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# REPORTS OF CASES

DECIDED BETWEEN

MAY 3, 1991 and AUGUST 29, 1991

IN THE

# Supreme Court of Nebraska

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## VOLUME CCXXXVIII

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STEVEN R. SCHROEDER

OFFICIAL REPORTER

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By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

## SUPREME COURT
## DURING THE PERIOD OF THESE REPORTS

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D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice

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# JUDICIAL DISTRICTS AND DISTRICT JUDGES

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| Thirteenth | Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas | John P. Murphy<br>Donald E. Rowlands II | North Platte<br>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<br>Paul D. Empson | Alliance<br>Chadron |
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| Number of District | Counties in District | Judges in District | City |
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| | | Albert C. Walsh | Papillion |
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| Sixth | Burt, Dodge, and Washington | Daniel J. Beckwith | Fremont |
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| Eleventh | Hall and Howard | Richard E. Weaver<br>David A. Bush | Grand Island<br>Grand Island |
| Twelfth | Buffalo and Sherman | Gerald R. Jorgensen | Kearney |
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| Sixteenth | Box Butte, Dawes, Grant, Sheridan, and Sioux | Glen A. Fiebig<br>James T. Hansen | Alliance<br>Chadron |
| Seventeenth | Garden, Morrill, and Scotts Bluff | James L. Macken<br>G. Glenn Camerer | Gering<br>Gering |
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| Nineteenth | Banner, Cheyenne, Deuel, and Kimball | Thomas H. Dorwart<br>C. G. Wallace | Sidney<br>Kimball |
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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. 88-780, filed July 5, 1991: **Cisler v. Continental Ins. Co.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Buckley, Davis, and Illingworth, District Judges. White, Shanahan, and Grant, JJ., dissent.

Nos. 88-1021, 88-1022, filed May 17, 1991: **Goeschel v. West Randolph Ballroom Corp.** Appeal from the District Court for Cedar County: Robert E. Otte, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

No. 89-129, filed May 31, 1991: **Kane v. Hays.** Appeal from the District Court for Lancaster County: Earl J. Witthoff, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

No. 89-371, filed May 31, 1991: **State v. Lafler.** Appeal from the District Court for Cheyenne County: John D. Knapp, Judge. Heard before Buckley, Davis, and Illingworth, District Judges.

## CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 88-693: **Alexander v. Gould, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-878: **Alston v. Gould, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-932: **Citizens Bank of Bancroft v. Abendroth.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-951: **Stapleton v. Gould, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-317: **Pospishil v. First Nat. Bank of Columbus.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-650: **Contra Costa Cty. ex rel. Petersen v. Petersen's Painting & Coating.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-736: **In re Estate of Olson.** Stipulation allowed; appeal dismissed.

No. 89-1328: **Curtin v. Department of Environmental Ctrl.** Motion sustained; appeal dismissed as moot.

No. 90-025: **Smidt v. Gerhard.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-026: **Null v. Gerhard.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-027: **Schaub v. Gerhard.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-028: **Harvey v. Gerhard.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-074: **Arizona Bank v. Coachman Corp. of Nebraska.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-155: **State v. Cannon.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-296: **State v. Gallion.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-510: **Myers v. Stuhr.** Appeal dismissed. See Rule 7A(2).

No. 90-597: **Frahm v. Frahm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-647: **Allen v. Douglas County.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-648: **Kumar v. Douglas County.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-649: **Allen v. Douglas County.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-658: **Dixon v. Camp.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-663: **Nietfeld v. Rose Ranch Grazing Assn.** Stipulation allowed; appeal dismissed.

No. 90-664: **Rose Ranch Grazing Assn. v. Nietfeld.** Stipulation allowed; appeal and cross-appeal dismissed.

No. 90-701: **Ed Phillips & Sons Co. v. Nebraska Liquor Control Comm.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-793: **State v. Bush.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-794: **State v. Gentert.** Appeal dismissed. See Rule 7A(2).

No. 90-805: **Continental Airlines v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-806: **Trans World Airlines, Inc. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-807: **Delta Airlines, Inc. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-808: **Midway Airlines v. State Bd. of Equal.** Pursuant

to stipulation, reversed and remanded.

No. 90-809: **American Airlines, Inc. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-810: **Northwest Airlines v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-811: **United Airlines, Inc. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-812: **United Parcel Serv. Co. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-838: **Wilkinson Mfg. Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-839: **Millard Mfg. Corp. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-840: **Paul A. Willsie Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-841: **Douglas Cty. Bank & Trust v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-842: **Olson Bros., Inc. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-843: **Thompson & Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-844: **Acme Printing & Mail Ad v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-845: **Omaha Printing Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-846: **Pathology Center v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-847: **Endicott Clay Products Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-848: **WOWT-Chronicle Broadcasting Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-863: **Guaranteed Mut. Life Co. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 90-864: **Central States Health & Life Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-865: **Mutual of Omaha Ins. Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-866: **America West Airlines, Inc. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed with respect to appellant's locally assessed personal property; and August 15, 1990, order of Nebraska State Board of Equalization and Assessment concerning valuation of appellant's centrally assessed personal property only is reversed and the cause remanded for further proceedings.

No. 90-875: **Woodmen Accident & Life Co. v. State Bd. of Equal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-876: **G.P. Express Airlines, Inc. v. State Bd. of Equal.** Pursuant to stipulation, reversed and remanded.

No. 90-906: **Weaver v. Mathews.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1053: **State v. Hill.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1058: **State v. Jackson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1116: **State v. Petrmichl.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1118: **State v. Huskey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1121: **State v. Vach.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1129: **State v. Garza.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1131: **State v. McCaul.** Motion of appellee for

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

No. 90-1137: **State v. Dickson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1171: **State v. Dykes.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1173: **In re Estate of Johnson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-1176: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1181: **State v. Harrison.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1183: **Hohnstein v. Halstead.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1190: **State v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1196: **Hibbard v. Chambers.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-1197: **State v. Koenig.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1199: **State v. Cottingham.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1203: **State v. Richard.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1215: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1221: **Kent v. City of Grand Island.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1224: **State v. Ham.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 90-1225: **State v. Ott.** Affirmed. See Rule 7A(1).

No. 90-1230: **State v. Meyers.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1232: **State v. Wullschleger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1233: **State v. Wullschleger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1234: **State v. Wullschleger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1235: **State v. Wullschleger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1238: **Bordenkircher v. Hermsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1239: **State v. Meyers.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1246: **State v. Mitchell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1247: **State v. Mitchell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1251: **State v. Boothe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1252: **State v. Whitnack.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1255: **State v. Titsworth.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-1259: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 90-1260: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 90-1261: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 90-1262: **Svoboda v. Trackwell.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-1267: **Central City Police Dept. v. Leitschuck- Perry.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 91-002: **State v. Centamore.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-011: **Lincoln Benefit Life Co. v. Morgan.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-022: **State v. Schrum.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-025: **Blumanthal v. Stone.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-026: **Novak v. Novak.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-027: **Thompson v. Moran.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-028: **Federal Land Bank of Omaha v. Hubka.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-039: **State v. Roberts.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-044: **In re Estate of Gordon.** Motion of appellee guardian ad litem for summary dismissal sustained; see Rule 7B(1).

No. 91-060: **State v. Johnson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-068: **McEntire v. Conness.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 91-070: **Triplett v. Dubuque Packing Plant No. 2.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 91-077: **State v. Young.** Motion of appellee for summary

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

No. 91-078: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-079: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-080: **State v. Sudduth.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-081: **Wigodsky v. Wigodsky.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-084: **Gifford v. Gifford.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-088: **State v. Marco.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-103: **State v. Morgan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-122: **State v. Koll.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-129: **Shoemaker v. Person.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-130: **Shoemaker v. Nelsen.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-132: **State v. Von Busch.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-134: **State v. Glantz.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-135: **Hollibaugh v. Square D Corp.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-143: **State v. Sivertson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-144: **State v. Dunn.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-145: **State v. Dunn.** Motion of appellee for summary

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

No. 91-146: **Easter v. Fitzgibbons.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 91-149: **State v. Copeland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-150: **State v. Kincaid.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-152: **State v. Hicks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-156: **State v. Hicks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-157: **State v. Alford.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-161: **State v. May.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-165: **State v. Driggers.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-166: **State v. Miedl.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-167: **State v. Riley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-169: **Clark v. Square D Co.** Motion sustained; appeal dismissed; each party to pay own costs.

No. 91-170: **Gallion v. Johnson.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-171: **K & N Mac Farms, Inc. v. Department of Roads.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 91-172: **Accord Properties v. Carr.** Stipulation allowed; appeal dismissed.

No. 91-178: **State v. Cox.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-180: **State v. Daugherty.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-182: **In re Estate of Dinklage.** Stipulation allowed; appeal dismissed.

No. 91-185: **State v. Forman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-188: **State v. Persinger.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 91-191: **Trackwell v. Trackwell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-195: **State v. Jacob.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-196: **State v. Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-199: **Tyler v. Goetsch.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-200: **Cassell v. Olson.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 91-207: **Thompson v. Nebraska Dept. of Correctional Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 91-208: **State v. Herstein.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-210: **Wengert v. Board of Ed. of Saunders Cty. Sch. Dist. No. 107.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 91-211: **Patera v. Patera.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-214: **O'Donovan v. Sacks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-220: **Lockard v. Ray.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 91-224: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-226: **State v. Burnett.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-227: **Hopson v. Ami-St. Joseph Ctr. for Mental Health.** Stipulation allowed; appeal dismissed.

No. 91-231: **Jelsma v. Klassen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-232: **State v. Combs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-235: **State v. Mayberry.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-236: **State v. Shoemaker.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-237: **State v. Dimmette.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-238: **State v. Blackburn.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-250: **State v. Halsey.** Appeal dismissed. See Rule 7A(2).

No. 91-254: **State v. Engels.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-265: **State v. Fowler.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-269: **State v. Wardell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-272: **State v. Fleming.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-273: **Schmailzl v. Lange.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-279: **Jonak v. City of Grand Island.** Stipulation allowed; appeal dismissed.

No. 91-281: **Commercial Fed. Bank v. Champion.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 91-288: **In re Interest of Green.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-301: **State v. Henley.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 91-302: **Federal Land Bank of Omaha v. Hubka.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-304: **Skeen v. Skeen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-310: **State v. McAlexander.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-311: **State v. Eddy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-312: **Gallion v. Hickman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-314: **State ex rel. Robak v. State Judicial Resources Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 91-317: **Department of Social Servs. v. Deffebaugh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-318: **Franssen v. Franssen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-327: **State v. Carter.** Trial court's order suppressing defendant's statements affirmed.

No. 91-331: **State v. Hernandez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-336: **Dearmont v. Hartley.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-343: **State v. David.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-354: **Hamel v. Burlington Northern RR.** Stipulation allowed; appeal dismissed with prejudice, at defendant's cost.

No. 91-362: **State v. Friend.** Affirmed.

No. 91-364: **State v. Hill.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 91-366: **State v. Longs.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-369: **Kern v. Department of Correctional Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. 91-383: **Holman v. Holman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-425: **Close v. Close.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-428: **State v. Sempek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-442: **Washa v. Washa.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-445: **Investors Real Estate Trust v. Mid-America Serv. Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 91-453: **Sampson v. Sampson.** Stipulation allowed; appeal dismissed.

No. 91-486: **State v. Wever.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 91-542: **State v. Juergens.** Appeal dismissed. See Rule 7A(2).

No. 91-573: **State v. Gray.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-578: **Andrews v. Andrews.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-581: **Wagnitz v. Wagnitz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-583: **State v. Alcorta.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 91-594: **Cook v. Olmer.** Stipulation allowed; appeal dismissed.

No. 91-596: **Morosin v. Leber.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 91-606: **Blommer Chocolate Co. v. Hilgert.** Stipulation allowed; appeal dismissed.

No. 91-614: **Shada v. Bressman.** Stipulation allowed; appeal dismissed with prejudice.

No. 91-641: **Beetem v. Dabrusky.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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THOMAS P. LEONARD, APPELLANT, V. DEBRA A. WILSON AND FRANK BURGHARDT, APPELLEES.

468 N.W.2d 604

Filed May 3, 1991. No. 88-843.

1. **Motor Vehicles: Liability: Proof.** In order to establish the applicability of the family purpose doctrine, it must be proven that the person sought to be charged with liability was the head of his or her family, that he or she furnished the car for the use and pleasure of the family, that the driver of the vehicle was a member of that family, and that the driver was, at the time of the accident, using the car for the purpose for which it was furnished and with the authority, expressed or implied, of the head of the family.
2. **Directed Verdict.** Where the facts adduced to sustain an issue are such that reasonable minds cannot differ and can draw but one conclusion therefrom, the issue should be decided as a matter of law.
3. _____. In considering the evidence for the purpose of a motion for a 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.
4. _____. If there is any evidence which will sustain a finding for the party against whom a motion for a directed verdict is made, the case may not be decided as a matter of law.
5. **Records: Appeal and Error.** It is incumbent upon the complaining party to present a record which supports the error assigned, and in the absence of such a record establishing the claimed error, the decision of the lower court will be affirmed.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Frank Meares for appellant.

Joseph Lopez Wilson for appellees.

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

HASTINGS, C.J.

Following a jury trial, plaintiff obtained a judgment against defendant Debra A. Wilson arising out of a motor vehicle accident. However, notwithstanding the absence of any verdict or judgment in the record as to the defendant Frank Burghardt, it is apparent from plaintiff's motion for a new trial that the jury rendered a verdict in favor of defendant Burghardt. Plaintiff appeals and assigns as error (1) failure of the trial court in not directing a verdict in favor of the plaintiff against Burghardt under the family purpose doctrine, (2) failure of the trial court to direct a verdict in favor of the plaintiff against Burghardt on the theory of negligent entrustment, and (3) submission of an erroneous jury instruction. We affirm.

On July 10, 1987, Thomas P. Leonard, the plaintiff, while driving his 1979 Harley-Davidson motorcycle, was involved in a collision with a 1980 Pontiac Sunbird owned by the defendant Frank Burghardt and being driven by his stepdaughter, Debra A. Wilson, in Omaha, Nebraska. There was no real question as to the negligence and liability of the defendant Wilson. The main issue in the case involved the responsibility of defendant Burghardt under the family purpose doctrine.

It is undisputed that Burghardt was the head of the household in which Wilson, a minor, resided. There is also no question that the automobile was maintained for the use, pleasure, and convenience of the members of that household. It was admitted that Wilson had driven this particular automobile on a number of occasions before this accident, but she was only permitted to drive when accompanied by an adult because she had only a learner's permit to drive.

On this particular day, Wilson, with permission of Burghardt, had driven the automobile earlier in the day, accompanied by her sister-in-law, to take the eye examination portion of the driving test, but for some unexplained reason she was not permitted to take the test that day. She and her sister-in-law returned home, and Wilson placed the car keys on the television set.

That night, Wilson took the Sunbird to pick up her boyfriend, and it was during that time that she had the accident. Neither Burghardt nor his wife was home at the time, and

Wilson had received no specific permission from either of them to take the car.

