He was adjudged accordingly and sentenced to imprisonment for a period of not less than 5 nor more than 8 years and ordered to pay restitution to the Nebraska State Patrol in the sum of $725. Rios assigns as error the trial court's (1) restitution order, as requiring a greater payment than authorized by Neb. Rev. Stat. § 28-427 (Reissue 1989), and (2) imposition of an excessive sentence. We affirm the sentence of imprisonment, vacate the restitution order, and remand that matter for further proceedings.

Rios had originally pled not guilty but changed his plea under an agreement whereunder the plaintiff-appellee State refrained from filing other charges and from making any recommendation as to the sentence which should be imposed.

As to the first assignment of error, the record establishes that with respect to the crime for which he was convicted, Rios, through an arrangement with a third party, delivered one-eighth of an ounce of cocaine to an undercover informant in exchange for $275 in law enforcement funds and that an additional $75 in such funds was expended in arranging for the purchase. Rios also made two subsequent sales which cost an additional $375 in law enforcement funds.

It is obvious that in computing the amount of restitution to be made by Rios, the trial court added together all law enforcement funds expended in all three undercover purchases from Rios. Rios claims that § 28-427 limits the amount of restitution to the $275 actually paid him in the one sale of which

he was convicted. He asserts the additional $75 expended was not a reasonably necessary expense.

Section 28-427 reads, in relevant part, that a court may order one convicted of violating the drugs and narcotics statutes to "make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person . . . as part of the investigation leading to such conviction." Resolution of the issue is controlled by the rules that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), and that where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988); *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986).

The plain and ordinary meaning of the words "as part of the investigation leading to such conviction" limits, as Rios contends, the amount of restitution ordered to the reasonable law enforcement expenses incurred in connection with the purchase of the cocaine for the sale of which Rios was convicted. Since the other two sales were subsequent to the one of which Rios was convicted, they could not have been part of the investigation leading to the conviction. Thus, when the State elected to forgo seeking to convict Rios of the subsequent sales, it elected as well to forgo any claim to reimbursement of the reasonable costs it incurred in connection with those two purchases. There is no merit, however, in Rios' claim that the $75 paid to the third party who arranged the transaction for which he stands convicted was not a reasonably necessary expense.

The remaining assignment of error requires even less comment. We repeat yet again the axiom that a sentence within the statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Johnson,* 236 Neb. 831, 464 N.W.2d 167 (1991). As a narcotic, cocaine is an "exceptionally hazardous drug," Neb. Rev. Stat. § 28-401(16) and (35) (Reissue 1989), the selling of which is a Class II felony, Neb.

Rev. Stat. §§ 28-405(a)(4) [Schedule II] (Reissue 1989) and 28-416(2), punishable by imprisonment for a period of from 1 to 50 years. While it is true that, as he laments, Rios is in part a victim of his own addiction, the fact remains that he stands convicted of spreading his affliction for profit. The nature of the crime is such that it cannot be said the sentence imposed constitutes an abuse of discretion.

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

ELIZABETH LEITZ, ADMINISTRATOR OF THE ESTATE OF KENNETH E. LEITZ, DECEASED, ET AL., APPELLEES, V. ROBERTS DAIRY AND UNDERWRITERS ADJUSTMENT COMPANY, APPELLANTS.

465 N.W.2d 601

Filed February 15, 1991. No. 90-343.

1. **Workers' Compensation: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party.
2. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
3. _____. When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer.
4. **Workers' Compensation: Words and Phrases.** The terms "injury" and "personal injuries" shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability, or death that is the result of a natural progression of any preexisting condition. Neb. Rev. Stat. § 48-151 (Reissue 1988).
5. **Workers' Compensation: Proof.** The claimant shall have a burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment.
6. **Workers' Compensation.** In cases under the Workers' Compensation Act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved, and the issue must be determined by the facts of each case.
7. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings

will not be set aside unless clearly erroneous.

8. **Workers' Compensation: Proof.** For an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
9. **Workers' Compensation.** The heart injury causation issue embraces two elements: (1) legal cause and (2) medical cause. Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment." Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused the collapse.
10. **Workers' Compensation: Proof.** An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.
11. _____:_____. While legal cause is established by satisfying the "stress greater than nonemployment life" test, a claimant must still demonstrate medical causation. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury.
12. _____:_____. A claimant is not required to prove that a preexisting disease or condition will not sometime in the future through natural progression result in disability.
13. **Workers' Compensation: Appeal and Error.** When the record presents conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Melvin C. Hansen and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellants.

John Kocourek, of Peterson Law Offices, and David R. Stickman for appellees.

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

PER CURIAM.

Roberts Dairy (Roberts) and its insurance carrier appeal from the unanimous finding by the Workers' Compensation Court upon rehearing that a fatal heart attack suffered by Roberts' employee Kenneth E. Leitz shortly after he unloaded

carts containing frozen ice cream products arose out of and in the course of his employment with Roberts. We affirm.

The appellants' four assignments of error combine to allege that the Workers' Compensation Court was clearly wrong in finding that Leitz' fatal injury arose out of and in the course of his employment with Roberts.

> In determining whether the evidence is sufficient to support an award by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. [Citation omitted.] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. [Citation omitted.]

Reynolds v. School Dist. of Omaha, 236 Neb. 508, 509, 461 N.W.2d 758, 760 (1990).

Viewed in the light most favorable to the appellees, the record reflects the following: Leitz was employed by Roberts as a semitrailer driver, working out of its Omaha distribution facility. On April 20, 1988, Leitz, then 48 years of age, was accompanied on his route by Gilbert Stogdill. Leitz' widow, Elizabeth Leitz, testified that at that time, Leitz was 6 feet tall and weighed between 195 and 210 pounds. As part of his duties, Leitz was required to unload carts which contained frozen ice cream products. The ice cream carts weigh approximately 150 pounds when empty. When the carts are loaded, they generally weigh approximately 300 to 400 pounds, but can range from 200 to 700 pounds in weight. The steel carts are approximately 6 feet in height and 30 by 28 inches in width and depth and are moved about on four 5-inch wheels. The carts were placed in threes across the width of the trailer in question on April 20. Although a mechanism holds the carts in place during transport, Stogdill testified that it was possible that the wheels of the carts became nonaligned during the trip.

On the workday in question, which started approximately at 4:30 a.m., Leitz and Stogdill were to deliver ice cream to "six stops on the drop route." Before the first delivery, the two men drove to Rockport, Missouri, where Leitz ate breakfast. The pair then drove to Falls City, Nebraska, where they delivered one cart to a facility, and then drove to the Sabetha, Kansas,

plant, where they left two carts. Between 11 and 11:30 a.m., Leitz and Stogdill arrived at a Roberts facility in Salina, Kansas, to unload 13 carts. Stogdill testified that the two men first straightened the carts in the trailer. After removing the load bars on the inside of the trailer, Leitz maneuvered the carts from their stationary position, out a side door, and onto a hydraulic lift. Stogdill testified that the most difficult aspect of propelling a cart is its initial movement from a stationary position. After the carts were placed on the hydraulic lift, Stogdill moved the carts from the lift and into a cooler. Leitz and Stogdill replaced the loaded carts in the trailer with empty carts. There was testimony that during this process, Leitz told Stogdill that he was woozy. It took about 30 to 45 minutes to unload and reload the trailer.

The temperature inside the trailer was 20 degrees with the doors open and 10 degrees below zero when they were closed. There was testimony that the outside temperature on April 20 was approximately 85 to 90 degrees. Stogdill recalled that Leitz was wearing only a hooded sweater over his work clothes. Dr. Ward A. Chambers, a cardiologist, testified that the human body makes adaptive changes in cold weather that are not beneficial to the heart and appear to adversely affect oxygen requirements. He further testified that large changes in temperature tend not to be well tolerated by the heart.

After finishing their duties on the loading dock at Salina, Leitz and Stogdill went into an office to complete some paperwork. After approximately 10 to 15 minutes, Leitz returned to the truck to retrieve additional paperwork. He came back to the office and then proceeded to a restroom. When Leitz returned from the restroom, he looked pale. He sat down by a receptionist and, in response to Stogdill's query, said that he felt dizzy. A short while later, Leitz sat down next to Stogdill. When another worker asked what was wrong, Leitz stated that as he was returning to the office from his truck, he felt a sharp pain run up his left arm, and that he became dizzy. After Leitz said that, he lay down and a rescue unit was summoned.

Emergency medical personnel were contacted at 1:25 p.m. Shortly after the paramedics' arrival, Leitz went into cardiac arrest. He was taken to St. John's Hospital in Salina, where he

was pronounced dead at 2:15 p.m.

The record reflects that there were several factors that increased the risk of Leitz' suffering a heart attack. Elizabeth Leitz testified that her husband had high blood pressure, but that he had been taking medication faithfully for it since the fall of 1983. There was medical expert testimony that Leitz' hypertension was being fairly well controlled. Dr. Edward R. Farrage, Leitz' family physician, testified that less than 2 weeks prior to his death, Leitz' blood pressure was 130 over 80, which was within normal limits. Leitz smoked cigarettes and was "chain smoking" on the day he died. Dr. Chambers testified that tobacco use will cause a degree of carbon monoxide which displaces oxygen in the blood. The record reflects that Leitz rarely exercised. Dr. Chambers reported:

> Autopsy revealed he had evidence of cardiac enlargement and severe atherosclerosis of the coronary arteries with complete occlusion of [the] left main coronary artery as well as severe atherosclerosis of his left anterior descending circumflex and right coronary artery. The heart was dilated and showed evidence of an old anterior myocardial infarction. The other left ventricular muscle was hypertrophied and most likely secondary to a long standing history of systemic hypertension.

On March 24, 1989, Elizabeth Leitz, as administrator of the estate of Leitz and as the deceased's widow, and Leitz' dependent children brought this action in the Workers' Compensation Court. After a one-judge hearing, the cause was dismissed on July 31, 1989, because the "plaintiff has not proved to a reasonable degree of medial [sic] certainty or probability that the heart attach [sic] which caused his death resulted from on-the-job exertion, which was greater than that experienced by the average man in normal non-employment life." A timely motion for rehearing was filed. Upon rehearing, a three-judge panel of the Workers' Compensation Court found Leitz' heart attack was covered under the compensation act. It is from the order upon rehearing that Roberts and its insurer appeal.

"When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his

or her employment, such employee shall receive compensation therefor from his or her employer . . . ." Neb. Rev. Stat. § 48-101 (Reissue 1988). "The terms ['injury' and 'personal injuries'] shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability, or death that is the result of a natural progression of any preexisting condition." Neb. Rev. Stat. § 48-151 (Reissue 1988). Section 48-151 further provides, "The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment."

> "In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case."

Mann v. City of Omaha, 211 Neb. 583, 591-92, 319 N.W.2d 454, 458 (1982).

We begin our analysis by recalling that the issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. See *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990).

Roberts and its insurer contend that Leitz' severe coronary artery disease and personal risk factors result in an enhanced degree of proof for the claimants, which standard has not been met in this case. Beginning in 1969, this court had consistently held that the presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. See, e.g., *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969) (articulating the "enhanced degree of proof" requirement for the first time). In *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the "enhanced degree of proof" language was expressly disapproved. This court

clarified a claimant's burden of proof in such cases, explaining that "for an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act." *Id.* at 468-69, 461 N.W.2d at 572-73. Accordingly, the issue is not one of enhanced degree of proof but of causation.

The causation issue embraces two elements: (1) legal cause and (2) medical cause. 1B A. Larson, The Law of Workmen's Compensation § 38.83(a) (1987). See, also, *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980) (citing 1B A. Larson, *supra*, with approval). "Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment.' Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this collapse." 1B A. Larson, *supra*, § 38.83(a) at 7-276 to 7-277.

This court has adopted the following test to establish legal cause when a preexisting disease or condition is present: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Spangler, supra.* Appellants contend that the evidence fails to show that Leitz' employment exertion was greater than that experienced during the ordinary nonemployment life of Leitz or any other person.

Before addressing appellants' contention, we initially consider whether the test for legal cause is still viable. This court has stated that this test is simply an application of the enhanced degree of proof in preexisting condition cases. *Spangler, supra*; *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982); *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981). Since the "enhanced degree of proof" language was disapproved in *Heiliger, supra*, it would seem to follow that the "exertion greater than nonemployment life" test, which is purportedly an application of the enhanced degree of proof, no longer has any validity.

However, that is not the case. *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969), the seminal case, cites *Brokaw, supra*, for the proposition that if a preexisting condition is present and the employment strain is no greater than that of nonemployment life, there can be no recovery under the workers' compensation laws. For that reason, later cases have misconstrued the "stress greater than nonemployment life" standard as an application of the enhanced degree of proof, which was the holding of *Brokaw, supra*. The *Beck* test was not based on the enhanced degree of proof. The rationale for the test was explained:

> "[W]hen the employee contributes some personal element of risk—e.g., . . . a personal disease which figures causally in his injury—the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the causal contribution of the personal risk. . . . If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal *non-employment* life of this or any other person."

(Emphasis in original.) *Beck, supra* at 480, 168 N.W.2d at 533-34 (quoting Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 Mich. L. Rev. 441 (1967)). See, also, 1B A. Larson, The Law of Workmen's Compensation § 38.83(b) (1987) (explaining that the foregoing is a test for legal causation). In other words, to show that the proximate cause of an employee's heart attack is work related, the employee must prove that he or she suffered some work-related stress or exertion which is greater than that in the ordinary nonemployment life of the employee or any other person. This is necessary to break any causal connection between the natural progression of the preexisting condition or disease and the injury at the workplace. Otherwise, the fact that the heart injury occurred at work would be strictly fortuitous.

The enhanced degree of proof language merely attempted to explain this problem of proximate or legal cause. See *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). Thus, it is clear that the "stress greater than nonemployment life" test is a function of proximate or legal cause, not an enhanced degree of proof, and remains valid.

Dr. Lydia K. Thigpen, a professor of physical education whose doctoral degree had an emphasis in the study of human movement, testified regarding the issue of employment exertion. She testified that to move a 200-pound cart from a stationary position, it took 20 to 25 pounds of force output. Moving a 700-pound cart from a standing position requires around 180 pounds of force output, Dr. Thigpen explained. She testified that moving a 700-pound cart requires the equivalent amount of force necessary to squat lift 180 pounds if one was weight lifting. In contrast, Dr. Thigpen testified that the highest force output for activities around the Leitz home for which she could obtain a reading was 16½ pounds of force output. She further testified that based on a reasonable degree of scientific certainty, Leitz' measured daily activities probably would have generated less than 20 pounds of force output. Dr. Thigpen testified that Leitz' activities in loading and unloading the carts required significantly greater exertion than his daily activities at home and those encountered by an average person in his or her nonemployment life. There was evidence that if the wheels were not aligned, more pounds of force output were required to move the cart. Roberts elicited testimony from various Roberts employees that it was no more difficult to move a cart than to mow a lawn or carry a bag of golf clubs. Dr. Michael H. Sketch, the chairman of the division of cardiology at Creighton University, testified that due to Leitz' severe heart disease, it would have been impossible for him to do any major physical work. As the trier of fact, the compensation court panel is the sole judge of the credibility of the witnesses. From its decision, it is apparent that the panel found the claimants' witnesses more credible. On the basis of the record presented to this court, it cannot be said that the compensation court panel was clearly erroneous in finding that Leitz' exertion or stress associated with unloading the ice cream carts on April 20 was greater than

that experienced during the ordinary nonemployment life of Leitz or any other person.

While legal cause is established by satisfying the "stress greater than nonemployment life" test, a claimant must still demonstrate medical causation. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury. *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

Dr. Chambers testified that "physical exertion causes an increase in myocardial oxygen consumption and the only way it can get this is through blood flow through the coronary arteries." He further testified that if the demand for oxygen is greater than the supply, the heart muscle malfunctions. Dr. Chambers testified that Leitz was in ventricular fibrillation, which he defined as a "totally chaotic electrical rhythm that causes a totally chaotic contraction pattern to where the heart pumps no blood and is virtually uniformly fatal in human beings." Based on a reasonable degree of medical certainty, Dr. Chambers concluded, "[T]he physical exertion associated with [Leitz'] employment on the day of his death was a direct cause of the arrhythmia that caused his demise." The doctor testified that his opinion was not altered by the presence of the risk factors such as smoking, obesity, consumption of a large breakfast, or hypertension. Dr. Chambers testified that the time lapse between Leitz' exertion and the onset of his heart attack had no significance because an arrhythmia can occur up to 24 hours after the precipitating event.

The appellants assert that the claimants' experts, by failing to specifically exclude the role of Leitz' preexisting disease, did not provide the necessary expert medical testimony to meet the claimants' burden of proof. This argument borders on the frivolous. Dr. Chambers was aware of Leitz' preexisting disease. By his conclusion that Leitz' heart attack arose out of and in the course of employment, it necessarily follows that he determined that the preexisting disease was not the cause of Leitz' fatal injury. A claimant is not required to prove that a

preexisting disease or condition will not sometime in the future through natural progression result in disability. See *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981).

Although Dr. Sketch, Roberts' medical expert, opined, to a reasonable degree of medical certainty, that the unloading of the truck had no bearing on Leitz' death, it is not this court's function to choose which expert is the most credible. When the record presents conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court. *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990). Thus, the compensation court panel was not clearly erroneous in finding that Leitz' employment contributed in some material and substantial degree to cause his fatal heart attack.

Because Roberts has failed to obtain a reduction in the amount of the award, it must pay attorney fees of $2,500 for the services of the claimants' attorney in this court. See Neb. Rev. Stat. § 48-125 (Reissue 1988).

The compensation court panel's finding that legal and medical cause has been shown in this case is not clearly erroneous. Its decision is therefore affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

On rereading the Nebraska test for legal causation in a workers' compensation case based on a "heart attack," one immediately recognizes that the present test is not only impractical but unrealistic and an invitation for conjecture and speculation otherwise judicially condemned in prosecution of a workers' compensation claim. As expressed today,

> [a]n exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.

The majority has declined to explain or illustrate application of the preceding standard. The reason for such absence of an explanation or illustration will become quite evident.

Under current Nebraska law, compensability for an employee's heart attack, including an employee's death from that cardiovascular condition, is a process of comparing or weighing the employee's actual work exertion and ordinary nonemployment exertion. If employment involves exertion greater than exertion in nonemployment life, a claimant has established a legal cause necessary for compensability under the Nebraska Workers' Compensation Act. Thus, under Nebraska's current rule for compensability of a heart attack, comparison of relative exertions is crucial, i.e., employment exertion versus exertion in an employee's ordinary nonemployment life, as well as employment exertion versus exertion in the ordinary nonemployment life of any person other than the employee who has suffered a heart attack.

Consider the following illustration: A is an enthusiast for physical fitness and runs several miles each week, which requires an average 80 units of heart strain every time A embarks on running. B leads a rather sedentary lifestyle and in any ordinary activity outside B's employment never incurs more than 30 units of heart strain. Assume that "any other person" in ordinary nonemployment life experiences exertion at 45 units of heart strain. Both A and B have a preexisting deleterious heart condition and work for the same employer. One day, while A and B are simultaneously doing the same work which requires 50 units of heart strain, each collapses from a heart attack and dies. B's death did "arise out of employment" because the fatal work exertion of 50 units exceeds the 30-unit exertion in B's nonemployment life. Therefore, under the present Nebraska rule, B's death from a heart attack is compensable. Although it appears that A's death did not "arise out of employment," since the 50 units of heart strain from employment exertion is less than the 80 units ordinarily experienced in A's nonemployment life, nevertheless, under the Nebraska alternative standard, "this or any other person," A can also establish legal cause necessary for compensability because A experienced employment exertion, 50 units, which is greater than exertion experienced by "any other person" in ordinary nonemployment life, 45 units. Legal cause for A's death is established, notwithstanding the reality that A's heart

attack resulted from employment exertion no greater than, and actually less than, the exertion experienced in A's ordinary nonemployment activity. The preceding illustration, however, may be suspect on account of the assumption concerning the level of heart strain from exertion in the ordinary nonemployment life of "any other person."

Commentators have observed:

> [I]n an effort to create a universal standard, Larson uses a comparison between the particular employment exertion at issue with "the exertions present in the normal *nonemployment* life of this or any other person." . . .
>
> . . . .
>
> Larson seeks to examine particular job stress, but does not examine that stress as it relates to *a particular individual.* Individuals are able to accommodate themselves over a period of time to physical stresses. In addition, individuals react differently to emotional stresses. Therefore, it is necessary to place the numerators (e.g., stress) with their denominators (reactivity of the individual). To consider only if the exertion is the type that is present in the "normal nonemployment life of this or any other person" is to ignore medical realities.

(Emphasis in original.) D. Juge & J. Phillips, *A New Standard for Cardiovascular Claims in Workers' Compensation*, 43 La. L. Rev. 17, 39-40 (1982).

Regarding the "any other person" alternative test for compensability of a heart attack, that is, exertion of the "normal nonemployment life of this [employee] or any other person," the court in *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989), stated:

> Adoption of this rule . . . raises several immediate problems which may defy reasonable solution. First is the matter of definition. Who is the average person in "normal" non-employment life? Second, how is the comparable level of activity in "normal" non-employment life to be determined, and by whom? How does one compare the level of exertion in moving or lifting heavy objects on the job versus strenuous, but "normal" non-employment activities? To what extent is

> one's personal life to be dissected to fit the equation? While undoubtedly well-intended, this proposal seems unworkable. . . .

See, also, *Southern Bell Tel. & Tel. Co. v. McCook*, 355 So. 2d 1166 (Fla. 1978) (event on which workers' compensation claim was based did not "arise out of" employment, when the employee suffered from an idiopathic condition manifested for the first time during the course of employment, since the employee simply bent over to pick up tissue paper, a movement which, due to the idiopathic condition, produced disability).

Under the Workers' Compensation Act, causation necessary for compensability is determined in reference to a particular employee who has sustained a specific disability from distinctive employment. The question is, Did this particular work-related incident cause this particular person this particular injury? Generally, in a workers' compensation case, causation does not inquire whether this particular work-related incident actually caused injury to an employee in the same manner as the injury would have been suffered by any other person. For that reason, exertion experienced in the ordinary nonemployment life of any person other than the employee becomes irrelevant to the issue of legal causation necessary for compensability under the Nebraska Workers' Compensation Act. Also, by injecting nonemployment exertion of "any other person" into the workers' compensation equation, an employer's liability turns on the relationship between a fictional individual's undefined efforts and a real person's—the worker's—known activities. If "any other person" meant "a person reasonably identifiable with or similar to" the worker who has sustained a heart attack, perhaps some semblance of particularity might be infused into Nebraska's alternative test, but that meaning does not exist in the Nebraska workers' compensation law. Consequently, the test remains and involves the ordinary nonemployment life of "any other person"—female, male, adult, or child. Additionally, the compensability standard involving the ordinary nonemployment life of "any other person" imposes an apparently impossible burden of proof consisting of conjecture or speculation inherent in the "any other person" hypothesis.

In a worker's "heart attack" case, the question is "whether the injury was the result of a personal rather than employment risk. . . . ' "The reason is that the employment risk must offset the causal contribution of the personal risk. . . ." ' " *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 509-10, 293 N.W.2d 415, 417-18 (1980). See, also, *Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977). "[W]hen the employee contributes some personal element of risk . . . the employment must contribute something substantial to increase the risk. The reason is that it must offset the causal contribution of the personal risk." 1B A. Larson, The Law of Workmen's Compensation § 38.83(b) at 7-278 (1987). Therefore, when legal causation has been established in a workers' compensation case based on a "heart attack," there still remains the necessity of establishing medical causation for compensability, that is, "exertion or stress in [the worker's] employment contributed in some material and substantial degree to cause the heart injury." *Spangler v. State*, 233 Neb. 790, 796, 448 N.W.2d 145, 150 (1989). Accord, *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982); *Sellens v. Allen Products Co., Inc., supra*; *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978).

Consequently, there appears to be a more practical and realistic rule: If an employee has a preexisting coronary condition conducive to a heart attack and suffers a heart attack which is the basis for a workers' compensation claim, the claimant must prove, by a preponderance of evidence, that, when considered apart from the antecedent condition, the worker's employment exertion is greater than the employee's usual nonemployment exertion and that such employment exertion substantially contributed to the employee's heart attack. The preceding test for compensability of disability or death from an employee's heart attack meets the requirement that an employee's personal injury must arise out of employment and avoids hypothetical humans as pseudofactors for an employer's liability in a very real and particularized employment situation. Moreover, the requirement that employment substantially contributes to an employee's heart attack forestalls evolution of the Workers' Compensation Act

into health or life insurance.

Under the preceding rule proposed, with the exception of eliminating the "any other person" element from the comparison between a worker's employment exertion and nonemployment exertion, the Nebraska rules for compensability of a heart attack would remain unchanged.

Notwithstanding my objection to the current legal causation test in heart attack cases, appellees supplied a reasonable factual basis for a comparison between the exertion experienced by Kenneth Leitz in his employment and the exertion which he usually experienced in his nonemployment life, evidence which provided a basis for the conclusion that Leitz' employment exertion was greater than his usual nonemployment exertion. Thus, the proof established that Leitz' myocardial infarction arose out of his employment with Roberts Dairy. Hence, the award in the Nebraska Workers' Compensation Court must be affirmed.

FAHRNBRUCH, J., concurring.

Since 1969, this court has held that an exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee *or any other person*. See *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969). Even if one ignores the values of stability and predictability which adhering to precedent engenders, the current test for legal causation is a sensible and prudent approach. The foregoing rule has been applied for over 20 years without difficulty.

As the court in *Allen v. Industrial Com'n*, 729 P.2d 15, 26-27 (Utah 1986), asserted:

> We believe an objective standard of comparison will provide a more consistent and predictable standard . . . . In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected of people in today's society, not what this particular claimant is accustomed to doing. Typical

activities and exertions expected of men and women in the latter part of the 20th century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. By using an objective standard, the case law will eventually define a standard for typical "nonemployment activity" in much the way case law has developed the standard of care for the reasonable man in tort law.

Carruthers v. PPG Industries, Inc., 551 So. 2d 1282 (La. 1989), demonstrates the weakness in a rule dispensing with the comparison to the nonemployment life of any other person. In *Carruthers*, the plaintiff's decedent died due to a heart attack shortly after climbing a flight of stairs at his place of employment. He suffered from emphysema, hypertension, and diabetes and had residual damage from childhood poliomyelitis. The decedent did not climb steps in his nonemployment life, and his outside activities were restricted to reading and watching television. Because the plaintiff would have been unsuccessful if the objective standard was retained, she argued that the court should compare the decedent's work-related stress to the amount of stress in his nonemployment life. The court originally declined to do so, stating, "Such a standard would ignore the considerations of causation and attendant fairness to employers and thus contravene the underlying purposes of the compensation statute." *Id.* at 1285. Furthermore, there were concerns that "were the rule otherwise, many employers would be reluctant to hire workers with even slight health problems if the natural progression of employees' illnesses, rather than work-related causes, made employers liable for compensation." *Id.* at 1284. While the *Carruthers* court granted a rehearing, vacated its prior opinion, and reversed the judgment, I agree with its former decision.

Other courts adhere to the test for legal causation adopted by this court. See, e.g., *Dept. of Transp. v. Van Cannon*, 459 N.W.2d 900 (Iowa App. 1990); *Bryant v. Masters Mach. Co.*, 444 A.2d 329 (Me. 1982).

It would be unfair to hold an employer liable when the

employee is in such a weakened condition that the employee does not even climb a flight of stairs in the employee's nonemployment life. Without a comparison to the nonemployment life of any other person, work-relatedness of the injury would be strictly fortuitous. Furthermore, employers would be reluctant to hire people with preexisting conditions or diseases.

On the other hand, if one has an unusually vigorous nonemployment life, it makes little sense to compare the employment exertion to that encountered by the average person. The comparison must also be made with this particular employee's nonemployment life. If the exertion is not any greater than he or she encounters in his or her nonemployment life, it cannot be said that the employment exertion caused the injury. Thus, it is sensible to make both comparisons. The test is conjunctive. That is to say, in each case, the comparison is made to the employee's nonemployment life *and* the nonemployment life of any other person.

JEANETTE ANN ROSEMANN, WIFE AND DEPENDENT OF FREDERICK J. ROSEMANN, APPELLANT, V. COUNTY OF SARPY, NEBRASKA, APPELLEE.

466 N.W.2d 59

Filed February 15, 1991. No. 90-214.

1. **Workers' Compensation: Proof.** For an award based on an employee's death, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in death compensable under the Nebraska Workers' Compensation Act.
2. _____: _____. A claimant has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability or death.
3. **Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
4. **Workers' Compensation: Words and Phrases.** In Neb. Rev. Stat. § 48-101 (Reissue 1988), the phrase "arising out of" refers to an injury which is the basis of a workers' compensation claim and the injury's origin, cause, and character, that is, whether an employee's unexpected or unforeseen injury results from

risks arising within the scope or sphere of employment.

5. **Workers' Compensation: Proof.** In a workers' compensation case based on an employee's heart attack, causation required for compensability consists of two parts: legal cause and medical cause. For legal causation, the workers' compensation law defines the type of exertion which satisfies "arising out of" employment as a requirement for compensability. For medical causation, medical evidence must establish that an employee's exertion, as the legal cause sufficient for compensability, in fact caused an employee's heart attack which is the subject of a workers' compensation claim.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

SHANAHAN, J.

Jeanette Ann Rosemann appeals from the order of dismissal by the Nebraska Workers' Compensation Court in an action against the County of Sarpy. We affirm.

STANDARD OF REVIEW

> "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. . . . In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached

> by the Workers' Compensation Court. . . . As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 460-61, 461 N.W.2d 565, 568 (1990). Accord, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

BACKGROUND OF THE ROSEMANN CLAIM

Jeanette Ann Rosemann is the widow of Frederick J. Rosemann, a former Sarpy County deputy sheriff who held the rank of sergeant and worked at the Sarpy County jail. On May 5, 1987, Sergeant Rosemann injured his left rotator cuff and arm during the course of his employment when he caught a falling truck tire and thereby prevented injury to a jail inmate. By July 6, 1987, Rosemann had fully recovered from his May 5 injury. Rosemann's medical bills from that injury were paid by the insurance company which provided workers' compensation coverage for Sarpy County.

For no apparent reason, on March 11, 1988, Frederick Rosemann began experiencing pain in his left shoulder, pain which intermittently persisted until March 18, 1988, when Capt. Daniel Williamson of the sheriff's department assigned Sergeant Rosemann to another office in the sheriff's headquarters and directed him to move all the furniture from Rosemann's old office into his new office in the headquarters. Cpl. Arthur Dudley observed Rosemann's attempt to push a 157-pound desk from Rosemann's old office to the new office and offered to help. Corporal Dudley and Rosemann then maneuvered the desk through the doorway of Rosemann's old office, pushed the desk 90 feet down the hall into another office, and moved a bookcase and filing cabinets from Rosemann's old office to his new office. At the conclusion of the furniture-moving project, neither Dudley nor Rosemann was out of breath or complained of overexertion.

Later on March 18, after the furniture had been moved to Rosemann's new office, Captain Williamson, while visiting

with Rosemann, noticed that Rosemann was pale and was rubbing his left shoulder and rotating his arm. Believing that Rosemann had aggravated his previously injured left rotator cuff, Williamson sent Rosemann home at approximately 3:30 p.m.

Throughout the evening of March 18, Rosemann's shoulder pain increased, continued notwithstanding medication, and prompted him to go to a hospital emergency room. Rosemann arrived at the hospital at 12:24 a.m. on March 19 and told the emergency room physician that he had been suffering pain in his left shoulder for a week, that the pain had been increasing and was not alleviated by medication, that he had previously sustained a rotator cuff injury, and that he was unaware of any recent injury. The emergency room physician found that Rosemann's left shoulder was tender on palpation and that Rosemann's shoulder pain was aggravated with palm-up abduction of his left arm to a horizontal position. The physician diagnosed Rosemann's condition as left rotator cuff syndrome, treated him accordingly, and released him.

After recuperating at home for a few days, Rosemann returned to work, but, while at home around 8 p.m. on March 22, after a relatively uneventful day, Rosemann experienced excruciating pain in the upper left part of his body, suffered a myocardial infarction, collapsed, and died in the bathroom of his home.

MEDICAL EVIDENCE AND DISPOSITION AT REHEARING

The emergency room physician testified regarding his diagnosis of Rosemann on March 19, 1988:

> Q. What diagnosis did you make at that time, if any?
>
> A. Left rotator cuff syndrome.
>
> Q. Doctor, could you state with a reasonable degree of medical certainty or probability that had you not been made aware of Mr. Rosemann's left rotator cuff shoulder problem from 1987, that your diagnosis and treatment of Mr. Rosemann would have been anything different at the time that you saw him?
>
> . . . .

> THE WITNESS: If I understand your question, you are asking me, would my interpretation of his complaint and physical findings been different had I not known about his previous shoulder difficulties?
>
> Q. . . . That's right.
>
> A. I think not. I think it would have been the same.

Dr. Jerry Jones, the pathologist who had performed the autopsy on Rosemann and prepared his death certificate, concluded that Rosemann died of "[a]cute and healing myocardial infarcts, posterior wall left ventricle [resulting from] [s]evere coronary atherosclerosis, with recent thrombosis, right coronary artery." According to Dr. Jones, "approximately 24 hours or less before [Rosemann's] death, he sustained [an] acute myocardial infarct . . . and it was this . . . acute myocardial infarct that really triggered the cardiac arrhythmia that caused his immediate death."

Dr. Bruce McManus, a cardiac pathologist, testified that

> [t]he proximate cause of death in this man's case is acute myocardial infarction, and that acute myocardial infarction is the heart attack that occurred just immediately before his death, which is of substantial size and . . . is somewhere between, is around 12 hours, plus or minus a couple, three hours, of age.

Dr. Michael Sketch, a cardiologist, testified that none of Rosemann's activities of March 18, 1988, caused or contributed to Rosemann's death. Dr. Sketch also testified that Rosemann's prior medical history, obtained when Rosemann came to the emergency room on March 19, 1988, did not "mask" Rosemann's coronary problem, "[b]ecause with myocardial infarctions, they do not cause tenderness to be present, and they don't cause pain to be experienced by the individual being examined with adduction."

The Nebraska Workers' Compensation Court found that evidence for the Rosemann claim "failed to prove . . . a causal connection between the rotator cuff injury and the heart attack," and also found that "[t]he plaintiff has failed to sustain her burden of proof" and dismissed Jeanette Ann Rosemann's action for workers' compensation.

ROSEMANN'S THEORY OF "MASKING"

"Accident" is statutorily defined as "an unexpected or unforeseen injury happening suddenly and violently . . . and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment." Neb. Rev. Stat. § 48-151(2) (Reissue 1988). Section 48-151(5) provides: "Death, when mentioned as a basis for the right to compensation, shall mean only death resulting from such violence and its resultant effects or from occupational disease." Further, § 48-151(4) in part states: "The terms ['injury' and 'personal injuries'] shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability, or death that is the result of a natural progression of any preexisting condition."

For an award based on an employee's death, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in death compensable under the Nebraska Workers' Compensation Act. See, *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988). A claimant has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability or death. *Heiliger v. Walters & Heiliger Electric, Inc., supra*; *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980). "Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). Accord *Heiliger v. Walters & Heiliger Electric, Inc., supra.*

It is undisputed that Frederick Rosemann's rotator cuff injury from the truck tire accident on May 5, 1987, was a work-related injury compensable under the Nebraska Workers' Compensation Act. Therefore, the issue is whether Frederick Rosemann's death was caused by "such violence [of Rosemann's work-related injury] and its resultant effects." § 48-151(5).

To meet a claimant's burden of proof concerning causation,

Jeanette Ann Rosemann asserts that "the primary compensable injury made treatment of Fred's ischemic heart disease extremely difficult, if not impossible, by making Fred's heart symptoms undetectable, unrecognizable, unnoticeable or masking over them." Brief for appellant at 17. Thus, Jeanette Ann Rosemann contends that symptoms of her husband's aggravated rotator cuff injury were indistinguishable from the symptoms of a myocardial infarction, so that the rotator cuff condition disguised or masked the symptoms of her husband's myocardial infarction and prevented an early and proper diagnosis of Frederick Rosemann's coronary condition during the emergency room examination on March 19, 1988. To support her position, Jeanette Ann Rosemann directs our attention to the proposition expressed in 1 A. Larson, The Law of Workmen's Compensation § 13.00 at 3-502 (1990): "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."

Professor Larson also makes the following observation:

> A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. . . . [W]hen the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results," and of claimant's own conduct as an independent intervening cause.

1 A. Larson, *supra*, § 13.11 at 3-502.

In his treatise, Professor Larson notes a group of medical-causation cases

> in which the existence of the primary compensable injury in some way exacerbates the effects of an independent medical weakness or disease. The causal sequence in these cases may be more indirect or complex, but as long as the

> causal connection is in fact present the compensability of the subsequent condition is beyond question.

1 A. Larson, *supra*, § 13.11(b) at 3-523 to 3-524.

In *Ribar v. H & S Earthmovers*, 618 P.2d 582 (Alaska 1980), the court considered an employee's contention that symptoms from a compensable injury misled the employee's attending physician, resulted in misinterpretation of symptoms from a prior preexisting condition, and caused "his physicians to act differently than they would have had his accident not taken place." 618 P.2d at 584 n.2. In *Ribar*, the court stated:

> We think that it makes little difference whether an industrial accident causes a delayed diagnosis of an underlying condition by actually concealing the symptoms of the condition or by merely causing confusion in the mind of the treating physician. In each case the condition is not discovered and appropriately treated because of the accident. The question in both cases is the same: was the accident a substantial factor in contributing to the applicant's condition in the sense that it delayed prior diagnosis and treatment of the [preexisting condition].

618 P.2d at 584. See, also, *Waibel v. State Compensation Department*, 471 P.2d 826, 829 (Or. App. 1970) (Hodgkin's disease antedated industrial accident, so that the work-related "injury masked the Hodgkin's disease symptoms, delaying treatment for the Hodgkin's disease and thus hastening the advent of [Waibel's] total disability"); *Namanowich v. En Operating Corporation*, 23 A.D.2d 912, 258 N.Y.S.2d 937 (1965), *aff'd* 17 N.Y.2d 642, 216 N.E.2d 342, 269 N.Y.S.2d 140 (1966) (employee's previous work-related injuries prevented a timely diagnosis of cancer and prevented curative or palliative surgery).

In the case before us, for availability of the "masking" theory, Rosemann's symptoms, as the basis for the rotator cuff diagnosis during the emergency room examination, would also have to be symptoms of a myocardial infarction. However, Dr. Sketch offered the opinion that the symptoms exhibited by Rosemann at the emergency room on March 19, 1988, were inconsistent with a myocardial infarction and negated existence of that particular coronary condition at the time Rosemann was

treated in the emergency room. To paraphrase Dr. Sketch's opinion, what Rosemann exhibited at the emergency room were not symptoms of a myocardial infarction. Thus, evidence supports a factual conclusion that Rosemann's symptoms at the emergency room were not related to a myocardial infarction. For that reason, symptoms attributable to Rosemann's prior rotator cuff injury could not and, therefore, did not distort, camouflage, or overshadow nonexistent symptoms of a myocardial infarction. Moreover, according to the emergency room physician, the interpretation of Rosemann's clinical symptoms and the diagnosis of Rosemann's condition, namely, a rotator cuff problem, would have been the same without the history of Rosemann's prior work-related rotator cuff injury. In short, a cause-and-effect relationship between Rosemann's rotator cuff injury and absence of a diagnosis of Rosemann's coronary problem has not been established, or, as the Workers' Compensation Court concluded, evidence failed to show a "causal connection between the rotator cuff injury and the heart attack," a determination which is not clearly erroneous. Since the evidence failed to establish that the rotator cuff injury delayed a proper diagnosis of Rosemann's coronary condition, caused an incorrect diagnosis, or resulted in absence of a diagnosis concerning Rosemann's eventual death-producing myocardial infarction, Rosemann's death was not one of the "resultant effects" of the work-related rotator cuff injury.

ROSEMANN'S EXERTION

Although the Rosemann appeal concentrates on "masking" to provide compensability for Frederick Rosemann's death, Jeanette Ann Rosemann also contends that Frederick Rosemann's physical exertion in moving office furniture in the course of his employment "substantially increased the risk created by [his] pre-existing, but unknown, arterial sclerosis and precipitated or contributed in a substantial and material degree to the heart attack suffered by [Frederick Rosemann] on March 22, 1988, which resulted in his death."

Frederick Rosemann and Corporal Dudley moved the furniture by sliding, not carrying, the items from Rosemann's old office. After moving the furniture, Dudley and Rosemann

were not out of breath and did not complain about overexertion. Rosemann's physical activities outside his employment included repairing automobiles, installing major household appliances, constructing a deck for his residence, adding kitchen cabinets in his house, painting and wallpapering in his home, and deer hunting. Beyond general references to the preceding activities, no evidence indicated whether exertion from Rosemann's employment activities was greater than exertion experienced in his nonemployment life or vice versa.

Neb. Rev. Stat. § 48-101 (Reissue 1988), provides that

> [w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

"There shall be no presumption from the mere occurrence of [an] unexpected or unforeseen injury that the injury was in fact caused by the employment." § 48-151(2).

Sections 48-101 and 48-151(2) of the Nebraska Workers' Compensation Act reflect a basic legislative intent that compensation is restricted to an employee's work-related injury and disability.

In § 48-101, the phrase "arising out of" refers to an injury which is the basis of a workers' compensation claim and the injury's origin, cause, and character, that is, whether an employee's unexpected or unforeseen injury results from risks arising within the scope or sphere of employment. See, *McGinn v. Douglas County Social Services Admin.*, 211 Neb. 72, 317 N.W.2d 764 (1982); *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982); *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 301 N.W.2d 68 (1981).

> [A] claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has

> combined with the present work-related injury to produce the disability for which the claimant seeks an award.

Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 467, 461 N.W.2d 565, 571-72 (1990).

However, notwithstanding the principle expressed in *Heiliger* regarding a preexisting condition, "heart attack" cases occupy a special place in the workers' compensation law of Nebraska. The cardiovascular catastrophe of a myocardial infarction, commonly known as a heart attack, results from cardiac ischemia, that is, insufficient blood supply to heart tissue, which, if severe enough and protracted, produces death of heart muscle. D. Juge & J. Phillips, *A New Standard for Cardiovascular Claims in Workers' Compensation*, 43 La. L. Rev. 17 (1982). Quite obviously, in any heart attack case brought under the Nebraska Workers' Compensation Act the foremost and essential problem is causation, that is, whether employment caused an employee's injury or death from a heart attack. See *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

In a workers' compensation claim based on an employee's heart attack, causation required for compensability consists of two parts: legal cause and medical cause. See, *Leitz v. Roberts Dairy, ante* p. 235, 465 N.W.2d 601 (1991); *Sellens v. Allen Products Co., Inc., supra;* 1B A. Larson, The Law of Workmen's Compensation § 38.83(a) (1987). For legal causation, the workers' compensation law defines the type of exertion which satisfies "arising out of" employment as a requirement for compensability. See, *Leitz v. Roberts Dairy, supra*; *Sellens v. Allen Products Co., Inc., supra*; 1B A. Larson, *supra*. For medical causation, medical evidence must establish that an employee's exertion in fact caused an employee's heart attack which is the subject of a workers' compensation claim. *Leitz v. Roberts Dairy, supra*; 1B A. Larson, *supra*. See, also, *DeSchaaf v. Indus. Com'n of Ariz.*, 141 Ariz. 318, 320, 686 P.2d 1288, 1290 (1984): "Legal causation concerns whether the injury arose out of and in the course of the employment. . . . [M]edical causation ordinarily requires expert medical testimony to establish that the industrial accident caused the injury."

> An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.

Leitz v. Roberts Dairy, supra at 241, 465 N.W.2d at 605. See, also, *Spangler v. State,* 233 Neb. 790, 448 N.W.2d 145 (1989); *Sellens v. Allen Products Co., Inc., supra*; *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969).

As previously noted, Dr. Sketch, a cardiologist, testified that none of Rosemann's activities on March 18, 1988, caused or contributed to Rosemann's death. Hence, the compensation court's decision that Jeanette Ann Rosemann had failed to satisfy her burden of proof that Frederick Rosemann's employment activities were the medical cause of the fatal myocardial infarction is not clearly erroneous. Also, nothing in Rosemann's case provided a reasonable factual basis for a comparative evaluation between the exertion in Frederick Rosemann's employment and exertion in nonemployment life. Although there is a rather general identification of Frederick Rosemann's various activities in his nonemployment life, the identified activities offer no factual foundation for a comparison between the exertion experienced in Frederick Rosemann's employment as a deputy sheriff and exertion experienced in nonemployment life. Thus, the proof in Rosemann's case fails to establish that his myocardial infarction arose out of his employment as a deputy sheriff of Sarpy County.

AFFIRMED.

STATE OF NEBRASKA EX REL. PATRICIA L. GADDIS, APPELLEE, V. CHARLES A. GADDIS III, APPELLANT.

465 N.W.2d 773

Filed February 22, 1991. No. 88-763.

1. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of a trial court's conclusion in a judgment under review.
2. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
3. _____: _____. Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court.
4. **Jurisdiction: Child Support.** A court has subject matter jurisdiction for an action brought under Neb. Rev. Stat. § 43-512.03 (Reissue 1988) only when there is no existing child support order in Nebraska or any other jurisdiction.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with direction to dismiss.

Thomas J. Garvey for appellant.

Charles E. Dorwart, Deputy Sarpy County Attorney, for appellee.

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

SHANAHAN, J.

The State of Nebraska, on relation or information of Patricia L. Gaddis, brought a child support action against Charles A. Gaddis III in the district court for Sarpy County, Nebraska, which entered judgment that Charles Gaddis pay $600 per month for his three minor children. We reverse and remand with direction.

STANDARD OF REVIEW

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988);

Christen v. Christen, 228 Neb. 268, 422 N.W.2d 92 (1988).

FACTS

On November 7, 1975, in Sarpy County, Nebraska, Charles Gaddis married Patricia. Later, Gaddises lived in Otoe County, Nebraska, with their three children. After Charles Gaddis moved to Colorado in February 1982 without having been personally served in the marital dissolution action brought by Patricia Gaddis in the district court for Otoe County, the court, on February 19, 1982, entered a decree dissolving the Gaddis marriage and granted Patricia custody of the Gaddises' children. Since the court lacked personal jurisdiction over Charles Gaddis, no child support judgment was entered in the dissolution proceedings. Subsequently, Patricia Gaddis and the children moved to Sarpy County.

As the result of an action by the State of Nebraska ex rel. Patricia L. Gaddis pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), the district court for Larimer County, Colorado, on February 7, 1983, ordered that Charles Gaddis pay $225 per month for support of the Gaddis children.

On February 24, 1988, the State of Nebraska, through the office of the county attorney of Sarpy County, filed an "equity petition" and alleged:

> COMES NOW Petitioner, State of Nebraska and on its relationship to and from the information of the Relator, Patricia L. Gaddis, and pursuant to Neb. Rev. Stat. . . . 43-512.03 (1987 Supp.) [requests] an Order of support which Order requires the Respondent to pay monthly child support for the parties minor child(ren) in such amount as the Court shall deem fair and reasonable. . . .