We consider the first two assignments of error together because they both involve the question of permission. The family purpose doctrine is explained as follows:

> [W]here the head of the family purchases, owns, maintains, furnishes, or provides a motor vehicle for the general use, pleasure, and convenience of the family, and a family member is using the car with the express or implied consent or permission of the owner, the negligence of the family member driver is imputed to the head of the family.

*Marcus v. Everett*, 195 Neb. 518, 524, 239 N.W.2d 487, 491 (1976). Accord, *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988); *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980).

Thus, in order to establish the applicability of the family purpose doctrine, it must be proven that the person sought to be charged with liability was the head of his or her family, that he or she furnished the car for the use and pleasure of the family, that the driver of the vehicle was a member of that family, and that the driver was, at the time of the accident, using the car for the purpose for which it was furnished and with the authority, expressed or implied, of the head of the family. *Marcus v. Everett, supra.*

The first three elements have been admitted or are established without question. However, the evidence does not conclusively establish the final element, that Wilson was driving the automobile with the permission, either expressed or implied, of Burghardt. The evidence directly negates any express permission. The question of implied consent is equivocal; at best it creates a question of fact for the jury.

Where the facts adduced to sustain an issue are such that reasonable minds cannot differ and can draw but one conclusion therefrom, the issue should be decided as a matter of law. See *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991). In considering the evidence for the purpose of a motion for a 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

which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Horst, supra.* Such was the case here, and the matter was properly submitted to the jury on the issue of permission or authority, which is also a necessary ingredient of the doctrine of negligent entrustment.

Finally, plaintiff complains of a jury instruction. Unfortunately, the record does not contain the instructions given in this case for us to examine. It is incumbent upon the complaining party to present a record which supports the error assigned, and in the absence of such a record establishing the claimed error, the decision of the lower court will be affirmed. *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990); *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990).

The judgment of the district court is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. MARK C. THOMAS, APPELLANT.

468 N.W.2d 607

Filed May 3, 1991. No. 90-143.

1. **Burglary: Criminal Attempt: Intent.** A person commits attempted burglary if such person intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime of burglary.
2. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
3. **Directed Verdict.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
4. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

5. **Directed Verdict.** In considering a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
6. **Witnesses: Testimony: Juries.** The credibility of a witness and the weight to be given to that witness' testimony are issues for the jury to resolve.
7. **Sentences: Probation and Parole: Appeal and Error.** Denial of probation and imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
8. **Trial: Words and Phrases.** An abuse of discretion occurs when the reasonings or rulings of the trial court are clearly untenable and deny a just result to the defendant.
9. **Appeal and Error.** Errors assigned but not discussed in an appellant's brief are not considered by the Supreme Court.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Mark C. Thomas, pro se.

Gary L. Hogg, Buffalo County Public Defender, on brief for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

FAHRNBRUCH, J.

Contending that the evidence was insufficient to identify him as the perpetrator of the crime with which he was charged and that he should have been placed on probation, Mark C. Thomas appeals his jury conviction for attempted burglary and his prison sentence of not less than 1 nor more than 3 years.

The district court for Buffalo County ordered Thomas to serve his attempted burglary sentence consecutively to the sentences imposed for two other convictions. The first of those convictions was for another attempted burglary, and the second was for possession of burglary tools. We affirm.

In this case, the defendant also stood trial on four separate counts of burglary in Kearney, Nebraska, but he was acquitted of those charges, and they need not be discussed further.

A person commits attempted burglary if such person

intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime of burglary. See Neb. Rev. Stat. § 28-201 (Reissue 1989). A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value. Neb. Rev. Stat. § 28-507 (Reissue 1989).

In this court, Thomas appeared pro se at oral argument. His brief, however, was prepared by the Buffalo County public defender's office and sets forth three assignments of error. Those assignments claim that the trial court erred (1) in failing to sustain defendant's motion for a directed verdict at the end of plaintiff's case and again at the end of the trial; (2) in sentencing, given the evidence and factual situation of the case; and (3) in allowing the prosecuting attorney to make reference to evidence which was clearly not involved in any one of the five counts on which the defendant was charged, thus prejudicing the jury as to the defendant.

Thomas first claims that the district court for Buffalo County should have sustained his two motions for directed verdict. We confine our review to Thomas' motion for a directed verdict at the conclusion of all of the evidence because any error in the ruling on his first motion for a directed verdict, at the conclusion of the State's evidence, was waived. See *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984) (a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict). In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Valdez*, 236 Neb. 627, 463 N.W.2d 326 (1990); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). In the consideration of a defendant's motion for a directed

verdict, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. See *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

The record reveals that in the early morning hours of May 12, 1989, John Schmidt, a police officer with the city of Kearney, was working a special detail entailing plainclothes foot patrol in the city. The purpose of the detail was to provide burglary patrol and building checks. Around 2 a.m., Schmidt was near an alley at the south end of a building housing Adventure Travel Service (ATS). To the east of this building was another building housing General Adjustment Bureau Services (GAB). A 5-foot-wide concrete walkway separated the two buildings.

While Schmidt was at the south end of the ATS building, he heard a high-pitched screeching noise that sounded like the cutting of glass. The officer moved into an inset area behind the building and, after hearing the sound two more times and the additional sound of someone shuffling around in the walkway, rounded the corner of the building and stood in the south entrance of the walkway. At that point, Schmidt observed Thomas facing the GAB building. Thomas was fumbling with a vent or wiring under a window. Schmidt, from 20 feet away, shined his flashlight on Thomas, who turned and faced Schmidt. Thomas was wearing dark pants with a double white stripe down the side, a dark top, and a black "ninja style" mask. Schmidt could see the eyes, nose, and upper cheekbone area of Thomas' face. The officer testified that he recognized and identified the subject. Schmidt observed Thomas from the front for 20 to 30 seconds.

Schmidt identified himself as a police officer and instructed Thomas to face a wall and to put his hands on it. He further demanded to know what Thomas was doing, and Thomas responded, "[S]ecurity." As Schmidt talked, Thomas began slowly walking backward. After making the comment "security," Thomas turned and ran from the north end of the walkway. Schmidt gave chase for two blocks, but lost him.

Schmidt's investigation upon his return to the crime scene

revealed that there was a residence located directly south of the building and across the alley. A bicycle, described as a "silver or gray Schwinn ten-speed," was discovered on the patio within the fenced backyard. The bicycle did not belong to the owner of the residence. In studying the crime scene, Schmidt found that there were scratch marks on the window above where he first saw Thomas standing and that a vent directly below the window had been bent upward.

Sometime between 5:30 and 6 a.m., Schmidt and other officers proceeded to Thomas' residence to execute an arrest warrant. The defendant's house was 14 to 15 blocks from the building housing GAB. Roma Thomas, the defendant's mother, answered the door and went to summon the defendant. The officers, shortly thereafter, followed her downstairs and placed Thomas under arrest. According to Schmidt, Thomas was fairly alert for someone who had just awakened. At 8:26 a.m., Roma Thomas telephoned a police investigator and thereafter reported that a bicycle, matching the description of the bicycle found at the residence near the crime scene, had been stolen from Thomas' residence. A warrant to search Thomas' home was executed later that afternoon. None of the clothing Schmidt said Thomas was wearing at the time of the attempted burglary was found.

Thomas does not challenge the evidence relating to any element of the crime with which he was charged other than the identification of himself as the perpetrator. In essence, he argues that there was a complete failure of evidence to identify him as the perpetrator of the crime or that it is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. We disagree. Officer Schmidt testified on direct examination that he recognized and identified the perpetrator as Thomas. On cross-examination, when questioned whether he could make a positive identification, Schmidt responded, "Yes. I was sure who it was." As stated, every controverted fact is resolved in favor of the State. The credibility of a witness and the weight to be given to that witness' testimony are issues for the jury to resolve. See, *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991); *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). It is

inherent in the jury's verdict in this case that the jury believed Schmidt's testimony identifying Thomas and that the defendant was proved beyond a reasonable doubt to be the perpetrator of the attempted burglary with which the defendant was charged.

Other evidence adduced at trial placing Thomas at the crime scene was the bicycle found nearby. After Thomas was arrested, his mother reported that a bicycle was stolen. The description of the bicycle matched the one found at the residence near GAB. It was found on a patio within a fenced backyard of a residence across the alley from GAB. The residence was owned by a 75-year-old woman, who testified she had never before seen the bicycle.

From the aforementioned evidence, it cannot be said that as a matter of law such evidence is so doubtful in character, lacking probative value, that it cannot sustain a finding that Thomas was the perpetrator of the crime with which he was charged. The evidence was sufficient to present a question of fact, and as such, it was properly submitted to the jury. Thomas' first assignment of error is without merit.

In his second assignment of error, Thomas asserts that the district court abused its discretion in imposing a prison sentence instead of placing him on probation and by not according proper weight to his background and the weight of the evidence on which he was convicted. Denial of probation and imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). See *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990) (whether sentence imposed is probation or incarceration is a matter within the discretion of the trial court). Attempted burglary is a Class IV felony carrying no minimum penalty and a maximum of 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985) and §§ 28-201 and 28-507. Since Thomas' sentence of 1 to 3 years' imprisonment was within the statutory limits, any error must turn on whether the trial court abused its discretion.

An abuse of discretion occurs when the reasons or rulings of the trial court are clearly untenable and deny a just result to the defendant. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253

(1990). Statutory guidelines in granting probation are found in Neb. Rev. Stat. § 29-2260(2) (Reissue 1989), which provides:

> Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court *may* withhold sentence of imprisonment *unless*, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(Emphasis supplied.)

Inherent in the trial court's colloquy with Thomas during sentencing is the conclusion that all three of the above elements were found to be present. The crime for which Thomas was convicted was committed while the defendant was out on bond for a prior offense. Further, the trial court recognized that Thomas had been granted probation by a federal court and that that probation was revoked.

The presentence report contained an evaluation of Thomas from a federal hospital facility. The staff summary recommending incarceration stated that Thomas could benefit from a prolonged structured period of supervision and that incarceration would not likely have an adverse effect on his emotional stability. See *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990) (a sentencing judge may consider relevant information contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted).

Finally, there is no question that Thomas' criminal record

shows a longstanding disregard for the rights of others. In his short life, Thomas has amassed a record containing six felonies. Clearly, to reward Thomas with probation would exacerbate his disrespect for the law.

The trial court gave regard to the nature and circumstances of the crime. Reviewing the history, character, and condition of Thomas, the court found that the defendant continued to blame others for his predicament and refused to accept responsibility. Having properly used the statutory guidelines denying probation, the trial court did not abuse its discretion. The second assignment of error is therefore without merit.

This court need not address the merits of the third assignment of error, for it was not discussed in Thomas' brief. Errors assigned but not discussed in an appellant's brief are not considered by the Supreme Court. *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). The same is true of issues raised at oral argument by Thomas pro se, but not assigned as error or discussed in his brief. To be considered by the Supreme Court, error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989). The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. BRENT D. DOUGLAS, APPELLANT.

468 N.W.2d 612

Filed May 3, 1991. No. 90-223.

**Trial: Motions to Suppress: Pretrial Procedure: Appeal and Error.** In a criminal trial, after the pretrial denial of a motion to suppress a defendant's statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.

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

James Martin Davis for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

GRANT, J.

Defendant was charged by information with possession with intent to distribute, deliver, or dispense cocaine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989). He filed a motion to suppress "the fruits of a search" of his residence and a motion to suppress his statements given to police officers. After hearing, the trial court denied the motions.

Later, a deputy county attorney and counsel for defendant waived jury trial and agreed "to stipulate the police reports into evidence and let The Court make its determination based on that sole exhibit," which was an identified collection of police reports. Defendant made no objection to the admissibility of any matters included in the identified exhibit of police reports.

The trial court found defendant guilty of the crime charged and later sentenced him to 6 to 20 years' confinement, with credit for 1 day in jail prior to sentencing. Defendant appealed to this court, assigning one error, contending that the trial court erred in admitting his statements into evidence. We affirm.

As set out above, no objection was made at trial to the admission of defendant's oral statements. We have held that in a criminal trial, after the pretrial denial of a motion to suppress a defendant's statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal. *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987); *State v. Cody*, 236 Neb. 69, 459 N.W.2d 195 (1990). See, Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989); *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). There is no reason that that settled rule should not be applied in jury-waived trials submitted on police reports, as in this case.

In addition, we note the appeal approaches the frivolous. In the police reports submitted, it is shown that at least 16 items, including scales, plastic bags, and drain water, seized pursuant to a search warrant, tested positive for the presence of cocaine. That evidence was not objected to and those seizures were not assigned as error in this court.

The judgment is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. SHAWN J. STATEN, APPELLANT.

469 N.W.2d 112

Filed May 3, 1991. No. 90-232.

1. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment.
2. **Investigative Stops: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
3. **Search and Seizure: Arrests.** A valid search as an incident to an arrest without a warrant necessarily depends on the legality of the arrest itself.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Arrests: Probable Cause.** The constitutional issue regarding a reasonable search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony.
5. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
6. **Police Officers and Sheriffs: Search and Seizure: Search Warrants: Motions to Suppress: Proof.** If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.

7. **Police Officers and Sheriffs: Arrests: Search and Seizure: Search Warrants.** If there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested.
8. **Police Officers and Sheriffs: Arrests: Search and Seizure: Weapons: Evidence.** A police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.
9. **Arrests: Search and Seizure.** A search incident to a lawful arrest need not be made immediately on arrest, but may legally be conducted later when the accused arrives at the place of detention.
10. **Police Officers and Sheriffs: Search and Seizure: Search Warrants: Motions to Suppress: Proof.** If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure was unreasonable; but if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
11. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed.
12. **Constitutional Law: Search and Seizure.** The "fruit of the poisonous tree" doctrine, expressed in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Robert M. Spire, Attorney General, and Barry Waid for appellee.

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

SHANAHAN, J.

The State charged that Shawn J. Staten intended to deliver or distribute cocaine in her possession, a violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988). In her suppression motions, Staten claimed that cocaine found on her person and her custodial statements were constitutionally inadmissible. See Neb. Rev. Stat. § 29-115 (Reissue 1989) (suppression of

accused's statement) and Neb. Rev. Stat. § 29-822 (Reissue 1989) (suppression of physical evidence). When the district court for Douglas County sustained Staten's motions, the State obtained a review by a judge of this court concerning the suppression orders. See Neb. Rev. Stat. §§ 29-116 and 29-824 (Reissue 1989). As a result of that review, the suppression orders were reversed. See *State v. Staten*, 233 Neb. 800, 448 N.W.2d 152 (1989). In a subsequent bench trial, Staten was convicted on the cocaine charge and sentenced to imprisonment.

## CONTACT AT THE AIRPORT

On the morning of March 29, 1989, in the Kansas City International Airport, Agent Carl Hicks of the Federal Drug Enforcement Agency was routinely observing arrival of flights from Los Angeles, California, and noticed a man and a woman, later identified as Tracy Wood and Staten, whom he described as "suspicious" inasmuch as the couple fit the drug courier profile. When Hicks approached the pair and asked them for identification, Wood and Staten said they had none. However, Staten later produced some identification and also displayed their plane tickets. Hicks noted that Wood and Staten had paid cash for their plane tickets and that they were flying to Omaha on Braniff Airline flight 1490, which was scheduled to arrive in Omaha at 8:30 that morning. Since no drug detection dog was available at Kansas City and because the couple's luggage was already on board the Omaha flight scheduled for departure in the next few minutes, Hicks terminated the interview with Wood and Staten, who boarded Braniff flight 1490 to Omaha.

Hicks telephoned Sgt. James Cisar of the Omaha Police Division and related Hicks' observations at the Kansas City International Airport. Cisar immediately called Sgt. William Agnew of the Omaha Police Division's narcotics unit. Agnew assembled a team of FBI agents and Omaha police officers, who went to Omaha's Eppley Airfield to meet Braniff flight 1490. Agnew also contacted Steve Sanchelli, an Omaha police officer who handles "Bush," a dog used for drug detection by the Omaha Police Division, and asked Sanchelli to bring Bush to the airport.

On arrival at the airport, the officers and the FBI agents went to gate 21, where flight 1490 was to arrive, and set up surveillance. When flight 1490 arrived at 8:30 a.m., the officers observed Wood and Staten disembark from the plane and walk to the baggage claim area. Staten made a phone call, after which she and Wood retrieved three pieces of luggage and began to walk toward the airport's main terminal area. Agnew approached Wood and Staten, identified himself as a police officer conducting a "narcotics investigation," and asked them to produce their plane tickets. Staten said she had discarded her ticket on the plane. When Agnew asked for some identification, Staten showed Agnew a copy of a birth certificate and her Social Security card. Agnew told Wood and Staten that a drug detection dog was en route to the airport and asked whether they would consent to having the dog "sniff" their luggage for the possible presence of controlled substances. Staten agreed to let the dog sniff her luggage, which included a brown "two suiter suitcase" bearing a Braniff identification tag: "Shawn Staten, 15546 Friar Street, VanNuys, California."

Wood and Staten accompanied the officers to the airport security area, where Agnew asked Staten about the reason for her presence in Omaha. Staten responded that she was visiting her brother, Harry Harris. Agnew knew that Harry Harris, an alias for Dan Staten, was in custody. Harris was a member of a Los Angeles gang and was "involved in narcotics activity" in Omaha. Also, Agnew had personally arrested Staten's sister, Mowesha Staten, in an Omaha motel for possession of a controlled substance.

Approximately 15 minutes after Staten had arrived in Omaha, Officer Sanchelli arrived at the airport with Bush, the drug detection dog. Bush had been specially trained in locating cocaine, heroin, and other controlled substances and was used to "alert" officers to the presence of a controlled substance within luggage. The "alert" consists of Bush's sniffing luggage and then biting or scratching luggage which contains a controlled substance. Before Staten encountered the officers at the Eppley Airport, Bush had positively verified controlled substances in "50 controlled alerts" and had located a controlled substance in luggage on 18 separate occasions.

Staten's luggage was placed in the airport hallway for Bush's "off-leash" sniffing. As the dog was sniffing Staten's luggage, "Bush alerted violently by biting and scratching" at Staten's "two suiter" suitcase, an indication that the luggage contained a controlled substance such as cocaine. After Bush "alerted on" Staten's suitcase, Agnew requested permission to search Staten's person and luggage. Staten told Agnew that he could search her luggage but not search her. When Agnew said that "a female officer would conduct the search in the privacy of a room," Staten still refused to permit a search of her person. According to Agnew: "At that point I informed [Staten] that she was under arrest for suspicion of possession of a controlled substance and she would be taken to central police headquarters and we were going to apply for a search warrant for her luggage and her person." No one questions that Staten was arrested for possession of a controlled substance at the airport. The officers then transported Staten to police headquarters.

At police headquarters, Staten was taken to an interview room where, shortly after 10 a.m., Officer James Haiar presented her with a *Miranda* "rights advisory form." Although Staten refused to make a statement, a few minutes later she indicated to officers that she would be willing to make a statement. Meanwhile, Agnew had prepared an application for a search warrant. In his affidavit for the search warrant, Agnew recounted the details preceding and during his encounter with Staten at the airport. Based on Agnew's affidavit, the county court for Douglas County issued a search warrant at 1:25 p.m. Shortly thereafter, in the presence of a female police officer, the warrant, which authorized a search of Staten's person and her luggage, was served on Staten. After Staten read the warrant, which she understood, she removed a plastic bag, containing 6 ounces of cocaine, from her bra. The police presented a second "advisory form" regarding the *Miranda* admonition. Staten indicated that she understood her rights, and then discussed her possession of the substance found in her possession. Staten told the police that she was transporting the substance, "crack" cocaine, from Los Angeles to Omaha for distribution and sale. A later laboratory test

confirmed that the substance in Staten's possession was cocaine.

## STATEN'S CONVICTION AND SENTENCE

Staten objected, claiming that the cocaine and her custodial statements were constitutionally inadmissible. After Staten's objections were overruled, the district court, presented with the foregoing facts, found Staten guilty of the cocaine charge and sentenced her to imprisonment for a term of 4 to 8 years.

## ASSIGNMENTS OF ERROR

For her assignments of error, Staten contends: (1) "The search of the Defendant's person which revealed cocaine hidden in her undergarments was illegal; the fruits of that search should have been suppressed," and (2) "The sentence imposed by the District Court was excessive, and as such, constitutes an abuse of discretion."

## CONSTITUTIONAL ADMISSIBILITY OF PHYSICAL EVIDENCE FROM STATEN

*Arrest of Staten.*

Staten claims that the search of her person was unreasonable and, therefore, a violation of U.S. Const. amend. IV and Neb. Const. art. I, § 7.

Although Staten neither questions the factual basis for the police stopping her at the airport nor asserts that any constitutional right was violated by her detention at the airport, nevertheless, we note that, under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment. See, also, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

The U.S. Supreme Court has held that persons whose

appearance and activities fit the so-called drug courier profile may be briefly detained by law enforcement officers under *Terry v. Ohio*. See, *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *United States v. Sokolow, supra*. The drug courier profile is a compilation of characteristics found to be typical for persons transporting illegal drugs, such as trips to and from cities which are major sources of drugs, with short stays in the cities; cash payment for tickets; use of aliases; unchecked luggage and little or no identification on luggage; attire; and nervousness. See *United States v. Sokolow, supra*.

In *Florida v. Royer, supra*, the U.S. Supreme Court held that police had no probable cause to arrest the defendant based upon the facts that he was traveling from Miami to New York City under an assumed name; that he was carrying two suitcases that appeared to be heavy; that he was young, was casually dressed, and appeared to be pale and nervous; and that he had paid for his ticket in cash with a large number of bills. The fact that defendant fit the so-called drug courier profile constituted adequate grounds for suspecting the defendant of carrying drugs and justified an investigatory stop by police officers. *Id.* However, because the police took the defendant to a small room for further interrogation, retrieved his checked luggage from the airline, took his airplane ticket and identification, and never informed defendant that he was free to leave at any time nor that he need not consent to the search of his luggage, the Supreme Court held that the investigatory stop exceeded the constitutional limitation of a *Terry* stop. See *Terry v. Ohio, supra*. The *Royer* Court found that the means employed by the police officers were too intrusive in relation to an investigative detention and that restraint of the defendant was unjustified, and then concluded that there were less intrusive means which the officers could have employed, while noting:

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this

> investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed [the defendant] in short order; a positive result would have resulted in his justifiable arrest on probable cause.

460 U.S. at 505-06.

The use of a specially trained dog to detect the presence of a controlled substance inside a container, such as luggage, has been held to be a feasible and expeditious way to detain a suspect for the shortest period of time in which to confirm or dispel suspicions. See *Florida v. Royer, supra*. See, also, *United States v. Place, supra* (canine sniff discloses only the presence or absence of narcotics, and such limited disclosure ensures against the embarrassment and inconvenience of the owner that is possible with other, more intrusive means of investigation). This conclusion is based on the fact that dogs trained especially for the purpose of detecting a controlled substance can detect the presence of concealed narcotics with almost unerring accuracy.

As expressed in *State v. Blakely*, 227 Neb. 816, 821, 420 N.W.2d 300, 304 (1988):

> A valid search as an incident to an arrest without a warrant necessarily depends on the legality of the arrest itself. . . .
>
> . . . [T]he constitutional issue regarding a reasonable search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony.
>
> When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.

Several courts have held that an "alert" by a trained drug detection dog constitutes probable cause for arrest. See, *People v. Unruh*, 713 P.2d 370 (Colo. 1986); *People v Price*, 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981); *People v.*

*Campbell*, 67 Ill. 2d 308, 367 N.E.2d 949 (1977); *Morrow v. State*, 757 S.W.2d 484 (Tex. App. 1988) (even in the absence of consent to search, a drug detection dog's "alert" to the presence of narcotics in defendant's luggage would have justified the arrest of appellant); *Pooley v. State*, 705 P.2d 1293 (Alaska App. 1985); *State v. Bullock*, 460 So. 2d 517 (Fla. App. 1984). See, also, *U.S. v. Massac*, 867 F.2d 174 (3d Cir. 1989); *U.S. v. Stone*, 866 F.2d 359 (10th Cir. 1989); *Garmon v. Foust*, 741 F.2d 1069 (8th Cir. 1984); *United States v. Spetz*, 721 F.2d 1457 (9th Cir. 1983); *United States v. Robinson*, 707 F.2d 811 (4th Cir. 1983); *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980); *United States v. Race*, 529 F.2d 12 (1st Cir. 1976).

In view of the officers' information about Staten and from all the circumstances at the airport, including Bush's "alert" and positive reaction to Staten's luggage, the police had probable cause to arrest Staten at the airport. Consequently, Staten's arrest withstands constitutional challenge.

*Search Without a Warrant.*

If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court held that if there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested and that such search is reasonable under the fourth amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence. See, also, *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

A search incident to a lawful arrest need not be made

immediately on arrest. "[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). See, also, *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). See, further, *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982) (arresting officers may search person of arrestee to discover and remove weapons and to seize evidence to prevent its concealment or destruction, as well as search the area within the arrestee's immediate control); *State v. McElroy*, 189 Neb. 376, 202 N.W.2d 752 (1972) (arrest of defendant and later search of defendant's person at police station held lawful).

The search of Staten's person, without a search warrant but as an incident of her lawful arrest, is not unreasonable and, therefore, does not violate the constitutional protection against an unreasonable search and seizure.

*Search With a Warrant.*

Although a search warrant was unnecessary for a valid search of Staten's person and was surplusage in relation to a search as an incident of a lawful arrest, the police, nonetheless, obtained a warrant to search Staten's person. However, Staten does not challenge the truth, accuracy, or sufficiency of the information which Agnew supplied in his affidavit for the search warrant.

> [T]he burden of proof depends on the basis for the search, that is, whether the search was conducted pursuant to a warrant or without a warrant. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.

*State v. Vrtiska, supra* at 461, 406 N.W.2d at 120. See, also, *United States v. Longmire*, 761 F.2d 411 (7th Cir. 1985); 4 W. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.2(b) (2d ed. 1987).

Thus, a defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed. *State v. Vrtiska, supra.*

In his affidavit, Agnew supplied sufficient information which established probable cause necessary for a constitutionally valid search warrant. Because validity or legality of the warrant in this case is unchallenged, Staten had the burden to establish that the search of her person was unreasonable and, therefore, contrary to the constitutional safeguards against an unreasonable search. However, since Staten presented nothing to demonstrate that the search warrant was deficient in any respect or for any reason and has failed to show that the search of her person was otherwise unreasonable, Staten has not established that the cocaine, obtained from her person as the result of a search warrant, is constitutionally inadmissible.

*Admissibility of Physical Evidence.*

Since the physical evidence was obtained through a reasonable search and seizure, the cocaine, obtained from Staten's person, was constitutionally admissible evidence used for Staten's conviction on the cocaine charge.

## STATEN'S CUSTODIAL STATEMENTS

As an additional aspect of the search and seizure question, Staten claims that her custodial statements, as "fruits of that search," are constitutionally inadmissible evidence and should have been suppressed. Thus, Staten contends that her custodial statements should have been suppressed because her statements were the product of an illegal search or, as condemned by *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), were the "fruit of the poisonous tree." In *Wong Sun*, the U.S. Supreme Court required exclusion not only of evidence directly produced by a constitutionally invalid search, but also of evidence indirectly derived from the unconstitutional search. Reference to "fruit of the poisonous tree" in *Wong Sun* is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in *Wong Sun*, whether

evidence is the derivative product of a constitutionally invalid search turns on the question " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." 371 U.S. at 488.

However, since the arrest and search of Staten are constitutionally sustainable, the *Wong Sun* doctrine is inapplicable as a bar to admissibility of Staten's custodial statements. Cf. *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989) (defendant's voluntary custodial statements to police, after defendant was confronted with physical evidence seized during a constitutionally invalid search, were inadmissible in the prosecution of a charge related to the subject matter of the custodial interrogation). Therefore, Staten's statements were constitutionally admissible as evidence on the cocaine charge against Staten.

## EXCESSIVE SENTENCE CLAIM

Finally, Staten contends that her sentence to a term from 4 to 8 years is excessive.

A defendant's intent to distribute cocaine in the defendant's possession is a Class II felony, see § 28-416(2), which is punishable by imprisonment for a minimum term of 1 year and a maximum term of 50 years. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985) (felony; classification of penalties; sentences).

Staten requests that this court reduce her sentence, see Neb. Rev. Stat. § 29-2308 (Reissue 1989), inasmuch as the cocaine charge "involved no threat of violence in any way." Brief for appellant at 9.

Although Staten's commission of the crack cocaine offense did not involve immediate physical force exerted against another person, the crime involves activity which is destructive to human beings and eventually results in harm evident from the physical and emotional injury to users of cocaine.

Although Staten has no record of prior arrests, she is an adult who cannot claim ignorance of crack and its consequences. Moreover, Staten willingly became an

instrument for distribution of cocaine for her personal gain. "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. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

The district court did not abuse its discretion in the sentence imposed on Staten. We find no justifiable reason to reduce that sentence. Therefore, we affirm the sentence imposed on Staten.

## CONCLUSION

The evidence used to convict Staten was constitutionally admissible. We decline to reduce Staten's sentence, in which there has been no abuse of discretion.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DAVID E. SANTOS, APPELLANT.
468 N.W.2d 613

Filed May 3, 1991. No. 90-245.

1. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion.
2. _____: _____. The failure to file a written motion for continuance supported by affidavit, as required by Neb. Rev. Stat. § 25-1148 (Reissue 1989), is a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.
3. _____: _____. Where a trial court has contributed to a party's lack of preparation, it is an abuse of discretion to deny a continuance.

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

James H. Truell for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

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

CAPORALE, J.

Pursuant to verdict, defendant-appellant, David E. Santos, was adjudged guilty of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989). After being found not to be a mentally disordered sex offender, he was sentenced to imprisonment for a period of not less than 8 nor more than 10 years. Santos urges the district court erred in, among other things, refusing to permit his attorney to withdraw and refusing to grant a continuance of the scheduled trial. We reverse the judgment of the district court and remand for a new trial.