In the petition, the State also alleged that pursuant to the URESA action in 1983, the Colorado court had ordered Charles Gaddis to pay support for his children.

Charles Gaddis filed a demurrer, claiming that in the pending Sarpy County action, the district court lacked "authority to modify a foreign judgment," namely, the Colorado child support order. We construe Charles Gaddis' demurrer to be lodged under Neb. Rev. Stat. § 25-806(1) (Reissue 1989), which

provides for a demurrer when, on the face of a petition, it appears that a "court has no jurisdiction of the person of the defendant or the subject of the action."

After the court overruled Gaddis' demurrer, the case proceeded to a trial, which established, among other things, that Charles Gaddis had been making payments pursuant to the Colorado child support order and that his last payment was made on February 8, 1988. As a result of the trial, the court ordered Gaddis to pay $600 monthly as child support for the Gaddis children.

ASSIGNMENT OF ERROR

Charles Gaddis contends that the district court "improperly assumed jurisdiction over the case . . . despite the existence of an order for child support which was in full force and effect in another jurisdiction."

BASIS FOR ACTION

Neb. Rev. Stat. § 43-512.03 (Reissue 1988) provides in part:

> The county attorney or authorized attorney shall:
>
> (1) On request by the Department of Social Services or when the investigation or application filed under section 43-512 or 43-512.02 justifies, file a petition against a nonsupporting parent or stepparent in the district, county, or separate juvenile court praying for an order for child support in cases when there is no existing child support order.

The State argues that § 43-512.03 relates to "cases when there is no existing [Nebraska] child support order." Thus, the issue is whether the district court had subject matter jurisdiction for the action commenced under § 43-512.03(1).

"Jurisdiction is the inherent power or authority to decide a case." *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 365, 417 N.W.2d 757, 763 (1988). Accord, *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988); *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983).

Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the

proceedings in question belong and to deal with the general subject involved in the action before the court. *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962).

"When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). Accord, *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986); *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985).

In § 43-512.03, "in cases when there is no existing child support order" is unambiguous, but supplies no specificity for, definition of, or language to identify the jurisdiction wherein an existing child support order has been entered in relation to an action brought under that statute.

The State argues that unless "Nebraska" is inserted into § 43-512.03 in reference to an existing child support order, i.e., "no existing [Nebraska] child support order," then a child support obligee could not obtain "an order of child support in Nebraska or any other jurisdiction simply because a Colorado RURESA order exists." Brief for appellee at 7. To accomplish the State's suggested interpretation, this court would have to apply the rule of statutory construction expressed in *Board of Regents v. Gillette*, 149 Neb. 56, 66, 30 N.W.2d 296, 301 (1947): "The rule is that words may be supplied by the courts in construing a statute where that is necessary to complete the sense thereof and give effect to the intention of the Legislature manifested therein." However, the preceding rule was rejected in *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Addition of "Nebraska" in reference to an existing child support order within § 43-512.03 is accomplished by legislative language, not verbal injection from the judiciary.

Consequently, as a prerequisite for an action under § 43-512.03, there cannot be an existing child support order in any jurisdiction. Hence, a court has subject matter jurisdiction for an action under § 43-512.03 only "when there is no existing

child support order" in Nebraska or any other jurisdiction. Here, as acknowledged in the State's petition and substantiated at trial, there was a subsisting Colorado child support order when the action was commenced under § 43-512.03. Therefore, in the case before us, the trial court lacked subject matter jurisdiction for an action under § 43-512.03.

Child support from Charles Gaddis may be attainable in Nebraska, for we note that under the Revised Uniform Reciprocal Enforcement of Support Act, §§ 42-762 to 42-7,104 (Reissue 1988), an "obligee may register the foreign support order in a court of this state," § 42-797, and "[u]pon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state," § 42-7,101(a). If there is personal jurisdiction over a child support obligor, an obligee may then seek a modification of a registered foreign child support order in the same manner as an obligee may seek modification of a child support order initially entered by a Nebraska court. See, Neb. Rev. Stat. § 42-364 (Reissue 1988) (modification of child support order); *Johnson v. Johnson*, 215 Neb. 689, 340 N.W.2d 393 (1983). Cf., *Wilson v. Ransom*, 233 Neb. 427, 446 N.W.2d 6 (1989) (challenge to personal jurisdiction over obligor or presentation of a defense when a foreign URESA order is sought to be enforced in Nebraska).

CONCLUSION

Since the district court lacked subject matter jurisdiction for the action brought under § 43-512.03, the court erred, as a matter of law, in overruling Charles Gaddis' demurrer, which should have been sustained pursuant to § 25-806(1), resulting in a dismissal of the proceedings. For that reason, we reverse and set aside the judgment of the district court and remand this matter to the district court with direction to dismiss the action.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

DEPARTMENT OF HEALTH, STATE OF NEBRASKA, ET AL., APPELLANTS, V. MANOR CARE, INC., DOING BUSINESS AS MANOR CARE OF LINCOLN, APPELLEE.

465 N.W.2d 764

Filed February 22, 1991. No. 88-928.

Administrative Law: Appeal and Error. In an appeal to the Supreme Court from an administrative agency's decision, the Supreme Court, pursuant to Neb. Rev. Stat. § 84-918 (Cum. Supp. 1990), tries factual questions de novo on the record and reaches a conclusion independent of the conclusion reached by the administrative agency, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the administrative agency heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson for appellant Department of Health.

Robert L. Lepp, of McGill, Parsonage & Lanphier, P.C.; John R. Holdenried and Barbara E. Person, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; and Charles M. Pallesen, Jr., and Thomas C. Huston, of Cline, Williams, Wright, Johnson & Oldfather, for appellants Milder Manor et al.

Charles V. Sederstrom, of Erickson & Sederstrom, P.C., for appellee.

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

SHANAHAN, J.

Pursuant to the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 et seq. (Reissue 1986), Manor Care, Inc., doing business as Manor Care of Lincoln, filed its application with the Department of Health (Department) for a certificate of need, namely, authorization for construction and operation of a 120-bed nursing home in Lincoln, Lancaster County, Nebraska.

The Certificate of Need Review Committee adopted the Department's findings and conclusions, see § 71-5838(4), and

denied the application of Manor Care, which appealed to the Certificate of Need Appeal Panel, see §§ 71-5862 and 71-5865. At this juncture, five potential competitors of Manor Care's intervened and contended that the decision of the Certificate of Need Review Committee should be upheld. The stipulated issues for the Certificate of Need Appeal Panel were whether Manor Care had met its burden to prove that (1) in Lancaster County "there is an unmet need for long term care services," a requirement under 182 Neb. Admin. Code, ch. 2, § 005.01A (1983); (2) any need is "consistent with the need projections in the [certificate of need] regulations and in the current State Health Plan or, if there is an inconsistency between the need projections in those two documents . . . that the need is consistent with such document having priority in accordance with 182 NAC 2.005.01B"; (3) all "alternatives for meeting any unmet need" have been identified and that Manor Care's proposal is either "the least costly alternative for meeting any unmet need" or "is the most effective alternative for meeting any unmet need," requirements under 182 Neb. Admin. Code, ch. 2, §§ 005.02A1 and 005.02A2 (1983); (4) any increased cost or charges attributable to Manor Care's proposed project "are justified because of any unmet need," which is required by 182 Neb. Admin. Code, ch. 2, § 005.02B (1983); (5) Manor Care's "proposed project is financially feasible," as required by 182 Neb. Admin. Code, ch. 2, § 005.02C (1983); (6) Manor Care's "proposed project is consistent with the utilization requirements and projections of need in the [certificate of need] regulations and in the current State Health Plan," which is required under 182 Neb. Admin. Code, ch. 2, § 005.02E1 (1983); and (7) Manor Care's proposed project either "fosters competition and increases the range of choices available to consumers and payers" or that "the proposed project optimizes sharing and minimizes unnecessary duplication of long-term care services," required by 182 Neb. Admin. Code, ch. 2, § 005.02F (1983). Disposing of the stipulated questions, the appeal panel reversed the decision of the review committee and granted Manor Care a certificate of need.

In February 1988, pursuant to § 71-5866, the Department and Manor Care's competitors appealed to the district court for

Lancaster County, which affirmed the decision of the appeal panel and refused to stay the issuance of the certificate of need.

ASSIGNMENTS OF ERROR

In their appeal to this court, the appellants contend that (1) the evidence does not sustain the appeal panel's decision; (2) "[t]he Appeal Panel erred in refusing to consider evidence of newly converted and newly authorized (but unconstructed) beds in calculating the long-term care bed supply for 1990," brief for appellant objectors at 7; and (3) the district court erred in denying the Department's request for a stay of the issuance of a certificate of need to Manor Care.

STANDARD OF REVIEW

Judicial review of a decision concerning a certificate of need under the Nebraska Health Care Certificate of Need Act is governed by the Administrative Procedure Act. § 71-5866.

Since proceedings for judicial review in this case were filed in the district court before July 1, 1989, see, Neb. Rev. Stat. §§ 84-917(5)(a) and 84-918 (Cum. Supp. 1990) of the Administrative Procedure Act, this court's standard of review is: In an appeal to the Supreme Court from an administrative agency's decision, the Supreme Court, pursuant to § 84-918, tries factual questions de novo on the record and reaches a conclusion independent of the conclusion reached by the administrative agency, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the administrative agency heard and observed the witnesses and accepted one version of the facts rather than another. *Department of Health v. Omaha Associates*, 232 Neb. 516, 441 N.W.2d 579 (1989). See, § 84-918; *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988).

THE FACTS

Manor Care has many health care facilities in several states, excluding Nebraska, and applied for a Nebraska certificate of need regarding a 120-bed skilled- and intermediate-care nursing

center to accept both medicare and medicaid recipients. Manor Care's proposed facility will be located in Lancaster County, will emphasize rehabilitation, and will offer a 30-bed specialized unit for victims of Alzheimer's disease and similar conditions. The estimated cost is $3,610,000, with an anticipated completion date of July 1989.

APPLICABLE REQUIREMENTS AND CRITERIA FOR ISSUANCE OF A CERTIFICATE OF NEED

The requirements and criteria concerning Manor Care's application are found in 182 Neb. Admin. Code, ch. 2, § 005 (1983):

> 005 REVIEW CRITERIA. The applicant bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria in this section which are appropriate and significant to the proposal in order to be granted a certificate of need.
>
> 005.01 The Need for Services.
>
> 005.01A. The applicant must establish that there is an unmet need for health care services for a specific population.
>
> 005.01A1 A need exists when additional services for health care are essential to make high-quality health care available and accessible to all citizens of the state.
>
> 005.01A2 Under this part 005.01A, the population in need and the health care services which are needed must be identified, and the need of that population for the identified services must be established. The need which must be established under this part 005.01A is the need for diagnostic, treatment, rehabilitation, or maintenance services, not facilities or equipment. Facilities or equipment for providing the needed services must be identified under subsection 005.02 below. The population in need of services must be identified by the applicant both numerically and geographically in terms of Nebraska counties and the metropolitan areas, but applicant's service area will be determined with emphasis on referral patterns and travel time and without strict observance of geographical or political boundaries. For applicants

which establish that they provide a substantial portion of their services or resources to individuals who reside outside the immediate or adjacent health service areas (which entities may include medical and other health professions schools, multidisciplinary clinics and specialty centers), the population in need of services shall include the proportion of individuals in special patient groups and out-of-area population groups to whom the applicant provides services.

. . . .

005.01B The need established under part 005.01A above must be consistent with the need projections in section 006 of these regulations (182 NAC 2), and with those in the state health plan most recently adopted under section 1524(c)(2)(A) of P.L. 93-641, 42 U.S.C. 300m-3(c)(A), and on file with the Secretary of State, each of which is hereinafter referred to as a document. Projections in section 006 of these regulations shall take priority over those in the state health plan in the case of conflicts between those documents. Exceptions to the requirement of consistency with the projections in the document having priority shall be made when justification is shown by a preponderance of the evidence.

005.02 The Project Proposed for Meeting the Need.

005.02A Alternatives.

005.02A1 The applicant must identify all the alternatives which could satisfy the need established under part 005.01A above, and describe their relative merits. The proposed project must be discussed along with the other alternatives, and sharing among facilities must be considered as a possible alternative.

005.02A2 The applicant must demonstrate that the proposed project is the least costly of the alternatives for meeting the need established under part 005.01A above, or if it is not the least costly, that it is the most effective alternative for meeting such need. In determining which alternative is the least costly, consideration shall include (but without limitation to) the following: the total cost of the project; charges to all consumers and payers, including

government reimbursement programs; the effect of the proposed means of financing on consumers and payers considered as a whole; and, in the case of construction projects (including remodeling), the design, methods, and materials of construction and the long-term energy costs for the project. The most effective alternative is the alternative which makes high-quality health care available and accessible to the greatest number of people in need of the services established as needed under part 005.01A above, maximizes the effectiveness of expenditures made for health care, minimizes unnecessary duplication of facilities and services, encourages development of appropriate alternative methods of delivering health care, and promotes wherever appropriate a more competitive health care delivery system.

005.02B Cost.

005.02B1 Any increase in costs or charges (to any class of payers or to all payers) resulting from the proposed project must be justified by the needs of the population established under part 005.01A above which will be met by the project. In estimating increases in costs or charges which will result from the proposed project, capital costs, operating costs, projected utilization of the proposed services, and any other factors bearing on future costs or charges shall be considered.

005.02B2 Increases in costs may be justified in part where improvements or innovations in the financing and delivery of health services will foster competition and promote quality assurance and cost effectiveness for consumers and payers.

005.02C Financial Feasibility.

005.02C1 The resources and proposed means of financing the proposed project must in fact be available.

005.02C2 It must be reasonably certain that the proposed project will be financially feasible for the period of life of the assets.

005.02D Continuity and Quality.

005.02D1 The proposed project must be coordinated with the existing health care system in a manner that

assures continuity of care including a succession of levels of service.

005.02D2 Ancillary or support services necessary to operate and maintain the proposed services under high standards of quality must be available or arranged.

005.02D3 It must be reasonably certain that the proposed services will be provided to the population in need on a continuous basis for the period of life of the assets.

005.02D4 The proposed project must be designed to provide or support high quality care. The quality of care provided by the applicant in the past may be considered in determining whether high quality care will be provided by the proposed project.

005.02E Impact on the Health Care Delivery System.

005.02E1 The proposed project must be consistent with the utilization requirements and the projections of need for the specific services proposed, which are contained in section 006 of these regulations and in the state health plan most recently adopted under section 1524(c)(2)(A) of P.L. 93-641, 42 U.S.C. 300m-3(c)(A), and on file with the Secretary of State. Requirements or projections in section 006 of these regulations shall take priority over those in the state health plan in the case of conflicts between those documents. Exceptions to the requirements or projections in the document having priority shall be made when justification is shown by a preponderance of the evidence.

005.02E2 If the applicant has a long-range development plan, the applicant must demonstrate that the proposed project is part of that plan and is consistent with other parts of that plan.

005.02E3 The proposed project must provide access for and contribute to meeting the health-related needs of medically underserved groups in its service area, particularly low-income persons, racial and ethnic minorities, women, handicapped persons, and the elderly.

005.02E4 In the case of a reduction or elimination of a service, including the relocation of a facility or service, the needs of the population presently served must be

adequately met by another facility or service, or by other arrangements.

005.02E5 If the proposed services are to be available in a limited number of facilities, health professional training programs in the area must have access to the services if necessary for training purposes.

005.02F Competition/Sharing.

005.02F1 Except as provided in subparts 005.02F2 and 005.02F3 below, the proposed project must increase the range of choices available to consumers and third-party payers with respect to the price and use of services, and must have the effect of fostering price competition among providers of health services.

005.02F2 In the case of leases or acquisitions of existing health care facilities, except as provided in subpart 005.02F3 below, the proposed lease or acquisition must not have the effect of reducing price competition among providers.

005.02F3 Where it is demonstrated that competition would not serve to promote quality assurance and cost effectiveness, the proposed project must optimize sharing and minimize unnecessary duplication in the health care delivery system.

THE NEED FOR SERVICES

Since the Department's regulations allow an applicant to identify the "population in need," see § 005.01A2, in proceedings before the appeal panel, Manor Care identified Lancaster County as the "population in need" of its health services. By stipulation, an initial issue was whether Manor Care's facility satisfied "an unmet need for long term care services *in Lancaster County* . . . ." (Emphasis supplied.) We construe this stipulation as a factual admission that Manor Care's proposed service area is Lancaster County, but we do not construe "service area" to mean "[h]ealth service areas or subareas" under 182 Neb. Admin. Code, ch. 2, § 002.02A (1983).

The appellants seek to enlarge Manor Care's proposed service area to include "a 30 mile radius around the City of

Lincoln. This service area would include all of Lancaster County, plus portions of Saunders, Seward, Saline, Gage, Otoe, and Cass Counties." Brief for appellant objectors at 23-24. Appellants argue that Manor Care's service area should be enlarged because a substantial number of Lancaster County residents have left the county to reside in nursing homes located in neighboring counties. Rather than demonstrating that Manor Care will serve persons outside Lancaster County, appellants' argument is more persuasive that Manor Care's proposed service area should be accepted and retained rather than enlarged. On the other hand, information that many residents from surrounding counties are moving, or have moved, to Lancaster County for nursing home care might evidence a need to enlarge Manor Care's service area. After reviewing the record, we find that Manor Care's proposed service area is Lancaster County.

In the present case, the primary dispute involves a determination of the long-term-bed need in Lancaster County. 182 Neb. Admin. Code, ch.2, §§ 006.09 et seq. (1983) provide:

> 006.09 Long-Term Care Beds (Skilled Nursing Facility and Intermediate Care Facility Beds, Excluding ICF-MR Beds).
>
> 006.09A The combined occupancy of long-term care beds in the applicant's service area must be 90 percent or greater before long-term care beds may be added.
>
> 006.09B A system of alternative services, including either home health services, home aide/homemaker services, or an adult day care center, must be accessible to a majority of the population in the service area of the proposed project before long-term care beds may be added.
>
> 006.09C Rural needs and local differences shall be recognized by using the age-gender group needs of the population in any applicant's service area identified under subpart 005.01A2 above. No long-term care beds may be added if the number of beds in the applicant's service area exceeds the need for that area determined by aggregating the bed needs estimated for each sex and age group from the following methodology:

$$\text{Long-Term Bed Need} = \frac{\text{Population} \times \text{Utilization Rate Goal}}{\text{Minimum Occupancy Rate Goal}}$$

The Department's regulations provide:

006.09C1 The population includes the total population of the applicant's service area, disaggregated by age (0-44, 45-64, 65-74, 75-84, 85 +) and sex.

006.09C2 The utilization rate is the number of long-term care residents per 1000 persons. The utilization rate goal for each sex and age group is as follows:

Age-Sex		Utilization Rate Goal
0-44	Female	0.10
	Male	0.11
5[sic]-64	Female	2.84
	Male	3.00
65-74	Female	14.87
	Male	13.82
75-84	Female	69.52
	Male	47.35
85 +	Female	247.81
	Male	173.25

006.09C3 The minimum occupancy rate goal is 90 percent, the goal for the ratio of the total number of patient days to the total annual available bed days.

At the appeal panel hearing, the Department supplied information that the projected number of long-term-care residents in Lancaster County for 1990 was 1,437, to which a factor of .9 is applied, resulting in a long-term-care need of 1,597 nursing home beds. As of 1987, there were 1,477 available beds. Deducting 1,477 (available beds in Lancaster County) from 1,597 (projected need) leaves 120 beds which will be needed for long-term care of Lancaster County residents.

The appellants argue that the number of existing beds in Lancaster County should include 28 beds which Bethphage Residential Care Center was recertifying and 50 beds in a proposed nursing home at Waverly, in Lancaster County. The state regulations fail to provide a method for calculating "existing beds." See §§ 005 and 006. In *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 598, 391 N.W.2d 582, 589 (1986), we stated that "[t]he mere filing of a notice of

intent [to apply for a certificate of need] does not, of course, indicate that the facility will be built." In our factual determinations, we have taken an approach that "existing beds" are only those beds currently available.

There is no evidence that Bethphage's recertified 28 beds were available for use. Further, when the appeal panel reviewed Manor Care's application, the administrative process was just beginning for determination whether the proposed Waverly nursing home was entitled to a certificate of need. Administrative and judicial review are two of many contingencies involved in determining whether a nursing home may be built and operated. Accordingly, we find that there were 1,477 existing and available beds in Lancaster County.

Thus, we conclude that there is a long-term need of 120 nursing home beds in Lancaster County.

CONSISTENCY OF NEED PROJECTIONS

The current state health plan and regulations pertaining to a certificate of need yield substantially different projections. However, projections in conformity with the Department's regulations take priority over the state health plan. § 005.01B. During oral argument in this appeal, the parties acknowledged that the certificate of need regulations applied; hence, the Department's regulations apply in accord with § 005.01B to determine consistency under the Department's certificate of need regulations. Manor Care's need projection is based on the regulations pertaining to a certificate of need, and the appellee's need projection, therefore, is consistent with the need projection under the regulations pertaining to a certificate of need.

IDENTIFIED ALTERNATIVES

Manor Care identified several alternatives for meeting any unmet long-term bed need, including addition of beds to existing facilities, conversion of excess hospital capacity, provision for less restrictive service alternatives, and sharing of services.

LEAST COSTLY ALTERNATIVE

Appellants argue that increasing the bed capacity of existing

facilities is a more cost-efficient way of satisfying the long-term bed need in Lancaster County. However, according to the proposal for a 10-bed addition at Homestead Nursing Home, the cost per bed is $95,000, while Manor Care projects a cost per bed of $30,000. Hence, Manor Care has supplied information that its proposed project is a cost-efficient means to satisfy the long-term bed need in Lancaster County.

JUSTIFICATION FOR ANY INCREASE IN COST

Dr. Lewis Price considered the construction cost of Manor Care's proposed 120-bed nursing home, cost of operation, and projected occupancy rates and concluded that a patient's daily fee would be $54.20, as compared to the average Lincoln-area fee of $54.05. Thus, Manor Care can meet the 120-bed need with a new facility at a cost of 15 cents more than the present daily fee. Moreover, the nominal fee increase is justified by considerations that Manor Care will foster competition, increase the range of choices available to patients, and promote cost-effectiveness for consumers and payers, as discussed below.

FINANCIAL FEASIBILITY

Manor Care, which has 140 nursing homes in many states, has financed, constructed, and operated nursing home facilities for 27 years and has sufficient resources available for the proposed construction and operation of a nursing home in Lincoln, Nebraska.

Considering our determination that there is a long-term-care bed need in Lancaster County, we accept Manor Care's income projections, which forecast a positive net income by the second year of operations, and conclude that Manor Care has demonstrated financial feasibility for its proposed project.

CONSISTENCY BETWEEN THE PROPOSED PROJECT AND THE NEED

Manor Care's proposed 120-bed facility is consistent with a projected need of 120 beds determined in accordance with the Department's regulations pertaining to a certificate of need.

COMPETITION

Section 005.02F1 provides that "the proposed project must

increase the range of choices available to consumers and third-party payers with respect to the price and use of services, and must have the effect of fostering price competition among providers of health services." Manor Care's proposed Alzheimer's program will consist of four components, including (1) specialized staffing, higher staff-to-patient ratio, medical specialty support, and a full-time program director; (2) structured daily programming and specialized services such as dietary services; (3) a uniquely designed physical environment and an interior decor that promote "way-finding" and minimize environmental irritants; and (4) family support, education, and participation. Dr. William Reichel described Manor Care's proposed Alzheimer's program as "state of the art." The Alzheimer's program at Manor Care would give Lancaster County a greater variety of health services and prices for those services. Also, Manor Care's new facility, with a specialized Alzheimer's program and daily fees virtually the same as those of area nursing homes, will likely attract prospective nursing home residents to choose Manor Care over another nursing home. As an additional competitor in the Lancaster County market of long-term health services, which has a need of 120 beds, Manor Care will likely intensify price competition among providers of health care services in the area of nursing homes.

CONCLUSION

Having reviewed the applicable requirements and criteria for a certificate of need, we conclude that Manor Care has met and satisfied its burden of proof for entitlement to a certificate of need. Accordingly, we affirm the judgment of the district court which affirmed the Certificate of Need Appeal Panel's order and decision that Manor Care satisfied the applicable requirements for issuance of a certificate of need.

DENIAL OF A STAY

During oral arguments before this court, the parties agreed that Manor Care has taken no action with its proposed project notwithstanding any decision that Manor Care is entitled to a certificate of need.

We have said:

> " ' "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. . . ." ' " "In general a case becomes moot ' "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." ' " "The province of a court is to decide real controversies and to determine rights actually controverted, and 'The judicial power does not extend to the determination of abstract questions.' " [Citations omitted.]

Mullendore v. School Dist. No. 1, 223 Neb. 28, 36, 388 N.W.2d 93, 99 (1986).

The question whether the district court abused its discretion by denying a stay on the issuance of a certificate of need is no longer a "live" issue because Manor Care has deferred construction, a situation the same as would have existed if a stay had been issued. Moreover, affirmance of the district court's judgment eliminates the necessity of examining the denial of the stay. Thus, whether the district court abused its discretion by denying a stay on the issuance of a certificate of need is rendered moot by our affirmance of the district court's judgment.

SUMMARY

Manor Care has presented sufficient information for entitlement to a certificate of need under the Nebraska Health Care Certificate of Need Act, while the Department and objectors have failed to show any basis under the Administrative Procedure Act for altering the district court's judgment.

AFFIRMED.

HASTINGS, C.J., and CAPORALE, J., not participating.

STATE OF NEBRASKA EX REL. GLENDA O. WARD, APPELLEE, V. SCOTT D. PAPE, APPELLANT.

465 N.W.2d 760

Filed February 22, 1991. No. 88-1076.

1. **Court Rules: Judicial Notice: Rules of the Supreme Court: Appeal and Error.** The Nebraska Supreme Court takes judicial notice of those trial court rules of practice which have been filed with the Supreme Court Clerk in accordance with the requirement of Neb. Ct. Misc. R. (rev. 1989).
2. **Courts: Judgments: Time.** After final adjournment of a term of the district court at which judgment was rendered, the district court has no authority or power to vacate or modify the judgment except for reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1989).

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

Thomas M. Kenney, Douglas County Public Defender, and Gary D. Olson for appellant.

Patricia J. Jacobs for appellee.

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

CAPORALE, J.

The respondent, Scott D. Pape, appeals and assigns as error the district court's refusal to apply retroactively the holding in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), that due process requires the appointment of counsel at public expense for an indigent accused of siring a child, and the resultant failure to vacate its decree declaring Pape to be the sire of two children born unto the relator, Glenda O. Ward, and ordering him to make payments toward their support. We affirm.

The decree in question was rendered on the 26th day of August 1987. *Carroll* was decided on the 20th day of May 1988. The motion to vacate the decree was filed on the 21st day of October 1988 in a proceeding instituted by the petitioner-appellee, State of Nebraska, on the 2d day of September 1988, to have Pape found in contempt for failing to make certain of the ordered payments.

The Nebraska Supreme Court takes judicial notice of those

trial court rules of practice which have been filed with the Supreme Court Clerk in accordance with the requirement of Neb. Ct. Misc. R. (rev. 1989). *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985); *State v. Barrett*, 200 Neb. 553, 264 N.W.2d 434 (1978). The court from which this appeal is taken constitutes the fourth district court judicial district. Neb. Const. art. V, § 10; Neb. Rev. Stat. § 5-105 (Reissue 1987). The applicable rule of that court provides that its terms commence on January 1 and adjourn on December 31 of each year. Fourth Jud. Dist. R. of Prac. 1G (rev. July 1985). Thus, Pape filed his motion to vacate the decree in question during a term of court commencing after the adjournment of the one during which the decree was rendered.

Neb. Rev. Stat. § 25-2001 (Reissue 1989) provides the only vehicle for a direct action directed at vacating an out-of-term district court decree. *State ex rel. Birdine v. Fuller*, 216 Neb. 86, 341 N.W.2d 613 (1983) (after final adjournment of term of court at which judgment rendered, court has no authority or power to vacate or modify judgment except for reasons stated and within the time limited in § 25-2001). Section 25-2001 reads as follows:

> A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made (1) by granting a new trial of the cause within the time and in the manner prescribed in sections 25-1143 and 25-1145; (2) by a new trial granted in proceedings against defendants constructively summoned as provided in section 25-517; (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; (5) for erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings; (6) for the death of one of the parties before the judgment in the action; (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or

> defending; (8) for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 25-1317; and (9) for taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

Pape's motion does not indicate upon which provision of the foregoing statute he relies. Indeed, the motion does not reveal the authority under which it was purportedly filed. However, even if the order overruling Pape's motion is a final one in the context presented, a question we do not address, an examination of each of the nine subsections of § 25-2001 reveals that Pape's motion does not fall within any provision of the statute.

Subsection (1) allows the district court to grant a new trial of the cause if the requirements of Neb. Rev. Stat. §§ 25-1143 and 25-1145 (Reissue 1989) are met. Under those statutes, an application for new trial must be filed within 10 days of entry of the judgment, unless unavoidably prevented or for the cause of newly discovered evidence. There is no showing that Pape was prevented from filing a motion for new trial for any reason other than that *Carroll v. Moore, supra*, was not decided within 10 days of the rendition of the decree. Thus, the first part of subsection (1) under these facts merges with the second part. Even if Pape's motion could be construed as being made under that second part on the basis that newly discovered grounds did not exist until this court's ruling in *Carroll*, again a question we do not address, the motion would be barred by the 1-year period of limitation contained in § 25-1145. Therefore, Pape's motion cannot be deemed to come within § 25-2001(1).

Subsections (2), (4), (5), (6), (7), (8), and (9), by their very terms and the lack of any evidence to bring Pape's motion within those terms, are inapplicable to this analysis. Therefore, unless Pape's motion can be deemed properly before the court under subsection (3), his appeal is procedurally barred.

The first part of subsection (3), providing that a judgment may be vacated "for mistake, neglect, or omission of the clerk," applies only to the actions of the district court clerk. See

Paine v. United States Nat. Bank of Omaha, 199 Neb. 248, 257 N.W.2d 826 (1977). For that reason, the first part of subsection (3) is inapplicable. The second part of subsection (3), dealing with "irregularity in obtaining a judgment or order," refers to judgments or orders "rendered contrary to the course of law and the practice of the courts." *Paine, supra* at 250, 257 N.W.2d at 827. *Paine* makes clear that relief for "*errors of law* or judicial acts" may not be sought under subsection (3). (Emphasis supplied.) *Id.* By claiming an error of law, Pape removes his motion from consideration under § 25-2001(3).

Because Pape has failed to show that his motion to vacate complies with some portion of § 25-2001, see *State ex rel. Birdine v. Fuller*, 216 Neb. 86, 341 N.W.2d 613 (1983), it cannot be said that the district court abused its discretion in overruling the motion. See *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990).

Accordingly, the order of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARD W. HAYDEN, APPELLANT.

466 N.W.2d 66

Filed February 22, 1991. No. 89-1354.

1. **Insanity: Rules of Evidence: Due Process.** The rights ensured by Neb. Rev. Stat. § 29-3703 (Reissue 1989) include adherence by the court to the Nebraska Evidence Rules and the right of the appellant to confront and cross-examine adverse witnesses.
2. **Insanity: Due Process.** Due process in review hearings is guaranteed under Neb. Rev. Stat. § 29-3704 (Reissue 1989).

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

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

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

GRANT, J.

Ward W. Hayden appeals from a determination by the district court that his present state of dangerousness requires continued confinement at the Lincoln Regional Center. The court made this determination following a hearing pursuant to Neb. Rev. Stat. § 29-3703 (Reissue 1989). That statute provides for annual review of the mental condition of persons who have been found not responsible for crimes because of insanity and have been confined after a determination of their dangerousness under Neb. Rev. Stat. §§ 29-3701 and 29-3702 (Reissue 1989). We reverse the finding of the district court and remand for a new hearing.

The facts leading up to appellant's confinement in the regional center are the following: On October 10, 1987, appellant stabbed his ex-wife with a knife, causing a deep laceration in her buttock and the rear of her upper thigh. He was charged with second degree assault and use of a knife to commit a felony. After a bench trial on March 16 and April 4, 1988, appellant was acquitted by reason of insanity. On April 5, 1988, the trial judge found probable cause to believe the appellant was dangerous by reason of mental illness or defect, as demonstrated by an overt act or threat, and ordered appellant confined to the Lincoln Regional Center for a 90-day evaluation, pursuant to § 29-3701.

Pursuant to § 29-3701, Dr. Woytassek of the regional center prepared an individualized treatment plan, a statement of dangerousness, and a statement of the conditions of confinement and treatment necessary to achieve the purposes of the plan. These documents were prepared based upon Dr. Woytassek's own interviews and observations and based upon written reports and records of other staff personnel at the regional center. The reports prepared by Dr. Woytassek were submitted to the district judge prior to the § 29-3702 initial commitment hearing as provided for under § 29-3701.

Appellant also had a separate evaluation undertaken by an expert of his own choice, pursuant to § 29-3701(6).

At the initial commitment hearing required by § 29-3702, Dr. Woytassek testified as to the results of the evaluation and the content of the treatment plan. The court found that there was clear and convincing evidence that appellant was dangerous by reason of mental illness or defect, as demonstrated by an overt act or threat, and ordered that the appellant be confined to the Lincoln Regional Center. That order was affirmed by this court. See *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989) (*Hayden I*).

On November 3, 1989, this matter came before the district court for an annual review hearing on the status of the appellant, pursuant to § 29-3703. As had been done prior to appellant's initial commitment hearing under § 29-3702, the court was presented in advance with the same types of specific documents and reports as are described in § 29-3701. On the second page of the records received by the court, 12 names appear under the heading "Present". The persons named include two psychiatrists, a psychologist, a social service worker, six nurses, an activities coordinator, and an "MDSO Program Coordinator." Under the heading "Introduction" appears the statement "This staffing is being held to formulate a report for the next review hearing set for Thursday, September 7, 1989, at 1:30 p.m., in Douglas County District Court." The records further contain a social service report, a psychological evaluation, a ward report, a nurses report, an activities report, a psychiatric interview, a psychiatric diagnosis, and findings. The fourth page is entitled "Requirements Pursuant to Neb. Rev. Stat., Sec. 29-3703, Supp. 1985," and contains sections entitled "Statement Of Dangerousness," "Least Restrictive Treatment Setting," and "Privileges Requested." The records then continue with 10 pages entitled "Lincoln Regional Center Master Treatment Plan," which contain notes signed and dated by a number of people, usually under the headings "Measurable Objective(s)" and "Target Dates." The dates on many of the notations show that those notations were made prior to appellant's original commitment hearing under § 29-3702. Attached to all of this is

a cover letter addressed to Judge Murphy and signed by Drs. Charles E. Richardson and William R. Stone. The letter states in part:

> As you will note, Mr. Hayden continues to be mentally ill and dangerous by virtue of his diagnosis and his history and actions prior to commitment. Mr. Hayden further lacks insight into the seriousness of his problems, he continues to exhibit diminished impulse control except in highly supervised situations, and he has been uncooperative with treatment.
>
> If you are in need of further information please contact either myself or Dr. Stone . . . .

At the annual review hearing held November 3, 1989, the State began by offering the report from the regional center into evidence. This dialog followed:

> THE COURT: Let's make an offer of the exhibit so that we've got that first. This is a hearing on the defendant's application to be released; is that correct?
>
> MR. MUNNELLY: That's correct. It's an annual review hearing.
>
> THE COURT: Annual review hearing. Does The State have anything to offer as far as exhibits?
>
> MR. COOPER: Yeah, the State would offer Exhibit #1, which is a copy of the report that was sent to The Court in August or on or about August 1st, 1989, and it has a cover letter from Drs. Stone and Richardson, a diagnosis, Statement of Dangerousness, and Treatment Plan. I would offer that.
>
> MR. MUNNELLY: I'm going to object on the basis that the report itself contains numerous summaries of various people who are employed in the regional center who are not going to be here to testify. Further, without a sufficient foundation from whoever the State's witnesses to be as to whether or not these are the type of reports or that's the—this is the type of information which he normally relies upon in the ordinary course of his profession, I think there has been insufficient foundation. And I'm not even sure—I—I believe Dr. Stone's not employed at the regional center. He works on an

> independent contract basis. Well, I don't know if Dr. Stone knows these people, has ever seen them, or ever met them before, people who are contained within this report. So I'd object on relevancy and a foundation basis.
>
> MR. COOPER: Well, I don't think there is a foundational requirement. The statute requires the regional center to submit a report to The Court, and The Court has received the original report.
>
> THE COURT: I'll overrule the objection then for the record and receive the report of the regional center, the annual report, which I'm sure they're required to make—
>
> MR. COOPER: Yes.
>
> THE COURT: —by statute, and Exhibit 1 is received.

After the exhibit was received, pursuant to an agreement of the parties and with the permission of the court, the appellant was allowed to put on a witness before the State's case, because the witness would not be available that afternoon. The subpoenaed witness was Ross Henke, a staff psychiatric social worker at the regional center who had seen the appellant on approximately 60 occasions. Henke's testimony was generally favorable to appellant. Henke testified that since the appellant had been admitted to the regional center, he had never been psychotic or delusional, nor had he ever been prescribed medication.

When the time came for the State to present its evidence, counsel stated, "The State has presented its evidence." The State chose to rest based solely on the strength of exhibit 1.

Appellant then called his own expert, who had examined appellant on two occasions. Appellant and appellant's father also testified as witnesses.

The State then called Dr. Stone, one of the two persons to sign the cover letter of exhibit 1, as a rebuttal witness. He testified that he had seen appellant on several occasions while serving as a consulting psychologist to the regional center on a contract basis. In his testimony he referred to records found in exhibit 1, as well as to other evaluations, and concluded that appellant should remain confined at the regional center in order to assure public safety.

At the conclusion of the testimony, the judge reserved ruling.

Five days later he issued an order that Hayden's commitment be continued. The order stated that "the conditions set forth in the report . . . marked as Exhibit Number 1 and incorporated by reference and the treatment proposed in said report [are] hereby approved by the Court."

Hayden timely filed this appeal. In his first assignment of error, he alleges that the district court erred in allowing exhibit 1 over objection. At oral argument appellant's counsel asserted that the statutory procedures for an annual review hearing under § 29-3703 are not the same as the procedures for original commitment under §§ 29-3701 and 29-3702. He contended that allowing the State to introduce records at the review hearing without following rules of evidence, and without allowing appellant to confront and cross-examine those testifying against him, deprived him of rights guaranteed under Neb. Rev. Stat. § 29-3704 (Reissue 1989).

Section 29-3703 provides:

> (1) The court which tried a person who is found not responsible by reason of insanity shall annually and may upon its own motion or upon motion of the person or the prosecuting attorney, review the records of such person and conduct an evidentiary hearing on the status of the person.
>
> (2) If as a result of such hearing the court finds that such person is no longer dangerous to himself, herself, or others by reason of mental illness or defect, and will not be so dangerous in the foreseeable future, the court shall order such person unconditionally released from further confinement. If the court does not so find, the court shall order such person returned to an appropriate facility under an appropriate treatment plan and conditions of confinement. The court may place the person in a less restrictive setting only if it finds that such placement is consistent with the safety of the public.

Section 29-3704 provides:

> At each hearing conducted pursuant to sections 29-3701 to 29-3703, the person shall be entitled to assistance of counsel and such additional rights as are guaranteed by the laws and Constitution of the State of Nebraska and by

the United States Constitution.

It should be noted that the drafters of § 29-3703 chose not to include the same specifically enumerated and detailed requirements for submitting reports to the court as are mandated by § 29-3701. Section 29-3703 merely directs the court to "review the records of such person and conduct an evidentiary hearing on the status of the person." The statute does not specify what those "records" consist of, and it does not require that the court be furnished with any evidence prior to the hearing. Therefore, we find that the State and the district court erred in believing that the specific provisions of § 29-3701 are somehow grafted onto the phrase "the records" in § 29-3703.

Section 29-3703 contemplates that the court may review some "records" of one acquitted on grounds of insanity before determining whether the confinement of such a person should be continued after an annual review hearing. However, evidence may not be introduced without regard to the statutory and constitutional rights of the appellant. This court recently stated in *Tulloch v. State, ante* p. 138, 143, 465 N.W.2d 448, 452 (1991), that § 29-3704 ensures "a full panoply of constitutional rights for the individual throughout the various hearings." These rights include adherence by the court to the Nebraska Evidence Rules and the right of the appellant to confront and cross-examine adverse witnesses.

In *Hayden I*, appellant claimed a violation of the Nebraska Evidence Rules when the State's expert was allowed to introduce the specific reports required by § 29-3701 into evidence over a hearsay objection. This court held that the objection was unwarranted, because § 29-3701 "requires that evaluations and treatment plans submitted to the court 'include the facts upon which conclusions stated therein are based,' " and because the reports were "foundation for Dr. Woytassek's diagnosis and opinion that defendant was mentally ill and dangerous." *Hayden I* at 215, 444 N.W.2d at 321. In that case, the court considered the reports for the purpose of explaining the basis for Dr. Woytassek's opinion. In the present case, the reports submitted by the State are hearsay because they were submitted to prove the truth of the matter asserted therein and

not for the purpose of explaining any expert's direct testimony.

In *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985), we held that rule 703 of the Nebraska Evidence Rules allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion. In that case a physician relied upon hearsay data in giving his expert opinion in court. This court held, however, that it was improper to allow the report, offered for its truth and containing the hearsay data, directly into evidence.

In *Hayden I*, the reports were allowed directly into evidence. They were not hearsay, however, because they were accepted for the purpose of explaining the basis for the expert's direct testimony. This distinction was recognized and explained in *People v. Anderson*, 113 Ill. 2d 1, 495 N.E.2d 485 (1986). In that case a psychiatric expert testified, based in part on hearsay material, regarding the defendant's sanity. The trial court allowed the testimony, based on hearsay material reasonably relied upon by experts in the field, under Fed. R. Evid. 703. The trial court refused to allow the underlying reports into evidence. The Illinois Supreme Court emphasized in remanding the cause that the reports were not hearsay if offered to explain the basis of the expert's opinion, and not for the truth of the reports themselves. The court stated that it would be proper for a jury to receive the reports with a limiting instruction advising the jurors to consider the reports only for evaluating the basis of the expert's opinion.

At an annual review hearing pursuant to § 29-3703, as under an initial commitment proceeding pursuant to § 29-3701, the court may receive records for the purpose of providing the basis for expert witnesses' opinions. In this case the State relied exclusively on the reports as proof of the issue before the court, without testimony except on rebuttal. Because the State provided no witness to lay foundation and no witness whom the appellant could confront and cross-examine, the appellant was denied due process. Due process in review hearings is guaranteed to appellant under § 29-3704. Because of this deficiency the State could not meet its burden of proving by clear and convincing evidence that the appellant required continued confinement at the regional center. See *Tulloch v.*

State, supra.

In addition to providing that the court "review the records of such person and conduct an evidentiary hearing on the status of the person," § 29-3703 requires that the court "shall order such person returned to an appropriate facility under an appropriate treatment plan and conditions of confinement" if the court cannot find the person no longer dangerous. Because the statute provides that the court must authorize a treatment plan, it is proper that the State recommend a treatment plan, provided that the State allows the person being recommitted an opportunity to confront and cross-examine the State's witness presenting the plan regarding the plan's content. In addition, the court could consider any plan which the appellant's expert might propose. The court may then choose to adopt either plan, or may order a treatment plan and conditions of confinement which the court deems appropriate. Because the State failed to meet its burden of proving by clear and convincing admissible evidence that the appellant requires continued confinement at the regional center, this cause is remanded for a new review hearing. Because the admission of exhibit 1 requires a reversal and remand, we need not consider appellant's other assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DARIUS N. CHRISTIAN, APPELLANT.

465 N.W.2d 756

Filed February 22, 1991. No. 89-1474.

1. **Rules of Evidence: Other Acts.** 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.
2. **Rules of Evidence: Appeal and Error.** In reviewing the admission of evidence of other acts under Neb. Rev. Stat. § 27-404(2) (Reissue 1989), an appellate court will consider (1) whether the evidence was relevant, (2) whether the evidence had

a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.

3. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and its decision will not be reversed absent an abuse of that discretion.
4. **Judgments: Evidence: Appeal and Error.** A judgment may be affirmed if error in the admission of evidence over objection was harmless beyond a reasonable doubt.
5. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and Barry Waid for appellee.

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

BOSLAUGH, J.

Following a jury trial, the defendant, Darius N. Christian, was convicted of unlawful possession with intent to deliver cocaine, a Class II felony, and was sentenced to imprisonment for 4 to 7 years. He has appealed and contends that the trial court erred in admitting, over objection, testimony concerning certain of his prior acts.

The evidence, when viewed in the light most favorable to the State, shows the following: At about 8:30 p.m. on June 24, 1989, Omaha Police Officers Daniel Clark and Charles Matson responded to a call concerning a disturbance at a lounge located at 4020 Lake Street in Omaha, Nebraska. The complaining party informed the officers that he had been confronted by a vanload of "Blood" gang members, one of whom had pointed a handgun at him and threatened to fight him. The complaining party further reported that the van was a blue Ford that was being driven eastbound on Lake Street and that other people in

the van were also armed.

Approximately 20 minutes later, Officers Clark and Matson answered an "intrusion alarm" at a nearby grade school. While checking the school for signs of forced entry, Officer Clark saw the defendant running from the area "with his head tilted forward and his right arm in front of his body as if he was cradling something." Suspicious of his flight and the manner in which he was carrying his arm, Officer Clark immediately pursued the defendant.

While in pursuit, Officer Clark saw the defendant look over his shoulder, so the officer shouted for the defendant to stop, but the defendant did not stop. Officer Clark then noticed that the defendant was approaching a blue Ford van with a number of parties standing around it. The Ford van was similar to the van that had been described by the complaining party who had been confronted by the Bloods earlier that evening, so Officer Clark drew his weapon and continued to run after the defendant. With Officer Clark closing the gap, the defendant ran past the van and the people near it, and proceeded toward a storm sewer opening.

As the defendant neared the sewer opening, Officer Clark saw, from a distance of 10 feet, the defendant run up to the sewer opening, bend over, and make a furtive movement with his hand, as if he were dropping something. The defendant then stood up and acted as if he had put something into his mouth, turned, and started walking away. Officer Clark apprehended the defendant and radioed for a backup. When the backup arrived, the defendant was placed under arrest, along with the parties standing around the van. Officer Clark then returned to the sewer opening and retrieved a baggie of cocaine from where he had seen the defendant place it. The defendant denied having had possession of the cocaine.

After his arrest, the defendant, along with the vanload of Bloods, was taken to police headquarters for questioning. Officer Matson advised the defendant of his constitutional rights, and the defendant voluntarily agreed to discuss the matter. Officer Matson then employed interrogation techniques involving untrue statements, in an effort to elicit a statement from defendant.

First, Officer Matson told the defendant that fingerprints had been lifted from the baggie, and he asked the defendant how his prints would be on the baggie. (No fingerprints were ever discovered on the baggie of cocaine.) The defendant responded that he had been at a "cooker," i.e., a place where individuals make crack cocaine, earlier in the day and that while there he had touched some empty baggies which were lying around. Second, Officer Matson informed defendant that the officer had a pink fluid which, when applied to the defendant's fingertips, would turn blue if he had recently touched cocaine. (The fluid would turn blue regardless of the substance on defendant's fingertips.) The defendant explained to Officer Matson that his fingertips would probably turn blue because the night before he had rolled a "primo joint," i.e., a marijuana and cocaine cigarette, for a friend at an after-hours place and that cocaine residue probably still remained on his hands.

At trial, over objection, Officer Matson was allowed to testify about (1) the defendant's presence at the cooker and (2) the defendant's rolling the primo joint. These two events were explored in detail on defendant's direct and cross-examination.

The defendant's sole contention on appeal is that the trial court erred in admitting, over objection, testimony concerning the defendant's custodial statements about (1) his presence at the cooker and (2) his rolling the primo joint. The defendant argues that this testimony concerned "prior bad acts" and thus, under Neb. Rev. Stat. § 27-404(2) (Reissue 1989), should not have been admitted.

At the time of the offer of the testimony of Officer Matson, who had conducted the interrogation of the defendant, the defendant had not testified and there had not been any representation that he would testify at the conclusion of the State's case. Hence, his credibility was not then in issue, and the testimony concerning his custodial statements was not offered for that purpose. The State explained that the testimony was relevant as to proof of possession and intent concerning the crime charged.

Evidence of prior bad acts may be introduced under § 27-404(2) whenever the evidence is relevant, so long as it is offered to prove something other than the bad character of the

accused or his tendency to commit criminal acts. *State v. Kenny*, 224 Neb. 638, 399 N.W.2d 821 (1987). Section 27-404(2) provides:

> 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.

In *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990), this court held that in reviewing the admission of evidence of other acts under § 27-404(2), an appellate court will consider (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.

It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and its decision will not be reversed absent an abuse of that discretion. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

First, we consider whether the evidence that the defendant had visited a cooker and had rolled a primo joint was relevant to the offense with which he was charged.

The defendant's admission that he had been present at a cooker on the day of his arrest and that he had rolled a primo joint on the night before was relevant because it showed his familiarity with the controlled substance which he had in his possession at the time of his arrest. It tended to show opportunity, knowledge, and absence of mistake or accident. We conclude that evidence as to the two prior acts involving drugs was relevant to prove the defendant's possession of crack cocaine with intent to distribute. The incidents took place some hours before the defendant was caught with drugs. The fact that the defendant had been at a cooker tends to make the fact

of his intent to deliver cocaine more probable than not.

Evidence of prior acts is always prejudicial if it tends to establish the defendant's guilt. However, such evidence is admissible if relevant unless it is unfairly prejudicial in the sense that it tends to make the conviction of the defendant more probable for an incorrect reason. We conclude the evidence in question was not unfairly prejudicial to the defendant.

The State further contends that even if the evidence in question should not have been admitted, the evidence of the defendant's guilt was overwhelming, and any error in receiving the evidence in question was harmless beyond a reasonable doubt.

This court may affirm the judgment if, after consideration of the record, the court finds that the admission of the evidence in question was harmless beyond a reasonable doubt. *State v. Olsan,* 231 Neb. 214, 436 N.W.2d 128 (1989); *State v. Watkins,* 227 Neb. 677, 419 N.W.2d 660 (1988); *State v. Lenz,* 227 Neb. 692, 419 N.W.2d 670 (1988).

" 'Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.' " *State v. Pettit,* 233 Neb. 436, 465, 445 N.W.2d 890, 907-08 (1989), quoting *State v. Watkins, supra.*

The defendant's possession of the cocaine was established by the eyewitness testimony of Officer Clark, who saw the defendant place the baggie near the opening to the storm sewer while the officer was chasing the defendant. The baggie contained crack cocaine having a value of $800 to $1,000. This evidence is nearly conclusive on the element of intent to deliver. Under the circumstances in this case, any error in the admission of evidence concerning the defendant's presence in the cooker and his rolling the primo joint was harmless beyond a reasonable doubt.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DAVID S. MATTHEWS, APPELLEE.

465 N.W.2d 763

Filed February 22, 1991. No. 90-176.

1. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
2. _____. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Drunk Driving: Sentences: Probation and Parole: Licenses and Permits: Revocation.** The relevant portion of Neb. Rev. Stat. § 39-669.07 (Reissue 1988) directs in clear, plain, simple, and unambiguous words that when one convicted of first-offense driving while intoxicated is placed on probation, he or she shall be ordered not to drive for any purpose for a period of 60 days from the date of the order of probation.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Exception sustained.

William P. MacKenzie, Deputy Sarpy County Attorney, for appellant.

No appearance for appellee.

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

CAPORALE, J.

Pursuant to the provisions of Neb. Rev. Stat. § 29-2315.01 (Reissue 1989), which, upon leave by this court, permits a prosecutor to take exception to a decision of the trial court in criminal proceedings, the plaintiff, State of Nebraska, filed this appeal, challenging the provision of the district court's probation order which permits defendant-appellee, David S. Matthews, to drive for limited purposes during the period in which his driving privileges otherwise stand suspended for violating Neb. Rev. Stat. § 39-669.07 (Reissue 1988) by driving while intoxicated, his first such offense. Although counsel was appointed pursuant to the provisions of Neb. Rev. Stat. § 29-2315.02 (Reissue 1989) "to argue the case against" the State, appointed counsel filed no brief and made no other appearance in this court. We sustain the exception.

Matthews pled guilty to the aforedescribed charge and to the

attempted possession of methamphetamine, a controlled substance, in violation of Neb. Rev. Stat. §§ 28-416(3) and 28-201 (Reissue 1989). The district court thereafter sentenced Matthews to a single 18-month period of probation. The probation order, which does not allocate its terms to either of the crimes, requires, among other things, that Matthews attend Alcoholics Anonymous or Narcotics Anonymous meetings twice per week as directed by the probation officer. The order also suspends Matthews' license to drive for 60 days from the date of the order but allows him to drive "to and from work, to and from [Alcoholics Anonymous] or [Narcotics Anonymous] meetings and to attend the Reniassance [sic] Program."

The State contends that the portion of the order which grants Matthews limited driving privileges violates § 39-669.07, which provides, in relevant part, that when one who has been convicted of first-offense driving while intoxicated is placed on probation, "the court shall, as one of the conditions of probation . . . order such person not to drive any motor vehicle for any purpose for a period of sixty days from the date of the order . . . ." No question being present as to the constitutionality of the foregoing statutory provision or as to the propriety of the unallocated order of probation, see *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990), the State's contention is resolved simply by reading the statute.

As we have recently reaffirmed, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Rios, ante* p. 232, 465 N.W.2d 611 (1991). The relevant portion of § 39-669.07 directs in clear, plain, simple, and unambiguous words that when one is placed on probation, he or she shall be ordered not to drive "for any purpose" during the statutorily designated period. The relevant statutory passage cannot be construed or interpreted to mean anything other than what it says, i.e., that one placed on probation for first-offense driving while intoxicated shall be ordered not to drive for any purpose during the designated 60-day period. There are other, albeit perhaps not as convenient, ways for

Matthews to travel to the court-ordered meetings and program besides driving himself.

Indeed, as the State points out, the foregoing result is compelled by *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984). The miscreant therein was convicted of second-offense driving while intoxicated and was placed on probation. The relevant portion of § 39-669.07 (Cum. Supp. 1982) then provided, as it does now, that when one convicted of second-offense driving while intoxicated is placed on probation, "the court shall, as one of the conditions of probation . . . order such person not to drive any motor vehicle . . . for any purpose for a period of six months from the date of the order . . . ." We ruled that the foregoing language, if constitutional, clearly prevented the court from permitting the miscreant to drive for work-related purposes during the 6-month period his driver's license stood otherwise suspended.

Accordingly, the State's exception must be, and hereby is, sustained.

EXCEPTION SUSTAINED.

ANTHONY GRINDLE, APPELLEE, V. CHRISTY R. GRINDLE, APPELLANT.

465 N.W.2d 749

Filed February 22, 1991. No. 90-219.

1. **Child Custody.** Matters involving child custody are initially entrusted to the discretion of the trial court.
2. **Child Custody: Appeal and Error.** In an appeal regarding child custody, the Supreme Court reviews the trial court's judgment de novo on the record to determine whether there has been an abuse of discretion by the trial judge, and such judgment will be upheld in the absence of an abuse of discretion.
3. **Child Custody: Courts: Modification of Decree.** When a court retains legal custody of a child, pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1988), the question of whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

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

E. Michael Slattery, of Reinsch & Slattery, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is an appeal from an order modifying a decree of dissolution of marriage wherein the district court had previously retained legal custody, Neb. Rev. Stat. § 42-364 (Reissue 1988), of the parties' two children, ages 4 and 6, and physical custody of the children had been placed with petitioner-appellee, Anthony Grindle. The appealed order granted legal and physical custody to petitioner with reasonable rights of visitation with the respondent-appellant, Christy R. Grindle, who was ordered to pay $200 a month in child support. Respondent assigns as error the court's finding that respondent failed to prove a material change of circumstances affecting the children's best interests and the district court's failure to find that it was in the children's best interests to be placed with respondent.

The parties' marriage was dissolved on December 22, 1986. This court affirmed that dissolution order with regard to custody of the children in *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987).

Respondent married Kelly Hartranft in July 1988. They bought a home and live in Avoca, Nebraska. Respondent works at Pendleton Woolen Mills, Nebraska City, Nebraska, earning $330 gross income a week; her husband is employed as a chef at a fraternity house in Lincoln, Nebraska, and plays in a band on weekends, for an annual gross income of $15,000.

Petitioner lives in Nebraska City in a home owned by his mother and himself. At the time of trial he was receiving unemployment compensation, managing his brother's hog operation which was in bankruptcy, and working for another farmer for corn to feed the hogs. He had been temporarily laid off from his construction job. His annual salary was $10,000 to

$12,000.

In her amended petition for modification filed August 9, 1989, respondent alleged that there had been a material change of circumstances and that it was in the best interests of the children that care, control, and custody of the children be placed with her. In his response, petitioner denied the respondent's allegations and alleged it was in the best interests of the children to award legal custody to him.

After hearing, the court denied respondent's application, finding that while she had established a substantial change in her life, there was little evidence to support a change in circumstances affecting the best interests of the children, which change in circumstances she had a burden to prove. In its formal order of February 15, 1990, the court found that the best interests of the children required a transfer of legal custody to the petitioner along with physical custody, which transfer was ordered.

The evidence shows that the respondent has worked diligently to change her situation from the time of the original decree, when she had no reliable employment, permanent home, or stable situation in which to raise her children. Since the entry of the decree, the respondent remarried, has a stable family relationship, maintains a nice home, is regularly employed, and has visited regularly with her children, developing a close, loving relationship. The respondent takes the children to church on the weekends that she has them. She also takes the children to the library, rides bikes with them, reads books with them, and sews clothes for them.

Although respondent had been gainfully employed for 15 months, she had not contributed any support toward the children.

Mary Gadeken, a psychiatric social worker, testified that the children's relationship with both parents was positive. She would not give an opinion as to where custody should be placed; however, she did state that if custody were placed with the respondent, the children could experience some separation anxiety, especially from their father and grandmother, with whom they also have a positive relationship.

The children live with the petitioner and his mother in their

home. The petitioner's mother operates a children's day-care center out of the home, and she cares for the parties' children when they are not at school. The petitioner's mother contributes part of her $1,500-a-month income to support the children.

Petitioner spends time with his children reading to them, taking them to the farm, taking them to church, and preparing their meals, and has acquired a piano so that the children may take lessons. The petitioner enrolled the children in preschool and has participated in Christmas programs there.

Matters involving child custody are initially entrusted to the discretion of the trial court. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988). In an appeal regarding child custody, the Supreme Court reviews the trial court's judgment de novo on the record to determine whether there has been an abuse of discretion by the trial judge, and such judgment will be upheld in the absence of an abuse of discretion. See *Christen v. Christen, supra*.

An order reserving legal custody in the court is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

The respondent claims the district court erred in holding that she had failed to meet her burden to establish a change in circumstances showing the petitioner to be unfit to have custody of the children and in holding that it was in the best interests of the children to place legal custody in the petitioner. The respondent correctly asserts that she should only have been required to prove it was in the best interests of the children to change their physical custody to her. In *Christen v. Christen, supra*, this court held that when a court retains legal custody of a child, pursuant to § 42-364, the question of whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child.

While the trial court was in error regarding respondent's burden of proof, such finding is not reversible error because in its written final order, the trial court did make a finding that the

best interests of the children required legal and physical custody to be placed with the petitioner, and such finding is supported in the record.

After a de novo review of the record, we find there was no abuse of discretion by the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF G.G., J.G., J.G., AND J.G., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. R.K. AND K.T., APPELLEES.

465 N.W.2d 752

Filed February 22, 1991. No. 90-449.

1. **Juvenile Courts: Due Process: Appeal and Error.** It is plain error for a juvenile court to enter an order requiring an individual to participate in certain remedial programs and to refrain from other conduct without according the individual his or her due process rights.
2. **Appeal and Error.** Although the Supreme Court does not consider assignments of error which are not discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
3. **Juvenile Courts: Due Process: Notice: Words and Phrases.** While a juvenile court has the authority, under Neb. Rev. Stat. § 43-2,107 (Reissue 1988), to permanently restrain or otherwise control the conduct of a person if a petition has been filed under the Nebraska Juvenile Code and the court finds that such conduct is or may be detrimental or harmful to the juvenile, the court must, before doing so, accord the person affected due process. Before such an order is issued, § 43-2,107 requires that the person to be restrained or whose conduct is to be controlled receives (1) notice that such an order is requested or contemplated and (2) an opportunity to be heard on the propriety of issuing such an order. The opportunity to be heard, described in § 43-2,107, means a meaningful opportunity to be heard.
4. **Juvenile Courts: Due Process: Evidence: Records: Appeal and Error.** Unless an affected person agrees to the entry of a restraining or conduct-controlling order under Neb. Rev. Stat. § 43-2,107 (Reissue 1988), a valid permanent order must have a factual basis for its issuance. The court must arrive at that factual basis from exhibits properly received in evidence, sworn testimony, facts stipulated by the person affected, or the admission of facts in open court by the person

affected justifying issuance of the order. A court reporter must keep a proper verbatim record of the proceedings and preserve it for appellate review.

5. **Appeal and Error.** A correct result will not be set aside merely because it is based upon reasons which may be incorrect.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Michael D. Wellman, Sarpy County Attorney, and Lawrence D. Gendler for appellant.

Robert B. O'Neal, of Arps & Schirber Law Offices, for appellee K.T.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The State appeals the vacation by the Sarpy County Separate Juvenile Court of its order for K.T. to show cause why he should not be held in contempt of court for failing to participate in certain remedial programs.

We hold that it is plain error for a juvenile court to enter an order requiring an individual to participate in certain remedial programs and to refrain from other conduct without according the individual his or her due process rights.

Although the Supreme Court does not consider assignments of error which are not discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. See *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). The error in this case falls within the plain error category. It affects the integrity, reputation, and fairness of the judicial process. In view of our holding in this case, it is not necessary to discuss the errors assigned by the appellant.

On February 22, 1989, a Deputy Sarpy County Attorney filed a petition in the separate juvenile court of Sarpy County alleging inter alia that four minor children of R.K. were children as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue

1988) because they were in a situation dangerous to their life or limb or injurious to their health or morals. In an affidavit filed simultaneously with the petition, the Deputy Sarpy County Attorney averred that the children reported that K.T. hit them with an open hand and closed fist approximately three times a day, that he used profanity toward them, and that they were in fear of what he might do next.

In response to the petition, affidavit, and a request for a restraining order, the trial court, before an adjudication hearing, temporarily restrained K.T. from residing with the children and set a March 3, 1989, hearing to determine if a permanent restraining order should issue. On February 24, custody of R.K.'s four minor children was granted to the Nebraska Department of Social Services (DSS).

When K.T. failed to appear at the March 3 hearing, the court continued in effect the February 22 restraining order and further ordered K.T. not to have any contact with the four children without authorization from the juvenile court. On April 5, the juvenile court judge vacated the restraining order against K.T. and reset the children's adjudication hearing for May 22, 1989. On April 6, the Deputy Sarpy County Attorney filed an amended petition, alleging that the children were "homeless or destitute or without proper support through no one's fault" and were therefore children described in § 43-247(3)(a). At an open court hearing on April 7, the mother, who was accompanied by her counsel, admitted the truth of the allegations of the amended petition. The court thereupon found the children were children described under § 43-247(3)(a), thereby giving the juvenile court jurisdiction of them. Also present at that hearing was the Deputy Sarpy County Attorney. The judge's order of April 7 recites that "the children herein have guardian ad litem, Lisa Lewis, to represent said children herein." The bill of exceptions does not reflect that the children's guardian ad litem was present. A disposition hearing was set for May 11, 1989. Meanwhile, the court continued custody of the children in DSS.

K.T. was not present, nor was he represented by counsel, at the April 7, 1989, hearing. At this point, it should be reiterated that the trial court had, on April 5, vacated the restraining order

against K.T.

Neither the bill of exceptions nor the transcript presented in this appeal reflects any court order after April 7 regarding K.T. until May 11, 1989. On that date, the court entered a "Findings and Order" in which it recited that the case came on for a dispositional hearing. Present were the children's guardian ad litem, their mother with her counsel, and a DSS worker. Neither K.T. nor his counsel, if any, was shown to be present. Nor does the record reveal that K.T. had been served with any summons or, for that matter, notice of the May 11 hearing.

K.T. was never named as a party in the juvenile court action involved here. Without any finding that K.T. was having contact with R.K.'s children at that time, in his dispositional "Findings and Order" of May 11, the juvenile court judge ordered that K.T. (1) cooperate fully with DSS in its provision of services, (2) participate in an individual counseling program approved by DSS, (3) complete a parenting program approved by DSS, (4) participate in a codependency program approved by DSS, (5) participate in a counseling program approved by DSS, (6) complete a drug-alcohol education program approved by DSS, and (7) totally abstain from the consumption or use of alcohol and all controlled substances not prescribed by a licensed physician. A copy of the order was purportedly sent to K.T., although the manner in which it was sent is not shown, nor is there any showing that K.T. received a copy of the order. The custody of the children was continued in DSS.

On July 13, 1989, a further disposition hearing was held with R.K. and her counsel, the children's guardian ad litem, and a therapist from Family Intervention and Treatment Services (FITS) present. The record does not reflect that K.T. was present or that he had notice of the hearing. In his July 13, 1989, order, the juvenile court judge continued the custody of the children in DSS and again ordered K.T. to comply with the same rulings imposed on him in the May 11 order.

On September 26, 1989, the Deputy Sarpy County Attorney filed a "Motion for Review of Disposition," in which he related that K.T. was arrested on or about the 20th of September 1989 for burning the finger of one of the children, with a flame, for playing with matches.

A hearing on the "Motion for Review of Disposition" was set for October 20, 1989. At that purported hearing, no witnesses were sworn. The hearing was nothing more than the juvenile court judge, R.K. and her counsel, a therapist, and apparently a DSS worker engaging in a more or less roundtable discussion. The court reporter noted that K.T. appeared on his own behalf. However, when the court called the case for review, the judge announced that only the children's guardian ad litem, R.K. and her counsel, a therapist from FITS, and the DSS worker were present. In his order regarding the hearing, the juvenile court judge made no mention of K.T.'s being present at the hearing. The bill of exceptions reveals that K.T., if he was present at the hearing, made no comment at the hearing and that he was not asked any questions nor given any opportunity to speak. The bill of exceptions reflects that the juvenile court judge totally ignored K.T. if he was present.

In his order of October 20, continuing the hearing until April 20, 1990, for further disposition, the juvenile court judge again ordered K.T. to comply with the seven requirements imposed earlier and, in addition, to participate in an anger control group arranged by DSS. There is no showing in the record that K.T. agreed to the entry of the order.

On February 5, 1990, the Deputy Sarpy County Attorney filed a motion in the juvenile court asking that K.T. be required to show cause why he should not be held in contempt of court for willfully failing to participate in (1) a chemical education program, (2) an anger control group, and (3) individual counseling, all of which were ordered by the court on October 20, 1989. The juvenile court judge immediately issued an order for K.T. to show cause at a specified time on February 16, 1990, why he should not be held in contempt of court for violating the court's October 20 order. No specific violations of the October 20 order were cited in the show cause order. On February 16, 1990, K.T. appeared in the juvenile court, counsel was appointed to represent him, and the show cause hearing was continued to March 29.

With K.T. and his counsel present, the show cause hearing was held on March 29, 1990. Evidence was adduced and the court ordered briefs, after which the matter was to be

submitted. On May 8, 1990, the juvenile court judge vacated the order for K.T. to show cause.

While a juvenile court has the authority, under Neb. Rev. Stat. § 43-2,107 (Reissue 1988), to permanently restrain or otherwise control the conduct of a person if a petition has been filed under the Nebraska Juvenile Code and the court finds that such conduct is or may be detrimental or harmful to the juvenile, the court must, before doing so, accord the person affected due process. Before such an order is issued, § 43-2,107 requires that the person to be restrained or whose conduct is to be controlled receives (1) notice that such an order is requested or contemplated and (2) an opportunity to be heard on the propriety of issuing such an order. The opportunity to be heard, described in § 43-2,107, means a meaningful opportunity to be heard.

Unless an affected person agrees to the entry of a restraining or conduct-controlling order under § 43-2,107, a valid permanent order must have a factual basis for its issuance. The court must arrive at that factual basis from exhibits properly received in evidence, sworn testimony, facts stipulated by the person affected, or the admission of facts in open court by the person affected justifying issuance of the order. A court reporter must keep a proper verbatim record of the proceedings and preserve it for appellate review. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

The proceedings of October 20 provided little, if any, semblance of a due process hearing. Assuming arguendo that K.T. was present at the hearing, the record reflects that (1) he was never provided a meaningful opportunity to be heard, (2) no evidence was adduced under oath, (3) no facts were stipulated by K.T., (4) no exhibits were properly received in evidence, (5) no admissions were made by K.T., and (6) there is no record that K.T. ever agreed to the entry of the order of October 20. K.T. was not afforded the safeguards against arbitrary action by a court.

Because K.T.'s due process rights in connection with the hearing were not accorded to him, the juvenile court's October 20 order was invalid from its inception and had no binding effect upon K.T.

Under the circumstances, it was plain error for the juvenile court to order K.T. to show cause why he should not be held in contempt of court for failing to obey the juvenile court order of October 20, 1989. For the reasons stated herein, the juvenile court judge's vacation of his show cause order, even though on other grounds, is affirmed. A correct result will not be set aside merely because it is based upon reasons which may be incorrect. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

AFFIRMED.

NORRIS C. COOL, APPELLANT, V. SAHLING TRUCKS, INC., APPELLEE.

466 N.W.2d 71

Filed March 1, 1991. No. 88-602.

Pleadings: Motions to Dismiss. A pretrial motion to dismiss another's action is not a permissible pleading.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for further proceedings.

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

Steven R. Voigt, of Butler, Voigt & Brewster, for appellee.

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

GRANT, J.

Plaintiff-appellant, Norris C. Cool, filed a replevin action against defendant-appellee, Sahling Trucks, Inc., seeking the return of a certain Kenworth truck tractor with a vehicle identification number (VIN) 176891S. Plaintiff appeals from the dismissal of his petition by the district court and from the judgment entered on defendant's cross-petition seeking

payment of costs and attorney fees on the ground that plaintiff's action was frivolous. The district court entered judgment on the cross-petition in favor of defendant and ordered plaintiff to pay costs and $1,200 in attorney fees.

At the center of this dispute is a 1980 Kenworth truck tractor. This vehicle was also the subject of our decision in *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989). In that case, the plaintiff, Don Nelson, brought two replevin actions in the Hall County District Court, seeking possession of a Kenworth truck tractor with a VIN 176891F from Neil Cool and Norris Cool. The actual VIN of the vehicle in dispute was 176891S. Nelson had brought the vehicle to Neil Cool for repairs. In order to secure financing for additional repairs, Nelson transferred his open title to the vehicle to Neil Cool. Neil Cool then secured a bank loan and used the funds to repair the truck tractor. Neil Cool's father, Norris Cool, loaned Neil money to pay off the bank loan. The bank released its lien on the title, and Neil Cool then transferred title to Norris Cool in satisfaction of the personal loan.

Nelson then filed his replevin actions against both Cools, and in a journal entry dated January 5, 1987, the district court ruled in Nelson's favor. The court found that "Plaintiff, Don Nelson, is the absolute owner of and entitled to, the immediate return and possession of the personal property described in the Petition, which property is described as follows: A 1980 Kenworth Tractor, ID# 176891F." This court reversed, however, and found in favor of the Cools. *Nelson v. Cool, supra.*

Between the district court's journal entry of January 5, 1987, and this court's opinion in *Nelson* reversing that order, a number of events occurred. On January 7, 1987, Nelson got a delivery order from the Hall County District Court and delivered the order to the Custer County sheriff. On January 9, 1987, the Cools moved for a new trial. On March 27, 1987, the district court denied the motion for new trial. On April 23, 1987, the Cools appealed to this court. They could have filed a supersedeas bond to preserve possession during the pendency of *Nelson v. Cool*, but they did not file a supersedeas bond.

On May 1, 1987, Nelson filed a motion for order to show cause as to why the Cools should not be held in contempt for

failure to deliver the vehicle. In an affidavit filed with the motion, a sergeant from the Custer County sheriff's office stated that he had "spoken with each of the Defendants, namely Neil Cool and Norris Cool, in an attempt to take the 1980 Kenworth tractor and deliver it to the Plaintiff, and that both Defendants have denied any knowledge of the 1980 Kenworth tractor to Affiant." On June 5, 1987, the court denied the motion, "for reason that the Court does not have jurisdiction of these consolidated cases pending their appeal to the Nebraska Supreme Court."

On August 11, 1987, Nelson obtained a new order from the Hall County District Court for delivery of a truck tractor, VIN 176891S. The previous delivery order and all other references up to that time had shown the suffix to the VIN to have been "F." That same day, the new order was delivered to the Thayer County sheriff. The Thayer County sheriff was able to find the vehicle, and that day delivered to Nelson the truck tractor with VIN 176891S. On August 12, 1987, Nelson obtained a new title to the vehicle from the Hall County clerk. On August 14, 1987, Nelson sold the vehicle to Sahling Trucks, Inc., appellee in the case at bar.

On that same day, August 14, 1987, Nelson filed an "Application for Order Nunc Pro Tunc." This application sought the correction of the Hall County District Court journal entry of January 5, 1987, as corrected by a January 7, 1987, order nunc pro tunc, to reflect that the proper VIN of the Kenworth truck tractor in question in *Nelson v. Cool, supra*, was 176891S rather than 176891F.

On August 17, 1987, Neil Cool filed a "Motion to Quash Order for Delivery." This motion was filed by the same attorney representing Norris Cool in the case at bar. The motion stated in part:

> 1. That on or about August 11, 1987, the Plaintiff herein [Nelson] obtained an order for delivery of a 1980 Kenworth VIN 176891S.
>
> 2. That the judgment entered by the Court herein in January of 1987, ordered that the Plaintiff was entitled to possession of a 1980 Kenworth tractor VIN 176891*F*.

(Emphasis supplied.)

On August 25, 1987, Nelson's nunc pro tunc application was denied, and the August 11, 1987, delivery order was quashed. Both orders were made with the stated reason that *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989), was pending before the Nebraska Supreme Court. By then the vehicle had already been delivered to Nelson and sold to Sahling Trucks.

On September 15, 1987, while the first action, *Nelson v. Cool, supra*, was still pending on appeal, Norris Cool filed his own replevin action against Sahling Trucks in Buffalo County District Court. That action is the subject of this appeal. Cool's theory in the district court was that he still had good title to the vehicle bearing VIN 176891S. In his brief submitted for this appeal, he also claims that Nelson's new title was void because it was not issued in the proper county pursuant to Neb. Rev. Stat. § 60-111 (Reissue 1984).

Sahling Trucks answered in the district court and filed a cross-petition for attorney fees and costs on the theory that Cool's suit was frivolous. Sahling Trucks then filed a "Motion to Dismiss." On May 9, 1988, a hearing was held and evidence was adduced by both parties. On May 10, the "Motion to Dismiss" was granted by the district court. At a later, separate hearing, Cool was assessed costs and $1,200 in attorney fees for a frivolous lawsuit. He then filed this appeal.

It was after the Buffalo County District Court's decision in this case that the *Nelson* case was argued before this court. Apparently, this court was not made aware, when *Nelson* was argued, of the district court's order in the present case.

Cool's main argument on this appeal is that the district court erroneously dismissed this case, without trial, pursuant to a "Motion to Dismiss." Cool argues that no such motion is recognized in our law. Because it is long settled that Nebraska does not recognize such a pleading as a "Motion to Dismiss" before trial, this case is reversed and the cause remanded to the district court.

In *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 220-21, 403 N.W.2d 383, 385 (1987), we said:

> The difficulty is that the case was resolved through a procedure not recognized in our law. The district court undertook to dispose of the actions on the basis of

evidence presented in conjunction with pretrial motions to dismiss. In rejecting that procedure in *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986), we again observed that a pretrial motion to dismiss another's action is not a permissible pleading. Accord, *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984); *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983).

Appellee argues that this defect could be cured by treating the motion as a motion for summary judgment. However, the appellee has not met the statutory requirements for bringing a summary judgment motion under Neb. Rev. Stat. § 25-1332 (Reissue 1989). Certain evidence presented at the hearing was referred to in the motion, but other evidence was not presented until the hearing. This evidence was not on file with the motion, and appellant could not have been expected to have notice of it. Cool specifically objected to the "Motion To Dismiss" procedure.

The effectiveness of summary judgment based on appellee's substantive claim of res judicata presents another question. Appellee asserts that the district court's decision in *Nelson v. Cool, supra*, served to bar appellant's claims under the principle of res judicata. The district court's decision in *Nelson*, however, was reversed by this court. Other courts have held that a prior judgment cannot have res judicata effect where it was reversed on appeal. E.g., *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259 (S.D. 1988).

It may well be that after a trial or after some other recognized means of resolving this case, the court may find in favor of the appellee and deem that the assessment of costs and attorney fees against the appellant is appropriate. However, the posture of this case at the present time does not allow us to review the order of dismissal. The order in this case was not premised on a demurrer, a summary judgment motion, or a judgment of dismissal at the conclusion of a trial. The scope of review of those orders is established. The procedures for review of an order of dismissal based upon the granting of a pretrial "Motion to Dismiss" are not known to this court. Accordingly,

the decision of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ATOKAD AGRICULTURAL AND RACING ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. THE GOVERNORS OF THE KNIGHTS OF AK-SAR-BEN, APPELLANT AND CROSS-APPELLEE.

466 N.W.2d 73

Filed March 1, 1991. No. 88-716.

1. **Records: Appeal and Error.** Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, even though certain evidence has been filed in the office of the clerk of the trial court.
2. **Trial: Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
3. **Contracts: Parol Agreement.** The terms of a written executory contract may be changed by a subsequent parol agreement prior to any breach of such contract.
4. **Contracts: Liability.** A modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective.
5. **Contracts.** The acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement.
6. **Contracts: Intent.** As a general rule, mere silence does not constitute an acceptance of an offer. It is otherwise if the relationship of the parties, their previous dealings, or other circumstances are such as to impose a duty to speak; and, if in such a case the offeree's silence or inaction conveys but one reasonable meaning, intentional assent on his part is not a requisite.
7. **Prejudgment Interest: Claims.** A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for a new trial.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Gregory M. Thomas, of Sodoro, Daly & Sodoro, for appellee.

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

COLWELL, D.J., Retired.

In this breach of contract case, defendant, The Governors of the Knights of Ak-Sar-Ben, appeals an adverse $50,000 jury verdict and judgment and a $10,932 prejudgment interest award, both in favor of plaintiff, Atokad Agricultural and Racing Association.

Both parties are Nebraska nonprofit corporations operating horseracing tracks. The parties, along with other tracks in Lincoln, Columbus, and Grand Island, were members of and active in the Thoroughbred Racing Association of Nebraska (TRAN), which promoted their mutual racing interests. Horseracing is closely regulated by Nebraska statutes.

Ak-Sar-Ben had financially assisted Atokad in its cash-flow problems in 1984 and prior years, including an agreement to pay Atokad's unpaid parimutuel taxes for 1983 to 1986, which taxes were paid in annual installments of about $61,000.

In 1984, plaintiff and defendant entered into a written contract whereby defendant agreed to pay $50,000 to plaintiff at the close of defendant's racing season in 1985 and 1986. Part of the consideration for the separate 1984 contract was that Ak-Sar-Ben could sponsor race programs on specified Sundays in competition with Atokad, which regularly had race programs on Sundays. Ak-Sar-Ben made the 1985 payment. Upon due demand, defendant refused to make the 1986 payment, claiming it was canceled by oral agreement of the parties modifying the 1984 contract. Plaintiff commenced suit on May 4, 1987, alleging the written contract and its breach. Defendant answered, including its affirmative defense of oral modification. Defendant's motion for summary judgment was denied.

Late in 1985, officers of Atokad were proposing legislation whereby each Nebraska track would contribute 1 percent of its exotic wagers, e.g., exactas, daily doubles, etc., to be placed in a small-track fund for distribution to certain Nebraska tracks, including Atokad, for their benefit and for better purses. Most of the other TRAN tracks were sponsoring various forms of

legislation favorable to their separate interests.

These legislative proposals were discussed in TRAN meetings during December 1985 and January 1986. The tracks shared the common thread of presenting united industry support of legislation, including their early general support for Atokad's bill, 1986 Neb. Laws, L.B. 1041, providing a 1/2-percent contribution rate. However, Atokad insisted that Ak-Sar-Ben's share should be 1 percent, because Atokad needed about $300,000 to begin racing in 1986, and those needs would be met only if Ak-Sar-Ben, as the largest betting volume track, contributed 1 percent.

At the January 31, 1986, TRAN meeting, L.B. 1041 was a main item for discussion. Robert Volk, general manager of Ak-Sar-Ben, offered to contribute three-fourths percent upon condition that Atokad forgive the 1984 contract. Atokad representatives responded that Atokad needed more money than the three-fourths percent would produce, and insisted that Ak-Sar-Ben should give 1 percent. Atokad made no response to the condition of forgiving the 1984 contract.

Following that meeting, officers of Ak-Sar-Ben and Atokad continued their discussion informally in the hall outside the meeting room. Robert Skochdopole, attorney for Ak-Sar-Ben and lobbyist for TRAN, did most of the talking, urging an early unified TRAN compromise agreement to present at a legislative committee hearing on L.B. 1041 to be held on February 11, 1986. He finally asked Atokad representatives, including Maurice Topf, whether, if Ak-Sar-Ben agreed to contribute 1 percent, Atokad would support that legislation and forgive the $50,000 contract payment. Atokad representatives understood the proposition, but did not agree to forgiving the $50,000; they did agree to present it to Atokad's board of directors, and Ak-Sar-Ben representatives agreed to present the proposition to Ak-Sar-Ben's board.

The Ak-Sar-Ben board of directors later approved the 1-percent proposal conditioned on forgiving the 1984 contract. There is no record of any similar approval by the Atokad board of directors.

A few days after January 31, 1986, while Volk and other Ak-Sar-Ben representatives were attending a racing meeting in

Florida, Volk telephoned Topf and told him that Ak-Sar-Ben would agree to the 1-percent contribution. Nothing was said about the 1984 contract. Volk and other Ak-Sar-Ben representatives testified that the cancellation of the 1984 contract was assumed by the silence of Atokad and its representatives and their later cooperation in sponsoring L.B. 1041.

Following this telephone call, Skochdopole was instructed to and did redraft L.B. 1041 to provide for Ak-Sar-Ben's 1-percent contribution. Copies of the new draft of L.B. 1041 were circulated to all TRAN members prior to their meeting on February 11, 1986. At that meeting, all TRAN members, including Atokad, approved L.B. 1041 and agreed to support its passage in the Legislature, and the bill later became law as Neb. Rev. Stat. § 2-1208.04 (Cum. Supp. 1986). Atokad representatives did support the bill, and in 1986 Atokad received about $230,000 in small-track funds.

Defendant assigns three errors: (1) the denial of its motion for summary judgment, (2) the giving of the court's instruction No. 6, and (3) the award of prejudgment interest.

Plaintiff cross-appeals, claiming the court erred in failing to grant its motion for a directed verdict against defendant's affirmative defenses.

SUMMARY JUDGMENT

Defendant's motion for summary judgment, as supported by an affidavit in the court file, claimed defendant was entitled to judgment upon its request for admissions that plaintiff had failed to answer. The motion was set for hearing on November 24, 1987. On November 23, 1987, plaintiff filed a motion for extension of time to reply to the requests.

At the hearing on November 24, defendant marked as an exhibit and made reference to its filed affidavit supporting its motion; however, it was never introduced into evidence. The only evidence in the hearing's bill of exceptions is an affidavit offered by plaintiff in support of its resistance to the motion. The court denied defendant's motion for summary judgment and granted plaintiff additional time to reply to the request for admissions.

The party moving for summary judgment has the burden of showing, by the evidence produced, that no genuine issue as to any material fact exists. See *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985).

Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, even though certain evidence has been filed in the office of the clerk of the trial court. Where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment, and, if an examination of the pleadings supports the judgment, it will not be reversed. See *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983). As there was no evidence presented by defendant in the hearing's bill of exceptions and the pleadings support the judgment, defendant's motion for summary judgment was properly denied.

INSTRUCTION NO. 6

In connection with defendant's affirmative defense of an oral modification of the 1984 contract, the court included in its instruction No. 2 that defendant had the burden to prove: "1. That the contract was modified by the mutual assent of each of the parties. Mutual assent is defined in Instruction No. 6 (2) That AK-SAR-BEN has fully complied with the agreement as modified."

Instruction No. 6 recites:

> You are instructed that "mutual assent" as used in Instruction No. 2 means the meeting of the minds of both of the parties to a contract; the fact that each agrees to all the terms and conditions in the same sense and with the same meaning as the others. "Mutual assent of the parties may be shown by their acts or conduct, and the surrounding circumstances. *If a party to an existing contract proposes a modification thereof, the mere silence of the other party leaves the contract as before without modification.*["]

(Emphasis supplied.)

At the court's instruction conference, defendant objected to the last sentence in instruction No. 6, claiming it was confusing

and indicated to the jury that an express agreement of assent was required. Defendant's objection was overruled.

"A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence." *Swartz v. Peterson*, 199 Neb. 171, 174, 256 N.W.2d 681, 684 (1977). The meaning of an instruction, not its phraseology, is the important consideration, and an assertion of prejudice will not be sustained when the meaning of the instruction is reasonably clear. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990).

The terms of a written executory contract may be changed by a subsequent parol agreement prior to any breach of such contract. *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989). A modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective. *Grand Island Prod. Credit Assn. v. Humphrey*, 223 Neb. 135, 388 N.W.2d 807 (1986). "[I]t is not essential that the mutual assent of the parties to modify the contract be express . . . it may be implied from acts and circumstances . . . from a course of conduct . . . and from acts of one party in accordance with the terms of a change proposed by the other." 17A C.J.S. *Contracts* § 375 at 427 (1963). A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement; it may be implied from conduct and the surrounding circumstances. See *Woods v. Woods*, 177 Neb. 542, 129 N.W.2d 519 (1964). Likewise, the acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement. See *Overman v. Brown*, 220 Neb. 788, 372 N.W.2d 102 (1985).

Concerning mutual assent, which was a fact question for the jury, it was Ak-Sar-Ben's theory that Atokad agreed to modify the 1984 contract by forgiving the 1986 $50,000 payment as shown by the parties' conversations, their conduct, and all of the surrounding circumstances. Ak-Sar-Ben had the burden to show that instruction No. 6 was prejudicial or that it adversely affected a substantial right. See *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

It was Atokad's theory that there was no competent evidence of its statements or conduct showing assent to the modification proposed by Ak-Sar-Ben; rather, the only evidence for the jury was Atokad's silence to Ak-Sar-Ben's proposed contract modification, which silence was not mutual assent. Atokad relies on *W. Wright, Inc. v. Korshoj Corp.*, 197 Neb. 692, 705, 250 N.W.2d 894, 901 (1977), which states that "if a party to an existing contract proposes a modification thereof, the mere silence of the other party leaves the contract as before without modification."

There was evidence in the record, if believed, supporting both theories and requiring appropriate instructions. We disagree with the court's treatment of those two theories as included in instruction No. 6, particularly the use of the phrase "mere silence" in the last sentence, without further definition and explanation.

> As a general rule, mere silence does not constitute an acceptance of an offer. Silence alone does not give consent, even by estoppel, since there must not only be the right, but the duty, to speak before the failure to do so can estop a person afterward to set up the truth, particularly where the silence or inaction has an uncertain or ambiguous meaning and the parties have reasonable differing views as to what was in fact meant. It is otherwise if the relationship of the parties, their previous dealings, or other circumstances are such as to impose a duty to speak; and, if in such a case the offeree's silence or inaction conveys but one reasonable meaning, intentional assent on his part is not a requisite.

17 C.J.S. *Contracts* § 41 e. at 670-71 (1963). See, also, 17 Am. Jur. 2d *Contracts* § 47 (1964). We have also said that acceptance of an offer may also be indicated by silence and inaction. See *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990). The last sentence in instruction No. 6 is a critical issue here, since it states the general rule without a clear explanation of that rule in accord with Ak-Sar-Ben's theory of modification. That part of the instruction was apparently taken from *W. Wright, Inc. v. Korshoj Corp., supra*, a suit by a subcontractor against the prime contractor for additional

expenses because of work suspension, which was not expressly provided for in their contract. The facts there are unlike those in the case at bar. The only evidence of a contract modification was that the subcontractor prepared a claim as directed by the prime contractor for forwarding to the owner. Accordingly, the "mere silence" was proper in *Wright*.

While there is no direct evidence of Atokad's formal acceptance of Ak-Sar-Ben's offer to commit 1 percent to the small-track fund conditioned on Atokad's canceling the 1984 contract's $50,000 payment, there was a fact question of Atokad's duty to respond and its acquiescence as shown by the close association of the parties; their previous dealings; Ak-Sar-Ben's benevolent assistance to Atokad; Atokad's 1986 need for $300,000 and continued insistence for Ak-Sar-Ben's 1-percent contribution to the small-track fund, which contribution was finally met; Atokad's legislative support of L.B. 1041 in its amended form and through final passage; and the other surrounding circumstances.

The use of the phrase "mere silence" in the last sentence of instruction No. 6, without explanation and guidance in its application, was confusing to the jury. Black's Law Dictionary 1382 (6th ed. 1990) defines silence as "[t]he state of a person who does not speak, or of one who refrains from speaking." A part of the instruction advised the jury that assent or acquiescence may be shown by acts or conduct and surrounding circumstances. The last sentence advises that mere silence (or failing to speak or respond) to an offer leaves the 1984 contract unmodified. A person trained in the law could understand the meaning of "mere silence" as used in instruction No. 6 without confusing it with other provisions in the same instruction relating to acts and conduct. To the contrary, a lay juror would be confused as to the meaning of the whole instruction because of the contradictions contained.

Instruction No. 6 was not reasonably clear. It was both contradictory and confusing to the jury, and it remained so after considering all of the instructions as a whole. Further, it was prejudicial to a substantial right of Ak-Sar-Ben's, requiring a new trial.

PREJUDGMENT INTEREST

Prejudgment interest will not be awarded on an unliquidated claim. "A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery." *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 764, 428 N.W.2d 899, 905 (1988). A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

In this case, although there was no dispute as to the amount due under the contract, the evidence demonstrated a reasonable controversy regarding the plaintiff's right to recover under the contract as related to the alleged modification. Accordingly, it was error for the trial court to award $10,932 prejudgment interest, and the same is set aside.

PLAINTIFF'S CROSS-APPEAL

Atokad's claim that the trial court erred in failing to direct a verdict at the conclusion of the evidence against Ak-Sar-Ben's affirmative defense is without merit. A directed verdict is proper where the evidence is not conflicting and reasonable minds cannot differ as to the conclusion to be drawn from the evidence. *Gretna State Bank v. Cornbelt Livestock Co.*, 236 Neb. 715, 463 N.W.2d 795 (1990). The relative evidence in this case was conflicting on the modification issue, from which evidence differing conclusions could be drawn. Further, Atokad was not aggrieved by the judgment and therefore cannot appeal. See *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989).

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., not participating.

FRED ABBOUD, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, APPELLANT, V. LAKEVIEW, INC., A NEBRASKA CORPORATION, AND CITY OF RALSTON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

466 N.W.2d 442

Filed March 1, 1991. No. 88-903.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided that where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact the trial judge heard and observed the witnesses and accepted one version of the facts over another.
3. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every fact necessary to entitle the claimant to relief.
4. **Injunction.** An injunction will not be issued unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Municipal Corporations: Property: Bonds: Sales: Legislature.** When city parkland is purchased with voter-approved bond funds, the property is held in trust for the public and may only be sold by the city if specifically authorized to do so by the Legislature and if the land is no longer needed by the city.
6. **Municipal Corporations: Property: Sales.** If property never existed as a park or was abandoned as a park by a city, the city is free to sell the land under its general statutory power to buy and sell property.
7. **Public Officers and Employees: Municipal Corporations: Contracts: Conflict of Interest.** A city officer who is "interested" in a contract between the city and an entity in which he has a financial interest may cure any conflict of interest if the interested officer (1) makes a declaration on the record to the governmental body responsible for approving the contract regarding the nature and extent of his or her interest, prior to official consideration of the contract; (2) does not vote on the matter of granting the contract, except that if the number of members of the board declaring an interest in the contract would prevent the board, with all members present, from securing a quorum on the issue, then all members may vote on the matter; and (3) does not act for the city or village which is party to the contract as to inspection or performance under the contract in which he or she has an interest.
8. **Municipal Corporations: Appeal and Error: Words and Phrases.** A city council is a "tribunal," under the definition of Neb. Rev. Stat. § 25-1901 (Reissue 1985), whose decision can be vacated, modified, or reversed by a court of proper jurisdiction.
9. **Municipal Corporations: Appeal and Error.** A city council exercises judicial functions in determining questions of fact, and if error proceedings are not filed to review the decision, it becomes final.

10. _____: _____. If no statutory right to appeal from the decision of a city council exists, then a petition in error is the only remedy afforded the plaintiff.
11. **Municipal Corporations: Pleadings: Ordinances: Appeal and Error.** In order to obtain review of a city council's decision, the petitioner must file in the reviewing court a transcript containing the order of the city council that contains the ordinances relied upon by the city council, as well as sufficient evidence for the reviewing court to determine whether the council's decision was correct.

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

Chris Abboud for appellant.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellee Lakeview, Inc.