On August 10, 1989, an information was filed which charged Santos with one count of the aforementioned crime stemming from his alleged forceful sexual penetration of a woman on June 12 of that year. Santos, represented by a private attorney, was arraigned on September 7, 1989, and entered a plea of not guilty. At that time, a jury trial was set for December 18, 1989. Santos' bail bond, apparently posted prior to arraignment, was continued, and Santos remained free on the subject charge.

On November 1, 1989, Santos' attorney filed a motion to withdraw, citing Santos' failure to maintain contact with the attorney, failure to comply with the district court's orders and his attorney's advice relative to submitting to certain tests, and failure to pay the attorney so that pretrial discovery could be undertaken, and Santos' financial condition, which allegedly rendered him a proper candidate for representation by the public defender. Although personally served with notice on November 7, 1989, that a hearing would be held on the motion at 4:30 p.m. that day, Santos failed to appear. The district court took no action on the motion, choosing instead to continue it from day to day.

Santos did not contact his attorney until the week prior to trial, and it appears the attorney was unable to meet with Santos until the Friday prior to the scheduled trial. No action was taken on the motion to withdraw until the day of trial.

Upon appearing for trial on December 18, 1989, the attorney renewed his motion to withdraw. After questioning Santos

regarding his failure to maintain contact with his attorney, the district court overruled the motion, notwithstanding Santos' assertion that he had become unable to pay for his attorney's services.

The attorney, upon leave of court, next filed notice that Santos wished to present evidence regarding his prior sexual contact with the victim. That notice was coupled with a motion for an in camera hearing regarding the use of such evidence of prior sexual conduct. Acknowledging the requirement of Neb. Rev. Stat. § 28-321(1) (Reissue 1989) that such notice of intent to present evidence of prior sexual conduct be given 15 days prior to trial, the attorney further orally requested that the trial be continued so as to allow the notice to be in compliance with the aforementioned statute. The district court overruled these motions and ruled further that evidence of the victim's prior sexual conduct would not be allowed at the trial and that the trial would begin that day. The matter proceeded accordingly.

In view of the resolution concerning the district court's refusal to sustain Santos' motion for a continuance, we do not concern ourselves with whether it should have permitted Santos' private attorney to withdraw. We begin our analysis of the continuance issue by recalling that a motion for continuance is addressed to the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *In re Interest of H.P.A.*, 237 Neb. 410, 466 N.W.2d 90 (1991); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). See, also, *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991). Although not mentioned by either party, it must be noted that Neb. Rev. Stat. § 25-1148 (Reissue 1989) provides, in pertinent part:

> Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in said cause or proceeding and setting forth the grounds upon which said application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon

which such continuance or adjournment is asked.

Not only was the application for continuance in this case made by oral motion, the motion was not supported by affidavits.

However, the failure to comply with the provisions of § 25-1148 is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance. *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990). Here, the motion for continuance was made immediately after the district court, on the very morning of trial, denied the attorney leave to withdraw on a motion which had been pending before it for 41 days. In addition, the circumstances leading to the request for a continuance were not only within the district court's knowledge but in part created by it. Under those conditions, the oral nature of the motion and the lack of a supporting affidavit are not, in and of themselves, a sufficient basis upon which to declare that the district court did not abuse its discretion in denying the continuance.

We thus move on to a consideration of the merits of the continuance request. In *Dolen v. State*, 148 Neb. 317, 27 N.W.2d 264 (1947), this court held that the defendant's motion for a continuance, made 9 days prior to trial, but 71 days after his preliminary hearing, in order that he might secure the testimony of his only material witness, who then resided out of the state, was timely and should have been granted. The *Dolen* court went on to state that the trial court further erred in not allowing a continuance so that defense counsel, appointed to represent defendant on the day of trial, could properly prepare a defense.

The general rule articulated in *Dolen*, that a continuance must be granted to allow defense counsel adequate time to prepare a defense, is recognized in courts throughout the country. See, e.g., *Collins v. State*, 276 Ark. 62, 632 S.W.2d 418 (1982); *State v. Simpson*, 403 So. 2d 1214 (La. 1981); *Marler v. State*, 382 So. 2d 644 (Ala. Crim. App. 1980); *In re Welfare of T.D.F.*, 258 N.W.2d 774 (Minn. 1977).

However, when the defendant's own actions or inactions are responsible for that lack of preparation, this court has refused to hold the failure to grant a continuance to be an abuse of discretion, even where defense counsel has had little time to

prepare. See, e.g., *State v. Sluyter*, 224 Neb. 768, 401 N.W.2d 480 (1987) (not an abuse of discretion to deny continuance to defendant who chose not to meet with appointed counsel between the preliminary hearing and trial).

On the other hand, courts have demonstrated a willingness to find error in a trial court's refusal to grant a continuance where the trial court itself is partially responsible for defense counsel's lack of preparation. See, e.g., *Swann v. City of Huntsville*, 471 So. 2d 1268 (Ala. Crim. App. 1985); *Swaim v. State*, 257 Ark. 166, 514 S.W.2d 706 (1974). In *Swann*, a trial court ordered a hearing on a petition for habeas corpus on the same afternoon it was received by the court. The trial court in that case notified petitioner's attorney of the scheduled proceeding, by telephone, 2 hours 15 minutes before the hearing was scheduled to begin, despite the fact that the attorney was then located 95 miles from the situs of the inquiry. The appellate court reversed, as an abuse of discretion, the trial court's denial of the petitioner's motion for a continuance, entered by the petitioner himself due to his attorney's inability to get to the proceeding on time. In so ruling, the appellate court noted that while a petitioner does not have a constitutional right to appointed counsel at a habeas corpus hearing, he or she does have a right to the presence of privately retained counsel at such proceedings.

The trial court's refusal to grant a continuance was similarly held to be an abuse of discretion in *Swaim*. In that case an apparent misunderstanding arose between the trial court and defense counsel, who was not licensed to practice in the state, regarding whether counsel would be allowed to represent the defendant at trial. On the day of trial, the trial court ruled that the out-of-state attorney would not be able to represent the defendant, leaving the trial to be conducted by a local attorney who had apparently done minimal work on the case. The trial court denied the local attorney's motion to continue the case, and trial was had that day, with the out-of-state attorney being barred from the courtroom and allowed to confer with local counsel only during recesses.

Although the Arkansas Supreme Court found the facts surrounding the misunderstanding somewhat unclear, it did note that the record unquestionably established a

misunderstanding between the trial court and the out-of-state attorney as to that attorney's ability to try the case; that this misunderstanding arose in part from statements of the trial court preceding trial; and that the out-of-state attorney had no inkling that he would be barred from the courtroom during the trial. Considering the totality of the circumstances presented in the case and noting the trial court's role in the misunderstanding, the Arkansas Supreme Court held that the motion for continuance should have been granted.

While Santos may have displayed a certain indifference to this case, the district court's 41-day delay in ruling on his chosen attorney's motion to withdraw left the attorney in a quandary as to his duties and Santos in doubt as to whom he should consult. Under those circumstances, it was not unreasonable for Santos to serve the notice required by § 28-321(1) on the day his attorney was denied leave to withdraw, and the district court thus abused its discretion in refusing to grant Santos a continuance.

Accordingly, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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STATE OF NEBRASKA, APPELLEE, V. RICHARD WARE, APPELLANT.
468 N.W.2d 616

Filed May 3, 1991. No. 90-290.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, LYLE WINKLE, Judge. Judgment of District Court affirmed.

Richard Scott for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

PER CURIAM.

Richard Ware appeals from the judgment of the district court for Platte County regarding Ware's misdemeanor conviction and sentence for issuing a bad check, in violation of Neb. Rev. Stat. § 28-611(1)(c) (Reissue 1989).

Ware, who represented himself throughout the county court proceedings, now claims that his guilty plea is invalid and that the sentence imposed is excessive.

Regarding the validity of Ware's guilty plea and, therefore, his conviction, the issue is whether Ware waived his right to counsel. We have examined the record and conclude that Ware knowingly, intelligently, and voluntarily waived his right to counsel regarding his plea-based conviction. See, *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990) (characterization of waiver); *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986) (valid guilty plea waives right to counsel); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (defendant's right to self-representation on waiver of right to counsel).

Ware's claim of excessiveness of the sentence imposed, namely, 6 months' imprisonment and restitution, is without merit. Under § 28-611(1)(c), issuing a bad check is a Class I misdemeanor, which has the following penalty: "Maximum — not more than one year imprisonment, or one thousand dollars fine, or both. Minimum — none." Neb. Rev. Stat. § 28-106(1) (Reissue 1989). "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).

Ware's conviction and sentence are affirmed; therefore, the judgment of the district court is affirmed.

AFFIRMED.

## STATE OF NEBRASKA, APPELLEE, V. LEROY A. ANDERSEN, APPELLANT.

468 N.W.2d 617

Filed May 3, 1991. No. 90-346.

1. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
2. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
3. **Verdicts: Appeal and Error.** The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. _____: _____. A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
5. **Mentally Disordered Sex Offender: Appeal and Error.** This court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that the finding of such declaration was an abuse of discretion.
6. **Sentences: Appeal and Error.** A sentence that is within statutory limits will not be disturbed upon appeal absent an abuse of discretion.
7. **Sentences.** It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively.
8. _____. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the other offenses.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

BOSLAUGH, J.

The defendant, LeRoy A. Andersen, was convicted by a jury of two counts of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1989). Following a presentence investigation and evaluations ordered by the court, Andersen was determined to be a mentally disordered sex offender whose disorder is nontreatable. He was sentenced to 20 months' to 5 years' imprisonment on each count, the sentences to run consecutively, with credit for 323 days. In his appeal, the defendant contends that the district court erred in (1) overruling his motions for dismissal, directed verdict, and new trial; (2) finding that his disorder is nontreatable; (3) imposing excessive sentences; and (4) imposing consecutive sentences.

In his first assignment of error, Andersen contends that his motions for dismissal, directed verdict, and new trial should have been sustained because the evidence was insufficient to support a finding of guilty on count II, sexual assault of T.H. The essence of Andersen's argument is that the evidence fails to provide any basis for finding that Andersen subjected T.H. to sexual contact.

> In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

*State v. Clancy*, 224 Neb. 492, 501, 398 N.W.2d 710, 717 (1987).

In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Patrick*, 227 Neb. 498, 418 N.W.2d 253 (1988); *State v. Richardson*, 227 Neb. 274, 417 N.W.2d 24 (1987). The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Patman*, 227 Neb. 206, 416 N.W.2d 582 (1987); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be

said as a matter of law that the evidence is insufficient to support the verdict. *State v. Jahan-Shahi*, 237 Neb. 543, 466 N.W.2d 795 (1991); *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989).

The evidence, viewed in the light most favorable to the State, shows that the incident in question occurred in the late afternoon on April 20, 1989, in Lincoln, Nebraska, in Peach Park. The victims, T.L. and T.H., were friends, both 7 years old, and the defendant was 56 years old. Heather Nelson, a witness to the incident, testified that at approximately 7 p.m. there were three young children, two girls and a boy, playing in the park. Nelson explained that while she was in the park, the children asked her to lift them on top of some culverts in the park. Nelson did so and then sat down on a picnic bench next to where the children were playing. While she was sitting on the bench, the defendant entered the park, approached Nelson, and began to talk with her. Shortly thereafter, the two little girls asked Nelson to help one of them climb back onto a culvert and to hand them pebbles. After helping the little girls, Nelson then went over to the little boy, who was on another culvert, and handed him pebbles.

When Nelson went to help the little boy, the defendant went over to the two little girls and started handing them pebbles. As the defendant handed the girls pebbles with his right hand, he placed his left hand on the leg of T.L. According to Nelson, the defendant first placed his hand below the knee of T.L., on the outside of her leg. He then moved his hand up the side of her skirt on the outside part of her leg. Nelson testified that she looked away for a moment and then turned around to see the defendant's hand going up the inside of T.L.'s skirt. Nelson then told the girls to sit down.

When the two girls sat down, Nelson brought them some more rocks. After picking up rocks, Nelson turned around and saw the defendant's hand going up the inside of T.L.'s skirt. According to Nelson, the defendant's hand was on the inside of T.L.'s leg and his hand was under her skirt. Disturbed by what she had seen, Nelson told her boyfriend, Tony Scattergod, who was playing basketball in the park, what the defendant was doing. When they looked over to where the defendant was

standing, however, the defendant had stopped. Nelson then returned to the picnic table and sat down. Moments later, she witnessed the defendant's hand rubbing the inside part of both girls' legs, underneath their skirts. Nelson again told Scattergod what the defendant was doing. This time, Scattergod yelled at the defendant, who then ran away.

Nelson told the girls to run home and tell their mothers what had happened. Later, when police officers came to the park, Nelson gave them a description of the defendant. Two days later, Nelson identified the defendant from a photographic array.

One of the victims, T.L., testified that she and her friend, T.H., were playing in the park when the defendant came into the park. She stated that the defendant approached them while they were playing with Nelson on the culverts in the park. T.L. explained that the defendant touched the front of her underpants in the area between the legs. She testified that when the defendant touched her underpants it made her unhappy and it hurt her. T.L. also testified that she saw the defendant touch her friend T.H. "[o]n the underwears." She explained that the defendant touched T.H. in the same place and in the same manner as he had touched her.

The other victim, T.H., also testified that while she and T.L. were playing in the park, a man approached them and gave them some rocks. She explained that the man touched her and T.L. on the legs, but she could not remember whether he had touched her private parts.

Gregory H. Sorensen, a detective sergeant with the Lincoln Police Department, testified that he interviewed the defendant on April 23, 1989, at the Lincoln Police Department. According to Sorensen, the defendant admitted that he had touched the outside of the underpants of both T.L. and T.H. in the vaginal area. The defendant explained to Sergeant Sorensen that he could feel the vagina and the vaginal opening at the time that he touched both girls.

The defendant contends that his motions for dismissal, directed verdict, and new trial should have been sustained because the evidence was insufficient to sustain a finding of guilty on count II, sexual assault of T.H. Specifically, he argues

the State did not prove that he subjected T.H. to sexual contact.

The crime of sexual assault of a child is defined in § 28-320.01(1): "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." "Sexual contact" is defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1989) as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. . . . Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

"Intimate parts" are defined in § 28-318(2) as "the genital area, groin, inner thighs, buttocks, or breasts."

The State's evidence which has been summarized was sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt on both counts. The direct testimony by the two victims described the sexual assaults. The testimony of Nelson, an eyewitness to the incident, corroborated the victims' testimony. Finally, the testimony of Sergeant Sorensen also provided corroborating evidence which, with the direct testimony of the victims and Nelson, was more than sufficient to support the verdicts. The evidence in this case was such that the district court could not properly dismiss the proceedings, direct a verdict of acquittal, or declare a new trial. The defendant's assignment of error is without merit.

In his second assignment of error the defendant contends that the trial court abused its discretion in finding that he is a nontreatable mentally disordered sex offender and that treatment is unavailable in Nebraska.