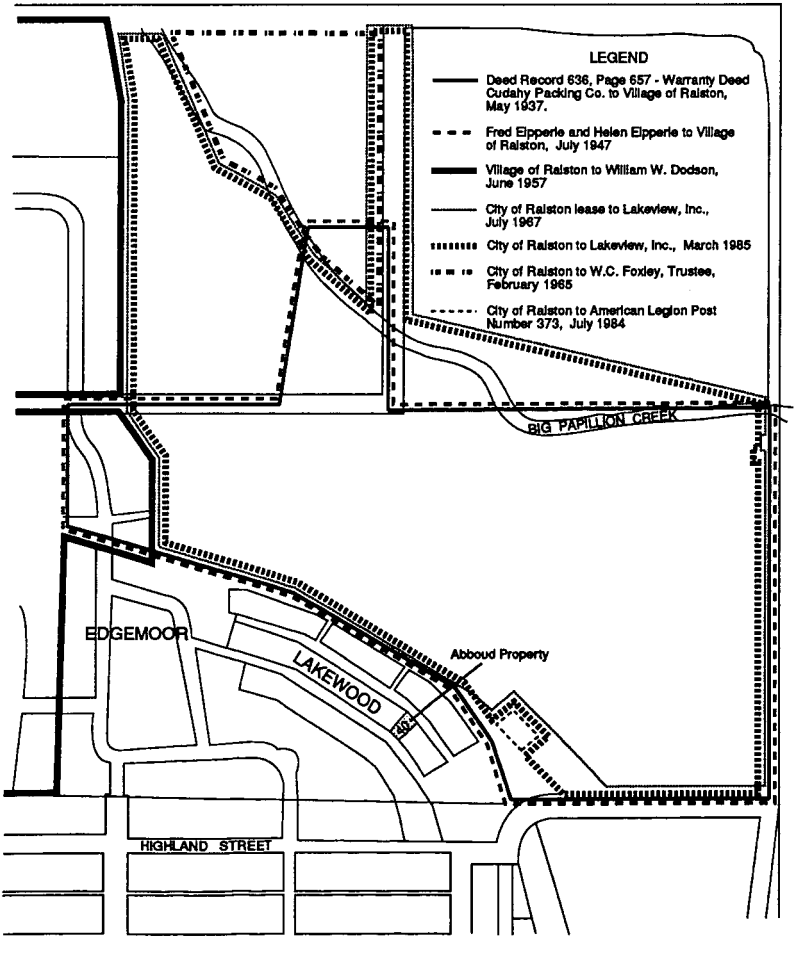
HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is the second appearance of this case before this court. Abboud's original action was for declaratory and injunctive relief against the defendants-appellees, Lakeview, Inc., and the City of Ralston (City). Abboud prayed for a permanent injunction prohibiting the sale of real property from the City to Lakeview, for a permanent injunction preventing the City from selling or using the property for anything other than a park, and for a finding that a 1967 lease between the City and Lakeview was void. The district court sustained the defendants-appellees' demurrer, and Abboud appealed to this court. This court reversed and remanded the action for further proceedings. See *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986). On remand the district court denied Abboud relief, and this appeal followed.

This action concerns real property, commonly referred to as the "Seymour Lakebed," on which Lakeview, under a lease with the City, built and maintained a golf course. The City subsequently sold the land to Lakeview under a purchase option in the lease. It is this sale that Abboud seeks to enjoin. Lakeview also leased and later purchased under the lease option an adjoining piece of property that was not part of the lakebed property we are concerned with in this action. The golf course is

built on both pieces of property. The boundaries of each piece of property are depicted in the diagram below. Abboud is a resident and former city councilman of Ralston. He also owns property located directly across the street from the golf course. This court has already decided that Abboud has standing to bring suit against the City. See *Abboud, supra*.



On May 8, 1937, the Cudahy Packing Company, for consideration, conveyed by warranty deed to the City (then a village) the lakebed property. The grant of the property was in the form of a fee simple subject to condition subsequent. The land, by the terms of the deed, was restricted to park or public recreation area use and subject to a right of reentry by the grantor in the event the property was ever used for a different purpose. Cudahy Packing thus held a future interest called a right of reentry. On October 27, 1944, Cudahy sold this interest (consisting of the right of reentry) to Mr. and Mrs. Fred Eipperle. On April 1, 1947, the voters of the City authorized the board of trustees to issue a general obligation bond in the amount of $5,000 to purchase the right of reentry from the Eipperles. The minutes of the Ralston City Council dated February 4, 1947, refer to the bond issue as "Park Bonds for purchasing land for park purposes." The minutes also state that the purpose for obtaining the Eipperles' interest was so that a dry lake on the property could be revived. Additionally, the minutes note that Fred Eipperle had been attempting for several months to cause the land to revert back to him, leaving the City without any interest in the land. The City subsequently obtained the Eipperles' title to the land by quitclaim deed. Because the City then owned both the present possessory and future interests, under the doctrine of merger the two estates became a fee simple absolute. See *Abboud, supra*. Therefore, the restriction in the deed from Cudahy Packing no longer existed, and the City owned the land in fee simple free of restriction. *Id.*

The testimony is conflicting as to the uses made of the lakebed property prior to construction of the golf course. Eldon Murray, the City's maintenance superintendent for 18 years and a resident of Ralston since 1949, testified that the property was not a park and was not treated as a park during that period. He stated that much of the property was marshy and full of mosquitoes and rodents. Murray testified that during his years as the maintenance superintendent there were no bathroom facilities, water fountains, improved trails, picnic tables, or flowers present on the property. A former mayor of Ralston, Wendell Kronberg, testified that the property was

abandoned, was used as a dump by residents of Ralston, and was an "eyesore." According to the May 20, 1952, city council minutes, the councilmen voted to permit Don Fucinaro to raise corn on the lakebed.

In support of his contention that the property was used as a park, Fred Abboud testified that his sons played football in the area and that he observed the area being used for fishing, hiking, and camping. Fern Taylor, a longtime resident of Ralston, testified that children ice-skated on the lakebed when there was water in it and that men trained hunting dogs in the area. Hugh Hamilton, a former city councilman and resident of Ralston, testified that in the 1950's water was pumped from Big Papillion Creek into the lakebed and that children swam and people fished there when the lake was full. He also testified as to the existence of a clubhouse on the property that was later torn down.

There is evidence in the record that the City did expend a small amount of money on the property prior to 1967. Murray, the maintenance superintendent, testified that his department mowed parts of the property when it was able to and that the area was sprayed for mosquitoes. The city council minutes during the years 1948 and 1949 mention plans for the installation of pumping equipment for the lake, which at that time contained water. The minutes also mentioned rental of the clubhouse to various organizations. There is no evidence in the record, however, that the City ever attempted to permanently revive the lake or develop the property into a park. Pictures of the property taken prior to the development of the golf course depict the land as overgrown and left primarily in its natural state. The City did not formally dedicate the land as a park or improve the land with the usual park amenities such as parking, landscaping, or bathroom facilities. The land remained in an undeveloped state until 1967, when the City entered into the lease with Lakeview.

Prior to and after entering into the lease of the property with Lakeview, the City sold three portions of the lakebed property to private parties: the first to William Dodson in June 1957, the second to W.C. Foxley in February 1965, and the third to the American Legion in July 1984. The boundaries of these parcels

are depicted in the diagram. Fred Abboud was a member of the city council and voted in favor of the sale to Foxley in 1965.

In 1963, a member of the city council suggested that the lakebed property be used to build a golf course. The council then began to actively seek bids from private developers interested in building and operating a golf course on the property. In 1967, the City leased the lakebed property, as well as an adjoining piece of property, to Lakeview after an earlier lessee, Miller, failed to develop the land as required in his lease agreement. The City-Lakeview lease specified that Lakeview was to develop and maintain the property as a golf course. The term of the lease was for 25 years, with an option to renew. The lease also contained a "right of first refusal." If Omaha ever annexed Ralston or the Ralston City Council ever decided to sell the property, Lakeview had the first right to purchase the land for $90,000. The rental price of the property was set at a fixed price for a term of years plus a percentage of the gross profits. The lease permitted Lakeview to charge any fees it wished for use of the golf course. The lease also provided that Lakeview had sole possession and responsibility for maintenance of the premises. The lease did give the City the right to inspect the premises, but there is no evidence in the record that the City ever exercised this right. Lakeview built and continued to operate the golf course for the next 16 years, paying to the City the agreed-upon rental.

In 1984, the Ralston City Council decided that it was in the City's best interest to sell the land. The City notified Lakeview of its intent to sell, and Lakeview decided to exercise its option to purchase the property. On June 19, 1984, the city council passed ordinance No. 761, declaring the property surplus. On November 20, 1984, the council passed ordinance No. 765, directing the sale of the land to Lakeview. Joseph Wager, a former councilman and mayor of Ralston, testified that the city council intended to use the proceeds from the sale of the golf course land to build a storage facility for the City's maintenance equipment.

On November 5, 1984, Abboud filed his petition in the Douglas County District Court, seeking to enjoin the sale. Pursuant to Neb. Rev. Stat. § 16-202 (Reissue 1987), on

December 20, 1984, Abboud filed a petition in remonstrance opposing the sale of the property. On January 8, 1985, the Ralston City Council confirmed the sale to Lakeview pursuant to ordinance No. 765, after determining, on the advice of the city attorney, that the remonstrance petitions failed to contain the number of signatures required by § 16-202. The election commissioner verified 836 signatures, 16 more than needed to comprise the 30 percent of registered voters required by § 16-202. Prior to the vote by the council, the city attorney recommended invalidating 55 signatures, leaving Abboud with less than the required number. The city attorney recommended that 29 signatures be considered invalid because they were obtained prior to the passage of ordinance No. 765 and that two petitions containing 26 signatures also be considered invalid because the petitions were circulated by an individual not registered to vote. Lakeview then purchased the lakebed property, as well as the adjoining piece of property it also leased from the City.

After the Douglas County District Court sustained the defendants-appellees' demurrer, Abboud, in his appeal to this court, assigned as error the district court's findings that he had no standing to sue, that the defendants-appellees did not violate the law when they failed to disclose a conflict of interest between City officials and Lakeview, and that the property was not held in public trust, so that the City was free to sell it.

As stated above, we determined that Abboud did have standing to sue. We never reached the question of whether a conflict of interest existed that would void the 1967 lease between Lakeview and the City pursuant to Neb. Rev. Stat. § 18-301.01(2) (Cum. Supp. 1984). We found that Abboud's claim that the lease was void was barred by the 1-year statute of limitations. His request for a permanent injunction barring the sale of the land was not similarly barred. We also held that under *Gallagher v. City of Omaha*, 189 Neb. 598, 204 N.W.2d 157 (1973), Abboud's petition stated a cause of action whereby the City may be limited in its rights to dispose of the lakebed property because it was purchased through a bond issue. Finally, we held that Abboud also stated a valid cause of action under § 16-202 through his filing of remonstrance petitions. We

then reversed judgment and remanded the cause to the district court for further proceedings on the "conflict of interest theory," the "bond issue theory," and the "remonstrance theory." See *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986).

On remand, the district court found no conflict of interest between Gerald Koch, the mayor of Ralston at the time of the sale, and Lakeview, of which Koch was a 12½-percent shareholder. The court found that Koch was not the mayor of Ralston during the time the property was declared surplus by the city council and when the ordinance authorizing the selling of the property to Lakeview was passed, and that Koch had made every effort to comply with § 18-301.01 by disclosing his interest in Lakeview.

The district court also rejected Abboud's "bond issue" claim. The court cited the applicable passage from *Gallagher v. City of Omaha, supra* at 602-03, 204 N.W.2d at 160, where this court stated:

> Where the park property has been acquired by the municipality especially for park use with funds from the sale of bonds specifically authorized by the electors for that purpose, the city is still a trustee of the property for such purpose, but in this case may divert the property from such use if it is clearly authorized to do so by the Legislature, at least where the property is no longer needed for park purposes.

The court stated that a city must meet two criteria in order to sell parkland purchased with bond funds. See *Gallagher, supra*. First, there must be a failure of park use or dedication as a park, and second, there must also be specific legislative authority authorizing the diversion of the land. *Id.* The court found that Neb. Rev. Stat. § 16-201 (Reissue 1987) conferred the needed legislative authority, in that § 16-201(3) gave each city of the first class the power to "sell and convey, exchange, or lease any real or personal property owned by the city, including park land . . . ." The court also found that the City authorized the sale when it declared the lakebed property surplus and decided to use the proceeds from the sale to build a storage facility for maintenance equipment. The court also determined that the

lakebed property was never regularly used as a park and was not formally dedicated as a park. Thus, the court found that the City complied with the rule in *Gallagher* and was authorized to sell the property to Lakeview.

Last, the court considered the "remonstrance theory" issue. Abboud contended that the remonstrance petitions contained the requisite number of signatures because § 16-202 required only that signers of the petitions be "electors," and there was no requirement that the "electors" be registered voters. The City and Lakeview contended that the findings of the Ralston City Council were conclusive and could not be attacked collaterally in this suit. Abboud's only remedy was through the filing of a petition in error. The court assumed that Abboud's amended petition was a petition in error and reviewed Abboud's contention de novo by making an examination of the relevant law and evidence. The court found "electors" to mean registered voters and denied Abboud relief under the "remonstrance theory."

Abboud claims the district court erred in finding the following: that property purchased with elector-approved bond funds for use as a park may be sold without legislative authorization other than § 16-201; that the lakebed property was never formally dedicated as a public park, thus restricting its disposition; that the lakebed property was abandoned as a park or that the trust was breached because of nonpark use; that the remonstrance petitions were signed by persons who were not legal electors; that the remonstrance petitions could not be signed prior to final passage of the ordinance authorizing the sale; and that Ralston Mayor Gerald Koch complied with § 18-301.01.

An action for injunction sounds in equity. *Federal Land Bank of Omaha v. Swanson*, 231 Neb. 868, 438 N.W.2d 765 (1989). In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Citizens*

State Bank v. Jennings State Bank, 236 Neb. 307, 461 N.W.2d 78 (1990). A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Federal Land Bank of Omaha, supra*. An injunction will not be issued unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Aro Inv. Co. v. City of Omaha*, 179 Neb. 569, 139 N.W.2d 349 (1966).

By this action Abboud seeks to have title to the lakebed property returned to the City. We will discuss the merits of his claim under the "bond issue" theory, the "conflict of interest" theory, and the "remonstrance" theory.

THE BOND ISSUE THEORY

Generally, a municipality may not sell property held for public use without legislative authority. 10 E. McQuillin, The Law of Municipal Corporations § 28.37 (rev. 3d ed. 1990). Municipal corporations hold all property in which the public is interested, such as streets, wharves, parks, and public squares, in trust for the use of the public, and these properties may only be disposed of by the municipality if it is authorized to do so by statute. 10 E. McQuillin, *supra*, § 28.38. The statutory authorization functions as the terms of the trust. *Id.* Property which is not appropriated or devoted to a public use, property which has ceased to be used or is not used by the public, or land which is in excess of public need may be disposed of by a city without special statutory authorization. 10 E. McQuillin, *supra*, § 28.38.20.

A park is for the benefit of and is held in trust by a city for the public. 10 E. McQuillin, *supra*, § 28.52. When the parkland is dedicated or donated to a city under the condition that it be used only as a park, the city cannot divert the land to a use inconsistent with the purposes of the grant. *Id.* In Nebraska, the city is prohibited for all time from diverting parkland received by gift or dedication from a private party and restricted only to park use. See *Ash v. City of Omaha*, 152 Neb. 393, 41 N.W.2d 386 (1950). See, also, *Rayor v. City of Cheyenne*, 63 Wyo. 72, 178 P.2d 115 (1947) (land dedicated by the City of Cheyenne for park use and accepted and used by the public may not be

diverted to another use by the city unless specifically authorized to do so by the Legislature). Other states permit the city to divert use of the land if specifically authorized to do so by the legislature. *Pearlman v. Anderson*, 62 Misc. 2d 24, 307 N.Y.S.2d 1014 (1970).

In contrast, where parklands are held in fee simple by a city, the city has greater discretion in the sale or diversion of the land. Where the land is conveyed to the municipality free from restriction and afterward used for park purposes, the city may sell the land under its statutory power to sell any property owned by it, or it may devote the property to other public uses. 10 E. McQuillin, *supra*, § 28.52.05. See *Carson v. State*, 240 Iowa 1178, 38 N.W.2d 168 (1949) (where land is already publicly owned and is designated for some particular public use, no contractual trust arises in favor of the general public that precludes subsequent diversion of the land by proper legislative authority). Where the property is paid for by the city through the use of general funds, the intended use for the property may be changed as the needs of the city demand. *Carlson v. City of Fremont*, 180 Neb. 262, 142 N.W.2d 157 (1966).

In summary, if land is given to a city by a private party with a restriction on its use, the city must adhere to this use for all time, at least in Nebraska. This rule is based on the theory that a binding contract between the dedicator and the public arises at the time of the gift. See *Carson v. State, supra*. If the city purchases land or devotes land it already owns to a public use, then the city is free to divert the land to another public use or sell the land if authorized by the Legislature. *Id.* No contractual trust arises in favor of the public that prevents subsequent diversion of the land. *Id.*

Nebraska has adhered to the general principles of law governing the power of municipal corporations to sell land devoted to public use. In *Ash v. City of Omaha, supra*, this court restricted the power of a city to dispose of land received as a gift.

> Where dedication is made for a defined purpose, neither legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or

> private, or whether dedication is a common-law or statutory dedication, notwithstanding that changed use may be advantageous to the public.

Ash, supra at 409, 41 N.W.2d at 396. This decision is consistent with the "dedicator-public contract" theory discussed above. In *Carlson v. City of Fremont, supra*, this court distinguished between land received by a city through an outright unrestricted grant or purchase and land received by gift or purchase conditioned for a specific use. We held that a city is free to divert the use of unrestricted land as the city determines, but land purchased or received by gift for a specific purpose is held in trust by the city for the benefit of the public. *Carlson, supra.* We determined that because the City of Fremont had purchased the land from the general fund and had not dedicated the land to any specific purpose, it was later free to divert the property to another use. *Id.*

This court has carved out a new exception to the powers of a municipality to dispose of parkland in *Gallagher v. City of Omaha*, 189 Neb. 598, 204 N.W.2d 157 (1973). The controversy concerning the City's right to sell the lakebed property centers on interpretation of this court's holding in *Gallagher*. In *Gallagher* the plaintiffs sued for declaratory and injunctive relief to prevent the City of Omaha and the Board of Regents of the University of Nebraska from entering into a "joint use agreement" whereby the university and the City of Omaha would jointly use a parking lot in Elmwood Park. The area where the parking lot was to be constructed had previously been for park use only. The park property subject to the agreement was purchased in 1892 with funds derived from a park bond issue for the purpose of enlarging Elmwood Park. The property has been continuously used for park purposes since that time.

This court held that park property acquired by a municipality through the sale of park bonds voted on by the electors is held in trust for the public by the city. The property may be diverted from park use only if the municipality is clearly authorized to do so by the Legislature and if the property is no longer needed for park purposes. Thus, the rule in *Gallagher* is composed of three parts. First, the land subject to the trust must be parkland purchased with bond funds voted on by the

electorate of the municipality. Second, the Legislature must have specifically authorized the municipality to divert the land from park use. Third, the property must no longer be needed for park purposes by the municipality. Under *Gallagher*, only when these three criteria are met can a city dispose of parkland purchased through a bond issue.

As discussed above, our holding in *Gallagher* does not eliminate a city's ability to sell dedicated parkland purchased with bond funds. Rather, it restricts a city's ability to sell the land only to the situation where the city has been specifically authorized to do so by statute and where the land is no longer needed by the city as parkland. Unlike the circumstance in which a city receives title to property by gift under a deed restricting its use to parkland, *Gallagher* does not totally bar the sale of parkland. Yet a city, even though empowered by statute to buy and sell land, is not totally free, under *Gallagher*, to dispose of parkland purchased with bond funds. By our holding in *Gallagher*, this court has followed the generally established rule of other jurisdictions that park property dedicated to and used by the public is somehow different from other city-owned property. See, *Carson v. State*, 240 Iowa 1178, 38 N.W.2d 168 (1949); *Rayor v. City of Cheyenne*, 63 Wyo. 72, 178 P.2d 115 (1947); *Wright v. Walcott*, 238 Mass. 432, 131 N.E. 291 (1921); *Aldrich v. City of New York*, 208 Misc. 930, 145 N.Y.S.2d 732 (1955); *Anderson, et al. vs. Mayor and Council of Wilmington*, 37 Del. Ch. 74, 137 A.2d 521 (1958); *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 448 (1947). These states have established guidelines permitting the sale or diversion of public parkland under certain circumstances. Nebraska has followed this trend in our decision in *Carlson v. City of Fremont*, 180 Neb. 262, 142 N.W.2d 157 (1967). There, we permitted the diversion of city parkland to use for a fire station because the City of Fremont purchased the land from general funds and owned it free of restriction. We stated that a trust for the benefit of the public only protects parkland received by a city as a gift or purchase conditioned for a specific public use. In *Gallagher*, we have encountered the "purchase conditioned for a specific public use" situation. We have gone beyond our decision in *Carlson v. City of Fremont, supra*, and

restricted the sale of park property purchased with bond funds to only the situation where the property is determined no longer needed by the city and the Legislature has specifically authorized the sale of the property.

As a preliminary matter we must decide if the *Gallagher* rule is applicable to a city of the first class, such as Ralston. The facts in *Gallagher* concern a city park in Omaha. Under Neb. Rev. Stat. § 14-101 (Reissue 1987), Omaha is classified as a city of the metropolitan class because its population is greater than 300,000. A metropolitan-class city is empowered

> (1) to sue and be sued, (2) to purchase, lease, lease with option to buy, acquire by gift or devise, and hold real and personal property within or without the limits of the city for the use of the city, and real estate sold for taxes, (3) to sell, exchange, lease, and convey any real or personal estate owned by the city, in such manner and upon such terms as may be to the best interests of the city . . . .

§ 14-101.

In contrast, Ralston is defined under Neb. Rev. Stat. § 16-101 (Reissue 1987) as a city of the first class because it has between 5,000 and 100,000 inhabitants. Under § 16-201 cities of the first class are empowered

> (1) to sue and be sued; (2) to purchase, lease, lease with option to buy, or acquire by gift or devise, and to hold real and personal property within or without the limits of the city, and real estate sold for taxes for the use of the city in such manner and upon such terms and conditions as may be deemed in the best interests of the city; (3) to sell and convey, exchange, or lease any real or personal property owned by the city, *including park land*, in such manner and upon such terms and conditions as may be deemed in the best interests of the city . . . .

(Emphasis supplied.) As can be seen from the language of the statutes, the Legislature has seen fit to include within the enumerated powers of a first-class city the right to sell parkland. The identical right is absent from the statute empowering metropolitan-class cities. If we assume the *Gallagher* rule applies to cities of the first class, it is possible that the inclusion of the "parkland" language within the statute

empowering first-class cities comports with the "specific legislation" requirement of *Gallagher*, thus allowing the sale of the lakebed property in this instance. We do not find it necessary to decide today whether the *Gallagher* rule is applicable to first-class cities or whether the sale of parkland within a first-class city may be accomplished under *Gallagher* by resort to § 16-201. Assuming the *Gallagher* rule applies to Ralston as a first-class city, we find the restrictions of *Gallagher* inapplicable here because the lakebed property never existed as a park, and at the very least the City abandoned any intent to use the land as a park when it leased the property to Lakeview in 1967. In order to "trigger" the *Gallagher* rule, the property in controversy must be park property purchased with bond funds. In this case, only the reversionary interest, not the property itself, was purchased with bond money. Most importantly, however, the land itself was never established as a park by the City and is therefore not "park property." Because the land never existed as a park through inaction of the City, the *Gallagher* rule is not applicable, and the City is free to sell the property to Lakeview under its general statutory power in § 16-201.

Various jurisdictions have held that a municipality requires no special legislative sanction to sell land that was acquired for a public purpose, but which was never devoted or dedicated to that purpose. In *Palmer v. City of Albuquerque*, 19 N.M. 285, 142 P. 929 (1914), the New Mexico Supreme Court permitted the sale of a partially constructed city building because it had never been dedicated to public use. The court said that municipal property was not impressed with a public trust until it had been "given over," appropriated, or devoted to a public use. Property devoted to a public use could not be sold without statutory authority, but the building, in its partially constructed state, had not been impressed with a public trust so as to defeat the right of the city to sell it.

In *Lester v. Walker*, 177 Ark. 1097, 9 S.W.2d 323 (1928), the Supreme Court of Arkansas affirmed the right of the city to sell a piece of riverfront property to the county despite the fact that there was a city ordinance prohibiting the sale of riverfront parkland. The court said that this property was not the

riverfront parkland mentioned in the ordinance, but even if it was, the city still had the right to sell the land to the county because the land had never been dedicated to public use. The city had passed an ordinance declaring that the property would thereafter be used as a park, but the land was never used as a park. The mere passage of the ordinance was not enough to impart a trust upon the land, and the city had the right to revoke the ordinance declaring the land as park by authorizing its sale.

In *Schneider v. West New York*, 84 N.J. Super. 77, 201 A.2d 63 (1964), the plaintiffs sought to set aside a sale of land by the Town of West New York on the grounds that the land was parkland and prohibited from sale by statute. The court, based on the rationale in *Palmer v. City of Albuquerque, supra*, allowed the sale because the city had never put the land to park use. The court stated that a mere declaration by the city that the land was acquired for park purposes was not enough to make the land unsalable under the statute. The town was free to dispose of the land if it decided not to use it for its intended purpose before it had done anything to appropriate the land to such use.

Likewise, the Supreme Court of New York, in *Pearlman v. Anderson*, 62 Misc. 2d 24, 307 N.Y.S.2d 1014 (1970), permitted the village of Rockville Centre to divert certain public land for use as a village hall and parking lot without legislative authority. The plaintiffs in the action contended that the land was a park and was thus restricted to park use. The court stated that the land had never been dedicated as a park, proof of its use as a park was meager, and the land had been acquired for general municipal purposes with moneys from the general fund. Therefore, the property could have been used for any public purpose, and the fact that the city had cleaned up the property, planted some trees, and put in walkways was not sufficient to place the property in trust for park purposes, thereby restricting its sale.

Other jurisdictions have held that when property devoted to public use has been abandoned or become inadequate for use by the public, the municipality may sell it under its general statutory power to buy or sell property. In *Marshall v. Mayor of Meridian*, 103 Miss. 206, 60 So. 135 (1912), the Supreme Court

of Mississippi held that a municipality had the power to sell the old city hall in order to partially finance the building of a new city hall. The court stated that property devoted to public use is generally impressed with a trust that prohibits the sale of the property in some circumstances. However, when the property has ceased to be used for its intended purpose, the trust ends and the municipality can sell the property pursuant to its general statutory grant of power. The court stated that when the intended use ceases, no more reason exists for the rule prohibiting the sale of property held in trust for the public. In this case the intended use for the old city hall ceased when the city council decided to construct the new building.

The Supreme Court of Minnesota, in *Reed v. Village of Hibbing*, 150 Minn. 130, 184 N.W. 842 (1921), likewise affirmed the right of the Village of Hibbing to sell the city hall to a mining company so that the company could mine ore from the ground beneath the hall. The court stated that the village had the power, under its general statutory authority to buy and sell property, to sell the building because it had become inadequate for use because of its location.

The Texas courts have addressed the "abandonment" issue in relation to property purchased with bond funds. In *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 448 (1947), the Texas Supreme Court affirmed a decision of the Court of Civil Appeal declaring valid the sale of certain mineral royalties to Moore. In about 1930, the City of Beaumont bought land with bond funds voted on and issued by the city for the purpose of constructing an airport. Later exploration of nearby tracts indicated that valuable minerals lay beneath the land. Moore purchased a one-sixteenth mineral royalty in and under the land for $13,772 from the city. Following this transaction, Moore entered into negotiations to sell part of the royalty to Gordon. Gordon eventually refused to accept conveyance of the royalty from Moore because he claimed that the City of Beaumont had no authority to convey the land and that the deed passed no title because the property had been purchased with bond funds voted on for airport construction. Moore filed suit against Gordon for specific performance and lost. Moore then demanded the return of his money plus interest from the city

and the city refused. In his suit against the city, Moore alleged, among other claims, that the city misrepresented its ability to pass good title to the airport land purchased with the bond funds. Therefore, it was necessary for the court to determine whether the city could sell to Moore an interest in the airport land. The majority of the analysis on this issue takes place in the lower court's opinion, which was affirmed by the Texas Supreme Court in its entirety. See, *City of Beaumont v. Moore, supra*; *Moore v. City of Beaumont*, 195 S.W.2d 968 (Tex. Civ. App. 1946).

The court held that the title the city passed to Moore and Moore to Gordon was not totally void, but was not the title Moore or Gordon had purchased. Because the land was purchased with bond funds, during the time the city council of Beaumont deemed it proper to use the land as an airport, the land was dedicated to that purpose and could not be used for any other purpose. A diversion of the land to a different purpose amounted to a diversion of the bond proceeds. However, the city need not use the land for the purpose forever. Voting the bonds did not require the city to operate the airport for all time to come. The city had the power to abandon the use of the land, but only when it exercised its discretion to do so on behalf of the public. Only after the land was in whole or in part lawfully abandoned by the city could the land be used for any other purpose.

The court concluded that the city's power to abandon use of land not needed for the purpose for which it was acquired would support the city's sale and conveyance of a royalty in land purchased with bond proceeds, and the city's deed would be expression enough of the city's intent to exercise that power. Thus the vendee would take title to the royalty subject to the contingency that the city might or might not abandon its use of the land. Therefore, the royalty interest was speculative, but not necessarily invalid.

As a preliminary matter, the City holds the lakebed property free of restriction. As discussed above, the City came to possess both the fee simple subject to condition subsequent as well as the reversionary interest, causing the two to merge into a fee simple absolute. The City is not prevented from alienating the

lakebed property through any restriction in the deed; likewise, no statute in Nebraska prohibits the sale of parkland. Therefore, we limit our discussion to whether or not the lakebed property was ever used as a park or was subsequently abandoned as a park by the City, thus enabling it to be sold to Lakeview.

We will first discuss whether the lakebed property was ever established as a park. Webster's Third New International Dictionary, Unabridged 1642 (1981) defines a park to be "a tract of land maintained by a city or town as a place of beauty or of public recreation . . . a large area often of forested land reserved from settlement and maintained in its natural state for public use (as by campers or hunters) . . . ." The key to determining whether or not the lakebed property was a park is the *City's* role in establishing or maintaining the property as a park. Random or particular use of the land by the public does not establish a park. It is the municipality's intention and resultant treatment of the land that determines whether it was a park. This may mean that a city places usual park amenities on the land such as bathroom facilities, park benches, water fountains, walkways, swimming pools, or even golf courses. It may also mean that the city preserves the land in its natural state as a wildlife refuge, a forest, or a camping spot for residents of the state. However, the determinative factor is the city's actions in regard to the land.

The district court held that the lakebed property was used as a park at best only sporadically and randomly and was therefore never dedicated to park use. We agree with the district court's conclusion but for different reasons. Although the bond issue funds voted on by the residents of the City in 1947 were intended to be used to purchase the reversionary interest in order to create a park on the lakebed property, the City never took any substantial steps in that direction. The determinative factor was the City's failure to dedicate the land to park use.

The City did almost nothing to the lakebed property. It did not build or maintain any bathrooms, picnic tables, water fountains, or other usual park conveniences on the property. It did nothing to promote or encourage use of the land as a public recreation area. Likewise, the City did nothing to preserve the

land in its natural state. It established no boundaries upon the land, promulgated no rules for camping or hunting, and made no effort to preserve wildlife on the land. With the exception of testimony regarding an abundance of stray dogs and rodents on the land, no evidence exists in the record that there was any wildlife on the property. Testimony in the record describes the land as a dump and swampy and full of mosquitoes. Pictures of the property before construction of the golf course show the property to be similar to a large overgrown vacant lot. It remained in this state for almost 20 years prior to the construction of the golf course. Testimony regarding the uses various Ralston residents made of the land concerns activities which any group of children or adults would make of a large area of vacant land. A vacant piece of land is not automatically branded a park because citizens use it to play football or to skate on a frozen lakebed. Since the City did nothing to establish the area as a park, it cannot simply be called a park because certain citizens participated in "parklike" activities on the property.

Additionally, the land was never dedicated to park use by the City. Black's Law Dictionary 412-13 (6th ed. 1990) defines dedication as

> [t]he appropriation of land . . . by the owner, for the use of the public, and accepted for such use by or on behalf of the public. . . .
>
> . . . .
>
> . . . A dedication may be express, as where the intention to dedicate is expressly manifested by a deed or an explicit oral or written declaration of the owner, or some other explicit manifestation of his purpose to devote the land to the public use. An implied dedication may be shown by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn
>
> . . . .

It is clear from the above definition that the operative act evidencing a dedication must be accomplished by the owner of the property. The owner must first "give over" the property to public use, allowing the public to accept it as such. This may be done either expressly or by implication through a course of

conduct. There is no evidence in the record of a formal dedication by the City. Given our above discussion, the City did not engage in any course of conduct that would give rise to an implied dedication. Until the decision to use the land as a golf course, the City did virtually nothing to the property but spray it for mosquitoes, mow certain accessible areas, and attempt to reduce the stray dog population. When the City decided to use the land as a golf course, it turned over all responsibility for the building and maintenance of the course to Lakeview. It assumed no role in the operation of the golf course except to collect the rent from Lakeview. Those actions, together with the passage of the ordinance and the issue of the bonds by the City, do not amount to a dedication or devotion of the property to park use. In this case, the City never "gave over" the lakebed property to public use, as required by the rule in *Palmer v. City of Albuquerque*, 19 N.M. 285, 142 P. 929 (1914). As in *Lester v. Walker*, 177 Ark. 1097, 9 S.W.2d 323 (1928), *Schneider v. West New York*, 84 N.J. Super. 77, 201 A.2d 63 (1964), and *Pearlman v. Anderson*, 62 Misc. 2d 24, 307 N.Y.S.2d 1014 (1970), a mere declaration or passage of an ordinance by the City declaring the land a park is not sufficient to impress a trust upon the land. The rules in those cases clearly require the municipality to do something more, something the City did not accomplish in regard to the lakebed property. Therefore, the City is free to sell the land under § 16-201 because the lakebed property was never dedicated or devoted to park use.

The City is also free to sell the lakebed property to Lakeview because it abandoned any pretense of using the lakebed property for public parkland when it leased the property to Lakeview for construction of the golf course. It is clear from the record that in the early 1960's the city council decided that the land would be better used as a golf course. The council members then began an active campaign to obtain a willing tenant for the land. Lakeview leased the land from the City and built and singlehandedly operated the golf course for 16 years. The City then determined that it would be in the City's best interest to sell the property to Lakeview and use the money to build a much-needed maintenance building. The City notified Lakeview it intended to sell the land, and Lakeview decided to

exercise the purchase option in the City-Lakeview lease. The City then declared the property surplus and went ahead with the sale.

The appellant claims that operating a golf course is a park use, thereby substantiating his allegation that the property was continuously used as a park until the sale to Lakeview. That would be the case provided the City operated the golf course or at the very least maintained a substantial degree of control over operation of the course. See, *Golf V. R. Co. v. City of Sioux City*, 222 Iowa 433, 269 N.W. 451 (1936) (golf course is considered a park use, and therefore the city is authorized to purchase the course as it would a park); *Clement v. O'Malley*, 95 Ill. App. 3d 824, 420 N.E.2d 533 (1981) (installation of golf driving range in city park is proper park purpose and did not breach the public trust because city park officials built and operated the course, public bodies controlled course use, the area would be devoted to a public purpose and open to the public, the diminution of the area of original use would be small, and none of the public use of the original area would be destroyed).

In this case the City neither owned, operated, nor maintained control over the course. The appellant attempts to overcome this problem by referring to our decision in *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956), for the proposition that a public park leased to a private party may still be considered dedicated to the public as long as the lease does not violate the dedication. *Omaha Parking Authority, supra*, concerns a situation totally distinct from this case and is therefore inapplicable. Here, the City leased the land to Lakeview and allowed it to build, operate, and maintain the course free of any interference from the City. The lease provided only that Lakeview must build the golf course within a specified time period, must pay the agreed-upon rental to the City, and must keep the course open to the public 6 days per week. The City maintained no control whatsoever over operation of the course, but treated the lease arrangement with Lakeview as a profitmaking venture and as a way to put the lakebed property to good use. The City's actions were wholly inconsistent with maintaining or operating a public park, even

if that park was a golf course. Therefore, by leasing the land to Lakeview, the City abandoned any intent to use the land as a park. Following abandonment of the use, under the rule in *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 448 (1947), the City was then free to use the land for any other purpose. It exercised this freedom by selling the property, under its general power to buy and sell property, to Lakeview.

In addition to leasing the land to Lakeview, the City also disposed of three additional parcels of property. Prior to entering into the Lakeview lease, the City abandoned two parcels of the land by selling them to various parties. Fred Abboud voted on and approved the sale of the Foxley parcel while he was a member of the city council. After entering into the lease with Lakeview, the council sold off another portion of the lakebed property to the American Legion. Selling off these parcels of land is also at odds with maintaining a park on the property and strongly evidences the City's intent to abandon use of the lakebed property as a park. The appellant's claim that the sale of the lakebed property is prohibited by *Gallagher v. City of Omaha*, 189 Neb. 598, 204 N.W.2d 157 (1973), fails because the City never dedicated the lakebed property to park use and, in the alternative, abandoned any use of the land as a park. The mere declaration by the Ralston City Council that the land was intended for future park use is not sufficient to establish the property as a park. Therefore, the *Gallagher* rule does not apply. Abboud's request for a permanent injunction prohibiting the sale of the land to Lakeview is denied.

THE CONFLICT OF INTEREST THEORY

Abboud claims as error the district court's finding that Ralston Mayor Gerald Koch complied with § 18-301.01. Section 18-301.01(2), the statute in effect at the time of the filing of this case, has since been repealed and reenacted in Neb. Rev. Stat. §§ 49-14,103.01 and 49-14,103.07 (Reissue 1988). Section 18-301.01(2) prohibited any city officer from being directly or indirectly interested in any contract to which the city was a party. The statute also provided that an action may be brought within 1 year of the signing of the contract to have the contract declared void. The record indicates that Koch, a city

officer, owned a 12½-percent share of Lakeview and was therefore "interested" in the contract between the City and Lakeview. We declared in Abboud's first appeal to this court that Abboud's action to declare the contract void under § 18-301.01(2) was barred by the 1-year statute of limitations. However, we also stated that his action for a permanent injunction preventing the City and Lakeview from exercising the purchase option agreement in the lease was not similarly barred. Abboud now argues that the contract between the City and Lakeview is voidable because Mayor Koch was a shareholder in Lakeview and a city officer. Abboud again attempts to have this court declare the contract between the City and Lakeview void under § 18-301.01(2) despite the fact he is barred from doing so by his failure to comply with the § 18-301.01(2) 1-year statute of limitations. The remedy provided by § 18-301.01(2) is not available to Abboud because he has failed to comply with the statute. Therefore, Abboud may not claim the district court erred by failing to afford him this remedy.

We said in our opinion accompanying Abboud's first appeal that he may seek a permanent injunction prohibiting the City and Lakeview from exercising the purchase option in the lease. Abboud does not make it clear whether or not he seeks this remedy, but we will assume he does based on his continuing claim that the sales contract between the City and Lakeview was burdened with a conflict of interest. In other words, we believe Abboud seeks to have the execution of the purchase agreement between the City and Lakeview permanently enjoined because Mayor Koch was both a shareholder in Lakeview and an officer of the City. Since the sale has already taken place, this would involve reconveyance of the property to the City. The district court found that no conflict of interest existed. We agree. We will look to § 18-301.01(3) for guidance concerning the interested party's ability to "cure" the conflict.

Section 18-301.01(3) provides that the remedy available under § 18-301.01(2) will not apply if the interested officer

> (a) Makes a declaration on the record to the governmental body responsible for approving the contract regarding the nature and extent of his or her

interest, prior to official consideration of the contract;

(b) Does not vote on the matter of granting the contract, except that if the number of members of the board declaring an interest in the contract would prevent the board, with all members present, from securing a quorum on the issue, then all members may vote on the matter; and

(c) Does not act for the city or village which is party to the contract as to inspection or performance under the contract in which he or she has an interest.

The record indicates that Koch was not the mayor in June 1984, when the city council declared the property surplus, and in November 1984, when the council passed the ordinance selling the property to Lakeview. Koch was sworn into office on December 3, 1984. Koch also testified that he revealed his ownership in Lakeview to the city council and that any time any business concerning Lakeview came before the council, he would declare his conflict and leave the council meeting. He also testified that he wrote a letter to the council or to the clerk of the City informing the City of his conflict. There is no evidence in the record that Koch attempted to influence anyone in any way relating to the contract. Therefore, Koch has complied with all the requirements of § 18-301.01(3) and has "cured" any conflict he may have had in the City-Lakeview transaction. No conflict existed, and therefore Abboud is not entitled to an injunction barring execution of the purchase option between the City and Lakeview. Abboud's claim that Koch had a conflict of interest because he was aware that certain condemnation proceeds would enure to Lakeview is so lacking in merit that we will not discuss it.

THE REMONSTRANCE THEORY ISSUE

Abboud alleges that the Ralston City Council was prohibited from confirming the sale to Lakeview because his petition in remonstrance was properly filed pursuant to § 16-202. Section 16-202 provides that

> if a remonstrance against such sale signed by legal electors thereof equal in number to thirty percent of the electors of such city voting at the last regular municipal election held

> therein, be filed with the governing body of such city within thirty days of the passage and publication of such ordinance, said property shall not then, nor within one year thereafter, be sold.

Abboud filed remonstrance petitions with the Ralston City Council, and the election commissioner verified 836 petition signatures, 16 more than the 820 needed to comprise 30 percent of the electors of the City, as required by § 16-202. The city attorney then reviewed the petitions and recommended invalidating 55 signatures. Based on the city attorney's findings, the city council then rejected the petitions and confirmed the sale of the lakebed property to Lakeview. Abboud requests that this court review the actions of the election commissioner, the city attorney, and the Ralston City Council de novo based on this court's decision in *Chan v. City of South Omaha*, 85 Neb. 434, 123 N.W. 464 (1909). He claims that the remonstrance petitions contained the requisite number of signatures because § 16-202 requires only that signers of the petitions be "legal electors" rather than registered voters, and therefore the decision of the city council to reject the petitions was wrong.

Pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1985), a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court. Neb. Rev. Stat. § 25-1903 (Reissue 1989) provides that the proceedings to obtain a reversal, vacation, or modification must be made by petition entitled "petition in error" filed in a court having the power to reverse, vacate, or modify the decision, and must set forth the assigned errors charged to the lower tribunal. Neb. Rev. Stat. § 25-1905 (Reissue 1989) requires that the plaintiff in error must file with the petition in error a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified.

A city council is a "tribunal" whose decision can be reversed, vacated, or modified by a court of proper jurisdiction. *Roberts v. City of Mitchell*, 131 Neb. 672, 269 N.W. 515 (1936). A city council exercises judicial functions in determining questions of

fact, and if error proceedings are not filed to review the decision, it becomes final. *Hiddleson v. City of Grand Island*, 115 Neb. 287, 212 N.W. 619 (1927). If no statutory right to appeal from a decision of a city council exists, then proceedings in error are the only remedy afforded the plaintiff. *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983). Since Nebraska does not provide a statutory right of appeal from the decision of a city council, Abboud's only remedy was to file a petition in error in the district court pursuant to § 25-1903.

The purpose of a petition in error proceeding is to determine whether the decision of the lower tribunal is in accordance with the law. *Dlouhy v. City of Fremont*, 175 Neb. 115, 120 N.W.2d 590 (1963). In *Brunken v. City of Omaha*, 225 Neb. 410, 417, 405 N.W.2d 595, 599 (1987), we stated:

> " 'The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court.' "

In *Andrews v. City of Fremont*, 213 Neb. 148, 151, 328 N.W.2d 194, 196 (1982), we stated: "A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion." In order to have obtained review of the lower tribunal's decision, the petitioner must have filed in the reviewing court a transcript containing the lower tribunal's order within 1 calendar month of issuance of the final order. See, *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988); *Fisher v. Housing Auth. of City of Omaha, supra*. We held in *Andrews, supra*, that the transcript filed in the reviewing court must contain the ordinances relied upon by the city council, as well as sufficient evidence for the reviewing court to determine whether the council's decision was correct.

Our decision in *Chan v. City of South Omaha, supra*, is distinguishable and therefore inapplicable to this case. In *Chan*, the city council did not overrule but, rather, ignored a

remonstrance petition filed by certain property owners. The city council made no decision as to whether the petition contained the amount of "frontage foot" owners required by the statute, nor did the petitioners have a hearing on the matter. Therefore, there was no decision by the council upon which the district court could find error. In that case we decided that whenever the sufficiency of a remonstrance petition is questioned in court, the fact should be determined without reference to the actions of the city council. The multitude of Nebraska cases following *Chan* that concern review of decisions of lower tribunals clearly establish that the review must be conducted upon filing of a petition in error unless another right of appeal is given through statute. This could not be accomplished in *Chan* because there was no decision issued by the lower tribunal to review. In this case it is clear that the Ralston City Council, in a public council meeting and against the objections of Abboud, decided to reject the remonstrance petitions filed by Abboud. This decision was final, judicial in nature, and may be reviewed only upon the filing of a petition in error in the district court.

Abboud has failed to comply with the procedural requirements for review of a decision of a tribunal such as the Ralston City Council. He is incorrect in asserting that this court's as well as the district court's standard of review of the actions of the Ralston City Council is de novo. Abboud's only remedy was to file a petition in error requesting the district court to reverse or modify the decision of the Ralston City Council. This court could then review the district court's determination on appeal. He has failed to file a petition in error, and therefore the district court and this court are without jurisdiction to hear his claim. The district court assumed that Abboud's amended petition was a petition in error for the purpose of concluding that the word "elector" in § 16-202 required that signers of the petitions be registered voters. This does not mean that the amended petition was a petition in error. Abboud's petition did not contain a record of the Ralston City Council hearing at which the remonstrance petitions were rejected. It did not contain a copy of the final order of the city council, as required by *Meier, supra*, and *Andrews, supra*,

although Abboud does make reference to the language in ordinance No. 765. Abboud did not specify what errors of law were committed by the Ralston City Council in reaching its decision. This is not sufficient to constitute a petition in error. Abboud has not properly presented his claims before either the district court or this court. Therefore, we are without jurisdiction to consider his claim.

CONCLUSION

An injunction is an equity action. *Federal Land Bank of Omaha v. Swanson*, 231 Neb. 868, 438 N.W.2d 765 (1989). Permanent injunctive relief is available only where there is no adequate remedy at law, probable success on the merits has been demonstrated, and the balance of equities favors the moving party. See, *Aro Inv. Co. v. City of Omaha*, 179 Neb. 569, 139 N.W.2d 349 (1966); 43 C.J.S. *Injunctions* § 16 (1978). We have discussed above the right of the City to sell the lakebed property to Lakeview and have determined that the City is permitted to do so because the lakebed property was never dedicated to public use as a park, and in the alternative, the City lawfully abandoned use of the property as a park when it leased the land to Lakeview. Therefore, Abboud has failed on the merits of his claim. We will also assume that Abboud has no adequate remedy at law because the lakebed property is unique, and Abboud, as a citizen of Ralston, cannot be compensated by money damages for loss of ownership of the property by the City. However, we do not believe that Abboud has demonstrated that the balance of equities favors him as the moving party, and therefore he is not entitled to injunctive relief in this action.