The record shows that in 1961 Andersen was convicted of child molesting in Scotts Bluff County, Nebraska, for which he was sentenced to 5 years in the Nebraska Penal and Correctional Complex. The record also shows that Andersen was convicted of debauching a minor in 1972 in Scotts Bluff County and was committed to the Lincoln Regional Center until January 1980. Since his discharge from the Lincoln

Regional Center, Andersen has been followed as an outpatient at the Veterans Administration Medical Center in Lincoln, where he receives psychiatric treatment and medication to treat his condition.

Following his present convictions, Andersen was evaluated in accordance with the requirements of Neb. Rev. Stat. §§ 29-2912 and 29-2913 (Reissue 1989) of the mentally disordered sex offender act. Three of the four examiners concluded that Andersen is a mentally disordered sex offender whose disorder is nontreatable. Drs. Sanat Roy and Daniel Ullman stated:

> Mr. Andersen's pedophilia disorder is not treatable within the MDSO Program, given the following. The pedophilia disorder has been refractory to previous attempts at treatment. Even with the years of effort the patient displayed in previous attempts at therapy, he was unable to internalize psychological controls of his pedophilia urges.

Dr. H.L. Balters offered the following opinion:

> There is a treatment facility in the state of Nebraska which is available to the client. In fact, the client has already been there for eight years of his life. Against that sort of backdrop of treatment failure, this worker truly does not believe that the client could benefit from additional placement at that same facility . . . . In other words, after eight years of prior programatic [sic] involvement by the client (then patient), one would expect that whatever the current judicial outcome for Mr. Andersen, he still is likely to become one of the recedevism [sic] statistics later on.
>
> Therefore, it is this worker's professional opinion that the client is a Mentally Disordered Sex Offender, someone likely to engage in future sexual offenses which will bring harm to someone else. However, this worker does not view the client as being treatable.

Dr. J.B. Bastani offered the following opinion:

> Mr. LeRoy Andersen has the classical pedophile profile. He is resistive to treatment. Treatment recommendation would not be made available in the State, that is testicular enucleation. This may sound

> shocking but in view of his poor compliance with medical treatment and the large population of minors at risk, he will repeat the act. . . .
>
> . . . .
>
> I must impress upon the Court the seriousness of Mr. Andersen's problem and short of close supervision with intramuscular injection of female hormone with residence in a nursing home (Veteran's Home), there is lack of anything further available due to his poor past compliance and chronic history of pedophilia.

This court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that such declaration was an abuse of discretion. *State v. Reddick*, 221 Neb. 322, 376 N.W.2d 797 (1985); *State v. Sell*, 213 Neb. 437, 329 N.W.2d 361 (1983).

The present record provides substantial evidence to support the trial court's conclusion that the defendant is nontreatable and that there is no treatment available for him in Nebraska. The trial court did not abuse its discretion in so concluding.

In his third assignment of error, the defendant claims the trial court abused its discretion in sentencing him to a term of 20 months' to 5 years' imprisonment on each count. The penalty for violation of § 28-320.01 is a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum sentence. A sentence that is within statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991). In view of the defendant's prior convictions involving crimes against children, the sentences imposed were not an abuse of discretion.

The defendant's final assignment of error contends that the trial court erred in ordering his sentences to run consecutively. He argues that his acts were part of a single course of conduct and that, therefore, the sentences imposed should have been concurrent with each other. "It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively." *State v. Nelson*, 235 Neb. 15, 24, 453 N.W.2d 454, 460 (1990) (citing *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). This court observed in *State v. Nelson,*

*supra* at 24, 453 N.W.2d at 460:

> The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the other offenses.

Here, the defendant was charged with two counts of sexual assault of a child. Count I involved the sexual assault of T.L., and count II involved the sexual assault of T.H. The evidence in count II required that the State prove the defendant engaged in sexual contact with someone other than the person whom he was charged with sexually assaulting in count I. As such, proof of count II required "additional evidence." The trial court did not abuse its discretion in imposing consecutive sentences.

There being no merit to the defendant's summarized assignments of error, the judgment and sentences of the district court are affirmed.

AFFIRMED.

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## BILLY BILLUPS, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES APPEALS BOARD, APPELLEE.

469 N.W.2d 120

Filed May 3, 1991. No. 90-619.

1. **Pleadings: Judgments: Time: Appeal and Error.** With some exceptions, a petition in error must be filed within 30 days after the rendition of the judgment or making of the final order of which complaint is made.
2. **Prisoners: Due Process: Notice.** The disciplinary process contemplated by Neb. Rev. Stat. § 83-4,121 (Reissue 1987) is commenced when written notice of the infraction is served on an inmate.
3. **Due Process.** Due process claims are generally subject to a two-part analysis: (1) Is the asserted interest protected by the due process clause, and (2) if so, what process is due?
4. _____. The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

5. **Appeal and Error.** This court is obligated to reach its conclusions on questions of law independent of those reached by the trial court.
6. **Due Process: Time.** A failure to perform an act within a time period prescribed by law is not a per se violation of due process.
7. **Prisoners: Due Process: Time.** A penal inmate's due process rights have not been violated when he or she has not been prejudiced by a delay in performing an act regarding prison disciplinary proceedings within the time prescribed by law.

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

Billy Billups, pro se.

Don Stenberg, Attorney General, and Terri M. Weeks for appellee.

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

FAHRNBRUCH, J.

Billy Billups appeals a district court's affirmance of a decision rendered in a prison disciplinary proceeding that Billups violated a Nebraska Department of Correctional Services rule prohibiting drug or intoxicant abuse. We affirm the decision of the district court for Lancaster County.

Billups' four assignments of error merge to allege only that the trial court erred in failing to find that Billups' due process rights were violated because a disciplinary misconduct report was not prepared and submitted within 72 hours of the discovery of Billups' infraction and that Nebraska State Penitentiary disciplinary proceedings were not commenced within 8 days of the discovery of the infraction.

On December 5, 1988, three inmate confidential informants were independently interviewed by custody personnel at the Nebraska State Penitentiary. All three informants provided internally consistent information regarding drug trafficking at the penitentiary by then Correctional Officer David Canada. Billy Billups was named by Canada as an inmate to whom Canada had brought marijuana. Canada made that statement on December 13 to Lynn Wright, a captain at the Nebraska State Penitentiary in Lincoln.

Thereafter, the matter was referred to the Nebraska State

Patrol for criminal investigation. On December 15, 1988, Canada told a State Patrol investigator that he had made two deliveries of marijuana to Billups, for the larger of which he had received $200 in late 1987 or early 1988. The State Patrol completed its investigation on December 19. Major Naylor, a correctional officer, on December 21, 1988, wrote a misconduct report regarding the charges. A principal hearing, which is described in 68 Neb. Admin. Code, ch. 6, § 006.04 (1987), was held on December 22, 1988, regarding the alleged marijuana trafficking. As provided in § 006.04, an investigating officer meets with an accused inmate and provides the inmate with written notice of the allegations, an opportunity to request representation and/or witnesses at a disciplinary hearing, and an opportunity to request assistance in the investigation to enable the inmate to muster evidence in the inmate's defense.

On January 3, 1989, a disciplinary committee of the penal complex heard evidence regarding the misconduct report prepared by Major Naylor. The disciplinary committee concluded that inmate Billups had violated 68 Neb. Admin. Code, ch. 5, § 005I[H] (1978), which proscribes the use of or trafficking in drugs, narcotics, or medication not prescribed by facility personnel or of intoxicants. As a sanction, the committee imposed 90 days' loss of good time and 60 days' disciplinary segregation.

On January 30, 1989, the disciplinary committee's decision was upheld by the Department of Correctional Services Appeals Board. Billups filed a petition in error and a certified transcript of the appeals board's decision in the district court for Lancaster County on March 1, 1989. The district court affirmed the decision of the appeals board.

Before we address Billups' assignment of error, some observations regarding the posture of this case are in order. As stated, judicial review was obtained in the district court by the filing of a petition in error. Although Neb. Rev. Stat. § 84-919 (Cum. Supp. 1990) reads, "Except as otherwise provided by law, the Administrative Procedure Act establishes the exclusive means of judicial review of a final decision of an agency in a contested case," the Legislature provided that this language would not become operative until July 1, 1989. See 1988 Neb.

Laws, L.B. 352, § 188. Thus, we need not reach the question of whether the Administrative Procedure Act is now the sole avenue for judicial review of a prison appeals board's decision. See *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981) (review in prison disciplinary proceedings may not be brought under the Administrative Procedure Act). At the time Billups filed his petition in error, § 84-919 (Reissue 1987) provided that the Administrative Procedure Act was cumulative to existing laws. Billups followed the proper procedure by filing a petition in error, see *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985), and this appeal is governed by the rules regarding error proceedings.

Despite Billups' concerns, he timely filed his petition in error in the district court. With some exceptions which need not be addressed here, a petition in error must be filed within 30 days after the rendition of the judgment or making of the final order of which complaint is made. Neb. Rev. Stat. § 25-1931 (Reissue 1989). The appeals board rendered its decision on January 30, 1989, and Billups filed his petition in the district court on March 1, 1989, the 30th day. See Neb. Rev. Stat. § 25-2221 (Reissue 1989) (in computing time, the day of the order is excluded, as well as the last day if it falls on a weekend or designated holiday).

We now turn to the merits of this appeal. It is Billups' contention that his infraction was discovered on or before December 13. He claims that because his misconduct report was not submitted and his principal hearing was not held in the time prescribed by law, his due process rights have been violated. As recalled, the misconduct report was submitted on December 21, and on December 22, the principal hearing was held.

"A written report of any infraction shall be filed with the warden within seventy-two hours of the occurrence of such infraction or the discovery of it." Neb. Rev. Stat. § 83-4,120 (Reissue 1987). The Department of Correctional Services' rules and regulations which were admitted into evidence also provide that if an employee has a reasonable belief that an infraction has been committed by an inmate, the employee is required to make a misconduct report within 72 hours of the discovery of

the infraction. See 68 Neb. Admin. Code, ch. 6, § 006.01 (1987). "No disciplinary proceeding shall be commenced more than eight calendar days after the infraction or the discovery of such infraction unless the committed person is unable or unavailable for any reason to participate in a disciplinary proceeding." Neb. Rev. Stat. § 83-4,121 (Reissue 1987). The disciplinary process contemplated by § 83-4,121 is commenced when written notice of the infraction is served on an inmate. *Johnson v. Vitek*, 205 Neb. 745, 290 N.W.2d 190 (1980). In this case, that date would be December 22, when the principal hearing was held.

" 'Due process claims are generally subjected to a two-part analysis: (1) is the asserted interest protected by the due process clause; and (2) if so, what process is due.' [Citation omitted.]" *Sanders v. Woodruff*, 908 F.2d 310, 312 (8th Cir. 1990), *cert. denied* ____ U.S. ____, 111 S. Ct. 525, 112 L. Ed. 2d 536. In answering the first question, we assume, but do not decide, that under the statutes and regulations, discipline of a prisoner implicates a constitutionally protected liberty interest. See *Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) (a state creates a protected liberty interest by placing substantive limitations on official discretion). See, also, *Sanders, supra*.

For the purpose of decision in this case, we assume, without deciding, that there was no compliance with the time requirements in respect to Billups' misconduct report and principal hearing. The question thus becomes whether such a delay denies a prisoner that process which is due him or her. That issue presents a question of law for this court. The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. See *Jordan v. Ben. Rev. Bd. of U.S. Dept. of Labor*, 876 F.2d 1455 (11th Cir. 1989). See, also, *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990) (matter of constitutionality presents a question of law). This court is obligated to reach its conclusions on questions of law independent of those reached by the trial court. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

This court has never before decided the specific question before us. However, we have held in other contexts that a failure to perform an act within a time period prescribed by law is not a per se violation of due process. See, e.g., *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987) (since the petitioner was not prejudiced, a failure to give notice of a hearing did not violate procedural due process).

Other courts have resolved the instant question under nearly identical facts. In *U.S. v. Warden, Stateville Correctional Ctr.*, 635 F.2d 656 (7th Cir. 1980), *cert. denied* 454 U.S. 843, 102 S. Ct. 156, 70 L. Ed. 2d 128 (1981), the petitioner prisoner, on October 17, 1978, received an "Institutional Disciplinary Report" which charged that on August 23 of that year, he interfered with a food cart, attempted to upset it, and attempted to steal food from the cart. A hearing on those charges was held on October 19, after which the petitioner prisoner lost 6 months' good time credit. He alleged that the correctional facility's failure to comply with the statutory requirements that written notice of the disciplinary violation be filed within 72 hours of its occurrence and that the disciplinary proceedings be commenced within 8 days violated his due process rights. The court held that the petitioner prisoner's due process rights were not violated because he did not allege that he suffered any harm from the delay. That is, the 2-month delay did not interfere with his right to marshal the facts and present a defense.

At issue in *Jensen v. Satran*, 332 N.W.2d 222 (N.D. 1983), was a penitentiary rule which required that disciplinary hearings be held as quickly as possible after an inmate was charged and that generally this period was not to exceed 72 hours. The penal inmate was charged with a rule violation occurring at approximately 9 p.m. on November 23, 1981. His hearing was held less than 24 hours in excess of the 72-hour period after he was charged. Under the second step of due process analysis, the court held that the inmate's due process rights were not violated by the delay because the inmate did not claim that he was prejudiced in any way by the delay, nor was there any indication of possible prejudice in the record. We hold that a penal inmate's due process rights have not been violated

when he or she has not been prejudiced by a delay in performing an act regarding prison disciplinary proceedings within the time prescribed by law.

Under the foregoing principles, Billups was not prejudiced by the delay in the submission of the misconduct report and commencement of the disciplinary proceedings. The record reflects that the earliest date on which a finder of fact could determine that correctional personnel discovered that Billups was involved in the drug use was December 13. Although there is a reference in the record to discovery on December 5 of drug trafficking occurring at the prison, there is no evidence in the record that corrections personnel were aware of Billups' involvement on that date. If we assume discovery on December 13, the misconduct report was submitted 5 days in excess of the statutory prescription, and disciplinary proceedings were commenced within 1 day of the time provided for in § 83-4,121. It is neither alleged by Billups nor reflected in the record how Billups was prejudiced by this de minimis delay. We hold that the proceedings provided Billups complied with constitutional procedural due process requirements.

The judgment of the district court for Lancaster County is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DONALD A. BROHIMER, APPELLANT.

468 N.W.2d 623

Filed May 3, 1991. No. 90-716.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
3. _____. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part vacated and remanded with direction.

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

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

CAPORALE, J.

After being charged by plaintiff-appellee State with first degree murder and the use of a deadly weapon in the commission of a felony, the defendant-appellant, Donald A. Brohimer, pled no contest to and was adjudged guilty of manslaughter and of using a firearm to commit a felony. He was thereafter sentenced to imprisonment for a period of not less than 6 years 8 months nor more than 20 years for the manslaughter conviction and to a consecutive term of 5 years for the use of a firearm conviction. In addition, Brohimer was ordered to pay $7,780.72 in restitution. Brohimer claims that his sentence is excessive and that the restitution requirement is in part unlawful. We affirm in part, and in part vacate and remand with direction.