Abboud claims that he relied on the lakebed property's continued use as a public park when he purchased his lot located near the golf course. In other words, he desires that the property continue to be used as a golf course for fear the value of his property will decrease. While this fear is a legitimate one, we do not feel that Abboud's desire to maintain his land value outweighs the loss that the City and Lakeview would incur if Lakeview is required to deed the land back to the City. As the diagram on page 328 indicates, the golf course is constructed

both on the lakebed property and on the adjoining piece of property purchased by Lakeview from the City. This adjoining piece of property was not purchased from the Eipperles with the park bond funds and is therefore not burdened with a public trust under *Gallagher v. City of Omaha*, 189 Neb. 598, 204 N.W.2d 157 (1973). None of our above discussion concerning the applicability of the *Gallagher* rule pertains to this piece of property. Lakeview holds title to this land free from restriction. The only property Abboud seeks to have revert to ownership by the City is the lakebed property purchased with the bond funds. This would necessitate placing the ownership of a single golf course in the hands of two different parties; thus Lakeview and the City would each own a portion of the course. Consequently, the golf course property would be rendered virtually unmarketable and its value would dramatically decrease.

Since Abboud has insisted that this property was and is a public park, under the rules reiterated in *Golf V. R. Co. v. City of Sioux City*, 222 Iowa 433, 269 N.W. 451 (1936), and *Clement v. O'Malley*, 95 Ill. App. 3d 824, 420 N.E.2d 533 (1981), to maintain the property as a public park the City would have to operate the course itself. In order to accomplish this the City would have to buy or lease back the adjoining piece of property from Lakeview and thus become the sole owner or operator of the golf course, something it sought to avoid doing in the first place by leasing and then selling the land to Lakeview. Since Lakeview's portion of the golf course is worthless by itself, Lakeview would likely sell or lease the land to the City, but only at a high price in order to recoup costs that went into building and maintaining the golf course.

Even if we assume that the land is conveyed back to the City, Abboud has not proposed a manner in which Lakeview can be compensated for the building and construction expenses. The lease between the City and Lakeview expressly provided protection for Lakeview in the form of a right of first refusal if the City ever decided to sell the property or Omaha ever decided to annex Ralston. Obviously both the City and Lakeview contemplated the eventual sale of the land and agreed to the purchase option and the rental price, as well as to the purchase price for the land. If the land were to be conveyed back to the

City, at the very least Lakeview is entitled to a refund of the purchase price with interest. In turn, the City should receive rent on the property for the time Lakeview owned the property. However, a refund of the purchase price does not compensate Lakeview for the money it spent building the golf course. The $90,000 price agreed upon for the property was applicable only to Lakeview. Reflected in the price was the fact that Lakeview had already spent a large amount of money constructing the golf course. If the City had offered the land for sale to another party, the price certainly would have reflected the value of the land as improved with the golf course. Undoubtedly this price would have been higher than the $90,000 price agreed upon between the City and Lakeview because the land was worth more improved with the course. A refund to Lakeview of only the $90,000 purchase price would not fully compensate Lakeview for the amount expended on the golf course. Lakeview would be forced to take a loss on the construction costs of the course.

In summary, Abboud has not demonstrated how the sale of the lakebed property to Lakeview has damaged him sufficiently so as to outweigh the potential detriment to the City and Lakeview. Clearly, the hardships likely incurred by the City and Lakeview in the event the property is deeded back to the City outweigh any concern Abboud may have regarding his property values. Abboud has not demonstrated how his situation will be any different now that Lakeview owns the property than it was when the City owned the land. Abboud's request for injunctive relief is denied. The title to the lakebed property is to remain with Lakeview. The decision of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

NATURAL GAS PIPELINE COMPANY OF AMERICA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE. TRAILBLAZER PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 461

Filed March 1, 1991. Nos. 89-901, 89-902.

1. **Taxation.** The power to tax is exercised when the tax is levied.
2. **Constitutional Law: Taxation.** Commutation of taxes in any form whatever is prohibited by Neb. Const. art. VIII, § 4.
3. **Statutes: Legislature.** The Legislature may, for the purpose of legislating, classify persons, places, objects, or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class.
4. _____: _____. A legislative classification must operate uniformly on all within a class which is reasonable.
5. **Constitutional Law: Taxation: Railroads.** The classification of railroad rolling stock as exempt in Neb. Rev. Stat. §§ 77-202.47 and 77-202(11) (Reissue 1990) is not based on any real distinction between railroads and other common carriers and is invalid as special legislation in violation of Neb. Const. art. III, § 18, and the uniformity clause of Neb. Const. art. VIII, § 1.
6. **Federal Acts: Taxation: Railroads.** The federal Railroad Revitalization and Regulatory Reform Act of 1976 prohibits only discriminatory taxation of railroads and does not prohibit the nondiscriminatory taxation of railroads by a state.
7. **State Equalization Board: Taxation: Valuation.** If the State Board of Equalization and Assessment arbitrarily undervalues a particular class of centrally assessed property, so that another class of such property is valued disproportionately higher, the valuation of the latter class of property must be lowered so that it will be equalized with the other property.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, and Bruce J. McWhirter, of Ross & Hardies, for appellants.

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

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

PER CURIAM.

This is an appeal from the findings and order of the State

Board of Equalization and Assessment (Board) dated August 15, 1989, denying claims for property tax relief submitted by various centrally assessed and locally assessed claimants. Pursuant to this court's order of September 11, 1989, the parties filed a "case stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989), separately setting forth the rulings of the Board complained of by the appellants and the exceptions and contentions of the parties with respect to those issues. In view of a community of issues and counsel, we have consolidated the appeals of Natural Gas Pipeline Company of America (NGPL) (case No. 89-901) and Trailblazer Pipeline Company (Trailblazer) (case No. 89-902) for disposition.

I. BACKGROUND

NGPL and Trailblazer are the owners of centrally assessed property in the State of Nebraska and operate natural gas transmission pipelines in Nebraska. The appellants' property in Nebraska includes real estate and personal property.

After our opinion in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), was filed on July 14, 1989, NGPL and Trailblazer sought equalization by the Board of the value of their property for Nebraska taxation. See Neb. Rev. Stat. § 77-506 (Reissue 1990).

A. 1988 Tax Year

In *Northern Natural Gas Co.*, this court considered the effect of *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), which construed § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988) (the 4-R Act). Section 306(1)(d) prohibits the states from imposing a tax on transportation property when the tax "results in discriminatory treatment of a common carrier by railroad . . . ."

In reviewing the 4-R Act, the U.S. Court of Appeals noted that the act prohibits imposition of a tax which discriminates against railroads, and considered personal property tax exemptions in determining whether there was discriminatory

tax treatment of railroads by the Nebraska tax structure. The court concluded: "When the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against Trailer Train and violates § 306(1)(d) of the 4-R Act." 885 F.2d at 418. The federal court then affirmed the injunction, granted by the trial court, which prevented the State of Nebraska from "collection of the discriminating tax." *Id.*

In *Northern Natural Gas Co., supra*, considering the effect of the *Trailer Train Co.* decision, we concluded that disproportionality in taxation within a class of property required this court to

> correct [a] constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. [Citations omitted.] This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.

232 Neb. at 815, 443 N.W.2d at 256.

In *Northern Natural Gas Co.*, we also considered whether a gas transmission pipeline was a fixture and, therefore, real estate taxable pursuant to Neb. Rev. Stat. § 77-103 (Reissue 1986). To resolve that issue, we employed a three-part common-law test to determine whether an item was a fixture: "(1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold." 232 Neb. at 817, 443 N.W.2d at 257. Applying the foregoing test, we concluded that a natural gas transmission line was not a fixture, since "the pipeline is not adapted to the use to which the ground in which it is embedded is applied," 232 Neb. at 821, 443 N.W.2d at 259, and concluded that the taxpayer's intention "was not to convert its annexations into fixtures. Consequently, we find the pipelines to be personal property," 232 Neb. at 822, 443 N.W.2d at 259.

Therefore, this court reversed the decision of the Board, which had refused Northern Natural Gas Company and Enron Liquids Pipeline Company's request that their property be equalized with property of railroads and car companies operating in Nebraska, and remanded the matter to the Board for further proceedings.

In the companion cases of *Trailblazer Pipeline Co. v. State Bd. of Equal.*, 232 Neb. 823, 442 N.W.2d 386 (1989), also decided July 14, 1989, this court held the rights of Trailblazer and NGPL regarding their equalization requests in 1988 were determined by *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), and remanded those causes to the Board for further proceedings.

B. 1989 Tax Year

In the proceedings after remand of the appellants' causes, the Board received evidence on August 11, 1989, pursuant to a stipulation among the parties, regarding the appellants' requests for equalization. Much of the stipulated evidence was the same as that presented in the 1988 hearing which was the basis for Trailblazer's and NGPL's previous appeals reported in *Trailblazer Pipeline Co., supra.* The parties have stipulated that NGPL's property in Nebraska was valued at $19,147,520 and that Trailblazer's property was valued at $95,070,376. Approximately 92 percent of NGPL's property in Nebraska is personal property and approximately 99 percent of Trailblazer's property in Nebraska is personal property.

At the equalization hearing on August 11, the Board set the equalization rate at 91.91 percent of actual value and, in its order of August 15, 1989, construed the appellants' requests for equalization as applications for tax exemption, stating:

> Equalization is the process by which the State Board assures that all tangible property and franchises, which are subject to tax, are assessed at a uniform level of value. The State Board does not have the authority to consider a claim for equalization of one class or subclass of property to a level of another class or subclass of property that is exempt or is not subject to tax, as this is a claim for exemption. While a claim as to the propriety of an

exemption may have merit, it is not properly raised before the State Board, and the claimants should seek other avenues of redress.

The claims brought before the State Board . . . are . . . claims to have the valuation of a subclass of personal property, commonly known as business personal property, equalized to the level of value of the personal property of car companies and railroad companies. . . .

The State Board finds that the state of Nebraska is preempted from taxing the personal property of car companies and railroad companies pursuant to a federal adjudication of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act, commonly referred to as the 4-R Act. 49 U.S.C. section 11503(b)(4). As a result of such federal preemption, the State Board finds that the personal property of car companies and railroad companies is not subject to tax and, therefore, cannot be the basis for a claim of equalization.

The State Board finds that in reality the claims of these centrally assessed claimants and locally assessed claimants are claims requesting to have their business personal property and/or real property exempt from taxation. The State Board finds that it has no statutorial [sic] or constitutional authority to rule upon such a claim.

II. ISSUES ON APPEAL

After the Board denied the claimants' equalization requests, NGPL and Trailblazer appealed, contending that the equalization rate of 91.91 percent violated Neb. Const. art. VIII, § 1, concerning uniform and proportionate values for taxation, and violated the equal protection clause of U.S. Const. amend. XIV. The appellants also contend that the Board erred by not granting the requested equalization in conformity with the uniformity and proportionality provision of the Nebraska Constitution and that the Board erred in its conclusion that it lacked authority to act on the appellants' requests for equalization.

Without responding to the appellants' assignments of error, the State filed its briefs and referred to events which occurred

after the Board's decision of August 15, 1989, and which occurred after the appellants filed their briefs in this appeal, namely, L.B. 1 and L.B. 7, which were passed on November 17, 1989, during a special session of the Nebraska Legislature and which, with an emergency clause, were signed by the Governor on November 21, 1989. In its briefs, the State contends that L.B. 1 and L.B. 7 render these appeals moot.

A. L.B. 1 AND L.B. 7

L.B. 1 provides in part:

> Section 1. That section 77-103, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:
>
> 77-103. The terms real property, real estate, and lands shall ~~include~~ mean city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto, and pipelines, railroad track structures, electrical and telecommunication poles, towers, lines, and all items actually annexed to such property, and any interest pertaining to the real property or real estate.
>
> The sole test for determining whether an item is a fixture or an improvement shall be whether there is actual annexation to the real property or real estate or something appurtenant thereto. Unless specifically enumerated in this section, real property and real estate shall not include machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes.
>
> Sec. 2. The changes made to section 77-103 by this legislative bill are expressly intended to apply to all litigation concerning ad valorem property taxes for the 1989 calendar year, including all litigation pending on the effective date of this act. [Sections 1 and 2 underscoring indicates amendatory new language.]

Sec. 3. This act shall become operative on January 1, 1989.

Sec. 4. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof. [Sections 3 and 4 are amendatory new language.]

The State concedes that the Legislature cannot, by definition, create a class of exempt personal property under the authority granted under Neb. Const. art. VIII, § 2, by defining property which clearly constitutes real property to be personal property.

L.B. 7, § 1, which is entirely new legislation, provides:

(1) The Legislature finds and declares that the levy and collection of property taxes upon the personal property of car line companies, which is composed of railroad rolling stock, has been enjoined by federal court order as a discriminatory tax in violation of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. 11503(b)(4).

(2) The Legislature finds and declares that, as a result of such court action, the Nebraska Supreme Court has ordered that the personal property of certain other taxpayers must be treated the same as that of such car line companies, which is in the same class for taxation purposes, but not taxed by virtue of federal court order, thereby diminishing to a potentially substantial degree the property tax base of local governmental subdivisions and consequently jeopardizing the continued adequate funding of essential public services provided by those subdivisions.

(3) The Legislature further finds and declares that some types of agricultural and manufacturing products and natural resources must or can more efficiently be transported over rails due to size, weight, and other restrictions or conditions and the transportation of such products is vital to the commerce and industry of the state and that therefor it is in the best interests of the state to enact legislation to encourage the maintenance in and

> through the state of railroad rolling stock which is the means of transporting such products.
>
> (4) Therefor, the Legislature finds and declares that a rational basis exists to classify railroad rolling stock as a separate and distinct class of property and to exempt the class from property taxation pursuant to the authority granted under Article VIII, section 2, of the Constitution of Nebraska.
>
> (5) It is the express intention of the Legislature that the changes made by this legislative bill shall affect all state litigation pending as of the effective date of this act.

This language has been codified at Neb. Rev. Stat. § 77-202.47 (Reissue 1990).

L.B. 7, § 2, amended Neb. Rev. Stat. § 77-202 (Cum. Supp. 1988) regarding personal property which is exempt from taxation. In its first 10 subsections, L.B. 7, § 2, reiterated the same exemptions which existed under § 77-202 (Cum. Supp. 1988), amended by L.B. 7, while subsection (11) (§ 77-202(11) (Reissue 1990)) provided for a new exemption of personal property as follows:

> (11) Railroad rolling stock shall be exempt from the personal property tax. Railroad rolling stock shall mean locomotives, freight cars, and other flanged-wheel equipment operated solely on rails and owned, leased, or used for or in railroad transportation. For tax year 1989, this subsection shall apply to railroad rolling stock upon which no levy has been made or upon which no tax may lawfully be collected.

L.B. 7, § 9, states: "This act shall become operative on January 1, 1989." L.B. 7, § 10, recites: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof."

The State contends that L.B. 1 and L.B. 7 render these appeals "moot," and argues:

> [T]he enactment of LB 7 effectively eliminates and moots any claim of a lack of "equalization" of appellant's personal property with the personal property of railroads and car companies for tax year 1989 as, by virtue of the

> Legislature's establishment of a separate class of exempt personal property consisting of railroad rolling stock under the authority granted pursuant to Article VIII, Section 2, of the Nebraska Constitution, appellant's claim improperly seeks equal treatment with property which is separately classified and exempted from taxation under state law, and not "other taxable property in the same class." . . . In short, LB 7 removes any basis for appellant to assert a lack of "equalization" with regard to the taxation of its personal property under Nebraska law in relation to the personal property of railroads and car companies operating in Nebraska for 1989, as found in the Court's prior decision in [*Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989)].

Briefs for appellee at 13-14.

Regarding L.B. 1, the State presents an argument much in the same vein as its argument for retroactivity of L.B. 7, that is, the statutory definition of "real estate," contained in L.B. 1 as an amendment to § 77-103 (Reissue 1986), renders these appeals "moot."

The State's reliance on events subsequent to the Board's action in August 1989 has presented an unusual procedural aspect to these appeals. Responding to the State's position of mootness, the appellants' reply brief contains several propositions on the mootness issue raised for the first time in the State's briefs. In our reading of the appellants' reply brief, we construe the various legal propositions stated by the appellants to be assignments of error which would have been asserted in their initial briefs if L.B. 1 and L.B. 7 had been in existence and, therefore, relied upon by the Board in its action taken in August 1989.

B. Application of L.B. 1 to 1989 Tax Year

The State's arguments concerning L.B. 1 and L.B. 7 presuppose that the two pieces of legislation could be properly applied in the 1989 tax year. We reach the opposite conclusion (1) because the subject matter of L.B. 1 is irrelevant to the matter of equalization and (2) because the application of L.B. 1

for the 1989 tax year would result in the commutation of a tax, in violation of Neb. Const. art. VIII, § 4.

As noted above, L.B. 1 changes the definition of "fixture," apparently to avoid the characterization of certain pipeline property as personal property rather than real estate. The practical effect of L.B. 1, therefore, would be to increase the proportion of pipeline property taxable as real estate. See, e.g., *Northern Natural Gas Co., supra*. In this action, the appellants requested "equalization." For purposes of equalization, however, it is immaterial whether the appellants' property is categorized as personal property or real estate.

Neb. Const. art. VIII, § 1, provides that, except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904). Accordingly, Neb. Rev. Stat. § 77-201 (Reissue 1990) provides that "all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made." The State agrees that "both real property and taxable personal property are within the class of 'all tangible property' under Article VIII, Section 1, of the Nebraska Constitution." Briefs for appellee at 47.

Since these causes must be remanded to the Board for further proceedings, we further observe that L.B. 1 cannot be constitutionally applied for the 1989 tax year because such application would result in the commutation of a tax, in violation of Neb. Const. art. VIII, § 4, which provides:

> Except as to tax and assessment charges against real property remaining delinquent and unpaid for a period of fifteen years or longer, the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any

> corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever; *Provided*, that the Legislature may provide by law for the payment or cancellation of taxes or assessments against real estate remaining unpaid against real estate owned or acquired by the state or its governmental subdivisions.

The power to tax is exercised when the tax is levied. See *Am. Prov. of Servants of Mary Real Estate Corp. v. County of Douglas*, 147 Neb. 485, 23 N.W.2d 714 (1946). In the present case, the entire process for levying taxes on valuations established in 1989 had been fully completed by the time L.B. 1 was enacted.

Pursuant to Neb. Rev. Stat. § 77-509 (Reissue 1990), the Board must certify its order pertaining to valuation and equalization to county officials on or before August 15. The county boards must then levy taxes for all political subdivisions by September 15. Neb. Rev. Stat. § 77-1601 (Reissue 1990). Section 77-1601 contains a special provision for further extension of budgets and levies, but such must be completed prior to November 1.

The county officer responsible for preparing the tax list must extend the levies and prepare the tax list for all property prior to November 1. See Neb. Rev. Stat. § 77-1613 (Reissue 1990). Such tax lists must, for personal property, be delivered to the county treasurer on or before November 1. See Neb. Rev. Stat. § 77-1616 (Reissue 1990). Those personal property taxes are due and become a lien on November 1. See Neb. Rev. Stat. § 77-205 (Reissue 1990).

The tax year is, therefore, completed on November 1, and the collection process cannot be changed without violating the provisions of Neb. Const. art. III, § 18, and Neb. Const. art. VIII, § 4. See, *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936); *Lynch v. Howell*, 165 Neb. 525, 86 N.W.2d 364 (1957) ("[t]he power to tax is determinable as of the date the tax is levied" (syllabus of the court)).

In *Steinacher v. Swanson, supra*, this court determined that

an act which provided that, under certain conditions, delinquent personal taxes could be paid in five equal annual installments and delinquent realty taxes could be paid in ten annual installments was a violation of Neb. Const. art. VIII, § 4, and the prohibition against a commutation for taxes "in any form whatever." In *Steinacher*, the court referred to a definition of "commutation" expressed in *Woodrough v. Douglas County*, 71 Neb. 354, 361, 98 N.W. 1092, 1095 (1904):

> [C]ommutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor or of a single payment in lieu of a number of successive payments, usually at a reduced rate.

Steinacher provides an insight into the types of statutes which are prohibited by Neb. Const. art. VIII, § 4:

> It is quite apparent that the framers of the Constitution of 1875, the one first containing this provision, and the members of all subsequent constitutional conventions, have been imbued with the idea that all taxpayers are entitled to the same treatment by the government they support. For this reason they have expressly written into our Constitution that the legislature not only shall have no power to release or discharge any one from the payment of his share of taxes, but a commutation for taxes *in any form whatever* is prohibited. From an examination of the definitions of the word "commutation" hereinbefore set out, and the use of the words "in any form whatever," contained in our constitutional provision, it is quite apparent that the legislature is prohibited by the Constitution from changing the method of payment of any tax once levied. Clearly, under this constitutional provision, the legislature cannot reduce the amount of the tax, extend the time of payment, or in any manner change the method of payment.

(Emphasis in original.) *Steinacher, supra* at 446, 268 N.W. at 321.

The real and personal property involved in these cases is

centrally assessed. As we noted above, the effect of L.B. 1, if applied retroactively to the 1989 tax year, would be to go back in time, increase the proportion of appellants' property that would presumably be taxable as real estate under our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), and significantly decrease the proportion of the appellants' personal property. However, the 1989 levy on both real and personal property was completed, and the taxing power exercised, 20 days before L.B. 1 was enacted.

Although the total amount of property subject to levy would remain the same, the effect of applying L.B. 1 in the 1989 tax year would involve the substitution of one sort of payment for another—the payment of a tax on real estate for a tax on personal property. This substitution, in effect, amounts to a commutation of the tax levied on the appellants' personal property and is prohibited by Neb. Const. art. VIII, § 4.

C. Application of L.B. 7 to 1989 Tax Year

As stated above, L.B. 7, § 2, amending § 77-202 at new subsection (11), exempts railroad rolling stock from taxation. The bill contains a specific legislative finding that

> the levy and collection of property taxes upon the personal property of car line companies, which is composed of railroad rolling stock, has been enjoined by federal court order as a discriminatory tax in violation of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b)(4).

Accordingly, the Legislature specifically found and declared that "a rational basis exists to classify railroad rolling stock as a separate and distinct class of property and to exempt the class from property taxation . . . ."

The appellants argue that the exemption of railroad rolling stock is a discriminatory classification which is unjustified and arbitrary.

We first note that the Legislature's declaration that taxation of railroad rolling stock was found to be a discriminatory tax in violation of federal law is incomplete. In *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), the court held only

that exemptions in Nebraska's personal property tax system favored the property of a majority of possible taxpayers in Nebraska and denied similar favorable treatment to the property of rail carlines; hence, Nebraska's personal property tax system imposed an unfair and discriminatory tax on railroads, in violation of the 4-R Act. Therefore, taxation of railroad property does not, in and of itself, violate federal law, as the Legislature seems to suggest. As noted in *Trailer Train Co.*, when property of a majority of possible taxpayers is exempted from taxation and railroad property is not exempt, there is discrimination against railroads which results in a violation of the 4-R Act.

In subsection (3) of L.B. 7, § 1, the Legislature attempts to justify the tax exemption of railroad rolling stock through the statement that

> some types of agricultural and manufacturing products and natural resources must or can more efficiently be transported over rails due to size, weight, and other restrictions or conditions and the transportation of such products is vital to the commerce and industry of the state and that therefor it is in the best interests of the state to enact legislation to encourage the maintenance in and through the state of railroad rolling stock . . . .

In *State, ex rel. Cone v. Bauman*, 120 Neb. 77, 82-83, 231 N.W. 693, 695 (1930), this court stated:

> The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class.

"A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are 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, 243, 369 N.W.2d 85, 87 (1985). See,

also, *State ex rel. Meyer v. Knutson*, 178 Neb. 375, 133 N.W.2d 577 (1965).

The Legislature's exemption of railroad rolling stock is not based on any real distinction between railroads and other common carriers. If "size" and "weight," mentioned in the Legislature's stated justification for the classification, refer to things which are large and heavy and the "restrictions or conditions" means that speed is not required, then the expressed legislative justification could just as easily refer to trucks and trucking companies as to railroads. On the other hand, if one thinks in terms of things which are small and light and must be moved quickly, the expressed justification could just as easily refer to airlines and airline companies.

The Legislature's stated justification is illusory. We fail to see any real and substantial difference between personal property used for income production by one type of business and the same type of income-producing personal property used by another type of business.

The Legislature's effort to exempt railroads is not based on a reasonable classification and violates both the proportionality and special legislation requirements of the Nebraska Constitution. There is no reasonable basis for treating railroads differently from other common carriers; therefore, the distinction, as a classification and basis for an exemption from personal property tax, reflected in L.B. 7, results from special legislation, prohibited by Neb. Const. art. III, § 18, and violates the uniformity clause of Neb. Const. art. VIII, § 1.

III. INITIAL ASSIGNMENTS OF ERROR

Having determined that L.B. 1 cannot constitutionally be applied to the 1989 tax year and that L.B. 7 is invalid as special legislation and in violation of the uniformity clause, we now address the assignments of error raised in the appellants' initial briefs.

A. Authority of the Board

First, there is the question concerning the Board's authority to act on the appellants' requests for equalization. The Board found that "the state of Nebraska is preempted from taxing personal property of car companies and railroad companies

pursuant to federal adjudication" of the 4-R Act. The Board then concluded that "the personal property of car companies and railroad companies is not subject to tax and, therefore, cannot be the basis for [the appellants'] claim of equalization."

The Board's conclusion as to "preemption" is clearly erroneous. As we read *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), and the 4-R Act, the State of Nebraska is prohibited by federal law from discriminatorily taxing railroad companies. In other words, federal law prohibits Nebraska from "[t]he imposition of any . . . tax which results in discriminatory treatment of a common carrier by railroad . . . ." § 306(1)(d) of the 4-R Act.

For that reason, in *Trailer Train Co.*, the State of Nebraska was enjoined from "collection of the discriminating tax," 885 F.2d at 418, but is not prohibited from levying a lawful tax on a common carrier by railroad. In many respects, the effect of the 4-R Act is very similar to and substantially no different from the effect to be achieved through the uniformity and proportionality clause in Neb. Const. art. VIII, § 1.

Therefore, whereas the Board concluded that it could not consider the appellants' requests for equalization in view of the 4-R Act and interpretational decisions by federal courts, we conclude that § 306(1)(d) of the 4-R Act, as interpreted by the federal courts, prohibits a discriminatory tax against a railroad but does not prevent a state's nondiscriminatory taxation of a railroad. A nondiscriminatory tax is what is required by the 4-R Act, not the abolition of legitimate state taxation of railroads.

B. Appellants' Requests for Equalization

Second, the Board construed the appellants' requests as a claim for exemption from taxation. We do not deny that the actual extent of the actual taxation of the appellants' property may be greatly affected by the impact of the 4-R Act and federal court decisions such as *Trailer Train Co.* However, to describe the appellants' requests for equalization as requests for exemption from taxation is unrealistic and arbitrary. The fact remains that the appellants requested equalization of their property, which must be considered in the light of applicable law, state and federal, statutory, and declared by judicial

interpretation of controlling statutes.

The basic principles pertaining to equalization of assessments are found in *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 302, 344 N.W.2d 620, 625 (1984):

> [I]t is permissible to reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property. To comport with our Constitution's requirement that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property," however, the results obtained by such permissible different methods must be in some way correlated so that the results reached shall be uniform and proportionate and shall not exceed actual value.

Furthermore,

> if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state.

Northern Natural Gas Co. v. State Bd. of Equal., 232 Neb. 806, 815, 443 N.W.2d 249, 256 (1989).

We therefore remand these causes to the Board for further proceedings consistent with this opinion and other applicable law, which includes *Northern Natural Gas Co. v. State Bd. of Equal., supra,* and *Trailblazer Pipeline Co. v. State Bd. of Equal.*, 232 Neb. 823, 442 N.W.2d 386 (1989).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE and FAHRNBRUCH, JJ., concurring.

While we concur in the result of the court's judgment, we wish to point out that the entire property tax base for school districts and other local units of government may be at risk.

The controlling federal law in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), was § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, which prohibits any state from imposing "any other tax

which results in discriminatory treatment of a common carrier by railroad . . . ." The court, in discussing the Nebraska statutory pattern of exemptions, simply held that "[w]hen the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against Trailer Train and violates . . . the 4-R Act." 885 F.2d at 418. There are similar federal statutes affecting interstate commerce in regard to air carriers, 49 U.S.C. § 1513 (1988); motor carriers, 49 U.S.C. § 11503a (1988); national banks, 12 U.S.C. § 548 (1988); federal savings and loan associations, 12 U.S.C. § 1464(h) (1988); and federal credit unions, 12 U.S.C. § 1768 (1988).

This state's response to *Leuenberger, supra*, was to enact L.B. 7, providing an additional exemption, this time for railroad rolling stock, thereby creating even greater discriminatory treatment against that commercial and industrial property which is not exempted.

It becomes obvious, therefore, that railroad rolling stock cannot be taxed at anything approaching the commanded "actual value," Neb. Rev. Stat. § 77-201 (Reissue 1990), absent legislative repeal of the exemptions set out in Neb. Rev. Stat. § 77-202 (Reissue 1990), or at least those of which it cannot be said that a justifiable and reasonable classification exists for the exemption. On the face of the statute, those exemptions that appear justifiable relate to exemptions of property whose tax proceeds would not justify the costs of collection, e.g., household goods, and to exemptions of property owned by nonprofit religious, educational, charitable, horticultural, or cemetery organizations, which property is used for those purposes.

If the system of ad valorem taxation is worthy of surviving as a method of supporting local units of government, then under our constitutional system, all property, except household goods and property owned by nonprofit educational, charitable, horticultural, or cemetery organizations, which property is used for those purposes, must be taxed or no property may be taxed.

This court in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), wrongfully justified the partial exemption from

taxation of an entire class of personal property, agricultural machinery, holding that the power to exempt personal property from taxation granted by the 1970 amendment to Neb. Const. art. VIII, § 2, to wit: " 'The Legislature *may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation*' " (emphasis in original), 192 Neb. at 67, 218 N.W.2d at 896, prevails over the uniformity requirement of Neb. Const. art. VIII, § 1, and is subject only (if at all) to the reasonableness of the classification of exempt property.

It has been said that "[t]axes are what we pay for civilized society," *Compania de Tabacos v. Collector*, 275 U.S. 87, 100, 48 S. Ct. 100, 72 L. Ed. 177 (1927) (Holmes, J., dissenting), and that "governmental costs not shared by one group of taxpayers must necessarily be shifted to and be borne by the remaining taxpayers . . . ." *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 62, 425 N.W.2d 320, 322 (1988). When property, regardless of whether it is real or tangible personal property, is classified so that it provides exemption from taxation to all but a small amount of property, the classification and exemption may well be unreasonable and arbitrary and may fall within the prohibition of Neb. Const. art. III, § 18, which is this state's "equal protection clause."

But, even if this state's present classification of property as exempt and not exempt was to be found valid under Nebraska's Constitution, it could not withstand muster under federal law. See *Leuenberger, supra*. See, also, *Trailer Train Co. v. State Bd. of Equalization*, 511 F. Supp. 553 (N.D. Cal. 1981) (stating that § 306 of the 4-R Act preempts discriminatory state tax law), *modified* 697 F.2d 860 (9th Cir. 1983), *cert. denied* 464 U.S. 846, 104 S. Ct. 149, 78 L. Ed. 2d 139; *State of Tenn. v. Louisville & N. R. Co.*, 478 F. Supp. 199 (M.D. Tenn. 1979) (upholding supremacy of federal law), *aff'd* 652 F.2d 59 (6th Cir. 1981), *cert. denied* 454 U.S. 834, 102 S. Ct. 135, 70 L. Ed. 2d 114.

The principles in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), in regard to discriminatory treatment of property, if followed to their logical conclusion, might well be applied not only to personal property, but also to real estate.

U.S. Const. art. VI provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In *Leuenberger, supra*, the U.S. Court of Appeals applied the provision of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, § 306(1)(d). The court condemned as discriminatory Nebraska's constitutional and statutory scheme of taxation of 25 percent of personal property and exemption of the remaining 75 percent. The personal property tax simply could not be enforced against railroad rolling stock while the exemptions exist. It is more than mere speculation that the court of appeals might well rule similarly in regard to other taxpayers who are also protected from tax discrimination by federal legislation.

In view of the numerous exemptions currently granted by Nebraska, the supremacy clause makes it impossible to levy taxes "by valuation uniformly and proportionately" on most real and tangible property, as commanded by Neb. Const. art. VIII, § 1. The 4-R Act and its companions in the supreme federal law prohibit taxation without taking into account exempt property, thus reducing the valuation of the protected properties to at least something less than true value, if logically any value at all.

At the same time, the boards of equalization cannot exercise their duty of valuing uniformly if the federally protected property and exempt property are not taxed and nonprotected and nonexempt property is valued and taxed.

The decision in *Leuenberger, supra*, has sounded the death knell for personal property taxation in this state unless the preferential treatment to certain classes of personal property is abandoned. Taxation of real estate may also be at risk for the same reasons.

GRANT, J., concurring.

I join in the concurring opinion of Judges White and

Fahrnbruch. I write to discuss another point which I feel should also be determined by the court at this time in connection with L.B. 1.

As noted in the opinion of the court, L.B. 1 departs from the common-law definition of "fixture" in order to avoid the characterization of certain property as personal property rather than real estate, thus increasing the proportion of pipeline property taxable as real estate under *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). We have concluded that L.B. 1 cannot constitutionally be applied to the 1989 tax year. I fully agree with that decision, but I also believe that L.B. 1 is unconstitutional on its face, and we should make that determination at this time.

Although the Legislature has broad power to define property for tax purposes, its power to define is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional definition and (2) the legislative definition must be reasonable and cannot be arbitrary or unfounded. See, *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974); *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934).

The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. In *State ex rel. Meyer v. Peters, supra*, we considered legislation purporting to exempt "household goods" from taxation, pursuant to Neb. Const. art. VIII, § 2, which provided, "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part . . . ." The definition of "household goods" in the taxing statute at issue in *Peters*, however, included "major appliances either attached or detached to real property." In other words, the statute purported to exempt property which would, under the common law of fixtures, be considered real estate. In holding that the Legislature could not constitutionally exempt such fixtures from taxation, we recognized the difficulty inherent in granting the Legislature unbridled definitional powers:

> Any definitional powers given to the Legislature are

> prefixed and limited. The power to define household goods and personal effects necessarily is limited to those articles which ordinarily would be understood to be embraced within that term. Certainly, it cannot be interpreted to give the legislature power to include air-conditioning systems, furnaces, automobiles or real estate within the term "household goods and personal effects." Since there must be a limit to such powers, it is reasonable to find the common law concepts serve as guides.

State ex rel. Meyer v. Peters, supra at 334, 215 N.W.2d at 524.

Similarly, in *Moeller, McPherrin & Judd v. Smith, supra*, the Legislature attempted to tax various items of intangible personal property as tangible personal property merely by defining them as such. This court struck down the attempted redefinition, observing:

> Section 77-104, Comp. St. 1929, which House Roll No. 9 purports to amend, provided that tangible property included all personal property possessing a physical existence, but excluding money, then defined intangible property as all other personal property, including money. Section 2 of House Roll No. 9 attempts to amend this by providing that tangible property shall consist of two classes, and that class 1 shall be all personal property possessing a physical existence, and then provides that class 2 of tangible property shall include stocks, notes, securities of foreign countries, accounts, judgments, liens of any kind, bonds, and all demands for labor, or other valuable thing, due or to become due. This introduces a new query, which is: May a legislature, under the guise of defining a word, do so with a definition which contravenes our Constitution, and which is not true or legal in fact? . . .
>
> Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the Legislature has power to define words used by it, but is this an unlimited power, or is it subject to reasonable construction? . . . In our opinion, there is a limit to the legislature's power to nullify and circumvent

> constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word.

Moeller, McPherrin & Judd v. Smith, supra at 432-33, 255 N.W. at 555-56.

Does the definition found in L.B. 1 tend to nullify or circumvent a provision of the Nebraska Constitution? I conclude that it does, in that Neb. Const. art. VIII, § 2, provides, "The Legislature may classify *personal property* in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." (Emphasis supplied.) In this case, the Legislature has not "classified" certain items of personal property, but has arbitrarily declared the personal property owned by an unfavored group of taxpayers to be "fixtures," which are presumably taxable as real estate under our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989).

Here, the Legislature has attempted to define and designate as a "fixture" that which is, in fact and in truth, personal property, and has gone beyond the bounds of its legitimate powers in doing so.

I also conclude that the classification set forth in L.B. 1 is unconstitutional because it is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and machinery and equipment used for other purposes.

Neb. Const. art. III, § 18, provides that "where a general law can be made applicable, no special law shall be enacted." Under this provision, legislation is unconstitutional if it is arbitrary and unreasonable in method of classification or if the classification does not rationally promote the purpose of the legislation.

In *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608-09, 300 N.W.2d 181, 187 (1980), we held:

> While it is true that the Legislature may classify where reasonable . . . it may not do so in an arbitrary manner. In *City of Scottsbluff v. Tiemann,* [185 Neb. 256, 266, 175 N.W.2d 74, 81 (1970)], we specifically said: "It is competent for the Legislature to classify objects of

> legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. [Citation omitted.] The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. [Citations omitted.] The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. [Citation omitted.] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* [Citations omitted.]" (Emphasis in original.)

See, also, *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

In L.B. 1, the classification of agricultural and business machinery is based solely on use. In *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970), this court was presented with the question of whether agricultural income-producing machinery and equipment used by any business which was required by law to report taxable income pursuant to the Internal Revenue Code constituted a reasonable classification for purposes of taxation. In that case, the Legislature attempted to separately classify for taxation purposes certain agricultural income-producing machinery and equipment. This method would have provided a different value of personal property specified in the act from that applied to all other tangible property in the same class.

In *McNeil, supra*, we observed that the establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity, contrary to Neb.

Const. art. VIII, § 1. We held:

> We necessarily find that the purported classification of property for tax purposes contained in the act does not rest on reasons of public policy, or any substantial difference of situation or circumstance that naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. It is therefore an attempt to create a classification within a classification without any reasonable grounds for so doing other than to secure advantages for those falling within the purview of the act. It is violative of the uniformity provisions of Article VIII, section 1, of the Nebraska Constitution. It is in effect special legislation in violation of Article III, section 18, of the Constitution.

Id. at 589-90, 177 N.W.2d at 599.

In the present case, "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" are tangible property which must be taxed uniformly as to both valuation and rate of tax. As we observed in *McNeil, supra* at 588-89, 177 N.W.2d at 598:

> There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests 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.

I would hold that L.B. 1 is unconstitutional in its entirety.

FAHRNBRUCH, J., joins in this concurrence.

CAPORALE, J., concurring.

I agree with the result reached by the majority and therefore join in its judgment.

Although there may be much of merit in what Judge Grant has written about L.B. 1, I agree with the majority's conclusion that the enactment cannot be constitutionally applied for the 1989 tax year.

Once that determination is made, further examination

appears inappropriate. See *County of Hall ex rel. Tejral v. Antonson*, 231 Neb. 764, 437 N.W.2d 813 (1989) (courts refrain from passing on the constitutionality of legislation unless such determination is necessary for the proper disposition of the questions raised on appeal). Accord, *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988); *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988); *Morse v. City of Omaha*, 67 Neb. 426, 93 N.W. 734 (1903).

L.B. 7 provides that for the 1989 tax year, the relevant section applies "to railroad rolling stock upon which no levy has been made or upon which no tax may lawfully be collected." As the majority's analysis of L.B. 1 demonstrates, the entire process for levying taxes on valuations established in 1989 had been fully completed by the time L.B. 7 was enacted. Consequently, L.B. 7, by its own terms, cannot apply to the issues presented for judicial determination in these cases.

Thus, again, while there may be merit in much of what the majority has declared with respect to L.B. 7, and perhaps too in much of what Judges White and Fahrnbruch have expressed in that regard, the above-cited rule of judicial self-restraint counsels against any present exploration of those issues.

SHANAHAN, J., concurring in part, and in part dissenting.

Although remanding these causes to the State Board of Equalization and Assessment is the correct result, cogent reasons for the remand, as such reasons appear to me, are quite different from the very suspect bases suggested elsewhere in this court's opinions in the present appeals.

For a centrally assessed taxpayer's appeal from a decision by the State Board of Equalization and Assessment, the standard of review was expressed in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 808-09, 443 N.W.2d 249, 252 (1989): "[T]he standard of review will be to search only for errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable." When this standard of review is applied in the present appeals, the state board's decision must be reversed.

The constitutional requirement that Nebraska property taxes

be levied uniformly and proportionately, see Neb. Const. art. VIII, § 1, is a rule of uniformity which applies to both the rate of taxation and valuation of property for tax-raising purposes. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987). "[T]he object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a *uniform standard of value*." (Emphasis in original.) *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 619, 134 N.W.2d 272, 278 (1965).

Equalization of assessments has for its general purpose to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904); *Gordman Properties Co. v. Board of Equal., supra.*

As a result of *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), issued on December 19, 1988, collection of the tax on personal property of Trailer Train, a centrally assessed car company-taxpayer in Nebraska, was permanently enjoined.

In the wake of *Trailer Train*, Natural Gas Pipeline Company (NGPL), as a centrally assessed "public service entity" within Neb. Rev. Stat. § 77-801 (Reissue 1990), requested that the state board equalize the value of NGPL's personal property for 1989. At the time of the August 15, 1989, hearing on NGPL's request, valuations for centrally assessed car companies and air transportation carriers were undetermined, but were expected to be determined in December 1989.

At the equalization hearing, the Nebraska Department of Revenue (DOR) informed the board that a "unit valuation method" was used to establish the value of personal property owned by railroads and public service companies, a "valuation of the entirety of a company, as opposed to a summation of individual parts of a company." Under the "unit valuation theory" or method, "particular assets . . . only develop value when there is an integrated use of [the] assets and the assets standing alone do not necessarily have an individual recognized value, [for example], a pipeline cut off at [a] county line would not necessarily have any value unless it's interconnected in a

complete unit." In applying the unit valuation method, DOR "allocates a portion of that total [unit] value . . . based on various factors, depending on [the] industry it is. These factors are intended to identify specific things about the companies that contribute to its value. Such as investment income, and other similar features." Although it is possible to determine a value for the various items of a centrally assessed taxpayer's personal property, that process "is extremely difficult, there's a lot of these types of property [that] do not carry value unless [they] are a part of the integrated unit." Nevertheless, according to DOR, through "unit valuation," personal property of railroad companies and public service entities is valued at "100 percent of market value." In reference to NGPL's equalization request, however, DOR used the 1989 "assessment sales ratio" for real estate in Nebraska's 93 counties, that is, the aggregate assessment sales ratio for residential and recreational acreages, commercial and industrial real estate, and agricultural land, which produced a factor of "91.91 percent," a weighted real estate average which was then applied to the value of NGPL's personal property. The board accepted the 91.91 real estate factor and set the 1989 equalization rate for NGPL's personal property at 91.91 percent.

As the result of the *Trailer Train* injunction, the state board faced a dilemma. If the value of NGPL's personal property were equalized with the value of other centrally assessed taxpayers' personal property, Trailer Train's personal property, which might have a value of "zero" for tax purposes as a result of the federal injunction, would become part of the equalization equation and perhaps necessitate a corresponding reduction in the tax value of NGPL's property, since the property of Trailer Train and NGPL apparently belong to the same general class. To avert that possibility, the State resorted to the 91.91 percent factor produced from the aggregate sales ratio of Nebraska real estate, although it was admittedly possible to achieve a value based on personal property of centrally assessed taxpayers—perhaps difficult, but, nevertheless, possible. Consequently, DOR resorted to real estate values to equalize the value of NGPL's personal property. In that process, DOR used values of real estate, nondepreciable

property with value ascertainable by different methods, in order to determine value for personal property, which is valued in relation to retail cost less depreciation. Thus, DOR's equalization method was not an attempt to compare apples with oranges, but an abortive attempt to establish a comparative similarity between oranges and orangutans. The absolute dissimilarity of property and essentially different values prevented an equalization under DOR's methodology. Were the adjustment of values made according to DOR's employed method, which was incorporated into the board's decision, there would truly be inequality in equalization. There is no factual basis for the board's equalization order; hence, the board's decision is arbitrary, unreasonable, and capricious and must be set aside.

In *Sommerfeld v. City of Seward*, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985), we stated: "It has long been a rule in Nebraska that a court, including the Supreme Court, will decline to pass upon constitutionality of legislation unless such determination of constitutionality is necessary for proper disposition of an action." Therefore, if chronology has rendered the subject matter of L.B. 1 "irrelevant to equalization," as other members of this court believe, what is really irrelevant is any discussion about the constitutionality of L.B. 1, now Neb. Rev. Stat. §§ 77-103 and 77-103.01 (Reissue 1990). That same critique applies to this court's comments about L.B. 7.

However, since the court has proceeded to express certain views and conclusions regarding the legislation in question, some additional comment is in order lest silence give consent and tacit approval to the constitutionally unwarranted conclusions in other opinions expressed today. So, "Once more unto the breach, dear friends, once more."

This court has concluded that in the context of the present appeals, L.B. 1 is irrelevant and, in view of the chronology, could not be retroactively applied at the peril of offending the anticommutation of tax provision in Neb. Const. art. VIII, § 4. Yet, the fact is that L.B. 1 has never actually been applied to the appellants' claims for equalization, and, additionally, the state board's previous equalization order has been set aside, resulting

in proceedings anew before the state board. Thus, the equalization order and consequent equalization-ordered levies have vanished. There remains the unanswered question about what tax statutes apply when the board considers the appellants' applications on remand. The lapse of time would seem to have obviated concerns about the chronology inasmuch as the state board, as a result of these appeals, has yet to enter an order pursuant to the appellants' applications, and several events, including the enactment of L.B. 1, have transpired, or will have transpired, before the board considers the appellants' application on remand. An intriguing question arises concerning the law applicable to the prospective equalization proceedings, but that question, and perhaps an even more fascinating answer, must await another day which undoubtedly will come.

It is difficult to accept this court's conclusion that application of L.B. 1 to a 1989 equalization "would result in commutation of a tax, in violation of Neb. Const. art. VIII, § 4," especially when *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936), is offered as support for that conclusion. Decided in 1936, *Steinacher* dealt with legislation obviously intended to ease some of the burden from property tax liability during the Depression years, a time for many, it is safe to say, when money was not all that plentiful. The questioned legislation in *Steinacher* provided that property taxes, otherwise payable in a lump sum, could be paid in installments of 5 years for personal property and 10 years for real estate. According to the *Steinacher* court, that legislative transformation of a lump-sum payment into installment payments violated the anticommutation prohibition in Neb. Const. art. VIII, § 4, because "if the legislature has the power to extend the time in which taxes must be paid, as was done in the instant case, it could repeat the extensions or extend them for such a duration of time that it would amount to a remission of the tax." 131 Neb. at 448, 268 N.W. at 322. As a more accurate analysis of the *Steinacher* situation, the time value of a monetary lump-sum payment vis-a-vis installment payments results in the unconstitutional reduction of the amount due from the tax liability. In a consideration of L.B. 1 on its face,

that is, a facial challenge based on Neb. Const. art. VIII, § 4, which is exactly the nature of the question that others have unnecessarily undertaken to answer, just how application of L.B. 1 results in a reduction of any tax liability is unknown. To reach the "commutation" conclusion expressed today, much more information is required for the factual premises necessary as the bases for such conclusion, information which is understandably absent in view of the sequence of events leading to and during pendency of the present appeals.

In passing on L.B. 7, the court assails the Legislature's expressed objectives and considerations for enactment of the legislation. Legislative expressions of purpose, considerations, or reasons underlying enactment of L.B. 7 (Neb. Rev. Stat. § 77-202(11) (Reissue 1990)) appear in § 1 of that bill, whereas the provision for tax exemption of railroad rolling stock appears in § 2 of the bill. Those legislative expressions in § 1 may be characterized as a preamble for the actual exemption specified in § 2. A statutory preamble is a declaration or explanation of the reasons for enactment of the legislation and objectives sought to be obtained by the legislation. *Griffith v. New Mexico Public Service Commission*, 86 N.M. 113, 520 P.2d 269 (1974). While a statutory preamble may express legislative motives and inducements for enactment of legislation, the preamble is not an essential part of the legislation. *Portland Van & Storage Co. v. Hoss*, 139 Or. 434, 9 P.2d 122 (1932). Although language in a legislative enactment may provide a manifest indication of the objective to be achieved through the legislation, a court, with or without an expression of a legislatively avowed objective, has the duty to determine whether the Legislature has constitutionally exercised its power reasonably related to a valid governmental purpose or interest. See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). Therefore, apart from the legislatively expressed objectives, purposes, reasons, motives, or inducements pertaining to L.B. 7, the judicial determination is whether L.B. 7 is unconstitutional on account of the exemption for a railroad's rolling stock.

Neb. Const. art. VIII, § 2, in part provides that "[t]he Legislature may classify personal property in such manner as it

sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." Generally, "the Legislature has plenary power over taxation except as limited by the Constitution." *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 587-88, 177 N.W.2d 596, 598 (1970).

Tax classifications must be based on a real and substantial difference, having a reasonable relationship to the subject of the particular legislation. *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934). Tax classifications which do not rest on real differences of situation and circumstances violate the uniformity clause of the Nebraska Constitution. See *State ex rel. Meyer v. McNeil, supra*.

There is a real and substantial difference between railroad rolling stock, tax-exempt under L.B. 7, and property of other common carriers. Transportation of Nebraska products to market is essential to this state's economy. Among Nebraska's chief products is grain harvested in this state. It is self-evident that expeditiously getting Nebraska-harvested grain into the stream of interstate commerce, which frequently involves grain shipments to mills and ports at some distance from Nebraska, is vital to the strength of our state's economy. Large and usually rapid interstate shipments by rail are readily distinguishable from the relatively smaller quantities moved by motor carriers. I am unaware of any planeloads of grain moving by air carriers within or departing Nebraska. Therefore, although this court feels that mention of "restrictions or conditions" somehow constitutionally damns L.B. 7, the "conditions" might well apply to something as common as the weather, including inclemency, climatic conditions which the Postal Service considers in the expression "Neither snow, nor rain, nor heat, nor gloom of night stays these couriers from the swift completion of their appointed rounds." Then again, in retrospect, maybe comparing postal service to railroad operations is a bad example. However, all the sundry and imaginative interpretations regarding a legislative preamble for a statute are beside the point, since the preamble is not part of the tax exemption in L.B. 7 for railroad rolling stock. What is important is the classification by which railroad rolling stock is tax-exempt personal property. There is a reasonable and

legitimate basis for the exemption of railroad rolling stock under L.B. 7. For that reason, courts should decline to inquire into the wisdom, policy, or justness of valid legislative action. As we noted in *Spence v. Terry*, 215 Neb. 810, 816, 340 N.W.2d 884, 887 (1983): "Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate."

Turning to some of the court's comments in view of *Trailer Train v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), especially the statement "[E]ven if this state's present classification of property as exempt and not exempt was to be found valid under Nebraska's constitution, it could not withstand muster under federal law," *Trailer Train* does not support such assertion, for the court in *Trailer Train* stated: "The purpose of § 306 of the 4-R Act is to prevent tax discrimination against railroads in any form whatsoever. . . . It does not encroach upon a state's right to tax its citizens as it sees fit, as long as that tax does not discriminate against railroads." 885 F.2d at 416-17. What *Trailer Train* does teach is that Nebraska's tax structure does not exist in some provincial and pristine environment or in a vacuum, hermetically sealed to the law of the land. As federal protection against a state's discriminatory taxation of property is extended to various entities, consequences of property tax exemptions under state law will have to receive the most careful attention lest exemptions result in imposition of a disproportionate share of the tax burden on federally protected entities and thereby prevent collection of a tax revenue from those protected entities. The bell some hear as a death knell is really the signal for round 2 in the tax fight after *Trailer Train*.

Also, some of this court criticizes *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), but as we recently noted in *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 252, 411 N.W.2d 35, 45 (1987), the Nebraska "Constitution . . . must be read as a whole." The constitutional requirement of uniformity or equality in taxation extends only to those objects of taxation which the Legislature has determined to be property subject to the tax burden. *U.S. Cold Storage v. Detroit Assessors*, 349 Mich. 81, 84 N.W.2d 487 (1957). See, also, T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (8th ed.

1927). As the court observed in *State v. Willingham*, 9 Wyo. 290, 294, 62 P. 797, 798 (1900):

> [T]he State may tax all, or it may select for taxation certain classes, and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution. . . . [The constitutional requirement of uniformity in taxation] merely obliges the Legislature to impose an equal burden upon all those who find themselves in the same class. . . . To be uniform, taxation need not be universal.

Requisite deference to each constitutional provision concerning taxation and exemption of property will be no small task and will be one which both the Legislature and this court will encounter again.

Next, there is the view expressed by some of the court that

> the classification set forth in L.B. 1 is unconstitutional because it is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and machinery and equipment used for other purposes.

For tax purposes, property is either real estate or personal property. L.B. 1, now § 77-103 (Reissue 1990), amends the statutory definition of "real estate," formerly contained in § 77-103 (Reissue 1986), and expands the previous definition, so that the meaning of "real estate" now includes "pipelines, railroad track structures, electrical and telecommunication poles, towers, lines, and all items actually annexed to such property, and any interest pertaining to the real property or real estate." Also, for purposes of taxation, L.B. 1 supersedes the common-law test to determine whether an item is a fixture or personal property and thereby eliminates the test for a fixture which this court used in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). As a consequence of L.B. 1, an article's actual annexation to real estate is the test to determine whether the item is a fixture and, therefore, part of the real estate. When used on real estate, each of the items added in the expanded definition of "real estate" in

§ 77-103 (Reissue 1990) is rendered immobile and becomes stationary as the result of some physical connection to the real estate. For instance, a pipeline is usually buried in the ground which it crosses, while structures such as electrical and telecommunications poles and towers are immobile when part of the structure is buried in the earth to support the remaining part above ground or when such items are securely fastened to buried foundations for additional support.

In contrast with the stationary aspect of those items within the definition of "real estate" in L.B. 1, a "center pivot," as part of an irrigation system, is self-propelled and, therefore, mobile machinery which consists of a single pipe or arm connected by a swivel to a fixed anchor or pivot usually located in the center of a field to be irrigated. The swivel arm, as the radius from the pivot point, is elevated and supported by towers which move on wheels along a constant circumferential path around the pivot. Water passing from the well near the pivot point is sprayed by sprinkler nozzles located on the arm as it sweeps the field much in the manner of the hand of a clock. Thus, the center pivot may be disconnected from the pivot point at one irrigation site and moved to another site for irrigation. See, Irrigation 327 et seq. (C. Pair 5th ed. 1983); M. Kay, Sprinkler Irrigation, Equipment and Practice 85 et seq. (Batsford Academic & Educational Ltd. 1983); II Academic American Encyclopedia 281 et seq. (1986). Irrigation systems used for agricultural and horticultural purposes may also consist of movable surface pipes as conduits for water sprayed from sprinklers attached to the pipes, thereby allowing mobility from one irrigation site to another. Therefore, mobility of a center pivot and other surface irrigation system distinguishes the foregoing property from those items which the Legislature has defined as "real estate" in L.B. 1.

Since it is extremely unlikely that there are mobile microwave towers or portable pipelines, in substance and effect, the Legislature has, by express definition, defined and classified some property as "real property" for taxation controlled by Neb. Const. art. VIII, § 1, and has, by specifically excluding certain types of property from "real estate," correspondingly defined and classified particular items as personal property for

the purposes of taxation controlled by Neb. Const. art. VIII, § 2, and Neb. Rev. Stat. §§ 77-201 et seq. (Reissue 1990). Therefore, the definition of "real estate" in L.B. 1 and the exclusion of certain property from statutorily defined "real estate," namely, a center pivot or other irrigation system of a type used for agricultural or horticultural purposes, have a rational basis and are, therefore, reasonable and not arbitrary or unfounded.

Even if this court had concluded that the business "machinery and equipment" provision of L.B. 1 was unconstitutional, that provision is distinct from "center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and is clearly severable pursuant to the express severability provision in L.B. 1, § 4. See, *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988); *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988); *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983).

In any event, these causes are remanded for proceedings before the State Board of Equalization and Assessment. With that disposition, I concur.

NORTHERN NATURAL GAS CO. ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 482

Filed March 1, 1991. Nos. 89-893 through 89-900, 89-947.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Norman H. Wright, Amy S. Bones, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

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

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

PER CURIAM.

This is an appeal from the findings and order of the State Board of Equalization and Assessment dated August 15, 1989, denying the appellants' claims for property tax relief. The appellants in these cases are the owners of centrally assessed property in the State of Nebraska and operate natural gas transmission pipelines in Nebraska.

The issues raised in this appeal are disposed of by *Natural Gas Pipeline Co. v. State Bd. of Equal., ante* p. 357, 466 N.W.2d 461 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *Natural Gas Pipeline Co., supra.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MCI TELECOMMUNICATIONS CORPORATION ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 80

Filed March 1, 1991. Nos. 89-903 through 89-905, 89-908 through 89-912.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Norman H. Wright, Amy S. Bones, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

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

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

PER CURIAM.

This is an appeal under Neb. Rev. Stat. § 77-510 (Reissue 1990) from the order of the Nebraska State Board of Equalization and Assessment (Board) denying the request of MCI Telecommunications Corporation (MCI), a public service entity, for equalization of its centrally assessed property. Pursuant to this court's order of September 11, 1989, MCI and seven other public service entities (together, Taxpayers) filed "cases stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989), separately setting forth the rulings of the Board complained of by the Taxpayers and the exceptions and contentions of the parties with respect to those issues. Due to an identity of issues and counsel, we have consolidated the appeal of MCI (case No. 89-903) with those of Teleconnect Long Distance Services & Systems Company (case No. 89-904); U.S. Sprint Communications Company Limited Partnership (case No. 89-905); Northwestern Bell Telephone Company, doing business as US West Communications, a Subsidiary of US West, Inc. (case No. 89-908); United Telephone Company of the West (case No. 89-909); American Telephone and Telegraph Company - Interstate Division, and AT&T Communications of the Midwest (case No. 89-910); Southeast Nebraska Telephone Company (case No. 89-911); and Omaha Cellular Telephone Co. (case No. 89-912) for disposition.

The procedural facts are essentially the same as those set forth in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, *ante* p. 357, 466 N.W.2d 461 (1991). The Taxpayers are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications systems in Nebraska. The Taxpayers' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

On August 11, 1989, the Taxpayers appeared before the Board and asked that their property be equalized with that of other centrally assessed taxpayers, including railroads and carline companies. As in *Natural Gas Pipeline Co.*, *supra*, the

Board, in its order of August 15, 1989, construed the Taxpayers' requests for equalization as applications for tax exemption and concluded that it had no statutory or constitutional authority to rule upon such claims.

The Taxpayers claim the Board wrongfully denied their requests for equalization because (1) the Board erred in finding that the State of Nebraska was preempted from taxing the personal property of car companies and railroad companies pursuant to a federal adjudication of § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988); (2) the Board erred in finding that as a result of such federal preemption, the personal property of car companies and railroad companies was not subject to tax and, therefore, could not be the basis for a claim of equalization; (3) the Board erred in finding that the claims of the centrally assessed taxpayers and locally assessed taxpayers were claims requesting to have their business personal property and/or real property exempted from taxation; and (4) the Board erred in holding that it did not have the authority to consider a claim for equalization of one class or subclass of property to a level of another class or subclass of property that is exempt or is not subject to tax, and in characterizing such a claim as a claim for exemption.

The Board contends that the enactment of L.B. 1 and L.B. 7 on November 21, 1989, renders this appeal moot.

The issues raised in this appeal are disposed of by *Natural Gas Pipeline Co., supra*. Therefore, the causes are remanded to the Board for further proceedings consistent with our opinion in *Natural Gas Pipeline Co.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ARAPAHOE TELEPHONE CO. ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 81

Filed March 1, 1991. Nos. 89-913 through 89-934.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

Paul M. Schudel and Nana G.H. Smith, of Woods & Aitken, for appellants.

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

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

PER CURIAM.

This is an appeal under Neb. Rev. Stat. § 77-510 (Reissue 1990) from the order of the Nebraska State Board of Equalization and Assessment (Board) denying the request of Arapahoe Telephone Company (Arapahoe), a public service entity, for equalization of its centrally assessed property. Pursuant to this court's order of September 11, 1989, Arapahoe and 21 other public service entities (together, Taxpayers) filed "cases stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989), separately setting forth the rulings of the Board complained of and the exceptions and contentions of the parties with respect to those issues.

Due to an identity of issues and counsel, we have consolidated the appeal of Arapahoe (case No. 89-913) with those of Arlington Telephone Company (case No. 89-914); The Blair Telephone Company (case No. 89-915); Benkelman Telephone Company, Inc. (case No. 89-916); Centel Cellular Company (case No. 89-917); Consolidated Telco, Inc. (case No. 89-918); Consolidated Telephone Company (case No. 89-919); Cozad Telephone Company (case No. 89-920); Dalton Telephone Company, Inc. (case No. 89-921); Eastern Nebraska Telephone Company (case No. 89-922); Eustis Telephone Exchange, Inc. (case No. 89-923); GTE North Incorporated (case No. 89-924); The Hamilton Telephone Company (case

No. 89-925); Hartman Telephone Exchanges, Inc. (case No. 89-926); Home Telephone Company of Nebraska (case No. 89-927); Hooper Telephone Company (case No. 89-928); The Lincoln Telephone and Telegraph Company (case No. 89-929); LinTel Systems Inc., doing business as Lincoln Telephone Long Distance (case No. 89-930); The Nebraska Central Telephone Company (case No. 89-931); Plainview Telephone Company, Inc. (case No. 89-932); Rock County Telephone Company (case No. 89-933); and Wauneta Telephone Company (case No. 89-934) for disposition.

The procedural facts are essentially the same as those set forth in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, *ante* p. 357, 466 N.W.2d 461 (1991). The Taxpayers are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications service businesses in Nebraska. The Taxpayers' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

On August 11, 1989, the Taxpayers appeared before the Board and asked that their property be equalized with that of other centrally assessed taxpayers, including railroads and carline companies. As in *Natural Gas Pipeline Co., supra*, the Board, in its order of August 15, 1989, construed the Taxpayers' requests for equalization as applications for tax exemption and concluded that it had no statutory or constitutional authority to rule upon such claims.

The Taxpayers have appealed, contending the Board erred (1) in denying their requests to reconsider its decision to equalize the taxable values of the Taxpayers' personal property at 91.91 percent, (2) in finding that it was not constitutionally or statutorily obligated to equalize the Taxpayers' personal property with that of railroads and carline companies in Nebraska, and (3) in finding that it did not have the statutory or constitutional authority to consider the Taxpayers' requests.

The Board contends that the enactment of L.B. 1 and L.B. 7 on November 21, 1989, renders this appeal moot.

The issues raised in this appeal are disposed of by *Natural Gas Pipeline Co., supra*. Therefore, the causes are remanded to

the Board for further proceedings consistent with our opinion in *Natural Gas Pipeline Co.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TELAMARKETING INVESTMENTS, LTD., ALSO KNOWN AS TELAMARKETING INVESTMENTS, INC., ALSO KNOWN AS TELAMARKETING COMMUNICATIONS, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
MIDAMERICAN LONG DISTANCE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 82

Filed March 1, 1991. Nos. 89-935, 89-936.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

Larry V. Albers, of Erickson & Sederstrom, P.C., for appellants.

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

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

PER CURIAM.

This is an appeal under Neb. Rev. Stat. § 77-510 (Reissue 1990) from the order of the Nebraska State Board of Equalization and Assessment (Board) denying the request of TelaMarketing Investments, Ltd., also known as TelaMarketing Investments, Inc., also known as TelaMarketing Communications, Inc. (TMC), a public service entity, for equalization of its centrally assessed property. Pursuant to this court's order of September 11, 1989, TMC and MidAmerican Long Distance Company (MidAmerican) filed "cases stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989),

separately setting forth the rulings of the Board complained of and the exceptions and contentions of the parties with respect to those issues. Due to an identity of issues and counsel, we have consolidated the appeal of TMC (case No. 89-935) with that of MidAmerican (case No. 89-936) for disposition.

The procedural facts are essentially the same as those set forth in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, *ante* p. 357, 466 N.W.2d 461 (1991). TMC and MidAmerican are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and conduct business operations in Nebraska as long-distance telecommunications companies known as resellers. Their property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

On August 11, 1989, TMC and MidAmerican appeared before the Board and asked that their property be equalized with that of other centrally assessed taxpayers, including railroads and carline companies.

As in *Natural Gas Pipeline Co., supra*, the Board, in its order of August 15, 1989, construed TMC's and MidAmerican's requests for equalization as applications for tax exemption and concluded that it had no statutory or constitutional authority to rule upon such claims.

TMC and MidAmerican contend on appeal that the Board erred in dismissing their requests for equalization of their property with that of the railroads, carline companies, and pipeline companies operating in Nebraska. The Board contends that the enactment of L.B. 1 and L.B. 7 on November 21, 1989, renders this appeal moot.

The issues raised in this appeal are disposed of by *Natural Gas Pipeline Co., supra*. Therefore, the causes are remanded to the Board for further proceedings consistent with our opinion in *Natural Gas Pipeline Co.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

UNITED AIRLINES ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 83

Filed March 1, 1991. Nos. 89-949, 89-951 through 89-957.

State Equalization Board: Taxation: Standing: Proof: Appeal and Error. In order to have standing to appeal from an order of the Nebraska State Board of Equalization and Assessment, a taxpayer whose property is centrally assessed must have made a showing before the board requiring affirmative action by the board.

Appeal from the State Board of Equalization and Assessment. Judgment in No. 89-949 reversed, and cause remanded for further proceedings. Appeals dismissed in Nos. 89-951, 89-952, 89-953, 89-954, 89-955, 89-956, and 89-957.

John K. Boyer, Norman H. Wright, Amy S. Bones, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

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

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

PER CURIAM.

This is an appeal by United Airlines (United), an air carrier, under Neb. Rev. Stat. § 77-510 (Reissue 1990) from the order of the Nebraska State Board of Equalization and Assessment (Board) denying its request for equalization of its centrally assessed property. Due to an identity of issues and counsel, we have consolidated the appeal of United (case No. 89-949) with those of seven other air carriers, Northwest Airlines, Inc. (case No. 89-951), American Airlines, Inc. (case No. 89-952), Midway Airlines (case No. 89-953), Trans World Airlines, Inc. (case No. 89-954), United Parcel Service Company (case No. 89-955), Continental Airlines (case No. 89-956), and Delta Airlines, Inc. (case No. 89-957), for disposition.

We first consider the Board's argument that none of the appellants except United have standing to prosecute an appeal from the order of the Board. The Board contends none of these

appellants have standing to appeal because they are not persons "affected" by the Board's decision, as that term was interpreted by this court in *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 278 N.W.2d 619 (1979), and *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953). The appellants in question contend that although they did not personally appear before the Board, they have standing to appeal because they were persons "affected" by the final decision of the Board.

Section 77-510 provides that "[f]rom any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality *affected thereby* may prosecute an appeal to the Supreme Court." (Emphasis supplied.)

In *Laflin, supra* at 430, 56 N.W.2d at 473, this court held, in determining that the taxpayer's remedy was a direct appeal under § 77-510 rather than a mandamus action, that "[i]t was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board."

In *DeCamp, supra*, we focused on the language in *Laflin* regarding the right of appeal under § 77-510 of "one who had made a showing requiring the affirmative action of the Board." In *DeCamp*, the taxpayer appealed the order of the Board regarding the equalization between counties of the valuation of real and personal property for the 1978 tax year. The State contended that DeCamp did not have standing to pursue an appeal pursuant to § 77-510 because he did not personally appear at the hearing before the Board. DeCamp alleged by affidavit in this court, however, that he was the owner of taxable real and personal property in several Nebraska counties and that he did appear before the Board in the form of a letter addressed to the Board.

We concluded in *DeCamp* that although a taxpayer may raise issues before the Board by correspondence rather than personal appearance, DeCamp's letter failed to do so (1) because it was sent to the Board after the hearings had been adjourned and (2) because the content of the letter did not make a showing

requiring the affirmative action of the Board:

> [The letter] referred only to the valuation of personal property and made no mention of the many issues, now raised in appellant's brief, relating to intercounty equalization of real property. But even as to personal property, the letter was not one of a "person affected" by the State Board's action. The letter did not reveal to the Board . . . that the appellant was the owner of property, either real or personal . . . .

DeCamp, supra at 370, 278 N.W.2d at 622.

In dismissing DeCamp's appeal, we said:

> Where the interest of the appellant was not presented to the State Board, the action in this court is more akin to one for declaratory judgment than an appeal. We are without power to "review," in this court, matters relating to equalization which have not already been presented to the State Board. Having failed to make a showing before the State Board requiring its affirmative action, the appellant lacks standing in this court.

DeCamp, supra at 371, 278 N.W.2d at 622.

The parties in this case have stipulated that United appeared at the August 11, 1989, hearing and that United submitted a request for equalization to the Board. This request consisted of the following documents: (1) an application for equalization and request to be placed on the agenda, (2) a stipulation of facts, and (3) a letter to the Tax Commissioner, dated August 10, 1989, requesting equalization of personal property tax for the year 1989.

In contrast, the appellants in cases Nos. 89-951, 89-952, 89-953, 89-954, 89-955, 89-956, and 89-957 did not appear personally before the Board and made no showing before the Board requiring its affirmative action. We have not been directed to any portion of the record showing that these entities appeared before the Board by correspondence and, after reviewing the record, we can find no such documentation.

The appellants rely upon a list in the record entitled "1988 AIR TRANSPORTATION CARRIER." This exhibit was offered by the Nebraska Department of Revenue (NDR) for the purpose of assisting the Board in keeping track of NDR's

numbering of exhibits involving centrally assessed companies. The exhibit lists 18 air carriers, but contains no other information.

The appellants in question contend in their reply brief only that "the State Board's actions undoubtedly 'affected' even Appellants who did not appear at the hearing," reply brief for appellants at 6-7, and that issues of standing should be determined in accordance with our decision in *Trailblazer Pipeline Co. v. State Bd. of Equal.*, 232 Neb. 823, 442 N.W.2d 386 (1989).

In *Trailblazer Pipeline Co., supra*, Trailblazer Pipeline Company (Trailblazer) and Natural Gas Pipeline Company of America (NGPL) appealed from the order of the Board equalizing all centrally assessed property valued by the state through application of a statewide aggregate level of assessment of 88.7 percent of actual value. The Board contended that NGPL, having failed to appear before the Board or to otherwise request action of the Board, lacked standing to bring an appeal.

After reviewing numerous substantive references in the record to NGPL, we held:

> [A]s to a centrally assessed public service entity taxpayer under the provisions of Neb. Rev. Stat. §§ 77-802 et seq. (Reissue 1986 & Cum. Supp. 1988), where, as here, the Board made a final decision with respect to the valuation of the property of such taxpayer . . . *and the record contains the information disclosing the basis for such decision and assessment and alleged error*, the taxpayer being affected by such decision was entitled to prosecute an appeal to this court under the authority of § 77-510.

(Emphasis supplied.) *Trailblazer, supra* at 832, 442 N.W.2d at 391.

In the present case, however, the record shows that the Board did not make a final decision regarding the valuation of any of the appellants' property except that of United. The other appellants' interests were not presented to the Board, and therefore, there can be no appeals. There was no showing before the Board that any of the appellants other than United were the owners of personal property.

Having failed to make a showing before the Board requiring its affirmative action, the appellants in cases Nos. 89-951, 89-952, 89-953, 89-954, 89-955, 89-956, and 89-957 lack standing in this court. See, *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 278 N.W.2d 619 (1979); *Trailblazer, supra*. The State's motions to dismiss the appeals in these cases are sustained.

With respect to the appeal of United, the procedural facts are essentially the same as those set forth in *Natural Gas Pipeline Co. v. State Bd. of Equal., ante* p. 357, 466 N.W.2d 461 (1991). United is an air carrier within the meaning of Neb. Rev. Stat. § 77-1244(1) (Reissue 1990) and owns, maintains, and operates flight equipment in Nebraska. The flight equipment is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-1244 et seq. (Reissue 1990).

On August 11, 1989, United's representative appeared before the Board and asked that United's property be equalized with that of other centrally assessed taxpayers, including railroads and carline companies.

As in *Natural Gas Pipeline Co., supra*, the Board, in its order of August 15, 1989, construed United's request for equalization as an application for tax exemption and concluded that it had no statutory or constitutional authority to rule upon such a claim.

United claims the Board wrongfully denied its request for equalization because (1) the Board erred in finding that the State of Nebraska was preempted from taxing the personal property of car companies and railroad companies pursuant to a federal adjudication of § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988); (2) the Board erred in finding that as a result of such federal preemption, the personal property of car companies and railroad companies was not subject to tax and, therefore, could not be the basis for a claim of equalization; (3) the Board erred in finding that the claims of the centrally assessed taxpayers and locally assessed taxpayers were claims requesting to have their business personal property and/or real property exempted from taxation; and (4) the Board erred in

holding that it did not have the authority to consider a claim for equalization of one class or subclass of property to a level of another class or subclass of property that is exempt or is not subject to tax, and in characterizing such a claim as a claim for exemption.

As in *Natural Gas Pipeline Co., supra*, the Board contends that the enactment of L.B. 1 and L.B. 7 on November 21, 1989, renders this appeal moot.

The issues raised in United's appeal are disposed of by *Natural Gas Pipeline Co., supra*. In light of our decision in that case, the cause of United Airlines, case No. 89-949, is remanded to the Board for further proceedings consistent with our opinion in *Natural Gas Pipeline Co.*

JUDGMENT IN NO. 89-949 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
APPEALS DISMISSED IN NOS. 89-951, 89-952, 89-953, 89-954, 89-955, 89-956, AND 89-957.

G.P. EXPRESS AIRLINES, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

466 N.W.2d 86

Filed March 1, 1991. No. 89-950.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

Alan D. Slattery and Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellant.

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

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

PER CURIAM.

This is an appeal under Neb. Rev. Stat. § 77-510 (Reissue 1990) from the order of the Nebraska State Board of Equalization and Assessment denying the request of G.P. Express Airlines, Inc., an air carrier, for equalization of its centrally assessed property. The appellant has raised nearly identical assignments of error to those of the appellants in *United Airlines, Inc. v. State Bd. of Equal., ante* p. 400, 466 N.W.2d 83 (1991).

The issues in this appeal are disposed of by *Natural Gas Pipeline Co. v. State Bd. of Equal., ante* p. 357, 466 N.W.2d 461 (1991). In light of our decision in that case, the cause is remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *Natural Gas Pipeline Co., supra.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JO ANNA E. MURPHY, APPELLEE, V. TIMOTHY J. MURPHY, APPELLANT.

466 N.W.2d 87

Filed March 1, 1991. No. 90-273.

1. **Motions to Vacate: Default Judgments: Appeal and Error.** The Supreme Court, in reviewing a trial court's action in vacating or refusing to vacate a default judgment, will uphold and affirm the trial court's action in the absence of an abuse of discretion.
2. **Equity: Foreclosure.** A suit in foreclosure is equitable in nature.
3. **Records: Pleadings: Appeal and Error.** In the absence of a bill of exceptions, the Supreme Court examines and considers only the pleadings in conjunction with the judgment reviewed. When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.
4. **Records: Pleadings: Presumptions: Appeal and Error.** Where there is no bill of exceptions, the Supreme Court is limited on review to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.

5. **Affidavits: Records: Appeal and Error.** The existence or contents of affidavits filed with the clerk of the trial court and found in the transcript, but not preserved in the bill of exceptions, cannot be noted by the Supreme Court.
6. **Real Estate: Contracts: Foreclosure.** A contract for the sale of land may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity.
7. **Equity: Judgments.** A writ of assistance is the process by which a court of equity finally carries its judgment or decree into effect.
8. **Records: Proof.** A journal entry in a duly authenticated record imports verity, and it is sufficient to support a finding unless there is proof to the contrary.
9. **Contracts: Foreclosure: Time.** When a decree of strict foreclosure is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract.

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

Dennis E. Martin and Lowell R. Johnson, of Martin & Martin, P.C., for appellant.

No appearance for appellee.

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

HASTINGS, C.J.

Defendant, Timothy J. Murphy, appeals from the overruling of his motions to stay the order of sale, to quash the writ of assistance, and to vacate the default decree of foreclosure. Although the action was brought as a strict foreclosure of a land contract, the decree amounted to one of ejectment. We affirm as modified.

The Supreme Court, in reviewing a trial court's action in vacating or refusing to vacate a default judgment, will uphold and affirm the trial court's action in the absence of an abuse of discretion. *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990).

On November 28, 1989, plaintiff, Jo Anna E. Murphy, filed a petition seeking strict foreclosure against the defendant. The petition alleged that on or about July 29, 1983, the parties entered into a land contract whereby the defendant agreed to purchase certain real estate, described as Lot 6, Block 4, Cleveland Place, Douglas County, Nebraska, from the plaintiff

for $25,000 plus 5-percent interest, with payments at the rate of $200 per month; that defendant had not made such payments on a regular basis and had made no payments since January 1988; that defendant was required to pay taxes on the real estate and had failed to do so; that the amount of payments made by defendant was less than the taxes and interest due; and that the amount due was in excess of the value of the real estate. Plaintiff prayed that defendant pay the amount due upon the contract, including principal, interest, and real estate taxes, and the costs of the action, by a date determined by the court, or that in the event of default of such payment ordered by the court, the defendant be foreclosed of all interest in the property, and plaintiff recover her costs.

Defendant failed to plead or appear, and a decree was entered on February 15, 1990. The court found that the contract was entered into by the parties, that the defendant had failed to make payments in accordance with the contract, that the amount due was in excess of the value of the real estate, and that plaintiff was entitled to strict foreclosure. The court, by its decree, "forever barred and foreclosed" the defendant of "all rights, title, interest, claim and equity of redemption in and to the real property" described in the land contract.

The defendant assigns as error the finding by the trial court that the amount due on the contract exceeded the value of the real estate, the entering of a default judgment against the defendant, the failure of the trial court to give defendant reasonable time to avoid foreclosure by performing the land contract, and the denial by the trial court of defendant's motions to quash the writ of assistance and to vacate the default judgment.

No bill of exceptions has been filed in this appeal. In the absence of a bill of exceptions, the Supreme Court examines and considers only the pleadings in conjunction with the judgment reviewed. When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review. *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986). Where there is no bill of exceptions, the Supreme Court

is limited to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986). The existence or contents of affidavits filed with the clerk of the trial court and found in the transcript, but not preserved in the bill of exceptions, cannot be noted by the Supreme Court. *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987).

Therefore, even in the absence of a bill of exceptions, the transcript, which includes the pleadings and orders of the court, is sufficient to present the issue for appellate review.

Strict foreclosure requires the purchaser under a land contract to pay the balance due on the contract within a specified time or be barred from all interest in the land. Such a contract may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity. *Miller v. Radtke*, 230 Neb. 561, 432 N.W.2d 542 (1988). A writ of assistance is the process by which a court of equity finally carries its judgment or decree into effect, *State Fire Marshal v. Village of Dorchester*, 189 Neb. 464, 203 N.W.2d 160 (1973), and is properly issued upon default under a decree of strict foreclosure.

It appears clear that in order to obtain a decree of strict foreclosure, one of the necessary elements which must be proved is that the property is of less value than the contract price. There is no bill of exceptions and thus no evidence in this regard. However, a finding to that effect is contained in the court's decree of foreclosure. " 'A journal entry in a duly authenticated record imports verity, and it is sufficient to support a finding unless there is proof to the contrary.' " *State v. Ziemba*, 216 Neb. 612, 625, 346 N.W.2d 208, 216 (1984).

The record supports a decree of strict foreclosure. However, where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979); *Swanson v. Madsen*, 145 Neb. 815, 18 N.W.2d 217

(1945). It is the order of this court, therefore, that the judgment of the district court forever barring and foreclosing the right, claim, or equity of the defendant in the property described in its decree be affirmed, unless within 20 days of the issuance of the mandate of this court, the defendant shall pay all amounts due under the contract of July 29, 1983, contained or referred to in the pleadings of the parties to this suit, in which event the defendant may apply to the district court for relief from said judgment. The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF H.P.A., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. M.A.C., APPELLANT.
466 N.W.2d 90

Filed March 1, 1991. No. 90-411.

1. **Motions for Continuance.** The granting or denial of a continuance of a trial or hearing is within the discretion of the trial court.
2. **Trial: Notice: Waiver.** When a party voluntarily or negligently fails to appear for scheduled court proceedings after proper notice, such party waives the right to be present at such proceedings.
3. **Parental Rights: Proof.** Clear and convincing evidence must support an order terminating parental rights.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

George E. Brugh for appellant.

Charles W. Campbell, York County Attorney, for appellee.

Kevin V. Schlender, guardian ad litem.

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

GRANT, J.

The parental rights of L.C. and M.A.C. to their son, H.P.A., were terminated by an order of the York County Court. The

father, L.C., did not appeal. The mother, M.A.C., timely appealed to this court, assigning five errors, which, as argued, may be consolidated into two: (1) that the trial court erred in overruling the mother's motion for a continuance of the hearing held to determine termination and in allowing the State to proceed in the absence of the mother and (2) that the trial court erred in finding that there was clear and convincing evidence to support the court's order terminating the mother's parental rights. We affirm.

The record shows that on December 3, 1986, a petition was filed in the county court alleging in paragraph 1 that H.P.A. was born on April 1, 1985, to M.A.C. and L.C., and alleging in paragraph 2(a) that H.P.A. was a juvenile as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), in that the child lacked proper parental care by reason of the fault or habits of his parents. On December 4, 1986, a detention hearing was held. The child was placed in the care and custody of the Nebraska Department of Social Services (DSS) pending disposition. The child has remained, under the supervision of DSS, with the same foster family since his placement.

On December 18, 1986, an adjudication hearing was held. Both parents admitted paragraphs 1 and 2(a) of the petition. A dispositional hearing was held on February 2, 1987. The child was ordered to remain in the care of DSS. The parents were ordered to attend inpatient alcohol treatment and to complete other requirements.

Between 1987 and 1989 a series of review hearings were held, and in each of these the court found that the mother had failed to comply with the court's previous orders. On September 13, 1989, a supplemental petition was filed seeking termination of the parents' parental rights to H.P.A.

With regard to the mother's first assignment of error, the record shows that the termination hearing was set for February 14 and 15, 1990. Proper notice was given to all parties that the hearing was to begin at 8:30 a.m. on Wednesday, February 14. Neither the father nor the mother appeared. Counsel for all parties were present, as were eight witnesses, two of whom were from outside York. In a colloquy with the court, counsel for the mother stated that he did not know why the mother was not

present, that counsel had talked to the mother on the preceding Monday, and that the mother lived "within a block or two" of the courthouse. The county attorney suggested that someone from the sheriff's office could try to reach the mother and give her a ride to the courthouse. The mother's attorney then said, "That might be the thing to do. Have a deputy go knock on her door."

Apparently that plan was followed. One-half hour later the sheriff testified, in open court, that he had gone to the mother's residence, had knocked on the door, and was met by the mother's boyfriend (not the child's father), who advised the sheriff that the mother was not there and refused to permit the sheriff into the house, but said the mother would be notified. As the sheriff talked to the boyfriend, the sheriff saw "four or five grocery sacks full of beer cans" on the porch.

The trial then proceeded and recessed at approximately 3 p.m. The trial court then continued the hearing until 9 a.m. on the next day. The mother did not appear at the continued hearing, and her attorney again moved for a continuance and refused to submit "my rest in her case." The trial court denied the requested continuance and determined that the mother had rested in the trial. On April 13, 1990, the court entered its order terminating parental rights.

In *Kulhanek v. Kulhanek*, 134 Neb. 349, 351-52, 278 N.W. 563, 564 (1938), this court considered a similar situation, and stated:

> The first proposition to be determined is whether the trial court abused its discretion in overruling the motion for continuance. There is nothing in the record but what discloses that the defendant absented himself voluntarily or through his own negligence. Courts cannot permit parties to thus disregard the prompt administration of trials. To hold otherwise would let any litigant determine for himself when he wishes to have his case tried. The defendant knew his case was to be tried at this term of court, every effort was made to reach him, the record discloses that some one was at his home when these efforts were made, and he cannot complain of his own neglect. Parties have a right to be present when their cases are

> tried, but this right may be waived, and it should be so held when the absence is voluntary and due to his own negligence.

The granting or denial of a continuance of a trial or hearing is within the discretion of the trial court. When a party voluntarily or negligently fails to appear for scheduled court proceedings after proper notice, such party waives the right to be present at such proceedings. In the case at bar, the court did not abuse its discretion in refusing to continue the trial of the case, even though the mother failed to appear. It is apparent that every opportunity to attend the trial was given to the mother. She chose not to attend. She waived her right to be present. The mother's first assignment of error is without merit.

In the mother's second assignment of error, she contends that the evidence was not sufficient to support a finding that her parental rights should be terminated. The facts before the court may be capsulized in the testimony of a chemical dependency counselor who worked for an agency which provided counseling for the mother from December 1986 through July 1988 and who began counseling her again on August 8, 1989. The record shows the mother was in inpatient treatment for chemical dependency in 1987 and had been in similar inpatient treatment at least two other times before that. In August 1989, the mother told the counselor that she had been using

> [a]lcohol, marijuana, sedatives and barbiturates, tranquilizers, amphetamines, cocaine. A category entitled, other opiates — op- — opioids and there was some question if there had been some heroine use and pcp use. And she also identified some other mixed drugs, and I'm not sure what those were off-hand.

The counselor testified as follows:

> Q. Did she tell you how frequently she used these various drugs?
>
> A. I believe that marijuana — That she was using marijuana on a almost daily basis, if not daily. And I think the other drugs, when they were available to her. They were current use, as far as the way that I documented, as either if there's been use within the past year or lifetime usage. And the ones I identified were those that she had

been using within the past year.

That such use continued up to the date of the hearing herein on February 14 and 15, 1990, may be concluded by consideration of the facts surrounding the mother's failure to appear for the hearing. The mother's second assigned error is without merit.

On April 13, 1990, the court entered an order terminating the rights of both parents, finding that there was clear and convincing evidence, including testimony by qualified expert witnesses, that the mother "substantially and continuously and repeatedly neglected" the child, that the mother was an unfit parent by reason of her habitual use of intoxicating liquor, that continued custody in either parent would result in serious emotional or physical damage to the child, and that termination of the parents' parental rights was in the best interests of the child.

Our de novo review of the record shows that there is clear and convincing evidence of the mother's continuous neglect and failure to change the lifestyle which led to the neglect of the child and that it is in the child's best interests to terminate the mother's parental rights. The decision of the lower court is affirmed in its entirety.

AFFIRMED.

IN RE INTEREST OF A.M.Y., F.E.Y., AND K.C.Y., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. W.H., APPELLANT.

466 N.W.2d 93

Filed March 1, 1991. No. 90-479.

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's findings; however, where the evidence is in conflict, we 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.

2. **Parental Rights.** The fact of participation in certain elements of the court-ordered plan of reunification does not necessarily prevent the court from entering an order of termination where the parent has not made satisfactory progress toward reunification.
3. _____. Indefinite foster care is not acceptable where the evidence suggests the need for a secure and permanent home.
4. _____. A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.

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

Martin J. Kushner, of Kushner Law Office, for appellant.

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

Karen L. Vervaecke, Assistant Douglas County Public Defender, guardian ad litem.

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

BOSLAUGH, J.

This is an appeal in a termination of parental rights case. The appellant's parental rights to his three children were terminated by an order of the separate juvenile court on May 9, 1990. He has appealed from the judgment and has assigned as error the trial court's termination of his parental rights and certain evidentiary rulings by the trial court.

Our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we 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. *In re Interest of A.B. et al.*, 236 Neb. 220, 460 N.W.2d 114 (1990).

The mother relinquished her parental rights on June 2, 1989, and her rights are not involved in this appeal.

On January 11, 1986, the children were removed from the mother's home and placed in the temporary custody of the State after being found home alone at 4 a.m. Following an adjudication hearing on March 26, 1986, the children were

found to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), being under 18 years of age and lacking proper parental care by reason of the fault or habits of their mother.

On April 14, 1986, the appellant filed a motion of intervention alleging that he was the natural, biological father of each of the children and that he wanted custody and physical possession of his children. On April 24, 1986, the trial court sustained the appellant's motion to intervene as to A.M.Y. and F.E.Y., and took under advisement the motion as to K.C.Y.

On May 28, 1986, the trial court found that the children were as described under § 43-247(3)(a) insofar as the appellant was concerned, after he admitted to the supplemental petition filed May 20, 1986. Specifically, the appellant admitted that the mother allowed him to visit in her home despite a court restraining order, that the mother had left the children in the appellant's custody on numerous occasions, and that on January 11, 1986, the mother left her home because the appellant was present and had been drinking. It was on January 11 that the children were found alone in their mother's home at 4 a.m.

Various plans for reunification were ordered between July 29, 1986, and June 2, 1989. The first plan ordered the appellant to:

> a. Participate in parenting and counseling and follow all recommendations; the Child Protective Service Worker will make the appropriate arrangements;
>
> b. Submit to a chemical dependency evaluation and follow all recommendations as a result of the evaluation; the probation officer will make the referral;
>
> c. Have reasonable rights of visitation as arranged by the Nebraska Department of Social Services; and
>
> d. Cooperate with the workers involved and notify them within 72 hours of any change in address or employment.

This order remained in effect until March 11, 1987, when two more recommendations were added. In addition to the provisions of the previous orders, the appellant was ordered to "[p]articipate in out-patient alcohol counseling and follow the

recommendations of the counselor; [and] [n]ot go to [the mother's] home if he is or has been drinking."

Further orders remained substantially the same until December 1, 1987, when the appellant was ordered only to "[n]ot have any contact with [the mother] or any of her family except for his weekly visitation with the children herein; [and] [c]omplete his alcohol rehabilitation program and attend at least 3 AA meetings a week and provide the Court with written verification of attendance."

The previous orders' provisions were dropped because it was believed that the parents, up to the December 1, 1987, hearing, had not been able to comply with anything the court had ordered, primarily because of the drinking problems and violence associated with them. In order for the parents to be able to properly parent their children, the court concluded that the first step was their giving up the alcohol.

Subsequent orders remained the same until November 4, 1988, when the appellant was ordered, in addition to having no contact with the children's mother, to have suitable housing for himself and his children, to attend one AA meeting a week and provide verification of attendance to the probation office, and to call the probation officer every month. On June 2, 1989, the appellant was also ordered to consistently visit the children.

On August 10, 1989, the motion to terminate the appellant's parental rights was filed. It alleged that reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the determination that the children were within the meaning of § 43-247(3)(a) in that (1) the appellant had failed to participate in parenting classes; (2) the appellant had failed to refrain from contact with the children's mother; (3) the appellant had failed to cooperate with the workers involved in the case, often not notifying them of his whereabouts or changes in his status; (4) the appellant had failed to refrain from consuming alcoholic beverages; and (5) the appellant had failed to obtain housing suitable for himself and the children.

The termination hearing was held on December 4, 1989, January 11, 1990, and April 25, 1990. On May 8, 1990, the trial court found all of the allegations contained in the motion were

true, that the children were within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1988) because reasonable efforts under the court's direction had failed to correct the conditions leading to the determination that the children were as described in § 43-247(3)(a), and that the best interests of the children would be served by terminating the appellant's rights.

The appellant contends the court deprived him of a fair evidentiary hearing by making conflicting rulings in favor of the State in two specific areas.

First, the appellant complains of the court's allowing the State's witness Harry DiLise to testify over objection about the actions of his predecessor with the Department of Social Services (DSS). The court allowed this testimony under the business records exception to the hearsay rule.

The appellant offered the testimony of Forrest Roper, a probation officer. Roper testified to events occurring while he was involved in this case from October 1987 to September 1988. Kara Murphy, the probation officer who received the case from Roper in September 1988, also testified on behalf of the appellant. The appellant attempted to have Murphy testify to events which occurred during the period when Roper presided over the case and to which Roper had already testified. It was on this basis that the State objected, and it was on this basis that the objection was sustained.

This situation can be distinguished from that involving the testimony of DiLise on behalf of the State. No other personnel from DSS testified.

The appellant's other examples of rulings he claims to be contradictory in terms of the scope of issues can also be distinguished. The State posed questions to its witnesses regarding the best interests of the children. The appellant's objections to these questions on the basis of relevance were overruled.

The appellant questioned DiLise as to whether the appellant ever lied to him or used profanity toward him. The court cut short the questioning on the basis that it was immaterial and outside the scope of the motion.

> The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated.

> First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987).

Questions as to whether the appellant had ever lied to the court or used profanity toward the worker are irrelevant regarding the combined issues of § 43-292(6) and the best interests of the children and were correctly eliminated.

After reviewing this record, it is clear that the appellant, after 3 1/2 years, made little or no progress toward correcting the conditions which led to the initial juvenile court determination that the children were within the meaning of § 43-247(3)(a).

The major concerns dominating the adjudication of this case from the outset were the alcoholism of the parents and the abusive relationship between them resulting from the alcoholism. Until these matters could be resolved, the appellant was unable to even begin work on other issues involved in directly parenting his children.

Two probation officers testified for the appellant and stated that they believed he had complied substantially with the court's orders; however, the probation reports from 1987 through 1990 show that the appellant was in violation of the court's orders. Although the appellant did follow some portions of the court's orders, such as completing a chemical dependency treatment (almost 2 years after it was ordered), the evidence shows that he had not corrected the conditions which originally brought these children to the attention of the court.

The appellant was ordered to participate in parenting classes, but he never enrolled or participated in parenting classes. The trial court later dropped this requirement with the hope that if the appellant were only required to successfully comply with the conditions of refraining from any form of contact with the children's mother and abstaining from alcohol, he would later

be ready to deal with issues more directly involving the parenting of his children.

The evidence shows that the appellant had assaulted the children's mother on more than one occasion following the inception of this case. The appellant was found to be in contempt for violating the court's order regarding no contact with the mother; however, he continued to have phone contact with her.

The appellant was ordered to refrain from consuming alcoholic beverages, to attend AA meetings, at first three times a week and then later once a week, and to provide verification of his AA attendance. While the appellant denied abusing alcohol, he did not deny using alcohol. The appellant's probation officers also testified that he did not provide verification of AA attendance except at review hearings, and then he never had verification for all required meetings.

The appellant was ordered to find housing suitable for himself and the children, but has lived with friends or in efficiency or one-bedroom apartments. He has no suitable housing. He was also ordered to cooperate with the workers involved in the case; however, one of the workers testified there were several periods of a month or more when he had no knowledge of the appellant's whereabouts.