There is no merit to the claim the sentence is excessive. Brohimer's 23-year marriage to his wife ended by a decree of dissolution dated June 26, 1989. During the following months, Brohimer continued to monitor his former wife's activities and experienced conflicts with her and her friend, the decedent, Freddy M. Baumwart. On the night of January 19, 1990, Brohimer had called his former wife's home and reported to her sister that he had some money for his former wife, part of the proceeds of a house sale. Later, he called his daughter and made the same report. He also wanted his former wife to sign an Internal Revenue Service form. After doing some drinking, he, sometime after midnight on January 20, started to drive to his former wife's home. En route, he encountered a truck occupied by his former wife and the decedent. A chase instituted by the decedent resulted in a confrontation between the two men,

during which Brohimer fired a shot which missed decedent. Brohimer then repumped his gun and shot decedent in the back of his head while decedent was walking away.

As we repeatedly reaffirm, a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Egger*, 237 Neb. 688, 467 N.W.2d 411 (1991). Both of the offenses of which Brohimer stands convicted are Class III felonies, Neb. Rev. Stat. §§ 28-305 and 28-1205 (Reissue 1989), punishable by imprisonment for a period of from 1 to 20 years, a $25,000 fine, or both such imprisonment and fine, Neb. Rev. Stat. § 28-105 (Reissue 1989). The prison sentences imposed are within the statutory limits and the nature of the offenses such that the sentences cannot be said to constitute an abuse of discretion, notwithstanding Brohimer's military service, college degree, good work record, and absence of prior violent crime, save for the violence he practiced on his former wife during the early years of their marriage.

The restitution claim, however, is another matter. Neb. Rev. Stat. § 29-2280 (Reissue 1989) provides that a defendant can be ordered to "make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted."

Brohimer asserts the district court erred by including the following in the amount of restitution he was ordered to pay: $1,829.62 for attorney fees, $100 for a contribution to a firemen's auxiliary (decedent had been a firefighter), and $272 for garage rental. Neither party directs us to anything in the record which explains the attorney fees or garage rental. What we do know is that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning and that 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. Matthews*, 237 Neb. 300, 465 N.W.2d 763 (1991).

The portions of the record called to our attention do not permit us to find that any of the items complained of were the result of "the actual physical injury or property damage or loss

sustained by the [decedent] as a direct result of the offense for which [Brohimer] has been convicted." The decedent's estate could not have become responsible for any attorney fees in the prosecution of this case, for prosecution was the sole responsibility of the State; charitable contributions may not be forced upon Brohimer; and simply establishing that rental expense was incurred does not demonstrate that the expense came about as a direct result of the subject offenses.

Consequently, we affirm the convictions and sentences imposed, but vacate the order of restitution and remand the cause with the direction that restitution be recomputed in accordance with this opinion.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTION.

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KAREN R. CODR, APPELLEE, V. MICHAEL A. CODR, APPELLANT.
469 N.W.2d 124

Filed May 3, 1991. No. 90-781.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Stan A. Emerson, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

Leo J. Eskey for appellee.

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

PER CURIAM.

Michael A. Codr appeals from the judgment of the district court for Saunders County, which dismissed his petition to modify a decree of dissolution. The court determined that there was insufficient evidence of a material change in circumstances to justify a change in child custody granted to the wife, Karen R. Codr, under the dissolution decree.

> "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, *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court.

We order the husband to pay the wife $1,000 to be applied toward her attorney fees for services in this court.

AFFIRMED.

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## DONAVON J. SCHMIDT, APPELLANT, V. CITY OF CROFTON AND EMPLOYERS MUTUAL COMPANIES, APPELLEES.

468 N.W.2d 625

Filed May 3, 1991. No. 90-1003.

1. **Workers' Compensation: Appeal and Error.** The Supreme Court will not substitute its view of the facts where the record substantiates the factual findings of the Workers' Compensation Court.
2. **Trial.** Ordinarily, causation is a matter to be determined by the trier of fact.
3. **Expert Witnesses.** Conflicting expert testimony must be weighed and resolved by the trier of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Kathleen Koenig Rockey and Matthew J. Carney, of Domina & Copple, P.C., for appellant.

Walter E. Zink II and David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

GRANT, J.

Plaintiff, Donavon J. Schmidt, appeals from an order of dismissal entered by the Nebraska Workers' Compensation Court on rehearing, with one judge dissenting, in an action against the City of Crofton and Employers Mutual Companies, the city's insurance carrier. Plaintiff timely appealed to this court. Plaintiff's three assignments of error may be summarized as one: The Workers' Compensation Court on rehearing erred in finding that plaintiff had failed to prove causation of his disability by a reasonable degree of medical certainty. We affirm.

The well-settled standard of review in workers' compensation cases is that findings of fact made by the compensation court on rehearing have the same force and effect as a jury verdict and will not be set aside unless clearly wrong. *Neneman v. Falstaff Brewing Corp.*, 237 Neb. 421, 466 N.W.2d 97 (1991). In a review of the record for clear error, the evidence must be viewed in the light most favorable to the successful party. *Id.*

The record, considered in the light most favorable to the defendants, shows that at the time of his accident, plaintiff, a 48-year-old male, had worked for the City of Crofton as a maintenance worker for approximately 15 years. While so employed on May 23, 1989, plaintiff was injured installing a 200-pound diving board at the city pool. Plaintiff stood underneath the diving board and used his head and right arm, along with the force of his legs, to push the board upward into place so that another employee could position the board on its rubber mounts. As he was lifting the board into place, plaintiff testified, he "felt kind of funny," as if he had just had a bowel movement, and that he was exhausted and lightheaded. He experienced rectal bleeding and called his wife to take him home. The next thing he remembers is being transported to the hospital in Yankton, South Dakota.

At Sacred Heart Hospital in Yankton, plaintiff was treated by Dr. Robert J. Neumayr, an internist. Plaintiff gave a brief medical history, including his treatment for anemia approximately a month prior to the lifting incident. In addition to the blood loss from plaintiff's lower gastrointestinal tract, Neumayr noted a general "change in sensorium" in that "[h]e wasn't the usual Donavon Schmidt. He wasn't sharp. He gave vague answers." Plaintiff testified that he felt dizzy and off balance. In response to these symptoms, plaintiff underwent several tests, including a CT scan on the day of the accident and an MRI scan approximately a week later. The CT scan indicated that plaintiff had suffered a left basilar ganglia lacunar infarct, a type of stroke in which part of the brain is damaged, and the MRI confirmed it. However, the MRI was unclear as to when this lacunar infarct was sustained. The radiologist characterized it as an "old" injury which, according to Neumayr, means the injury did not occur on the day the test was done, but it could have occurred a day, a week, or a month prior to the test. Nonetheless, Neumayr testified that the strain of heavy lifting directly caused plaintiff's subcortical brain hemorrhage, or lacunar infarct, and his consequent behavioral problems.

On Neumayr's recommendation, plaintiff was examined by several physicians, including a rheumatologist, a neurologist, and a psychiatrist. Plaintiff was also examined by several psychologists. Neumayr first referred plaintiff to Dr. William R. Palmer, a rheumatologist in Omaha, to determine whether plaintiff was suffering from some type of rheumatologic, or connective tissue, disease which would manifest itself in plaintiff's change in personality. Palmer first examined plaintiff on June 22, 1989, and found the examination to be "completely normal except for his very flat affect and . . . a moderate amount of depression." Palmer was not certain that plaintiff suffered from a rheumatologic disorder and withheld his recommendation pending further test results. On July 21, 1989, after evaluating the test results, Palmer could not "identify a connective tissue disease as a cause of [plaintiff's] problems" and remained "at a loss to explain [plaintiff's] current mental and physical status."

Dr. Ronald A. Cooper, a board-certified neurologist, first examined plaintiff on June 22, 1989, at the request of Neumayr. Cooper testified in his deposition, taken June 12, 1990, that he could not determine the cause of plaintiff's personality disorder, but that it was not the lacunar infarct. Cooper agreed with Neumayr that plaintiff had indeed suffered a lacunar infarct at some time, but specifically did not agree that it was the cause of plaintiff's personality disorder. Cooper stated that a lacunar infarct is a small stroke in the brain, "usually less than a sonometer (sic) in size," or about half an inch, and that he did not feel that a small stroke at the deep center of the brain would cause plaintiff's problems. He testified that a subcortical hemorrhage would not cause the type of problems plaintiff was experiencing unless it was "very large and causing compression of the brain itself" and that unless the lacunar infarcts are multiple and affect both sides of the brain, they generally do not cause problems with personality and memory function. He also stated that a single lacunar infarct, "if it's in the right area, can cause a weakness, a stroke-like picture, but it . . . should not cause problems with cognitive function with thinking. . . . The cortex of the brain usually has to be involved with a single stroke to cause those type[s] of changes."

In a letter to defendant Employers Mutual, dated October 27, 1989, Cooper stated, "I do not feel that the small lacunar infarct noted in the left basal ganglia has anything to do with the patient's symptomatology and is probably an incidental finding." Cooper concluded that there was no relationship between the lifting incident and plaintiff's personality disorder.

On referral from Cooper, plaintiff was evaluated at Bishop Clarkson Memorial Hospital by Dr. Bruce D. Gutnik, a psychiatrist, on June 23, 1989. Gutnik noted in his report to Cooper that during this evaluation, plaintiff "denie[d] any sadness or depression, and denie[d] any personality change" since the accident. Gutnik also noted that a "computerized axial tomography and MRI of [plaintiff's] brain showed an old lacunar infarct in the left basal ganglia with probably no clinical significance." Neumayr's diagnosis was eventually supported by Gutnik, who later concluded, after examining the results of plaintiff's neurological testing, that plaintiff's diminished

long-term memory for new material, his impaired capacity to perform motor encoding tasks, and his slow right-hand reflex capability indicated an atypical subcortical organic dysfunction such as can be seen following small subcortical brain hemorrhages.

The compensation court on rehearing reviewed all of the testimony, and two judges of the court concluded that the evidence "preponderate[d] in the defendants' favor as to the question of causation," relying heavily on Cooper's testimony. The court dismissed plaintiff's petition.

We are precluded from substituting our view of the facts for that of the Workers' Compensation Court if the factual conclusions reached by that court are substantiated by the record. *Neneman v. Falstaff Brewing Corp.*, 237 Neb. 421, 466 N.W.2d 97 (1991); *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991). The central issue in this case concerns causation, a matter ordinarily for the trier of fact. *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990).

The record in the present case contains conflicting medical testimony as to causation. Plaintiff's original treating physician, Neumayr, an internist not board-certified in his field, concluded that the manner in which plaintiff lifted a diving board while installing it at work caused a lacunar infarct in plaintiff's brain and that the lacunar infarct, or subcortical brain hemorrhage, in turn caused plaintiff's personality disorder. Neumayr's conclusions were based on plaintiff's CT scan and MRI test. Other doctors agreed, in varying degrees, with Neumayr's conclusions.

Cooper's opinion was completely at odds with Neumayr's opinion. Cooper defined a subcortical hemorrhage as a "hemorrhage under the cortex of the brain." While Cooper had no explanation for plaintiff's personality disorder, he did not "find any definite evidence" in plaintiff of a subcortical organic dysfunction or a subcortical organic hemorrhage of a size which would cause the type of personality changes plaintiff was experiencing. He stated that plaintiff's lacunar infarct was a small isolated infarct located in an area of the brain not responsible for personality functions and that neither the

lacunar infarct nor the lifting incident had any relation to plaintiff's personality problems. Cooper based his opinion on plaintiff's medical history, examinations, and tests.

The trier of fact must weigh the evidence and resolve any contradiction in conflicting testimony from expert witnesses. *Kidd v. Winchell's Donut House*, 237 Neb. 176, 465 N.W.2d 442 (1991). Even contradictory testimony from the same expert witness which produces a good faith conflict of opinion is a matter to be resolved by the fact finder. *Id.; Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986).

Although the medical testimony conflicts, based on our review of the record we cannot say the compensation court erred in finding that plaintiff failed to meet his burden of proof as to causation and in dismissing plaintiff's petition. Therefore, the judgment of that court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V. SHON M. SHURTER, APPELLEE.
468 N.W.2d 628

Filed May 3, 1991. No. 91-141.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

Stephen A. Scherr, Adams County Attorney, for appellant.

Arthur R. Langvardt for appellee.

FAHRNBRUCH, J.

The Adams County Attorney appeals a district court order suppressing testimonial and physical evidence (a sawed-off shotgun) obtained as a result of a search of Shon M. Shurter's mobile home. The order of the district court for Adams County is reversed, and the cause is remanded for further proceedings.

In addition to any other right to appeal, the State may appeal from an order granting a motion for the return of seized

property and to suppress evidence. Neb. Rev. Stat. § 29-824 (Reissue 1989). Section 29-824 further provides that such review is conducted by a single judge of the Supreme Court.

In reviewing the district court's suppression order, the following well-established principles must be applied: "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. [Citations omitted.]" *State v. Cortis*, 237 Neb. 97, 106, 465 N.W.2d 132, 140 (1991). However, with regard to questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991).

At the suppression hearing held on November 1, 1990, Steven D. Murphy was the sole witness. Murphy is a Hastings, Nebraska, police officer and a graduate of the law enforcement training center at Grand Island. He had received continuing education in the law enforcement field.

Officer Murphy testified that while he was on duty on April 12, 1990, he went to the Hastings residence of Shurter for the purpose of investigating a reported vandalism to Shurter's pickup truck on a previous night. When Murphy arrived at Shurter's mobile home between 9 and 11 a.m., he observed the pickup truck in front of Shurter's residence. He exited his vehicle, walked up to Shurter's residence, and knocked on the door. There was no response. Murphy returned to his car and began driving away. At that point, Shurter opened the door of the mobile home and motioned Murphy to come back. When Murphy approached Shurter, he identified himself as a police officer and informed Shurter that he needed to talk to someone concerning the dollar amount of the damage to the vandalized pickup truck.

With Shurter standing in the doorway of the mobile home, holding the door partially open, and with Murphy on the steps, the two men began discussing the damage to the pickup truck. Shurter had only a blanket around his waist which he was holding with one hand. The temperature was cool, and it was drizzling.

Officer Murphy, on cross-examination, testified that after a

short conversation, he most likely asked Shurter if he could come into the mobile home. He could not state whether he definitely made that request, but he did testify that it was his normal practice to do so. On direct examination, Murphy stated that in response to his request to come inside, Shurter stepped back from the door and opened it farther, but did not say anything. The officer testified that he did not demand entry into the mobile home or threaten Shurter, that he was wearing civilian clothes, and that his firearm was not visible to Shurter. As Murphy entered the residence, Shurter was approximately 4 to 5 feet from the door.

After Murphy entered the mobile home, he noticed a BB gun replica of a semiautomatic Uzi rifle that was lying on a counter directly in front of him. While the two men continued their conversation regarding the damaged pickup truck, Murphy looked around to see if any other weapons were present. He saw a sawed-off shotgun on a coffee table in Shurter's living room approximately 12 to 15 feet from where he stood inside the doorway to the mobile home. Murphy walked to the coffee table, picked up the weapon, removed a shell, and took possession of the shotgun.