This same worker testified that the children have special needs because of severe behavioral problems. He gave the appellant the names of the children's schools and their therapists so that the appellant could become more familiar with their needs. The appellant did not believe his children had any problems and did not contact the teachers or therapists. The appellant testified he was "not familiar with the type of behavior [his children] have."

The children have been in the custody of DSS since January 11, 1986, and in continuous foster care since February 17, 1987. The appellant has made no substantial progress toward reunification. He has not corrected the conditions leading to the adjudication of this matter. The fact of participation in certain elements of the court-ordered plan of reunification does not necessarily prevent the court from entering an order of termination where the parent has not made satisfactory

progress toward reunification. See, *In re Interest of V.M.*, 235 Neb. 724, 457 N.W.2d 288 (1990); *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987).

All three children in this case have behavior problems and need stability and permanency now. Indefinite foster care is not acceptable where the evidence suggests the need for a secure and permanent home. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988). "A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987). It is in the children's best interests that the appellant's parental rights be terminated.

The judgment is affirmed.

AFFIRMED.

WALTER S. NENEMAN, SR., APPELLANT, V. FALSTAFF BREWING CORPORATION, APPELLEE.

466 N.W.2d 97

Filed March 1, 1991. No. 90-644.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James E. Harris, of Harris, Feldman, Stumpf Law Offices, and Gordon M. Ryan, of Ryan, Seidler & Langdon, for appellant.

Timothy M. Kenny and Bryan S. Mick, of Abrahams, Kaslow & Cassman, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the Workers' Compensation Court, which found that appellant, Walter S. Neneman, Sr., suffered from an occupational disease, asbestosis, incurred between 1942 and 1983 while in the employ of the appellee, Falstaff Brewing Corporation, and ordered the appellee to make payment of all future medical expenses.

The court further found that "the plaintiff has failed to maintain his burden of proving that he sustained any disability as a result of said occupational disease." Appellant assigns as error the finding that he was already totally disabled when his asbestosis manifested itself and therefore his earning power was not diminished by the asbestosis. We affirm.

The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong. *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 457 N.W.2d 285 (1990); *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990); *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990).

The facts most favorable to the prevailing party are as follows: Neneman was employed for a period of 41 years by and retired in 1983 from Falstaff. During his last 2 years of employment, Neneman began to suffer from substantial and painful non-employment-related medical problems, and as a result of participation in childhood athletics, Neneman had sustained several injuries to his knees. In addition, from an early age he suffered from osteomyelitis.

In December 1981, Neneman was hospitalized and underwent an osteotomy conducted by Dr. Gerald E. Ries. Subsequently, in March 1982, Neneman was diagnosed with thrombosis of the left knee, leading to a total knee replacement and another recovery period of 6 to 8 weeks. He returned to work but experienced more pain and difficulty. In May 1983, he was readmitted to the hospital and underwent a manipulation of the right knee, and on August 18, 1983, he was admitted to the emergency room at Bergan Mercy Hospital for treatment of osteomyelitis in his right ankle. He was again hospitalized, on August 25 and on September 12. He was readmitted to the hospital on November 20 for treatment of an infection. He was dismissed from the hospital on December 1, but never again returned to work with Falstaff.

Sometime in 1983, Neneman applied for Social Security, retroactive to September 1983, because of his recurring problems. Disability was granted prior to February 6, 1984, based on the report of Dr. Ries. He has received Social Security and pension benefits since that date. Dr. Ries' letter in support of his non-work-related disability retirement plan stated in part: "I hereby certify that because of [this] condition WALTER NENEMAN . . . (is) totally disabled so as to be unable to engage in any gainful employment or occupation by reason of a medically demonstrable (physical) . . . condition, and in my opinion such disability . . . (will) continue for the remainder of his life." On February 7, 1990, at the request of Neneman, Dr. Ries once more confirmed that Neneman could not be engaged in any kind of employment as a result of his orthopedic problems, without regard to any consideration of possible asbestosis.

It is obvious that there is evidence in the record which supports the finding of the compensation court that prior to the discovery of asbestosis, the defendant was totally disabled from a non-employment-related condition. As we are not free to substitute our judgment for that of the compensation court, the judgment must be affirmed.

AFFIRMED.

LEAH SCHILLEREFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE SCHILLEREFF, DECEASED, APPELLEE AND CROSS-APPELLANT, V. INDEPENDENT PLUMBING AND HEATING, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

466 N.W.2d 99

Filed March 1, 1991. No. 90-675.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Robert W. Mullin, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

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

PER CURIAM.

On rehearing in the Nebraska Workers' Compensation Court, an award was entered for George Schillereff based on his claim for injury from asbestosis and chronic obstructive pulmonary disease secondary to long-term nicotine use. After the award and while this appeal was pending, George Schillereff died. Hence, this appeal involves Leah Schillereff, personal representative of the estate of George Schillereff, deceased.

Independent Plumbing and Heating, Inc., as George Schillereff's employer, appeals and claims error in the Nebraska Workers' Compensation Court's (1) finding that Schillereff's disability was causally related to his employment, (2) finding that Schillereff suffered injurious exposure to asbestos during his employment with Independent, (3) denying a continuance, and (4) admitting inadmissible hearsay.

Leah Schillereff cross-appeals and claims that the Workers' Compensation Court erred by failing to order immediate payment of the award to Schillereff.

"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. . . . In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . . As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 460-61, 461 N.W.2d 565, 568 (1990) (quoting from *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988)); Neb. Rev. Stat. § 48-185 (Reissue 1988).

> In a workers' compensation case, by a preponderance of evidence a claimant must prove that the claimant's employment proximately caused the claimed injury or disability and thereby correspondingly negate that a claimant's condition existing independent of the claimant's employment and before a work-related incident alleged to be a cause of the claimed disability is the sole cause of the disability for which compensation is sought. . . . Under the preceding rule, proof that employment proximately caused a compensable injury and disability simultaneously establishes that a claimant's disability is not solely attributable to deterioration of an employee's antecedent condition which has resulted in disability.

Heiliger, supra at 466, 461 N.W.2d at 571.

The evidence supports the finding by the Nebraska Workers' Compensation Court that George Schillereff's injury arose out of and in the course of his employment with Independent.

Independent has failed to show an abuse of discretion by the Nebraska Workers' Compensation Court in denying a continuance and has failed to show prejudice resulting from the court's refusal to grant a continuance.

The Nebraska Evidence Rules do not apply in proceedings before the Nebraska Workers' Compensation Court. See, Neb. Rev. Stat. § 48-168 (Reissue 1988); Neb. Evid. R. 1101(4)(d), Neb. Rev. Stat. § 27-1101(4)(d) (Reissue 1989); *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991).

We are unable to conclude that the Nebraska Workers' Compensation Court was clearly erroneous in its findings for the award reviewed. Therefore, the award of the Nebraska Workers' Compensation Court is affirmed.

We find no abuse of discretion or error to sustain Schillereff's cross-appeal.

Since Independent has failed to reduce the amount of the Schillereff award reviewed in this appeal, we order Independent to pay $2,000 which is to be applied toward a fee for the Schillereff lawyer regarding services in this court. See Neb. Rev. Stat. § 48-125(1) (Reissue 1988).

AFFIRMED.

RALPH L. ROMSHEK AND BETTY J. ROMSHEK, APPELLEES AND CROSS-APPELLANTS, V. FRANCIS E. OSANTOWSKI ET AL., APPELLANTS AND CROSS-APPELLEES.

466 N.W.2d 482

Filed March 8, 1991. No. 88-746.

1. **Equity: Appeal and Error.** In an appeal of an action in equity, this court tries the factual issues raised by the appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, this court may consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Injunction: Proof: Appeal and Error.** In a de novo review, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.

3. **Waters: Words and Phrases.** Diffused surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course.
4. _____: _____. A watercourse is defined as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook. Neb. Rev. Stat. § 31-202 (Reissue 1988).
5. _____: _____. A natural drainageway is formed when diffused surface waters concentrate and accumulate in volume so as to lose the characteristics of diffused surface water and flow into a well-defined course, whether it be a natural depression, swale, ditch, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land.
6. **Waters.** The flow of water in a natural drainageway cannot be interfered with to the injury of a neighboring proprietor.
7. _____. Diffused surface water may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface water is concentrated into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface water does not apply.
8. _____. A natural drainageway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression.
9. _____. It is the duty of a lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the water which may reasonably be anticipated to drain therein, and this is a continuing duty.
10. _____. The mere presence of an artificial element in a drainageway does not destroy its characterization as a natural drainageway. It is only where an essential part of the drainageway is artificial or manmade that such characterization may be precluded.
11. **Waters: Negligence.** An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, which have no natural outlet or course of flow, by discharging the water therefrom by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, provided that this is done in a reasonable and careful manner and without negligence.
12. **Equity: Appeal and Error.** Where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings.
13. **Waters: Injunction.** Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner.
14. **Waters: Liability: Damages: Proof.** Where water from another source has been added to water from a source for which a defendant is liable, and the combined

waters cause damage, it is incumbent upon the plaintiff either to establish that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which defendant is liable.

15. **Pleadings.** Any error or defect in the pleading which does not affect the substantial rights of the adverse party must be disregarded.
16. **Crops: Damages.** The general rule is that the measure of damages for the destruction of a growing crop is the value of the crop in the condition in which it existed at the time of its destruction.
17. **Judgments: Final Orders.** A conditional judgment is, as a general rule, wholly void because the judgment does not perform in praesenti and the final effect is left to speculation and conjecture.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed in part as modified, and in part reversed and remanded.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Barry L. Hemmerling, of Jeffrey, Hahn, Hemmerling & Wade, P.C., for appellees.

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

HASTINGS, C.J.

The defendants appeal from a mandatory injunction entered against them by the district court, an order directing a prospective monetary penalty, and a judgment for damages in favor of the plaintiffs.

In an appeal of an action in equity, this court tries the factual issues raised by the appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, this court may consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. Neb. Rev. Stat. § 25-1925 (Reissue 1989); *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990).

In the de novo review, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him

or her to relief. *Uhing v. City of Oakland, supra.*

The plaintiffs, Ralph L. and Betty J. Romshek, are the owners of the northeast quarter and the east half of the northwest quarter of Section 8, Township 16 North, Range 2 West of the 6th P.M., in Butler County, Nebraska. The defendants, Francis E., Ernest J., and Leo J. Osantowski are the owners of the northwest quarter of Section 9, Township 16 North, Range 2 West of the 6th P.M., in Butler County, Nebraska. The Osantowskis' property is located directly east of the Romsheks' property. The two farms are separated along their common boundary by a township road which extends north to the Platte River.

There are three water drainageways that are important in a discussion of this case.

First, there is a manmade watercourse, referred to as the creek or the drainage ditch in the testimony of the various witnesses. It enters the plaintiffs' farm at the southwest corner and flows east-northeast, crossing the township road approximately 412 feet north of the parties' south property lines. That drainage ditch extends onto the defendants' land in an east-northeast direction for some distance and then formerly headed diagonally in a northeasterly direction.

That drainage ditch drains a large tract of land southwest of both the defendants' and plaintiffs' land. A dike runs along the north side of the ditch, beginning on the property upstream from the plaintiffs' land and extending downstream through the defendants' land until the point where the drainage ditch cut diagonally across the defendants' land. A wooden bridge spans the drainage ditch at the point where the ditch crosses the township road.

Second, there is a natural drainageway which the plaintiffs claim is located approximately 200 feet north of the south end of the wooden bridge and which runs generally west to east across plaintiffs' farm. According to the testimony of Ralph Romshek and others, this drainageway passes through a 48-inch culvert under a township road where a bridge was at one time located, across adjoining land onto plaintiffs' land and, in past years, through two culverts beneath the township road separating the plaintiffs' and defendants' land, and east

across the defendants' property to the drainage ditch. The two culverts mentioned above extend east and west beneath the township road separating the plaintiffs' and defendants' land and permitted the water to pass under the road on its natural course. One culvert is a 24-inch reinforced concrete pipe. The other culvert is located 8 feet north of the concrete culvert and is a 48-inch corrugated metal pipe "squash" culvert. The concrete culvert has been in place since prior to 1948. The metal culvert was installed during the 1960's.

Whether this second-described drainageway ever existed in such a way as to flow east from the township road and across defendants' property is one of the major issues in this case.

The third drainageway is a natural watercourse which the parties and witnesses call the Platte River overflow. It extends from the plaintiffs' farm across the township road in a southeasterly direction and thence easterly across the defendants' farm at a point approximately 1,600 feet north of the south end of the township road bridge over the drainage ditch.

Romshek described the overflow as coming out of the Platte River in an easterly direction through his east pasture. In some places the overflow is 8 feet deep and 20 feet wide. Romshek continued, stating that the Platte River overflow crosses the township road through a 48-inch (actually a 54-inch) squash culvert. Once it passes through the culvert, the overflow is on the defendants' land. Romshek testified that before the defendants' land was leveled, the overflow went through a hay meadow and was 6 or 7 feet deep, but was wider than on the plaintiffs' land.

There is no dispute regarding the first of these three drainageways. The controversy focuses on the last two.

The plaintiffs alleged in their amended petition that when the defendants leveled their land in 1976 or 1977, a natural drainageway was blocked, thereby causing water to accumulate on plaintiffs' land, which damaged their crops. This was the second drainageway described above, which, according to the plaintiffs, found its way onto defendants' land through the two culverts.

Romshek testified that heavy rains in 1982 and 1986 resulted

in crop damage. He stated that crops would drown if under water for 2 or 3 days. He further testified that as a result of the obstruction in the drainageway caused by the defendants' raising the west side of their land during the leveling process, the water did not drain off his land and instead remained there for several days, which caused the crops to drown.

Romshek testified that prior to the leveling of the defendants' land, there were no road ditches. The land on both the east and west sides of the road were about level with the township road. The road, he said, was slightly higher at the point of the two culverts to allow the road to pass over them.

Testifying further, Romshek stated that prior to the leveling by the defendants, the second drainageway passed over his property starting at the west end, moved in a generally easterly direction to the two culverts, went through the culverts to the defendants' land, and crossed defendants' land until it reached the drainage ditch. The second drainageway was described by Romshek as a "natural drainway that was a foot or two deep and it didn't go in a straight line, it meandered through the farm and it drained local water off of this farm." He further described local water as the water off the "river bottom ground" and as rainwater. The width of the drainageway was approximately 12 to 15 feet, but the drainageway could get much wider after a heavy rain. Romshek stated that the water flowed in an easterly direction.

Romshek stated that the water drained from the property to the west of his property, as well as from his own. The drainageway ran east across plaintiffs' land, through the culverts, and into "something like a swale that was probably a foot or two foot deep" and "fifteen to twenty feet wide" on the defendants' land just east of the two culverts.

Plaintiffs presented other witnesses who testified regarding the natural drainageway. The first of these witnesses was Gerald McDonald, a road maintainer for Savannah Township, which township encompasses the township road separating the parties' land. McDonald testified that he has been a road maintainer since 1948. During that time he has been up and down that road on the average of twice a month, at speeds of less than 10 miles per hour.

McDonald further testified that there was a swale running east from the two culverts. The swale was described as 1 1/2 to 2 feet deep and 10 to 12 feet wide. The swale extended into the field and ran beside some trees and beyond. At a time when only the concrete culvert was in place, McDonald testified, during heavy rainfall water would run over the road in the approximate location of the culverts.

There was additional testimony from McDonald that even after the pasture on defendants' land was plowed and farmed, the water flowed in the same pattern. He testified further that the swale remained until the defendants leveled their field. Once the field was leveled, the elevation was changed. The defendants' field, according to McDonald, was about 1 1/2 to 2 feet higher than the township road.

Joe Mick, a retired farmer, also testified as to the existence of the swale. Mick said that there was a swale located just east and west of the two culverts. The path of the water was west to east from plaintiffs' land, through the culverts, and across defendants' land. Mick also noted the trees that McDonald had previously pointed out as formerly being located on the defendants' land.

The swale was described by Mick as approximately 1 1/2 feet deep and 15 to 20 feet wide. The swale was still there after the field was plowed for farming. Mick stated that the swale ran east until it met the drainage ditch.

Kenneth Ebel, a farmer from the area, also testified concerning the swale. Ebel had helped the previous owner of the defendants' land, Art Ronkar, put up hay and had also combined his corn 1 year on that same parcel of land. Ebel testified that he observed a "low area" or a "swale" in the area directly east of the culverts. Ebel described the swale as 1 to 1 1/2 feet deep and between 10 and 15 feet wide, with sloping sides. That area was "farmed through." The water would run from the field on the west, through the culverts, and then east-northeast to the drainage ditch.

Joseph Proskovec, an engineer and an earth-moving contractor, also testified. He leveled the defendants' land. Proskovec explained the survey made. The rod readings were taken at 100-foot intervals in a grid pattern. No effort was

made to find the lowest spot in the field.

Proskovec used the survey map to show a low area running west to east originating near the culverts and ending at the drainage ditch. The path takes into account only the actual rod readings; thus it is only a general representation of the depression.

Defendants all deny the existence of the swale, and all three of them testified that there was not a swale or low spot east of the two culverts. However, Leo Osantowski testified in a deposition that the water ran through the culverts, hooked to the north, and then headed east into the defendants' field and eventually into the drainage ditch.

William O'Callaghan was called to testify for the defendants. He used to travel the township road on his way to and from work and said that he had never seen a swale or low spot east of the two culverts.

Richard Walsh, a sanitary engineer, was called as an expert witness by the defendants. Walsh testified that he examined the area, topographical map, aerial photographs, and other exhibits. He concluded that there was not a swale east of the two culverts. Walsh did state on cross-examination that the topographical map did indicate one of several low spots just east of the approximate location of the two culverts. His examination took place more than 10 years after the defendants leveled this land in 1977.

Plaintiffs also alleged in their amended petition that when defendants leveled their land, they blocked the third drainageway previously mentioned, the Platte River overflow. A 36-inch culvert had been inserted into the ditch that defendants had created to carry the flow of water from the Platte River overflow to the east of the defendants' property. The defendants placed a floodgate over the west end of the culvert to control the water passing through the culvert. Not only was the culvert too small to allow the necessary volume of water to pass through, but the floodgate on the culvert was down and silted shut until the time of this lawsuit.

There were many aerial photos of the area, one dated as early as 1938, as well as many pictures of standing water and residue from flooding, which were helpful in determining the existence

of the swale or natural drainageway. The exhibits also showed the Platte River overflow and the obstructions placed there by the defendants. Photographs indicated the presence of the drainageway north of the bridge in the area where plaintiffs claim the swale or natural drainageway existed. The fact that there were two culverts in this location would tend to indicate that ordinarily a fairly large quantity of water passed through this point. Based upon the exhibits, the testimony, and a visual inspection by the trial court, as related in its order, the trial court concluded that there was a natural drainageway east of the two culverts across defendants' land.

The district court entered judgment in favor of the plaintiffs. The court ordered the following to be done within 90 days: (1) the dirt east of the two culverts be removed to create a ditch equal in elevation to the bottom of the lowest culvert, 8 feet wide and 1,000 feet long, due east of the two culverts, with a slope of .1 foot for every 200 feet, and (2) the dike, culvert, and floodgate located on the Platte River overflow be removed and other dirt be removed to create a ditch equal in elevation to the bottom of the 54-inch squash culvert, 8 feet wide and 500 feet long, due east of the culvert, with a slope of .1 foot for every 200 feet. The court further ordered that the defendants comply with the two directives within 90 days and that failure to so comply would result in civil contempt, with a penalty of $500 per day for each day thereafter that the defendants did not comply. The court also ordered money damages be paid to the plaintiffs in the amount of $4,300.

The defendants assign as error the court's order that defendants regrade the Platte River overflow, the court's finding that a natural drainageway exists in the area of the two culverts across the township road, the court's order that the defendants be required to excavate a ditch 8 feet wide and 1,000 feet long to begin at the elevation of the lower of the two culverts beneath the township road, the court's determination that weather data showing that the 1982 and 1986 rainfall exceeded the average annual rainfall by 20 inches or more not be received in evidence, the court's order that plaintiffs be awarded money damages, and the court's order that defendants were to pay a penalty of $500 per day if they failed to remove the

dirt and dike within 90 days. Plaintiffs cross-appeal, assigning as error that the court did not order the defendants to remove the dirt from the swale and the Platte River overflow to create ditches extending to the drainage ditch. We review this case de novo on the record.

The first three assignments of error will be considered together. The nature of the water must be determined—whether it is diffused surface water or flows in a natural watercourse or a drainageway—to ascertain which rule to apply to the drainage of that water.

Diffused surface water is defined as "water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow." *Gruber v. County of Dawson*, 232 Neb. 1, 9, 439 N.W.2d 446, 453 (1989); *Shotkoski v. Prososki*, 219 Neb. 213, 362 N.W.2d 59 (1985); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980). A watercourse is defined as "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook . . . ." Neb. Rev. Stat. § 31-202 (Reissue 1988).

There are occasions when surface waters are concentrated in force and volume to form a natural drainageway other than a watercourse. In these instances the rules relating to diffused surface water as a common enemy do not apply. *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985). Thus, a watercourse is a drainageway, but the converse is not necessarily true. *Id.*; *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). A natural drain does not have to have all of the attributes of a watercourse, but it is required to have some of the attributes of a watercourse. *Shotkoski v. Prososki, supra*; *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

A natural drainageway is formed when diffused surface waters concentrate and accumulate in volume so as to lose the characteristics of diffused surface water and flow into a well-defined course, whether it be a natural depression, swale, ditch, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land. *Gruber v. County of Dawson, supra*; *Holman v. Papio Nat. Resources Dist.*, 228

Neb. 94, 421 N.W.2d 430 (1988); *Belsky v. County of Dodge, supra*; *Shotkoski v. Prososki, supra*. The flow of water in a natural drainageway cannot be interfered with to the injury of a neighboring proprietor. *Belsky, supra*; *Town of Everett v. Teigeler*, 162 Neb. 769, 77 N.W.2d 467 (1956).

The current Nebraska rule regarding diffused surface water was announced in the leading case of *Nichol v. Yocum, supra*. In *Nichol*, the court rejected the common enemy doctrine and instead accepted the common-law rule. The court summarized the rule on avoidance of diffused surface water as follows:

> [D]iffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. . . . "[A] natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the waters which may be reasonably anticipated to drain therein, and that this is a continuing duty."

Nichol v. Yocum, supra at 306, 113 N.W.2d at 200. See, *Gruber v. County of Dawson, supra*; *Belsky v. County of Dodge, supra*; *Shotkoski v. Prososki, supra*; *Krafka v. Brase*, 218 Neb. 335, 353 N.W.2d 276 (1984); R. Harnsberger & N. Thorson, Nebraska Water Law & Administration § 4.06 (1984).

The water flowing through the two culverts has several characteristics of diffused surface water. Ralph Romshek testified that the water was "local water" which was drained off the river bottom ground and was rainwater. However, the water loses some of the characteristics of diffused surface water when it enters the swale on the southern portion of the plaintiffs' land, passes through the two culverts, and heads east toward the drainage ditch. The water now forms a natural drainageway

because of the regularity in the course the water takes and the concentration of the volume of water. In addition, the drainageway makes its way to the drainage ditch, which has a continuous stream of water. Thus, it takes on more characteristics of a natural drainageway.

The court in *Nichol* stated that the controlling factor is not whether water is present in the drainageway at all times; rather, the controlling factor is whether the course the water uniformly takes is temporary or occasional. Romshek and several witnesses testified that every time there was a heavy rain, the water drained toward the swale. The course the water took was always along the same path. While it is true that water was not always present in the swale, this is not a controlling factor. The water ran consistently on the same path through the swale. This is the controlling factor.

The evidence establishes that the water that passed through the two culverts was not diffused surface water. The water has collected and combined in volume to flow into a depression or swale through which it flows in a state of nature.

Defendants make much of the fact that the water flows in a ditch and through the concrete and corrugated metal culverts, none of which are natural features. The court in *Gruber v. County of Dawson*, 232 Neb. 1, 8, 439 N.W.2d 446, 452 (1989), stated that " 'the mere presence of an artificial element in a drainageway does not destroy its characterization as a natural drainageway. It is only where an essential part of the drainageway is artificial or manmade that such characterization may be precluded.' " (Quoting *Holman v. Papio Nat. Resources Dist.*, 228 Neb. 94, 421 N.W.2d 430 (1988).) Despite the construction of the ditch and the presence of the two culverts, the water was carried across the defendants' land from the same entrance to the same exit. This is evidenced by the testimony that in extremely heavy rain the water crossed the road about 50 feet north of the two culverts, found its way to the swale, and continued east to the drainage ditch. The water did not cross at the two culverts because the road is higher at that point to provide for the culverts. However, the water crossed at a low point in the road close to the location of the two culverts. Thus, the presence of the artificial features did not

change the path of the natural drainageway on the defendants' property.

Defendants also argue that when the plaintiffs leveled their own land, the plaintiffs eliminated all traces of the natural drainageway on their property, and thus they should not prohibit defendants from doing the same thing.

This argument can be answered with reference to the case of *Stuthman v. Adelaide D. Hull Trust*, 233 Neb. 586, 447 N.W.2d 23 (1989). The *Stuthman* case involved a natural basin or depression. The east ridge of the depression, which was the highest point, was about 2 feet higher than the lowest point of the depression. Surface waters accumulated in the depression on a temporary basis only.

A drainage ditch was dug to facilitate drainage by preventing surface water from accumulating in the depression. The ditch, which was located entirely on the defendants' property, emptied into a natural drainage course also located on the defendants' property. The natural drainage course continued through a drainage culvert, onto the plaintiff's property, and into a creek. The plaintiff complained that the excess drainage caused wet areas on her land. The trial court dismissed the petition.

This court relied on Neb. Rev. Stat. § 31-201 (Reissue 1988), which provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

The court stated:

> "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of

> drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence."

Stuthman, supra at 590-91, 447 N.W.2d at 27, quoting *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905). Accord *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950).

A further principle was applied in the *Stuthman* case, wherein the court stated:

> "An owner has the undoubted right to protect his land from mere surface water and, in the interest of good husbandry, to drain lagoons or basins thereon of a temporary character, by discharging such surface waters by means of artificial channels into a natural surface water drain and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts."

Stuthman, supra at 591, 447 N.W.2d at 27, quoting *Todd v. York County*, 72 Neb. 207, 100 N.W. 299 (1904).

The court in *Stuthman* applied the above principles and held that the defendants could construct a ditch to drain the surface waters from their land into a natural draw or surface drain. The court found that at no time did the water leave the natural course of drainage, other than on the defendants' own land. Since the ditch was constructed entirely on the defendants' land, the defendants were not liable for damages. The defendants' actions in creating a ditch were found to be protected by § 31-201 and the precedent cited above.

The leveling performed by the plaintiffs in the case at bar is not so different from the ditch constructed in *Stuthman v. Adelaide D. Hull Trust*, 233 Neb. 586, 447 N.W.2d 23 (1989). The basin in *Stuthman* is described similarly to the swale in this

case. The plaintiffs in this case also created somewhat of a ditch in the leveling project. The plaintiffs leveled their land to drain to the east, and ran their crop rows in that same direction. The crops were irrigated by the water flowing down the rows. In essence, small ditches were created between the rows to irrigate the crops. As the water reached the east side of the plaintiffs' field, it entered into the natural drainageway and passed through the culverts onto the defendants' land. Eventually the water made its way to the drainage ditch.

In comparing this case to *Stuthman*, it can be inferred that any leveling by the plaintiffs was permitted, provided the water exited their land in the natural drainageway. Plaintiffs will not be liable for any damages to the landowners downstream, including the defendants, for draining the waters into a natural drainageway that begins on their own property, as long as this is done in a reasonable and careful manner. See *Stuthman, supra*.

Plaintiffs have drained the water off their field in such a way that they have not been negligent. The water drains generally west to east to the culverts. The water is not forced upon the defendants' land in great volume, it flows at a natural pace. Furthermore, the leveling done by the plaintiffs did not change the point where the swale enters the defendants' land. The court in *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962), stated that an upper proprietor may change the course of surface water on his own land by ditch or embankment, provided that the upper proprietor does not alter the point at which the water exits his land. Therefore, the leveling of the plaintiffs' land did not alter the status of the water in the natural drainageway.

Defendants allege that the plaintiffs have leveled their land to drain to the southeast corner. They further allege that if the dike was not present on the north side of the drainage ditch, the water would flow off the plaintiffs' land into the drainage ditch and thus eliminate the problem. They contend that the reason the southeast corner is not draining is a combination of the leveling of the plaintiffs' land, the presence of the dike on the north side of the drainage ditch, and the low elevation of the southeast corner. This does not explain why the plaintiffs did not have the drainage problem they presently have prior to the

defendants' leveling their field.

In order for the plaintiffs to prevail under their theory that the leveling of the field obstructed a natural drainageway, they must show by a preponderance of the evidence that the drainageway traversed the road and defendants' land before the road was altered and the defendants leveled their land, that the drainageway was formed and existed in a state of nature, and that it carried water from a higher estate to a lower estate. *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446 (1989); *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985).

Plaintiffs' evidence is persuasive that the drainageway would cross the road even without the culverts and that prior to the leveling the water would have continued east to the drainage ditch. Further, the evidence supports the conclusion that the drainageway was formed and existed in a state of nature. The artificial elements do not destroy the characterization as a natural drainageway. Lastly, the plaintiffs have shown that the water is draining from a higher estate to a lower estate.

This court has continuously stated that where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985); *Darsaklis v. Schildt*, 218 Neb. 605, 358 N.W.2d 186 (1984). See, also, *Holman v. Papio Nat. Resources Dist.*, 228 Neb. 94, 421 N.W.2d 430 (1988); *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984); *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982); *Jameson v. Nelson*, 211 Neb. 259, 318 N.W.2d 259 (1982).

The order entered by the trial court on May 26, 1988, states that the court conducted a drive-by inspection of the properties and the township road separating the properties on March 9, 1988. The court's order continues with a "Findings of Fact" stating the observations and the findings made by the court as a result of the premises view, as well as other findings of fact deduced from the testimony and evidence. The findings of fact,

set out in part, are as follows:

> Exhibits 1, 2, 11, 12, 100, 401, 402, 413 coupled with the testimony of Ralph Romshek, Jerold [sic] McDonald, Joe Mick, Kenneth Ebel, Joe Proskovec and premises view conclusively establish two natural drainways and one man made drainway that run generally west to east from plaintiffs' property onto and across defendants' property.
>
> The man made drainway is a drainage ditch that has been in place for 30 years or more located approximately 412 feet north of the South one-half section line as it passes from plaintiffs' property onto defendants' property undera [sic] bridge in the north-south township road which separates the two properties. There is no contention between the parties with regard to this drainway.
>
> One of the other two natural drainways, hereafter referred to as drainway #1, runs generally west to east from plaintiffs' property onto and across defendants' property at a point approximately 180-200 feet north of the south edge of the bridge across the drainage ditch thru two culverts in the township road separating the two properties.
>
> The other natural drainway, hereafter referred to as the Platte River overflow, runs generally west to east from the plaintiffs' property onto and across defendants' property at a point approximately 1600 feet north of the south edge of the bridge across the drainage ditch thru a 4 foot squash culvert in the township road separating the two properties.
>
> Exhibits 11, 12, 35, and 36, the testimony of Ralph Romshek and Joe Proskovec, and the premises view establish that in 1976 the defendants undertook extensive leveling of their farm which resulted in fills of dirt as much as 1.5 ft. or 18 inches in drainway #1 along defendants' west property line immediately to the east of the two west-east culverts in the township road and extending easterly at various depths and widths for 1000 feet or more.
>
> Leveling also resulted in fills of dirt as much at [sic] .5

> ft. or 6 inches or more in the Platte River overflow along defendants' west property line immediately to the east of the [54] inch squash culvert in the township road and extending easterly at various depths and widths for at least 500 feet.
>
> . . . [Defendants] also installed a flood gate attached to a 36" culvert thru the dike immediately to the east of the [54]" squash culvert in the township road as shown by Exhibits 38 and 39 and the premises view.

In *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 683, 414 N.W.2d 256, 260 (1987), this court stated that "[s]ince the record in this case does not tell us what the judge saw nor what findings he made as a result of his view, we give no weight to the fact that he viewed some of the lands involved." Accord *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446 (1989).

In *Johnson* and *Gruber* the court did not give any weight to the trial court's premises view because the findings reached as a result of the view were not set out. In the following two cases the court did set out its findings, and thus weight was given to the premises view. In *Krafka v. Brase*, 218 Neb. 335, 353 N.W.2d 276 (1984), this court gave consideration to the findings of the trial court as a result of the view of the premises. The findings of the trial court were stated as follows:

> "The Court concludes that in a state of nature the water simply would not flow in the manner that the Plaintiff claims. The visual inspection of the Plaintiff's real estate indicated no particular source of drainage from the south. The Court is left with the conclusion that if there is water accumulating on the Plaintiff's land it is water that could be classified as surface water, which can be repelled by adjoining landowners . . . ."

Id. at 337-38, 353 N.W.2d at 278.

In *Jameson v. Nelson*, 211 Neb. 259, 318 N.W.2d 259 (1982), this court also gave appropriate weight to the fact that the trial court had viewed the premises. In that case the trial court found the following:

> "2. That the original cut on the Jameson land in 1952 was to provide drainage of lagoons on the Nelson land directly to the north of the cut;

3. That water did drain to the south at the place of the cut prior to the cut being made;

4. That the new ditch will increase drainage flow through the old cut;

5. That the three dam structures in the draw below the cut do not have sufficient capacity to hold the additional drainage;

6. That this presents a danger to the crop land of the plaintiff below the dam sites."

Id. at 265-66, 318 N.W.2d at 263-64.

In the case at bar the trial court set forth the things it saw. In addition, the trial court found that the land had been leveled with fills of as much as 1.5 feet in "drainway #1," the swale, and that the land had been leveled with fills by as much as .5 foot in the Platte River overflow.

The trial court also stated the findings made as a result of the view of the premises. The trial court found that there were two natural drainageways common to both properties. The characterization of the waters as natural drainageways is very important to the plaintiffs' theory of the case. The trial court continued, describing the direction and path of the drainageways as they passed over the plaintiffs' property, through the various culverts, and onto the defendants' property.

The results of the trial court's findings are reaffirmed by the evidence in the record. In fact, the trial court specifically notes the exhibits and testimony which supported the findings and conclusions reached as a result of his view of the premises. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985), and *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985), tell us that the record must contain competent evidence to support the findings made by the court in the premises view. The record does support the findings of the trial court. The fact that the trial court cites to exhibits and testimony in conjunction with the findings as a result of the premises view should not detract from the fact that the premises were viewed and findings were made as a result of that view. The exhibits and testimony cited should be considered support from the record for the findings made by the trial court as a

result of the premises view.

Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner. *Gruber v. County of Dawson, supra.* Plaintiffs have shown that the obstruction of the natural drainageway will continue to harm them. The water cannot flow through the swale on its path to the drainage ditch, thereby causing the water to build up on the plaintiffs' land and destroy the crops growing thereon. The swale is a natural drainageway and defendants have no right to dam, divert, or otherwise repel water that flows through said drainageway. Thus, the injunctive relief was properly granted to prohibit the defendants from obstructing the natural drainageway.

The Platte River overflow is clearly a watercourse as defined by § 31-202. The overflow is over 2 feet below the surrounding land and has a continuous outlet to a stream of water. The Platte River overflow is sometimes dry. However, the court in *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983), noted that a watercourse could sometimes be dry and that it need not flow continuously. Thus, the Platte River overflow is a watercourse.

The defendants do not dispute the portion of the trial court's order which requires them to remove the floodgate and culvert that they built into the Platte River overflow. The defendants do object to the portion of the order which requires them to regrade the Platte River overflow on their property to the same elevation as the bottom of the 54-inch squash culvert.

The flow of water cannot be interfered with to the detriment of the upper proprietor. *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985). The defendants have admitted that they have tampered with the flow of the Platte River overflow. This has resulted in water's backing up on the plaintiffs' land, damaging their pastureland. The trial court was correct in granting the injunction to prohibit the defendants from obstructing the flow of the Platte River overflow. The defendants can make changes in the course on their own land, provided the watercourse continues to take the same flow of water as before.

At this point, the cross-appeal will be discussed in conjunction with defendants' assigned errors regarding the ditches that were ordered to be created. Plaintiffs argue that the ditches are insufficient because they do not extend to the drainage ditch, as the swale and the Platte River overflow formerly did. When the land was leveled, the diagonal portion of the drainage ditch was removed. The drainage ditch now extends east to the east property line of the defendants. Plaintiffs argue that the new ditches will be inadequate to hold the water draining from their property.

Defendants argue that the ditches they are ordered to make are much deeper than before the leveling. The defendants point to a survey map to show that the amount of dirt added to the area where the swale and the Platte River overflow are located is much less than the amount of dirt they will now be forced to remove. Further, they will now be forced to have two large ditches in their property.

Both arguments are correct; however, the judgment is sound. While it is true the ditches are much deeper than the previous drainageways, they are also much shorter. Defendants will have ditches on their property, but they will not extend the entire length that they did before. Plaintiffs get shorter drainageways, but much deeper drainageways. The solution appears to be a compromise to provide adequate drainage while allowing the defendants to enhance the productivity of their property. Therefore, the assignments of error regarding the ditches to be created on the defendants' property are without merit.

The defendants' next assignment of error is the failure of the trial court to receive into evidence rainfall data. The court stated in *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 691, 414 N.W.2d 256, 265 (1987), that

> where water from another source has been added to water from a source for which a defendant is liable, and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which defendant is liable.

Accord *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1,

305 N.W.2d 888 (1981). The rainfall data are clearly relevant to the measure of damages. The plaintiffs claim that their crops were drowned because water could not flow through the swale off their land. The rainfall data are necessary to determine if part of the crop would have drowned even if the natural drainageway was not blocked. The trial court should have considered whether the greater-than-average rainfall would have affected the drainage of the water in light of the fact that Romshek testified that water sometimes remained on the field overnight after a heavy rainfall before the defendants leveled their land. Thus, the failure to permit these data into evidence was error.

The next assignment of error is the award of damages. Defendants allege that the plaintiffs did not properly plead damages to their crops and pastureland. In paragraph 6, the plaintiffs' amended petition alleges that

> sometime during 1976 or 1977, Defendants did move certain dirt upon their property and deposited the same in a fashion so that said natural drainway was obstructed and caused water to accumulate upon the property of the Plaintiffs immediately west of the culvert located under the public road that separates the Plaintiffs' land from the Defendants' land and through which such natural drainway flowed and such accumulation of water caused damage to the crops growing on said land.

The amended petition further alleged, in paragraph 3 of the second cause of action, that "such accumulation of water caused damage to the pasture land thereon . . . ."

Defendants argue that since crops are personal property and there is a specific measure of damages for injury to growing crops, the crop damages are special damages. Therefore, they argue that the amount of the special damages must be stated, pursuant to Neb. Rev. Stat. § 25-804 (Reissue 1989), which provides in part: "If the recovery of money be demanded, the amount of special damages shall be stated [in the petition]."

Plaintiffs failed to state the specific amount of money damages requested for the damage of their crops and pastureland. Defendants argue that this failure should preclude any evidence from being admitted regarding these special

damages.

Damages based upon the value of an unmatured crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *State v. Dillon*, 175 Neb. 350, 121 N.W.2d 798 (1963); *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957). The loss of profits expected upon transactions with third persons must be specially pleaded. C. McCormick, Handbook on the Law of Damages § 8 (1935). Thus, by analogy, damage to crops should also be specially pleaded. Plaintiffs failed to specially plead the damages to their crops.

Any error or defect in the pleading which does not affect the substantial rights of the adverse party must be disregarded. Neb. Rev. Stat. § 25-853 (Reissue 1989); *Gibbs v. Johns*, 183 Neb. 618, 163 N.W.2d 110 (1968). No substantial rights of the defendants were affected by the failure of the plaintiffs to state the amount of the damages to their crops. The defendants were aware from the petition that the plaintiffs intended to seek damages for the damage to the crops and the pastureland. Thus they were put on notice that they would have to defend the issue of damages and the amount thereof. Any other discrepancies in the notice given by the petition could have been cleared up by an appropriate motion.

In the case *Swick v. Cosler*, 194 Neb. 781, 235 N.W.2d 639 (1975), this court found that under the statutes which govern pleadings and service of process, the inclusion of a dollar amount for general damages was not jurisdictional. Any error by the plaintiff in stating a dollar amount of general damages did not affect any substantial right of the defendant. *Swick, supra*. The failure to state the amount of special damages should not be jurisdictional as well. In addition, if the defendant is aware of the damages he must defend, no substantial right of the defendant is affected. Thus, the proof of the damages should be permitted.

The general rule is that the measure of damages for the destruction of a growing crop is the value of the crop in the condition in which it existed at the time of its destruction. *Pulliam v. Miller*, 108 Neb. 442, 187 N.W. 925 (1922). The value of a matured crop may be proven by showing the market value,

less the necessary costs of harvesting, threshing, and transporting to market. *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *Pulliam v. Miller, supra.*

A more extensive list of factors to be taken into account in determining the value of a damaged crop is set out in *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922). The value of the crop at the time of its injury or destruction is determined by taking into account the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring land; the development of the crop at the time of destruction; the yield of a similar crop not injured; the market value of the crop as injured; the market value of the probable crop without injury; the time of the injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crop's not maturing; and all other circumstances illustrated by the evidence tending to establish such value. *Hopper v. Elkhorn Valley Drainage District, supra.*

The trial court did not admit evidence of rainfall. This is clearly relevant to the valuation of the crop. The trial court also did not take into account the cost of harvesting and transporting the crops to market. The valuation of the damage to crops is speculative at best; however, the trial court needs to examine all the circumstances surrounding the development, harvesting, and marketing of the crop to assure that as much speculation is removed as is humanly possible.

The trial court failed to consider several important factors in arriving at its decision. The determination of the valuation of the damages to the crops is reversed, and the cause is remanded with directions that the trial court permit the introduction of evidence to show the cost of the above-mentioned factors and any other factors which may affect the valuation of the crop.

Defendants' final assignment of error challenges the decree of the trial court giving the defendants 90 days to comply with the decree and imposing a penalty of $500 per day for each day thereafter that the drainage condition is not corrected. This court has held that a conditional judgment is wholly void

because the judgment does not perform in praesenti and the final effect is left to speculation and conjecture. *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989); *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987); *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). In the case *Lemburg v. Adams County, supra* at 292, 404 N.W.2d at 431, the court added that "final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of [the parties], a conditional judgment is wholly void."

A judgment determines the rights and obligations which currently exist. It should not look to the future in an attempt to judge the unknown. The judgment entered by the district court attempted to do just that. The judgment called for a penalty for failure to comply with the decree within a limited period of time, 90 days. The failure to comply with the decree would be civil contempt. By placing the penalty within the decree, the trial court has entered a judgment based upon rights and obligations which are not currently in existence. The trial court has determined the outcome of the contempt charge and the penalty, prior to any wrongdoing by the defendants with respect to the decree.

The brief for the plaintiffs cites a case which the plaintiffs claim is very similar, *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963). The case is similar in that both cases involve the removal of a dike and both cases also provide a time limitation for complying with the order. However, the cases differ in one significant respect. In *Kasparek*, the action for civil contempt was commenced after the time period had passed. The defendants in that case did not properly comply with the decree, and thus the civil contempt action was commenced. There was also no fine or penalty mentioned in the original decree for failure to comply.

The decree of the trial court should be modified to eliminate that portion which sets forth the penalty for civil contempt.

AFFIRMED IN PART AS MODIFIED, AND
IN PART REVERSED AND REMANDED.

JOHN J. McVANEY, APPELLANT, V. BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM, A PARTNERSHIP, APPELLEE.

466 N.W.2d 499

Filed March 8, 1991. No. 88-881.

1. **Directed Verdict: Appeal and Error.** On appeal from the granting of a motion for a directed verdict, the Supreme Court reviews the evidence in the light most favorable to the party against whom the motion is directed, and that party is entitled to have all controverted facts resolved in his favor and to have the benefit of all inferences which can reasonably be drawn from the evidence.
2. **Directed Verdict.** If there is any evidence in favor of the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law.
3. **Trial: Juries: Directed Verdict.** When reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury.
4. **Attorney and Client: Negligence: Proof: Proximate Cause.** There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
5. **Partnerships: Liability: Torts.** A partnership or every member of the partnership is vicariously liable for torts committed by one of the partners acting within the scope of partnership business.
6. **Contracts: Attorney and Client: Proof.** An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from the conduct of the parties. The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them, and the attorney, aware of such reliance, does nothing to negate it.
7. **Contracts: Attorney and Client.** No formal contract, arrangement, or attorney fee is necessary to create the relationship of attorney and client; the contract may be implied from the conduct of the parties.
8. **Contracts: Malpractice: Proof.** A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement, and a contract may be implied from conduct and circumstances. However, it is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based.
9. **Attorney and Client.** An attorney impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.

10. **Attorney and Client: Malpractice: Judgments: Proof.** In a malpractice action against an attorney, a plaintiff has the burden of proving that he or she would have been successful in obtaining and collecting a judgment in the action for which he or she contracted with an attorney and that he or she was prevented from doing so by the attorney's negligence.
11. **Actions: Negligence: Proximate Cause: Damages.** The elements of a negligence cause of action are duty, breach, proximate cause, and damages.
12. **Negligence: Proximate Cause: Proof.** Standing alone, the fact that a gas explosion due to a leak has occurred is not sufficient to demonstrate that a gas distributor's negligence was the proximate cause of the explosion.
13. **Trial: Negligence: Juries: Proof.** A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that injury occurred in the manner claimed.
14. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.
15. **Negligence: Circumstantial Evidence: Proof.** Negligence, like any other fact, may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred.
16. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the injury to the plaintiff.
17. **Trial: Expert Witnesses.** With respect to the requirement of expert testimony, the test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders.
18. _____: _____. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
19. _____: _____. When an expert opinion is given which is not in accordance with the actual facts, it lacks probative value.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Lawrence L. Marcucci and Edward N. McConnell, of Marcucci, Wiggins & Anderson, P.C., and John M. McHale, of The Peters Law Firm, P.C., for appellant.

Joseph K. Meusey and Robert M. Yates, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

John J. McVaney appeals a directed verdict adverse to him in an attorney malpractice action in which he alleged inter alia that the defendant law firm failed to timely file a negligence action against the Metropolitan Utilities District (MUD).

In directing a verdict at the close of the plaintiff's case in chief for the defendant law firm, Baird, Holm, McEachen, Pedersen, Hamann & Strasheim (Baird), the district court for Douglas County found as a matter of law that McVaney failed to adduce sufficient evidence from which a jury could find that negligence on the part of MUD was the proximate cause of an explosion which destroyed a building McVaney owned. We affirm.

In effect, the trial court held that one of the two experts called to testify by McVaney could not testify to a reasonable degree of certainty that any of the things that MUD did or failed to do was a proximate cause of the explosion and that the second expert's opinion regarding proximate cause was based not upon facts, but impermissibly upon mere conjecture.

On the night of February 5, 1983, a veterinary hospital in Omaha owned by McVaney, who was licensed to practice veterinary medicine at that time, was destroyed by a natural gas explosion. For several days preceding the explosion, McVaney and others reported to MUD that they smelled natural gas in the vicinity of the veterinary hospital. In its normal state, natural gas is odorless, and an odor is introduced into the gas as a safety measure. This odor is commonly referred to as "gas." From January 26 to and including February 4, 1983, MUD employees made several visits to McVaney's property and to the vicinity of the hospital in an attempt to identify and repair any suspected gas leaks.