Though the record is silent on this point, Shurter was apparently charged with possession of a short shotgun, in violation of Neb. Rev. Stat. § 28-1203(1) (Reissue 1989). That crime is a Class IV felony and is punishable by a term of imprisonment of up to 5 years, a fine of up to $10,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989). Contending that his fourth amendment rights were violated, Shurter moved to suppress "all objects seized from the residence of Defendant . . . together with all testimony as to observations made or statements made by the Defendant . . . ." The trial court sustained Shurter's suppression motion, finding that "there is no evidence the officer requested permission to enter."

## I. JURISDICTION

> In making an order granting a motion to suppress and to return property, the district court shall in such order fix a time, not exceeding ten days, in which the county attorney . . . may file a notice with the clerk of such court of his

intention to seek a review of the order.

Neb. Rev. Stat. § 29-826 (Reissue 1989). In this case, the district court entered its order on January 10, 1991, but did not in that order set a time in which the State could file a notice of intent to seek review of the district court's order. The State filed its notice of intent to seek review on January 22, 1991. Shurter argues that because the county attorney's notice of intention to seek review was not filed with the clerk of the district court within 10 days of the suppression order, this court is without jurisdiction to hear the appeal.

Whatever the merits of Shurter's legal argument, he is incorrect as a factual matter. In computing the time in which the county attorney was required to file his notice of intent to seek review, the last day of the period so computed is not counted if it falls on a weekend or holiday. Neb. Rev. Stat. § 25-2221 (Reissue 1989). In this case, the 10th day fell on Sunday, January 20, 1991, which may not be computed in determining the time in which the county attorney was required to file the notice. The following day must also be excluded, since it was a state holiday commemorating the birth of Martin Luther King, Jr. Thus, the last day on which the Adams County Attorney could lodge this appeal was Tuesday, January 22, 1991. The record reflects that he did so on that date.

Shurter argues that because the county attorney failed to obtain the Attorney General's consent to file in this court an application for summary review of the suppression order as required by § 29-824, this court is without jurisdiction. Again, the merits of Shurter's argument need not be reached, as he is mistaken as a factual matter. Included in the transcript is the Attorney General's consent to the Adams County Attorney's appeal in this matter.

## II. SEIZURE

The State argues that Officer Murphy had a right to be in Shurter's mobile home because Shurter consented to his presence there and that his seizure of the short shotgun was then justified under the plain view doctrine. Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. See, U.S. Const.

amend. IV; Neb. Const. art. I, § 7. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *Horton v. California*, ____ U.S. ____, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Assuming the first two elements listed in *Horton* are met, there is no question that Officer Murphy had a lawful right of access to the sawed-off shotgun, since it was lying in the open in a place where he had a right to be. See *U.S. v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991). Accordingly, this appeal turns on whether Shurter consented to Officer Murphy's entry into his mobile home and whether the incriminating nature of the short shotgun was immediately apparent to the officer.

1. CONSENT

The right to be free from an unreasonable search and seizure may be waived by consent of the citizen. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). " 'Affirmative consent may be established by acts entirely aside from the use of words.' " *State v. Walker*, 236 Neb. 155, 159-60, 459 N.W.2d 527, 531 (1990) (quoting *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973)).

> In order for the consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne. . . . In other words, the consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. . . . The determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of the consent. . . . In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. . . . The burden is upon the government to prove that the

consent to search was voluntarily given.

(Citations omitted.) *Prahin, supra* at 416, 455 N.W.2d at 559-60.

Shurter agrees that a police officer may enter a residence with the occupant's consent, either express or implied, and then the officer may seize objects in plain view. However, the defendant contends that before consent can be given, law enforcement officers must first seek permission to enter a residence.

On this question of law, the court has an obligation to reach a conclusion independent of that of the trial court. In *Walker, supra*, an off-duty police officer went to a home which he leased to check on some repairs, among other nonpolice matters. Although the officer was off-duty, the Supreme Court first analyzed the case as if the officer had been on duty. After the officer rang the doorbell several times and knocked loudly on the door, the defendant answered the door. The officer explained to the defendant that he had arranged a meeting with his tenant at the house. The defendant informed the officer that the tenant was not at home, stepped back, and held the door open, allowing the officer to enter the residence. After the officer entered the premises, he observed a balance beam scale and a controlled substance residue in plain view, which led to the defendant's arrest and conviction for possession of methamphetamine. The court determined that the defendant implicitly consented to the officer's entry into the home, where he observed the objects in plain view, and the court upheld the defendant's conviction. A number of courts, both federal and state, have found lawful consent for entry by law enforcement officers on the basis of an individual's conduct in opening a door and stepping backward, even in the absence of a request by the officers to enter. See, e.g., *United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975); *U.S. v. Breland*, 715 F. Supp. 7 (D.D.C. 1989), *aff'd* 918 F.2d 225 (D.C. Cir. 1990); *People v. Gross*, 166 Ill. App. 3d 413, 519 N.E.2d 1043 (1988), *appeal denied* 121 Ill. 2d 576, 526 N.E.2d 835, *cert. denied* 488 U.S. 854, 109 S. Ct. 142, 102 L. Ed. 2d 115; *People v. Taylor*, 111 A.D.2d 520, 489 N.Y.S.2d 394 (1985), *appeal denied* 66 N.Y.2d 618, 485 N.E.2d 245, 494 N.Y.S.2d 1041; *Daugherty v. State*, 652 S.W.2d 569

(Tex. App. 1983). When one manifests consent by making an inviting or pointing gesture, such as waving a law enforcement officer into the premises or opening the door wider and stepping backward, it would be unwise to invalidate such a consent for the reason that the officer failed to engage in the empty formality of first seeking permission to enter.

The trial court found that based on Officer Murphy's equivocal testimony, it could not find that the officer asked Shurter if he could enter his mobile home. That finding is not clearly erroneous in view of Officer Murphy's uncertain testimony on that point. Therefore, there are two scenarios under which Officer Murphy entered the mobile home: Either Officer Murphy first stepped into the mobile home and Shurter moved aside, or Shurter opened the door farther and stepped backward. In the first instance, it cannot be said that the consent would be voluntary, but as the foregoing case law instructs, consent would be valid in the latter case.

Under the totality of the circumstances, Shurter, by his conduct, voluntarily consented to Officer Murphy's entry into the defendant's mobile home. It is uncontroverted that while Officer Murphy was driving away from Shurter's mobile home the defendant waved to Murphy to return. It is also uncontroverted that as Shurter and the officer were visiting, Shurter held open the door of his mobile home. It is further uncontroverted that before Officer Murphy entered the mobile home Shurter stepped back and opened the door wider, which permitted Murphy to enter the mobile home. By stepping back and opening the door of his home wide enough for Officer Murphy to enter the home, Shurter, by his conduct, invited Officer Murphy into his home. It is not necessary for a police officer to request entry into a residence when a defendant either verbally or by his or her conduct invites the police officer into the defendant's residence.

2. Incriminating Nature Immediately Apparent

Officer Murphy testified that he had received training in the identification of illegal weapons. He further testified that he observed a sawed-off shotgun sitting on a coffee table a short distance from where he was standing. Murphy's testimony

reflects that the incriminating nature of the contraband was immediately apparent to him. The fact that Officer Murphy, while remaining standing by the door, looked around the mobile home for illegal weapons does not invalidate the seizure of the short shotgun. The fourth amendment does not prohibit the warrantless seizure of contraband or evidence of a crime in plain view, even though the discovery of the evidence was not inadvertent. See *Horton v. California*, ____ U.S. ____, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). See, also, *U.S. v. Cardona-Rivera*, 904 F.2d 1149 (7th Cir. 1990).

The suppression order of the district court for Adams County is reversed. The cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## BRENT FLYNN, NATURAL FATHER AND LEGAL GUARDIAN AND NEXT FRIEND OF JASON FLYNN, APPELLANT, V. LAWRENCE CHARLES BAUSCH, M.D., APPELLEE.

469 N.W.2d 125

Filed May 10, 1991. No. 88-1079.

1. **Physician and Patient.** Generally, a physician's duty to exercise the required skill or standard of care arises out of the physician-patient relationship.
2. **Health Care Providers: Presumptions.** Absent fraud or misrepresentation, consent to medical treatment is presumed.
3. **Physician and Patient.** A physician-patient relationship arises when the physician undertakes treatment of the patient.
4. **Summary Judgment.** Summary judgment is appropriate when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.
5. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains

uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

6. **Trial: Physician and Patient: Proof.** The existence of a physician-patient relationship is normally a question of fact; however, the party claiming existence of the relationship must offer some facts to show that the relationship came into existence.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Fredric H. Kauffman, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

CAPORALE, J.

The infant appellant, Jason Flynn, acting by and through Brent Flynn, his natural father, legal guardian and next friend, brought this medical malpractice action against the appellee, Lawrence Charles Bausch, M.D., who successfully moved for a summary judgment resulting in dismissal of the action. The infant, claiming the record presents a genuine issue of material fact concerning the existence of a physician-patient relationship between himself and Bausch, assigns the ruling as error. We affirm.

The infant was born February 4, 1986, at St. Elizabeth Community Health Center of Lincoln, and he and his mother, Linda Flynn, were released from the hospital on the 6th. On February 8, the mother took the infant to Harlan C. Shriner, Jr., M.D., because she was concerned that the infant might have developed an infection after his circumcision.

Shriner noted the infant appeared "[n]ormal otherwise but extremely yellowish green." The infant also had a rash in the areas of his back, buttocks, and upper legs, which apparently suggested bleeding into the tissues. Shriner performed a test to determine the level of the infant's bilirubin (a bile pigment, Dorland's Illustrated Medical Dictionary 167 (26th ed. 1981)).

The laboratory technician reported that the reading on the machine was above 30, the highest reading the machine was capable of making. After the examination in his office, Shriner was concerned about extreme jaundice (a condition characterized by high concentrations of bilirubin in the blood and its deposition in the skin, Dorland's, *supra* at 688) and the rash, and immediately admitted the infant into the neonatal intensive care unit at St. Elizabeth, where, at 1 p.m., various tests were ordered.

At some point within the next hour and a half, Shriner had a brief conversation with Bausch in the nursery, where Bausch was attending a patient in the crib next to the infant's. Shriner wanted Bausch's opinion "as to what . . . was going on and what might be a reasonable approach." Shriner considered this to be an informal consultation, but Bausch stated that in his judgment, it was not in any way a consultation, claiming that at St. Elizabeth, 90 percent of consultations follow a procedure involving written orders.

Shriner could not recall what specific information he gave Bausch, other than the fact that he "had a very jaundiced baby" with a rash and a history of slight fever. According to Shriner, the two agreed that more information was needed and that Shriner was to "get back" with Bausch "if the information indicated something different than what was going on at that point." The infant's claim that Shriner and Bausch had an additional conversation in the nursery following a particular test is unsupported by the portion of the record which he cites, and our independent review of the record finds no support for this assertion. There is deposition testimony by a nurse, stating that a second nurse told her that Shriner spoke with Bausch. Other than the deponent's belief that this was a telephone discussion, there is nothing to indicate that this was a second conversation. In fact, the deponent was unaware that Bausch had ever seen the infant. In any event, the statement of the second nurse recounted by the deponent is hearsay and, as such, would be inadmissible.

According to Bausch, Shriner informed him that he had an infant who was jaundiced or appeared unusual, with a rash. Bausch also recalled that Shriner gave him some "sketchy

information" about the mother being discharged early from the hospital, that "the bilirubin had run off the meter at his office," that he had obtained another bilirubin test at the hospital after the infant was admitted, and that he had ordered a series of other tests. Bausch did not look at the infant's chart or any test results, nor was he aware of the infant's name.

Although he looked at the infant, Bausch stated that he did not "examine" him. However, Bausch was able to observe that the infant appeared to be clinically jaundiced and recalled seeing a rash on his buttocks and trunk. Bausch advised Shriner to wait pending the outcome of the ordered tests before performing an exchange transfusion, but made no comment as to how long to wait.

A third physician expressed the view that the primary issue was to treat the infant's high bilirubin level and that a second issue was to learn whether he was "septic" (a condition produced by the decomposition of microorganisms, Dorland's, *supra* at 1189) and to treat that. According to this physician, the two conditions were not dependent upon each other and could and should have been treated independently and vigorously. The infant alleges he suffered brain damage and other injuries which would have been avoided had he received a timely diagnosis and exchange transfusion.

Generally, a physician's duty to exercise the required skill or standard of care arises out of the physician-patient relationship. See, e.g., *Oliver v. Brock*, 342 So. 2d 1 (Ala. 1976); *Rainer v. Grossman*, 31 Cal. App. 3d 539, 107 Cal. Rptr. 469 (1973); *Podvin v. Eickhorst*, 373 Mich. 175, 128 N.W.2d 523 (1964); *Ingber v. Kandler*, 128 A.D.2d 591, 513 N.Y.S.2d 11 (1987); *Easter v. Hospital*, 303 N.C. 303, 278 S.E.2d 253 (1981); *Fabian, et ux., Aplnts. v. Matzko, et al.*, 236 Pa. Super. 267, 344 A.2d 569 (1975); *Childs v. Weis*, 440 S.W.2d 104 (Tex. Civ. App. 1969); *Lyons v. Grether*, 218 Va. 630, 239 S.E.2d 103 (1977). While the relationship is often described as contractual in nature, based upon the express or implied consent of both physician and patient, 1 S. Pegalis & H. Wachsman, American Law of Medical Malpractice § 2:3 (1980), we have held that absent fraud or misrepresentation, consent to medical treatment is presumed, *Jones v. Malloy*, 226 Neb. 559, 412

N.W.2d 837 (1987). The relationship can therefore be said to arise when the physician undertakes treatment of the patient. See M. McCafferty & S. Meyer, Medical Malpractice Bases of Liability § 1.02 (1985). This relationship engenders a duty to the patient and, in certain cases, to third parties who may be subject to serious risks associated with a patient's treatment or condition. See, e.g., *Watkins v. U.S.*, 589 F.2d 214 (5th Cir. 1979) (plaintiff injured in automobile accident attributed in part to physician's negligent prescription of Valium to patient driver); *Gooden v. Tips*, 651 S.W.2d 364 (Tex. App. 1983) (facts similar to *Watkins*); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) (parents who caught scarlet fever from child after being informed by physician that they could take child home without risk of infection stated cause of action against physician); *Davis v. Rodman*, 147 Ark. 385, 227 S.W. 612 (1921); *Jones v. Stanko, Admx.*, 118 Ohio St. 147, 160 N.E. 456 (1928); *Edwards v. Lamb*, 69 N.H. 599, 45 A. 480 (1899). See, also, 1. S. Pegalis & H. Wachsman, *supra* § 2:20, and cases cited.

Some courts, however, have held that a physician-patient relationship is not a necessary prerequisite for sustaining an action in medical malpractice, and have grounded liability upon the traditional duty analysis for negligence. See, e.g., *Davis v. Weiskopf*, 108 Ill. App. 3d 505, 439 N.E.2d 60 (1982). Since nothing is called to our attention in the facts of the case before us which would support imposition of such a duty in the absence of a physician-patient relationship, we need not now determine the general question of whether liability can ever exist absent an underlying physician-patient relationship.