MUD provided natural gas to McVaney's hospital through a service line from a main in a street to a gas meter located on the west side of McVaney's building. Piping from the meter ran through a wall (wall pipe) and was attached to a fuel line within the hospital's basement. The internal fuel line traversed the basement to the east side, where it was connected by several pipes to a hot water heater and two furnaces. MUD owned the gas meter and the pipe extending from the main in the street to

McVaney's gas meter. The remaining piping, connecting the gas meter to the hospital's internal system, was owned by McVaney.

In the basement of the hospital, there was a partial false ceiling approximately 2 feet below the first floor. The east side of the basement, housing the furnaces and water heater, had no false ceiling. The furnaces and water heater were located in the northeast section of the basement. There was a sound-deadening wall between the furnaces and a series of pens to the west. An exhaust fan, located on the basement's west wall below the false ceiling, was capable of removing 6,000 to 12,000 cubic feet of air per hour from the basement. The basement's volume was 17,400 cubic feet. McVaney testified that the fan in the basement was operating continuously during the 7-day period preceding the explosion.

On January 26, 1983, McVaney smelled gas in a first-floor reception area of his hospital. He relighted the pilot lights of the furnaces and the hot water heater, which were out, and he contacted MUD. On that date, no gas leak was found by MUD personnel, but the gas meter was replaced. On January 31, McVaney again smelled gas in the reception area of his hospital and called MUD. A responding MUD employee discovered a gas leak and tightened a loose pipefitting in the basement of McVaney's building.

On February 2, McVaney detected the odor of gas as he entered his hospital. He telephoned MUD. MUD workers found negligible gas leaks inside McVaney's hospital on February 2, which they attributed to methane gas released by animal wastes. They further reported a Class I leak in the vicinity of a stop box located approximately 100 feet from McVaney's hospital. The stop box was situated underneath the other side of the street from McVaney's building and was not connected to the fuel line inside McVaney's building. According to MUD's procedures manual, a Class I leak is one that "represents an existing or probable hazard to persons or property, and requires immediate repair or continuous action until the conditions are no longer hazardous." An MUD construction crew was dispatched to the site to investigate, and it concluded that the situation was not hazardous and that it did not warrant further attention that night. On February 3, MUD

workers returned to the site, but found no gas leaks.

MUD personnel returned to the vicinity of McVaney's hospital on February 4, after a deputy sheriff reported smelling gas in the area. The MUD workers found a gas leak on a gas service valve across the street, west from McVaney's building. The record is undisputed that this leak would not have affected McVaney's building, which was located on the east side of the street, as the pocket of gas found underneath the west side of the street never migrated beyond the street's east curb.

On February 4, in view of the problems with leaking gas encountered during the week, an MUD employee decided to test the gas service lines to McVaney's hospital. Combustible gas indicator and flame ionization unit tests performed by an MUD crew revealed no leak within the McVaney hospital. Both tests are designed to detect the presence of a gas leak. A soapy solution which bubbles when there is a gas leak was also applied to the wall pipe and the fittings of the gas appliances, but did not disclose the presence of any gas leak.

Gas service to McVaney's building was shut off on February 4 so that the pipes could be pressure tested. This fourth test was conducted on the entire gasline from the main in the street to the valves on the water heater and two furnaces located in the basement of McVaney's building. The test disclosed a loss of pressure, indicating the existence of a leak somewhere in the fuel line between the appliance valves on the hot water heater and two furnaces and the gas meter. The test was conducted twice, with identical results. In accordance with their procedures manual, MUD personnel classified the leak as a Class III leak, which is defined in the MUD manual as "non-hazardous at the time of detection and can be reasonably expected to remain non-hazardous." The leak was "about the size of a pilot light." One of McVaney's two experts testified that such a leak was "insignificant," and McVaney's second expert testified that a leak of that size would not pose a risk of explosion. MUD's investigator, who was called by the plaintiff, testified without reservation that the leak was not hazardous. MUD's engineering and construction manager, who was also called by the plaintiff, testified that the leak was nonhazardous and would reasonably be expected to remain so. There were no

other experts who testified on that point.

On that same day, MUD workers chipped away some concrete from the wall pipe and discovered that the pipe did not have a sleeve, which was due to the owner's construction. Although there was no MUD requirement that a sleeve be in place, MUD personnel were concerned regarding the lack of a sleeve encasing the wall pipe.

The MUD workers intended to return the following Monday to inspect the wall pipe. Before leaving the premises, one of the MUD employees turned on the gas and relighted the pilot lights on the furnaces and water heater.

On the morning of February 5, McVaney smelled gas in the reception area of the building and again that evening when he entered the front door of the hospital. He testified that on the day of the explosion, the odor of gas was no stronger in the evening than it was in the morning. McVaney did not contact MUD regarding the gas odor. During that evening, sometime before midnight, the building exploded.

After the explosion, MUD conducted an investigation to determine the cause of the explosion. The State Fire Marshal's office concurrently investigated the cause of the explosion and, as part of its investigation, subpoenaed MUD's records. An MUD investigator, called to the witness stand by McVaney, testified he discovered two pieces of evidence which led him to conclude that gas was intentionally introduced into the hospital in order to cause the explosion. First, a "dripleg" that should have been screwed onto a "tee" on a pipe attached to the south furnace was missing. A dripleg is a pipe that may catch debris as the fuel is transported through the line. After the explosion, the threads on the pipe to which the dripleg should have been attached showed no visible signs of damage. Despite a search of the immediate area where the dripleg should have been found, it was never located. Regarding the second piece of evidence, MUD's investigator testified that there was high gas consumption in the McVaney hospital in the days preceding the explosion. McVaney was later charged criminally with intentionally burning a building to defraud an insurer, but he was acquitted after a jury trial.

McVaney retained the defendant law firm to assist him in

collecting policy proceeds from his insurance company, which was refusing payment for the loss caused by the explosion. The policy proceeds were eventually recovered by Baird to McVaney's satisfaction.

In his amended petition, McVaney claimed that he entered into an oral contract with Baird to pursue a negligence claim against MUD and that Baird negligently failed to file the claim within the applicable 1-year statute of limitations. See Neb. Rev. Stat. § 13-919 (Reissue 1987) (with some exceptions, a claim against a political subdivision must be filed within 1 year). MUD is a political subdivision. Because of Baird's alleged negligence, McVaney claimed that he was barred from recovery for MUD's alleged acts of preexplosion negligence and negligent postaccident investigation.

McVaney filed a motion for partial summary judgment on the issue of Baird's breach of duty. Baird countered with a motion for partial summary judgment on the issues regarding MUD's postexplosion investigation. The court denied McVaney's motion, but granted Baird's motion. Before trial, McVaney unsuccessfully filed motions in limine to exclude evidence regarding his recovery of insurance policy proceeds and the filing of criminal charges.

At trial, after McVaney rested, Baird moved to strike paragraphs 16(d) and (e) of McVaney's amended petition regarding the reasonableness of Baird's investigation of the explosion and the reasonableness of its actions in general because no expert testimony was presented on these issues. Baird additionally moved for a directed verdict. The court granted the motion to strike and the motion for a directed verdict.

On appeal, McVaney raises a number of assignments of error regarding various rulings made during the course of the trial, including the trial court's alleged error in sustaining Baird's directed verdict motion. Because of this court's determination that the trial court properly directed a verdict against McVaney, we need not set forth or discuss the remaining assignments of error.

I. INTRODUCTION

As stated, after McVaney rested, Baird moved for a directed

verdict. The court sustained the motion, reasoning that the evidence adduced was insufficient as a matter of law for the jury to find that MUD's alleged negligence was the proximate cause of the explosion at the McVaney hospital. The principal thrust of McVaney's appeal is that the trial court erred in granting a directed verdict.

> On appeal from the granting of a motion for a directed verdict, the Supreme Court reviews the evidence in the light most favorable to the party against whom the motion is directed, and that party is entitled to have all controverted facts resolved in his favor and to have the benefit of all inferences which can reasonably be drawn from the evidence. [Citation omitted.]

Belgum v. Mitsuo Kawamoto & Assoc., 236 Neb. 127, 129, 459 N.W.2d 226, 227 (1990). "If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. [Citations omitted.]" *McCune v. Neitzel*, 235 Neb. 754, 762, 457 N.W.2d 803, 809 (1990). However, when reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury. *Belgum, supra.*

There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). A partnership or every member of the partnership is vicariously liable for torts committed by one of the partners acting within the scope of partnership business. *Martinez v. Koelling*, 228 Neb. 1, 421 N.W.2d 1 (1988). See, also, Neb. Rev. Stat. §§ 67-313, 67-315 (Reissue 1990).

II. ATTORNEY-CLIENT RELATIONSHIP

Baird argues that as a threshold requirement, no attorney-client relationship existed between it and McVaney with respect to a lawsuit against MUD. This argument presents an issue of first impression in this state.

An attorney-client relationship ordinarily rests on

> contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from the conduct of the parties. [Citation omitted.] The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. [Citation omitted.] In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it. [Citations omitted.]

Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). See, also, *George v. Caton*, 93 N.M. 370, 600 P.2d 822 (1979) (no formal contract, arrangement, or attorney fee is necessary to create the relationship of attorney and client; the contract may be implied from the conduct of the parties), *cert. quashed* 93 N.M. 172, 598 P.2d 215; *Woods v. Woods*, 177 Neb. 542, 129 N.W.2d 519 (1964) (a binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement, and a contract may be implied from conduct and circumstances). However, "[i]t is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based." *Kurtenbach, supra* at 56.

Gerald Laughlin is an attorney and a Baird partner. At the time of the events in question, Laughlin was primarily engaged in trial practice. While Laughlin was unable to classify the types of cases in which he was involved, he was active in commercial and personal injury litigation.

McVaney testified that although he did not enter into an express contract with Laughlin to pursue his negligence claim against MUD, Laughlin was his attorney "and it just flowed like night after day that if I had a problem, [Laughlin] would handle it." In 1983, McVaney and Laughlin discussed McVaney's suit against MUD on at least a dozen occasions.

McVaney testified that he made it clear to Laughlin that he intended to pursue his claim against MUD and provided Laughlin with a list of his alleged damages in the planned lawsuit. In December 1983, Laughlin arranged a meeting for Laughlin, McVaney, and an expert witness to discuss the case. The record reflects a number of notes written in 1983 by McVaney to Laughlin in which the case against MUD is discussed.

In depositional testimony received into evidence, Laughlin stated that almost from the very first time he met with McVaney following the explosion, which was approximately 1 week after the explosion, he believed McVaney wanted him to prosecute a claim against MUD for causing the explosion and that he never informed McVaney that his law firm would not handle a claim against MUD in McVaney's behalf. Nor did Laughlin tell McVaney to seek other counsel in his lawsuit against MUD. Laughlin's deposition further reflects that he was considering the possibility of a lawsuit against MUD and that he discussed with McVaney in a general sense the damages recoverable in such an action. He further conducted preliminary research regarding the problem of causation.

From the foregoing evidence, a reasonable finder of fact could conclude that McVaney sought assistance from Laughlin in his claim against MUD, that the claim against MUD pertained to matters within Laughlin's professional competence, and that Laughlin impliedly agreed to pursue the action against MUD. Furthermore, a reasonable finder of fact could determine that the McVaney-Laughlin relationship existed with respect to the lawsuit against MUD.

III. BREACH OF STANDARD OF CARE

Having determined that a reasonable finder of fact could find that an attorney-client relationship existed between McVaney and Laughlin with respect to the MUD lawsuit, we next consider whether Laughlin neglected his reasonable duty in failing to timely file the claim against MUD. An attorney " ' "impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. .

. ." ' [Citations omitted.]" *Stansbery v. Schroeder*, 226 Neb. 492, 497, 412 N.W.2d 447, 450 (1987). Baird contends that expert testimony was necessary to show the standard of care for attorneys with respect to the statute of limitations and that no expert testimony as to that issue was offered.

Laughlin testified that he was unaware of the applicable statute of limitations and that it was a breach of the standard of care for attorneys in Omaha, Nebraska, to not be aware of the 1-year statute of limitations for filing claims against political subdivisions. In its second amended answer, Baird admitted that MUD was a political subdivision. By way of depositional testimony, Laughlin further related that it was a breach of the standard of care for attorneys in Omaha, Nebraska, not to inform a client that he or she had 1 year in which to file a claim against MUD. Laughlin testified at trial that he did not have knowledge of the statute of limitations until McVaney informed Laughlin that McVaney had been advised by another attorney that the statute of limitations had run.

In this case, no outside expert testimony was necessary because Laughlin's testimony established a lawyer's standard of care respecting a statute of limitations. Upon review of the evidence, it is plain that a reasonable finder of fact could conclude that Laughlin, in failing to timely file an action against MUD for McVaney, breached his duty of care.

IV. PROXIMATE CAUSE

In a malpractice action against an attorney, a plaintiff has the burden of proving that he or she would have been successful in obtaining and collecting a judgment in the action for which he or she contracted with an attorney and that he or she was prevented from doing so by the attorney's negligence. See *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988). Thus, McVaney not only must demonstrate by a preponderance of the evidence Laughlin's malpractice, but also the negligence of MUD in the underlying action. The elements of a negligence cause of action are duty, breach, proximate cause, and damages. See *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991).

The central issue in this case is whether MUD's alleged

negligence was the proximate cause of the explosion in McVaney's building. The trial court held that expert testimony was necessary to demonstrate proximate cause and that based upon the testimony of the plaintiff's two expert witnesses, the jury would be required to speculate as to the cause of the explosion. With respect to the underlying lawsuit against MUD, the parties have limited their discussion on appeal to the issue of proximate cause. It is assumed arguendo that duty, breach, and damages were adequately pled and proved.

Standing alone, the fact that a gas explosion due to a leak has occurred is not sufficient to demonstrate that a gas distributor's negligence was the proximate cause of the explosion. See *Reed v. Metropolitan Utilities Dist.*, 173 Neb. 854, 115 N.W.2d 453 (1962). The foregoing rule may be modified in some cases by the doctrine of res ipsa loquitur, which permits the issue of liability to become a jury question. See *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987). However, the res ipsa loquitur doctrine is inapplicable if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident. *Id.* In this case, McVaney alleged specific acts of negligence on the part of MUD in his amended petition and attempted at trial to demonstrate the precise cause of the accident.

In resolving the proximate cause issue, this court is guided by the following principles. A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that injury occurred in the manner claimed. See *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954). "The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another." *Shibata v. College View Properties*, 234 Neb. 134, 143, 449 N.W.2d 544, 550 (1989).

> Negligence, like any other fact, may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of the fact to be

> determined may reasonably be inferred. . . . Thus it may be reasonable to infer . . . from the fact that soon after the passage of a train a fire started up beside the track, that it was caused by negligence in controlling sparks from the train.

Prosser and Keeton on the Law of Torts, *Negligence: Proof* § 39 at 242-43 (5th ed. 1984). See, also, *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986) (while circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the injury to the plaintiff).

We agree with the trial court that expert testimony was necessary to show that MUD's negligence was the proximate cause of the explosion at the McVaney hospital. In *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990), this court held with respect to the requirement of expert testimony that the test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders. As the remaining discussion demonstrates, the issue of causation of the explosion in McVaney's building was highly technical and not within the common knowledge and usual experience of a factfinding jury.

In order for gas to explode, two requirements are necessary: a sufficient ratio of gas to the atmosphere and an ignition source. For a natural gas explosion, the percentage of gas to air cannot be below 5 percent or above 15 percent.

In the early morning hours following the explosion, an MUD investigator recovered the wall pipe and found that it was corroded. The record reflects that the wall pipe had a 1/8-inch hole, a crack, and another small hole. It was McVaney's theory that the wall pipe was the source of the gas leak which caused the explosion and that MUD was negligent with respect thereto. As stated, MUD's investigator theorized that the dripleg was intentionally removed to introduce gas into McVaney's hospital and that a candle or some other source within the building ignited the gas. During his case in chief, in addition to calling MUD's experts, McVaney presented the testimony of his own two experts to prove causation.

Keith Naeve, a consulting engineer having experience in investigating natural gas explosions, testified that the most significant act of preexplosion negligence by MUD occurred when its crew left McVaney's hospital on Friday evening after discovering a small, insignificant gas leak, but failing to find its source or to repair it. Naeve testified that although the leak was small when discovered, "it *may* have been something that *could* increase in time based upon environmental factors and become a hazardous leak at a later date." (Emphasis supplied.) Naeve stated that in chipping away the mortar and concrete on the exterior wall in order to inspect the wall pipe, the *likelihood* was increased that the corroded wall pipe could be flexed or bent and leak. During cross-examination, Naeve admitted that he could not testify to a reasonable degree of certainty that any of the things that MUD did or failed to do was a proximate cause of the explosion. Naeve's testimony dealt only in possibilities as to whether any negligence on the part of MUD proximately caused the explosion in McVaney's building. A proximate cause of an explosion is not sustained by evidence from which a jury can arrive at such a conclusion only by guess, speculation, conjecture, or choice of possibilities. See *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989). Therefore, Naeve's testimony could not serve as a basis for a jury to determine that the explosion was proximately caused by negligence on the part of MUD. The trial court was correct in not permitting the jury to speculate on the proximate cause of the explosion or base a plaintiff's verdict on that issue upon Naeve's testimony.

McVaney also called as an expert Dr. Stanley Clark, chairman of the agricultural engineering department at Kansas State University. He testified that he had experience in determining causes of gaseous explosions. However, this case was the first time in which Dr. Clark investigated a natural gas explosion.

It was Dr. Clark's opinion that the largest hole in the wall pipe leaked approximately 42 cubic feet of gas per hour and that gas accumulated in the space above the false ceiling and was ignited by the pilot lights in the furnaces. On cross-examination, Dr. Clark testified that he did not know when the hole in the wall

pipe began to occur. Because the space above the false ceiling comprised 1,100 cubic feet, Dr. Clark concluded that the wall pipe could have produced a combustible mixture of gas and air in less than 3 hours, keeping in mind that gas will not explode unless it constitutes 5 to 15 percent of the air. Dr. Clark testified that although gas is lighter than air, the gas would reach the ignition source because a pressure differential would create the possibility of air's descending to the ignition source and the gas would naturally diffuse out into an open area. In this case, the open area would be the area above which there was no suspended ceiling and in which the gas appliances were located. He further asserted that air is drawn to a furnace because of consumption of air by the burners and by the furnace's vent pipe.

There was testimony that when the fan was operating, a much larger leak was required before the gas reached its explosive limit. As recalled, the fan was capable of removing 6,000 to 12,000 cubic feet of air per hour from the basement. Logic would dictate that the gas would be removed from the basement before it reached its explosive limit. However, there was testimony that not "every little piece of volume in this whole volume of the basement is exchanged every so often" and that the exchange rate would be even lower above the suspended ceiling. There was also testimony that although an explosive limit might not be reached in a structure as a whole, pockets of gas within a building can reach an explosive limit. Dr. Clark testified that the basement fan on the west wall would have removed only a very small fraction of the air in the space above the false ceiling and that a sound-deadening wall between the gas appliances and the fan would lessen the effect of the exhaust fan in that area of the basement.

Dr. Clark testified that the pilot lights of the furnaces were the ignition source. He further testified that for his hypothesis to be viable, the dripleg had to be in place on the south furnace at the time of the explosion because if the dripleg was removed, the furnace pilot lights would almost surely extinguish. Although Dr. Clark appears to have relied on the furnaces' pilot lights as the ignition source, he also testified, "We have a decreased pressure in this zone and so the gas could sort of come

down into this region where the pilot lights were located, and there were pilot lights on both furnaces and also on the *water heater*." (Emphasis supplied.) A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986). Therefore, taking nothing else into consideration, a reasonable finder of fact could determine that the water heater's pilot light provided the ignition for the gas. However, this still does not mean there was sufficient evidence to submit the case to the jury.

While arguments regarding the fan and ignition source are not fatal to McVaney's claim, his theory of causation is inconsistent with the indisputable physical evidence in this case. Without resort to outright speculation, McVaney's proof on the issue of causation simply fails to account for the missing dripleg and the exorbitant consumption of gas at his hospital prior to the explosion.

Without contradiction, the postexplosion investigation revealed that the dripleg which should have been attached to a pipe on the south furnace was missing. Dr. Clark theorized that the dripleg became disengaged due to the explosion. He admitted that the threads on the pipe to which the dripleg was attached did not show any visual damage. Dr. Clark further conceded that if the dripleg was screwed in tight and threaded properly, there would be trauma to threads caused by the separation during the explosion. Dr. Clark attempted to explain the absence of damage to the threads by speculating that the missing dripleg was loose or short-threaded or that there may have been damage to the thread that only microscopic tests would reveal. There was no physical or scientific evidence of any such damage.

It is uncontroverted that the dripleg was in place on Friday, when MUD, for the last time prior to the explosion, departed McVaney's veterinary hospital. The MUD worker who relighted the pilot lights of the furnaces and water heater reported that there was no gas consumption registered by the gas meter's test hand when the gas was turned off. That would not have been the case had the dripleg been removed. The worker smelled no gas odor, nor did he hear a hissing sound of

escaping gas when he relighted the pilot lights of the two furnaces and the water heater. If the dripleg had not been attached, it is undisputed that the furnace pilot lights could not have been relighted by the MUD employee. Furthermore, Dr. Clark testified that if the dripleg had been attached loosely enough to fall off, the various procedures followed by MUD would have detected any leak. The evidence is undisputed that procedures did not detect any leak attributed to the manner in which the dripleg was fastened.

Another major problem with attributing the explosion to a leak from the wall pipe is the inordinate amount of gas that flowed through the meter. Assuming that the furnaces and water heater were operating at maximum capacity, it is undisputed that 10,680 cubic feet of gas in excess of that necessary to operate the two furnaces and water heater at maximum capacity was consumed from January 31 to February 5. Dr. Clark testified that based on the size of the hole in the wall pipe (discovered after the explosion) and considering his view of the pressure, the larger hole in the wall pipe could leak 42 cubic feet of gas per hour. McVaney's other expert testified that the large hole would have leaked well beyond 50 cubic feet per hour. At those rates, it would have taken between 8 and 10 days for the 10,680 cubic feet of gas to escape from the larger hole in the wall pipe. There is no evidence by any expert as to the extent of any leak due to a lesser hole or crack in the wall pipe or the leak repaired on January 31. Furthermore, the leak discovered on February 4 was leaking at a rate of only 2 cubic feet per hour, and although the wall pipe was sheared off due to the explosion, this could at most account for 722 cubic feet of gas. Thus, the proven leaks and the alleged wall pipe leaks would account for far less than 10,680 cubic feet of gas.

Dr. Clark testified that if the wall pipe had been leaking at the rate of 42 cubic feet per hour on February 4, the testing by MUD employees on that date would have detected the leak. McVaney's other expert, Naeve, testified that if a leak caused the explosion, it had to develop sometime between the time the MUD crew left McVaney's hospital on Friday and the time of the explosion on Saturday evening.

Naeve further testified that the missing dripleg provided a

gas leak which explained the meter reading of excessive gas use. It is undisputed that the gas meter was accurate to within 0.07 percent. As previously stated, the dripleg was in place when the MUD employees left the McVaney building on Friday.

In the absence of mere conjecture, the only possible explanation for the missing dripleg is that it was removed after the MUD employees left the hospital, but before the explosion. Dr. Clark's expert opinion as to the proximate cause of the explosion is based not upon fact, but conjecture. When an expert opinion is given which is not in accordance with the actual facts, it lacks probative value. *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987). See, also, *City of Lincoln v. Jordan*, 131 Neb. 879, 270 N.W. 508 (1936) (the opinion of experts cannot prevail over actual facts).

V. CONCLUSION

From a thorough review of the record, it is clear that as a matter of law, McVaney failed to adduce sufficient evidence from which a jury could properly find that any negligence on the part of MUD was the proximate cause of the explosion at the plaintiff's veterinary hospital. To find that negligence on the part of MUD was the proximate cause of the explosion at the hospital would have required the jury to reach such a conclusion by guess, speculation, conjecture, or choice of possibilities. The trial court properly directed a verdict for the defendant.

AFFIRMED.

CAPORALE, J., not participating.

MARY ELIZABETH KAREL, APPELLANT, V. STANLEY JOSEPH KAREL, APPELLEE.
466 N.W.2d 511

Filed March 8, 1991. No. 88-1047.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, upon the recommendation of the Appellate Division of the District Court, CLARK, GITNICK, and CARLSON, District Judges. Affirmed as modified.

Michael D. Stevens and Alice L. Rokahr, of Blackburn & Stevens, for appellant.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

PER CURIAM.

Having considered the briefs and the recommendation of the Appellate Division of the District Court and upon a de novo review of the record, we find that the trial court abused its discretion in ordering child support payments to commence on October 1, 1988. Accordingly, the judgment is modified to provide for said payments to begin on June 1, 1988, and the judgment, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

VIRGINIA R. SWIERCZEK, APPELLANT, V. BENJAMIN L. LYNCH ET AL., APPELLEES.
466 N.W.2d 512

Filed March 8, 1991. No. 88-1073.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give that party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Negligence.** The doctrine of res ipsa loquitur is appropriate when, in the ordinary course of events, injuries would not have happened if those who had the exclusive management or control of the instrumentality or agency which proximately caused the injuries had used proper care.
4. **Malpractice: Negligence: Proof.** Res ipsa loquitur in medical malpractice actions allows an inference of negligence without affirmative proof in three situations: (1) when the act causing the injury is so obviously negligent that it may be inferred as a matter of law, e.g., leaving a foreign object in the body or amputating the wrong leg; (2) when the general experience and observation of a layperson teaches that the result would not be expected without negligence; and (3) when proof by experts creates an inference that negligence caused the injuries.
5. **Negligence: Proof.** In a res ipsa loquitur case, the plaintiff is not required to establish the exact manner in which he or she was injured or the precise act or event which precipitated his or her injury.
6. **Malpractice: Negligence.** It is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of his or her teeth and come out with an injury to nerves in his or her arms and hands, without some type of negligence occurring.
7. **Negligence: Proof.** Because res ipsa loquitur is a procedural doctrine and not a part of the substantive law, it raises an inference of negligence, which is enough to allow the case to go to the jury on that issue with no requirement other than that the facts pled in the petition are supported by proof. There is no corresponding duty for the plaintiff to go beyond that to prove other facts.
8. **Malpractice: Physicians and Surgeons: Master and Servant: Negligence: Liability.** Physicians and nurses who assist in an operation, though employed by the hospital, become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon the surgeon for their negligent acts, under the doctrine of respondeat superior.
9. **Malpractice: Negligence: Proof: Summary Judgment.** The burden of proof in a res ipsa loquitur medical malpractice case is on those persons who were awake, aware, and conscious at the time of the injury and were responsible for the plaintiff's safety at a time when he or she was not in a position to assume that responsibility. Because res ipsa loquitur implies causation, a material issue of fact exists that must be presented to the trier of fact, and summary judgment is not appropriate.
10. **Negligence: Proof.** The exclusive control requirement of res ipsa loquitur is satisfied if it is shown that the injury resulted from an external force applied while the plaintiff was in the control or custody of the defendants, even though some of the defendants may be subsequently exonerated from the charge of negligence. Exclusive control is shown where there was no possibility that a third

party, not a defendant, could have caused the injury.

11. **Malpractice: Physicians and Surgeons: Independent Contractor: Negligence: Liability: Words and Phrases.** The duty of care owed by a physician is nondelegable, which means that an employer of an independent contractor is not relieved from liability arising from the delegated duties negligently performed.
12. **Tort-feasors: Independent Contractor: Negligence: Liability.** The law ordinarily does not permit a tort-feasor to escape liability by the act of attempting to transfer responsibility for a nondelegable duty to an independent contractor.

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

James R. Welsh, of Welsh & Sibbernsen, and Owen A. Giles for appellant.

Albert M. Engles and Gretchen K. Harvey, of Hansen, Engles & Locher, P.C., for appellee Lynch.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees Caldwell and Archbishop Bergan Mercy Hospital.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This medical malpractice action comes to us as an appeal from the district court's order sustaining the motions for summary judgment of three of the defendants. Virginia R. Swierczek, the plaintiff-appellant, brought the action based on alleged nerve injuries she suffered as a result of dental surgery. Named as defendants were an oral surgeon, a physician, an anesthesiologist, a nurse anesthetist, and a hospital. After several amended petitions and motions for summary judgment, the only remaining defendant is the anesthesiologist.

We reverse and remand to the district court for further proceedings.

The exhibits introduced in support of the motions for summary judgment establish that Swierczek, a 52-year-old fourth grade teacher in Omaha, was referred to Dr. Benjamin L. Lynch, an oral surgeon, on January 4, 1982, for treatment of

periodontal disease. Dr. Lynch advised Swierczek to have all of her teeth removed and recommended that she obtain a second opinion from Dr. Leo Ambrose. On or about March 21, Swierczek saw Dr. Ambrose and had impressions made for dentures. Because Swierczek had a history of bleeding during dental treatments, the surgery was scheduled for Archbishop Bergan Mercy Hospital.

The afternoon of June 7, Swierczek was given a complete preoperative physical examination by Dr. John D. Hartigan, a physician who is no longer a party to this case. No other physical problems were found, and Swierczek was admitted to the hospital. On admission, a nurse completed an assessment form based on information provided by Swierczek. A discrepancy appears on the assessment form, where the space for the notation of neurological problems is checked "no [difficulty]" and "paresthesia," with "3 fingers [right] hand" indicated on the comment line. It is unclear whether both items were checked initially, or if one was added at a later time. (Paresthesia is defined as an abnormal sensation, such as prickling or tingling.)

The next day Swierczek was taken to the hall outside the operating room at approximately 11:25 a.m., where an "IV was placed in her right arm or hand." She was taken into the operating room and was asked to move from the transporting cart to a table. She said she remembered seeing Dr. Lynch and an assistant in the room and remembered being told that she would feel woozy. She then lost consciousness and does not remember anything further until about 7:30 a.m. on June 10.

Her sister-in-law, Irene Swircek, said that Swierczek awoke at about 4:30 p.m. on June 8 and said, "My God, I can't feel my hands." Swircek said she took one of Swierczek's hands to try to warm it, and Virginia cried out in pain. A nurse told them the pain would work out.

Swierczek noticed when she awoke on June 10 that she had abnormal sensation in both her little fingers and parts of her palms, similar to electric shocks. Swierczek complained about the sensation to a nurse, who told her it would go away. She also reported the feeling to Dr. Lynch, who apparently took no action. When Swierczek was released from the hospital on June

11, she continued to feel a tingling sensation in her hands and palms. The next day she visited Dr. Ambrose and told him about the pain in her hands. She stated that he said, "You have developed ulnar neuropathy."

Swierczek continued to complain about the pain in her hands when she visited Dr. Lynch on Wednesday, June 16. She also visited one of Dr. Hartigan's associates and reported the hand pain to him. Because her hands continued to bother her, she called Dr. Lynch again, on June 27, to ask what to do about the pain, and was told that he would try to reach a doctor for her the next day. At this time Swierczek could not touch her right shoulder, received shocks when she raised her arms, could not comb her hair, and could not hold objects.

Swierczek was seen on July 1 by Dr. Harold Ladwig, a neurologist, who noted in his report that "[t]he patient's examination reveals the presence of an ulnar neuropathy involving both ulnar nerves with greater involvement of the right upper extremity. The patient has continued to have severe dysesthesias involving the ulnar distribution bilaterally." (Dysesthesia is defined as the impairment of the sensitivity to touch.) Hospitalization was recommended for further diagnostic studies and treatment. She was readmitted to Archbishop Bergan Mercy Hospital on July 5. Dr. Ladwig consulted with Dr. D.L. McKinney, who also noted "[p]ossible bilateral ulnar neuropathy with pronounced dysesthesia." Swierczek remained in the hospital until July 17, receiving paraffin wax treatments and using an electrical stimulator for pain relief.

On July 22, Dr. Ladwig requested an evaluation for Swierczek at the Mayo Clinic. She was a patient there in August. Dr. Robert Dinapoli, a neurologist at the Mayo Clinic, concluded that Swierczek "developed a bilateral ulnar neuropathy, right more than left. This was due to physical compression of the nerves probably from local pressure with some subsequent damage to the nerve fibers." Dr. Dinapoli said it was expected that Swierczek would gradually recover with physical therapy and that surgery was not necessary.

Swierczek visited Dr. Lynch again, on August 20, for the removal of a root tip, or tooth fragment, which had broken off

during surgery. Dr. Lynch stated that this procedure and a postoperative x ray taken on August 25 ended his involvement with the plaintiff.

In a deposition, Dr. Hartigan explained ulnar neuropathy as a condition which involves poor function of the ulnar nerve, one of the three main nerves in the hand, which supplies innervation to the muscles which pull the fingers together. Dr. Hartigan stated that he has seen ulnar neuropathy occur following surgery as a result of pressure on the nerve, pressure which could come from the padding during surgery, the operating table, the transporting cart, a hospital bed, or a bed railing, "almost anything that could apply sustained pressure, usually unperceived by the person." A patient may not perceive the pressure because of the anesthetic. The ulnar nerve would be at greater risk in surgical procedures which are completed with the patient lying on her back, he said. However, Dr. Hartigan said he had no opinion as to the cause of Swierczek's ulnar neuropathy.

Because of the pain, Swierczek was able to return to teaching for only 1 week between June 1982 and January 1983. In a deposition taken March 26, 1986, Swierczek stated that she had not had the tingling sensation for about a year, but still has severe cramps in her hands at times and has to stop momentarily to wait until her fingers return to position. She said that her little finger will not bend and that she sometimes has a sensation of bugs crawling on her hands. For almost 30 years prior to the surgery she was a pianist and organist and is no longer able to play as she did earlier. Her sister-in-law stated that she has not heard Swierczek play the piano, organ, or accordion since the surgery and that Swierczek's hands have taken on a clawlike appearance.

PROCEDURAL BACKGROUND

The plaintiff's initial petition, filed June 7, 1984, named as defendants Dr. Lynch; Dr. Hartigan; Dr. Edward E. Gatz, an anesthesiologist; C. Scott Caldwell, a nurse anesthetist; and Archbishop Bergan Mercy Hospital. Following an amended petition and motions for summary judgment by all defendants, the plaintiff moved for leave to file a second amended petition,

basing her claim on two theories of recovery—negligence and res ipsa loquitur. The district court granted the summary judgment motions of Drs. Lynch, Hartigan, and Gatz, and granted the summary judgment motions of Caldwell and Bergan Mercy on the negligence theory, but allowed the res ipsa loquitur claim against these two parties to stand.

The plaintiff then filed a motion for new trial seeking reversal of the dismissals of Drs. Lynch, Hartigan, and Gatz. The motion was overruled as to Dr. Hartigan and he was dismissed from the case. His dismissal has not been appealed to this court. Bergan Mercy and Caldwell filed a motion for new trial which was overruled. The portion of the earlier order which dismissed the plaintiff's petition as to Drs. Lynch and Gatz was vacated and set aside, and the res ipsa loquitur theory of recovery was reinstated.

Following third and fourth amended petitions, the defendants again moved for summary judgment. The motions of Dr. Lynch, Bergan Mercy, and Caldwell were sustained, and the motion of Dr. Gatz was overruled. The plaintiff's motion for new trial as to Dr. Lynch, Caldwell, and Bergan Mercy was overruled. The only remaining defendant is Dr. Gatz, the anesthesiologist. The plaintiff-appellant assigns as error the district court's order sustaining the motions for summary judgment of Dr. Lynch, Caldwell, and Bergan Mercy and dismissing the action as to them, which deprived her of the right to effectively proceed against Dr. Gatz, and the district court's failure to grant a new trial and to set aside the dismissal of Dr. Lynch, Caldwell, and Bergan Mercy.

STANDARD OF REVIEW

In appellate review of a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted, in this case the plaintiff, and give her the benefit of all reasonable inferences deducible from the evidence. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). Summary judgment is properly 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. *Id.*

We find that there are genuine issues of material fact as to the cause of Swierczek's injury and as to the responsibility for that injury. Summary judgment was not properly granted in this case, and we reverse the judgment and remand the cause to the district court for further proceedings.

RES IPSA LOQUITUR

The plaintiff is now proceeding on the theory of res ipsa loquitur, alleging that her injuries would not have happened except for the negligence of some party. She suggests through affidavits and depositions of experts that the ulnar neuropathy occurred due to the placement and padding of her arms during surgery, but that because she was unconscious she cannot identify either the instrumentality or the individual responsible for the injury.

We have previously been faced with only one case which concerned hospital liability under the res ipsa loquitur doctrine. In *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 3-4, 165 N.W.2d 85, 88 (1969), we explained the doctrine: "[T]he accident and the resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or agency, proximately causing such accident, or injuries, use proper care."

We cited a Washington case for its definition of three situations in which negligence may be inferred without affirmative proof:

> "(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries."

McCall, supra at 5, 165 N.W.2d at 88, quoting *Horner v. Northern Pac. etc. Hosp.*, 62 Wash. 2d 351, 382 P.2d 518

(1963). We are not concerned with a foreign object here, but with an event which would not be expected to occur without negligence.

The "general experience" or "common knowledge" test has been accepted by other courts as well. In *Voss v. Bridwell*, 188 Kan. 643, 662, 364 P.2d 955, 970-71 (1961), the Supreme Court of Kansas held:

> Where common knowledge and experience teach that a resulting injury would not have occurred to a patient if due care had been exercised, an *inference* of negligence may be drawn, thus giving rise to an application of the doctrine of *res ipsa loquitur*, without medical evidence which is ordinarily required to show not only what occurred but how and why it occurred.

(Emphasis in original.)

More recently, the Wisconsin Court of Appeals held that res ipsa loquitur may be invoked " 'in medical malpractice actions only where a layman is able to say as a matter of common knowledge that the consequence [sic] of the professional treatment are not those which ordinarily result if due care is exercised . . . .' " *Froh v. Milwaukee Medical Clinic, S. C.*, 85 Wis. 2d 308, 314, 270 N.W.2d 83, 85 (1978). See, also, *Dalley v. Utah Valley Regional Med. Ctr.*, 791 P.2d 193 (Utah 1990) (res ipsa loquitur applies where it is within a layperson's knowledge that some negligence occurred; expert testimony is not required).

As we noted in *McCall, supra* at 5, 165 N.W.2d at 89, "The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof." Res ipsa loquitur allows the inference of the defendant's negligence because the inference "is probable and more plausible than any other explanation propounded. . . . [T]he plaintiff need not establish the exact manner in which he was injured, or the precise act or event which precipitated his injury." *Morgan v. Willis-Knighton Medical Center*, 456 So. 2d 650, 655 (La. App. 1984). See, also, *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965).

We find that it is appropriate for the plaintiff here to rely on

the doctrine of res ipsa loquitur as her theory of recovery. It is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring. Because res ipsa loquitur is a procedural doctrine and not a part of the substantive law, it raises an inference of negligence, which is enough to allow the case to go to the jury on that issue with no requirement other than that the facts pled in the petition are supported by proof. There is no corresponding duty for the plaintiff to go beyond that to prove other facts. Summary judgment is not appropriate, and the district court erred in its granting of the defendants' motions.

> EXCLUSIVE CONTROL OF INSTRUMENTALITY
> Under this doctrine [res ipsa loquitur], when an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence.

Widga v. Sandell, 236 Neb. 798, 803, 464 N.W.2d 155, 158 (1991). See, also, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944).

We have already established that the injury sustained by Swierczek is of a kind which does not ordinarily occur in the absence of someone's negligence. We next consider whether it was caused by an agency or instrumentality within the exclusive control of the defendants.

The situation in the *Ybarra* case is similar to Swierczek's situation. The plaintiff entered the hospital for an appendectomy and awoke from the operation with a sharp pain between the neck and the right shoulder. The pain spread to the lower part of his arm and grew worse, eventually developing into paralysis and atrophy of the muscles around the shoulder. He asserted that the injury occurred while he was in the

operating room under anesthetic, and brought suit against the doctors, nurses, and anesthetist.

The *Ybarra* defendants argued that the plaintiff had not shown an injury caused by an instrumentality under the control of the defendants, had not shown which instrumentality caused the injury, and had not shown that any of the defendants had exclusive control over any particular instrumentality.

The court held that the doctrine of res ipsa loquitur applied and that

> [e]very defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. . . . The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

Ybarra, supra at 491-92, 154 P.2d at 690.

Physicians and nurses who assist in an operation, though employed by the hospital, "normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of *respondeat superior*." *Id.*

The court said that when the patient was unconscious during surgery

> it is manifestly unreasonable for [the defendants] to insist that he identify any one of them as the person who did the alleged negligent act.
>
> . . . It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make.

Ybarra, supra at 492-93, 154 P.2d at 690-91.

The California court noted that the test of control is one of the right of control rather than actual control, and held that when an unconscious plaintiff receives an unusual injury as a part of medical treatment, all defendants who had any control

over the body or the instrumentalities which might have caused the injuries may be required to give an explanation of their conduct. *Id.*

Other courts have also applied the "borrowed servant" doctrine to similar malpractice actions. In a case in which carpal tunnel surgery was canceled when problems developed with the anesthesia, an appeals court in Maryland found that "the surgeon acted as a special employer who borrowed nurses and other attendants from their general employer—the hospital—and thus became liable for their negligence." *Franklin v. Gupta*, 81 Md. App. 345, 367, 567 A.2d 524, 535 (1990), *cert. denied* 319 Md. 303, 572 A.2d 182.

However, an Illinois appellate court rejected the "borrowed servant" rule and held that hospital employees who assist a surgeon remain hospital employees "even though the surgeon retains some degree of control over them." *Foster v. Englewood Hospital Ass'n*, 19 Ill. App. 3d 1055, 1061, 313 N.E.2d 255, 260 (1974). If the control is retained, the surgeon may be liable for the hospital employees' negligence. The court noted "a rule making a surgeon liable for every negligent act of every hospital employee under his control is too harsh, a rule exculpating him for every negligent act of persons under his control simply because they are not his employees is too lenient." *Id.* at 1063, 313 N.E.2d at 261.

In the present case, Dr. Lynch argues that he cannot be held liable because he was not in the operating room at the time the plaintiff was moved from the cart to the operating table and that he had no responsibility for her transportation either to or from the surgical suite. In a case where the plaintiff fell off the operating table and was injured, the Colorado Supreme Court held that, because of the complex activity in an operating room, the exact moment at which the surgeon's responsibility begins cannot be determined.

> It is not a matter of law when the sole responsibility of the hospital ends and the surgeon's responsibility begins or supersedes it. *These are questions of fact for the jury under the particular circumstances of each case.* The surgeon cannot arbitrarily fix the time at which his responsibility begins.

(Emphasis supplied.) *Beadles v. Metayka*, 135 Colo. 366, 370, 311 P.2d 711, 713 (1957). Swierczek did not receive the opportunity to present her case to a jury to allow it to determine these questions.

Citing an Oklahoma case, the *Beadles* court noted, " 'The patient is helpless under the influence of an anaesthetic and absolutely at the mercy of surgeons performing the operation, and they are charged with the duty to see that no preventable injury results to their patient. . . .' " *Id.*, quoting *Aderhold v. Bishop*, 94 Okla. 203, 221 P. 752 (1923).

The Utah court in *Dalley v. Utah Valley Regional Med. Ctr.*, 791 P.2d 193, 197 (Utah 1990), stated:

> The very purpose of the doctrine of res ipsa loquitur is to allow a plaintiff who may have been unconscious or incapacitated during an operation the opportunity to establish negligence and causation by circumstantial evidence. A plaintiff who is under anesthesia or otherwise incapacitated can identify neither the instrumentality nor the person(s) in control of the instrumentality. To place this burden of proof upon a plaintiff is to require the impossible.

The court said a better approach would be to allow the plaintiff to "prove causation either by tracing the injury 'to a specific instrumentality or cause for which the defendant was responsible' or by showing 'that the defendant was responsible for all reasonably probable causes to which the accident could be attributed.' " *Id.*

In that case, in which a woman sustained a burn on her leg while undergoing a caesarean section operation, the court said that a plaintiff who receives an injury to a body part not involved in the operation is entitled to call upon res ipsa loquitur. The burden is then placed

> upon those persons who were awake, aware, and conscious at the time of the injury, who were responsible for the plaintiff's safety at a time when he or she was not in a position to assume that responsibility. Res ipsa loquitur infers [sic] causation, and therefore a material issue of fact exists that must be presented to the trier of fact. If plaintiff prefers to rest upon the inference of cause established by

> res ipsa loquitur, then that is a tactical decision that should not be short-circuited by summary judgment.

Dalley, supra at 200.

As we noted in *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 6, 165 N.W.2d 85, 89 (1969), courts have generally held that the exclusive control requirement "is satisfied if it is shown that the injury resulted from an external force applied while the plaintiff was in the control or custody of the defendants, even though by subsequent explanation some of the defendants are exonerated from the charge of negligence." Exclusive control is shown where "there was no possibility that a third party, not a defendant, could have caused the injury." (Emphasis omitted.) *Id.* Swierczek should be allowed to rely on the inference of negligence raised by res ipsa loquitur or to present further evidence as to the instrumentality which caused her injury. She was short-circuited here.

NONDELEGABLE DUTIES

The hospital and surgeon cannot escape liability by attempting to delegate the responsibility for activity in the operating room to the anesthesiologist or other staff present there. The duty of care owed by a physician is nondelegable, which

> means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.

Foltz v. Northwestern Bell Tel. Co., 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985). In plain language, the law ordinarily does not permit a tort-feasor to escape liability by the act of attempting to transfer responsibility for a nondelegable duty to an independent contractor.

Dr. Gatz, the anesthesiologist, is the only remaining defendant, following the granting of the motions for summary judgment. There are questions of material fact as to what

caused Swierczek's injuries and as to who might be responsible for them. If the actions of the district court are allowed to stand and Dr. Gatz is able to prove that he was not responsible for Swierczek's injuries, she will be without recourse against the other defendants.

As the surgeon, Dr. Lynch is responsible for the total care of his patient, and although he asserted that he had nothing to do with transporting Swierczek, it is not clear from the record that the injuries occurred during transportation. Her arms could have been bumped or rearranged during the course of surgery. Dr. Lynch cannot be excused from the action at this point.

The hospital, which is responsible for the actions of its nurses and nurse anesthetist, also cannot be excused from the action. A copy of Bergan Mercy's operating room procedures is in the record, and it indicates that the circulating nurse assists anesthesia personnel with transferring the patient to the operating room and with positioning the patient on the operating table. The scrub nurse assists with draping the patient, and the circulating nurse assists in securing the large drape. The anesthetist and circulating nurse transfer the patient to the recovery room. The circulating nurse, with guidance from the anesthetist, is responsible for assuring that the patient is in good body alignment and is protected from pressure during surgery. It can be inferred from these policies that the hospital and its nurse anesthetist exercised control over the instrumentality which caused Swierczek's injuries. Neither of these parties can be excused at this point.

Swierczek, by pleading the doctrine of res ipsa loquitur, has raised an inference of negligence, which must be answered by all named defendants. The injury to the nerves in her arms is not an injury which would normally occur during the extraction of teeth, absent some negligence by some party. She is entitled to present her case to a jury to determine whose responsibility it was to assure her safety. The district court erred in granting summary judgment to Dr. Lynch, Caldwell, and the hospital. We reverse, and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.