Summary judgment is appropriate when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. *Ruwe v. Farmers Mut. United Ins. Co.*, *post* p. 67, 469 N.W.2d 129 (1991); *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991); *Tuttle & Assoc. v. Gendler*, 237 Neb. 825, 467 N.W.2d 881 (1991). Moreover, a party moving for summary judgment has the

burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Tuttle & Assoc. v. Gendler, supra; Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991). The propriety of the summary judgment in this case therefore rests on whether the record, when viewed in the light most favorable to the infant, shows that there was no physician-patient relationship between him and Bausch. In other words, the judgment was properly granted if the record shows that Bausch did not undertake any part of the care and treatment of the infant.

The existence of a physician-patient relationship is normally a question of fact; however, the party claiming evidence of the relationship must offer some facts to show that the relationship came into existence. *Oliver v. Brock*, 342 So. 2d 1 (Ala. 1976). In *Oliver*, the Supreme Court of Alabama upheld a summary judgment in favor of a physician because there was no evidence a physician-patient relationship existed. The physician in *Oliver*, one Brock, had a phone conversation with Oliver's treating physician. The treating physician called Brock about a different patient and made "a casual reference to the condition of [Oliver] in the abstract, without mentioning her name," and Brock told the physician that the treatment seemed to be correct. *Id.* at 4. The Alabama court concluded: "There is nothing in this record to support the allegation that . . . Brock took any part in the treatment of . . . Oliver, by way of advising her physicians, or otherwise." *Id.* at 5.

In *Rainer v. Grossman*, 31 Cal. App. 3d 539, 107 Cal. Rptr. 469 (1973), a treating physician presented his patient's case history and x rays to a lecture group of 20 to 50 physicians. Grossman, a physician and university professor of medicine, was the lecturer. He, together with most of the other physicians present, expressed the opinion that surgery was indicated in

cases like the one presented. The treating physician later recommended surgery to his patient, and the patient was so treated. The patient later claimed that the surgery was unnecessary and constituted malpractice and that Grossman's opinion was relied upon by the treating physician. The court held that the professor's pedological discussion did not create a duty toward the treating physician's patient.

Notwithstanding Bausch's advice that an exchange transfusion be delayed pending the development of further data and his invitation for further discussion thereafter, the conversation between him and Shriner, without more, was, as a matter of law, too general to support an inference that Bausch had undertaken to participate in the infant's care and treatment. Absent such an inference, the record fails to support a finding that there existed a physician-patient relationship between the infant and Bausch. That being so, the trial court correctly concluded Bausch was entitled to judgment as a matter of law.

AFFIRMED.

HASTINGS, C.J., not participating.

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CHRIS J. RUWE, APPELLANT, V. FARMERS MUTUAL UNITED INSURANCE COMPANY, INC., SUCCESSOR TO CONCORDIA MUTUAL INSURANCE COMPANY, APPELLEE.

469 N.W.2d 129

Filed May 10, 1991. No. 89-049.

1. **Summary Judgment.** A motion for summary judgment is not intended to be a substitute for a demurrer or a motion for a judgment on the pleadings.
2. _____. A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.
3. **Trial: Pleadings: Pretrial Procedure: Summary Judgment.** When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that.

4. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted.
5. **Torts: Insurance: Claims: Proof.** 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.
6. **Torts: Insurance: Claims: Pleadings.** The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances?
7. **Pleadings.** A petition is sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover.
8. **Actions: Pleadings.** It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action.
9. _____: _____. Pleadings frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet. In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
10. **Insurance: Claims: Proof.** Reckless indifference to the facts or to the proof submitted by an insured is shown by an insurer's failure to conduct a proper investigation and subject the results to a reasonable evaluation and review.
11. **Insurance: Claims: Damages: Proximate Cause.** When an insurer acts in bad faith in the settlement of a claim with its insured, the insured is entitled to recover damages for economic loss proximately caused by the insurer's actionable conduct.
12. **Actions: Pleadings.** The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with directions.

Lawrence H. Yost and David C. Mitchell, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

Robert T. Grimit and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

FAHRNBRUCH, J.

Chris J. Ruwe appeals a trial court ruling that the allegations in his second amended petition did not state a cause of action when it alleged that his insurance carrier, Farmers Mutual United Insurance Company, Inc. (Farmers), acted in bad faith in settlement of Ruwe's first-party fire insurance claim.

We reverse the ruling of the district court for Washington County and remand the cause for further proceedings.

Specifically, Ruwe's three assignments of error can be combined to allege that the trial court erred in (1) failing to recognize that Ruwe stated a cause of action for an insurer's bad faith settlement of a claim with its insured and (2) admitting into evidence an affidavit of the insurer's attorney in support of its motion for summary judgment. Our decision concerning the first assignment of error obviates the necessity of reaching Ruwe's second assignment of error.

Before reciting the facts in this case, it is first necessary to determine the record to be considered on appeal. On September 23, 1988, Farmers moved for summary judgment. On December 23, 1988, the court, without explanation, sustained Farmers' motion. On January 6, 1989, Ruwe moved for reconsideration of the ruling on Farmers' summary judgment motion or, alternatively, for a new trial. In his motion, Ruwe stated,

> It is not clear from the Court's ruling whether it sustained the Defendant's Motion for lack of Nebraska authorities supporting Plaintiff's Cause of Action or whether it sustained said Motion for lack of a factual basis to support a claim of Bad Faith as alleged in Plaintiff's Second Amended Petition.

Although Ruwe's motion for a new trial was not timely, see Neb. Rev. Stat. § 25-1143 (Reissue 1989) (a motion for a new trial must be made within 10 days of the decision rendered, with two exceptions not applicable here), he nonetheless filed his notice of appeal within 30 days of December 23, 1988, as required by Neb. Rev. Stat. § 25-1912 (Reissue 1989). Therefore, this court has jurisdiction of this appeal.

During a hearing on Ruwe's motion for a new trial, Farmers explained to the trial court that it moved for summary

judgment on the basis that Ruwe failed to state a cause of action, but that if he did state a cause of action, there was no genuine issue of material fact for a jury to resolve. The district court entered an order on January 13, 1989, finding that the summary judgment motion was sustained on the basis that Ruwe had failed to state a cause of action. Neither party filed any motion thereafter.

A question arises because of Farmers' attempt to use a summary judgment motion to challenge whether Ruwe had stated a cause of action. A motion for summary judgment is not a proper method to challenge the sufficiency of a petition to state a cause of action. *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959). This court has further held that "[a] motion for summary judgment is not intended to be a substitute for . . . a demurrer, or a motion for a judgment on the pleadings. [Citation omitted.]" See *Regnev, Inc. v. Shasta Beverages*, 215 Neb. 230, 233, 337 N.W.2d 783, 785 (1983). The Legislature has provided that a petition may be challenged by demurrer for a failure to state a cause of action. See Neb. Rev. Stat. § 25-806 (Reissue 1989). It has further provided that a summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 1989). However, there simply is no statutory authorization for this hybrid procedure which Farmers has created to challenge Ruwe's second amended petition. When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988); *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989); *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). Therefore, we consider only the pleadings to determine if Ruwe's second amended petition stated a cause of action. See *Hutmacher,*

*supra*.

> [A] motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. [Citations omitted.]

*Hutmacher, supra* at 79-80, 430 N.W.2d at 278.

In his second amended petition, which was filed on June 18, 1987, Ruwe listed two causes of action: (1) breach of contract and (2) bad faith settlement of a first-party insurance claim. This appeal concerns only Ruwe's second cause of action.

In that regard, Ruwe alleged the following: that he is a resident of Washington County, Nebraska; that on January 1, 1986, Concordia Mutual Insurance Company (Concordia) merged into Farmers; and that by the terms of the merger Farmers assumed all liabilities of Concordia.

Ruwe further alleged in substance that Concordia issued and delivered to him its policy of insurance, insuring for a period of 3 years certain property; that a hog barn and three associated grain bins were later added to the policy; that the hog barn was insured in the amount of $37,500 and the three grain bins for $2,500; that he paid, and Concordia accepted, all premiums; and that among the casualties against which Concordia insured him was damage caused by fire.

He also alleged that on September 21, 1985, while the policy was in force and effect, the hog barn and the livestock housed therein were wholly destroyed by fire and the three grain bins were damaged; that on September 22, 1985, he notified Concordia's agent of the damage to his buildings and livestock caused by the fire; that Concordia's agents made repeated inspections of the destroyed building, but never thoroughly investigated the fire scene; that he signed a proof of loss which was timely submitted to Concordia on November 12, 1985; that on December 27, 1985, Concordia advised Ruwe that it was denying his claim and, in so doing, breached the implied covenant of good faith and fair dealing under the policy by withholding benefits based on the false accusation, without a

reasonable basis, that he had committed arson; and that Concordia acted unreasonably and in bad faith by denying his claim without a proper and thorough investigation of the fire scene.

Ruwe claimed that as a proximate result of the defendant's wrongful failure to pay benefits under the policy, he suffered damages in the sum of $128,070.44 for the loss of his hog farrowing business as well as the aggravation and inconvenience of being deprived of the insurance proceeds to which he was entitled. A copy of Ruwe's insurance policy was attached to and made part of Ruwe's second amended petition.

In its answer to Ruwe's second amended petition, Farmers admitted that Ruwe was a resident of Washington County, Nebraska, and that Farmers assumed Concordia's liabilities after the two entities merged. Except for Ruwe's admissions against interest, Farmers denied each and every allegation set forth in Ruwe's second amended petition.

The court entered an order on February 9, 1988, bifurcating Ruwe's breach of contract and bad faith causes. After 2 days of trial on Ruwe's breach of contract claim, Farmers, on July 20, 1988, offered to confess judgment in the amount of $45,570. Ruwe agreed, and the trial court entered judgment in that amount in his favor. Ruwe was further awarded attorney fees in the amount of $24,786.25 on that cause of action.

As stated, Farmers thereafter successfully moved for summary judgment on Ruwe's second cause of action, and this timely appeal followed.

In *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), this court held that an injured policyholder who is also a "covered person" or an injured policyholder who is also a beneficiary may bring a cause of action in tort against the policyholder's insurer for bad faith settlement of the policyholder's insurance claim. " '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. . . .' " *Id.* at 57, 464 N.W.2d at 777 (quoting *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978)). With respect to the first

part of that test, we agree with the view expressed by the *Anderson* court:

> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, *i.e.*, would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. [Citations omitted.]

*Anderson, supra* at 692, 271 N.W.2d at 377. Accord *Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 347 N.W.2d 595 (1984). We further held in *Braesch* that in such actions, a plaintiff could recover damages for mental suffering proximately caused by an insurer's bad faith settlement of the plaintiff's claim.

With respect to the pleading requirements at issue, Neb. Rev. Stat. § 25-804(2) (Reissue 1989) requires a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. A petition is sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). "[I]t is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. [Citations omitted.]" *Moore v. Puget Sound Plywood*, 214 Neb. 14, 18, 332 N.W.2d 212, 215 (1983). "Pleadings frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet. [Citation omitted.]" *Id.* In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988).

In *Braesch, supra*, the plaintiffs alleged that their insurer denied coverage despite the fact that an uninsured motorist's negligence was the sole and proximate cause of their daughter's death and that their insurer in bad faith refused to settle their claim, never entered into serious negotiations, and conducted only a perfunctory investigation. The *Braesch* plaintiffs further claimed that the refusal to settle was part of an effort to put psychological pressure on them to settle their claim for

considerably less than its value. We held there that the petitions stated causes of action. Though the allegations of bad faith are different in this case than in *Braesch*, it is the breach of the covenant of good faith and fair dealing from which liability springs and which is implicated in both cases. The tort embraces any number of bad faith settlement tactics, such as inadequate investigation, delays in settlement, false accusations, and so forth. See, generally, S. Ashley, Bad Faith Actions Liability and Damages §§ 5.04 to 5.22 (1991).

Ruwe alleged that certain of his property was covered by a fire insurance policy issued to him by Farmers, that the property was damaged by fire, that he notified Farmers of the loss, and that Farmers denied his claim. Ruwe's principal allegation of bad faith is that Farmers denied his claim without a proper and thorough investigation of the fire scene and falsely accused him of arson without a reasonable basis. The knowledge or reckless disregard element of the *Braesch* test may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured. See, *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978). This reckless indifference to the facts or to the proof submitted by an insured is shown by an insurer's failure to conduct a proper investigation and subject the results to a reasonable evaluation and review. *Atlantic Life, supra*; *Anderson, supra*. In this case, Ruwe's claim that Farmers denied his claim without a proper and thorough investigation of the fire scene sufficiently alleged that element of the *Braesch* test. Ruwe's second amended petition sufficiently alleged Ruwe's status as an injured policyholder-covered person, the absence of a reasonable basis for Farmers' denial of the benefits of the fire insurance policy, and Farmers' knowledge or reckless disregard of the lack of a reasonable basis for denying Ruwe's claim.

Ruwe's claims that he suffered economic losses and mental suffering as the proximate result of Farmers' wrongful failure to pay the policy benefits were proper elements of his damages. Although in *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), we did not reach the question of the

recoverability of damages for economic loss, it is clear that these damages may be recouped. In *Braesch*, we recognized that the amount recoverable under an insurance policy does not compensate a party entitled to bring a bad faith action for mental anguish. Likewise, an aggrieved policyholder may suffer economic losses far in excess of the limits of the policy. For example, in *Merlo v. Standard Life and Accident Ins. Co. of Cal.*, 59 Cal. App. 3d 5, 130 Cal. Rptr. 416 (1976), an insurer's bad faith refusal to pay disability benefits ultimately resulted in an insured having to sell his home in foreclosure proceedings at less than its fair market value. The *Merlo* court held that the insured's consequential economic loss included the loss of equity in his home, which amounted to $7,470. Thus, when an insurer acts in bad faith in the settlement of a claim with its insured, the insured is entitled to recover damages for economic loss proximately caused by the insurer's actionable conduct. See, e.g., *Chavers v. National Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d 642, 155 Cal. Rptr. 843 (1979); *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I. 1980). See, also, W. Shernoff, S. Gage & H. Levine, Insurance Bad Faith Litigation § 7.04[1] (1990); 1 Shepard's Causes of Action 205, § 28 (1983).

While Ruwe could have been more detailed in his allegation that Farmers' investigation was inadequate, "[t]he fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action. [Citation omitted.]" *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 198, 403 N.W.2d 721, 733 (1987).

Under this court's standard of review of a judgment on the pleadings, the statement of facts set forth in Ruwe's second amended petition properly and adequately framed the issues upon which the cause was to be tried and advised Farmers as to what it had to meet.

The judgment is reversed and the cause remanded to the district court for Washington County with directions to allow the plaintiff to proceed upon his second amended petition as to his second cause of action.

REVERSED AND REMANDED WITH DIRECTIONS.

GRANT, J., concurring.

I agree wholly with the opinion in this case. I write separately only to inform the members of the bar that problems lurk in the practice of law that most practicing lawyers and judges (specifically including the writer of this concurrence) never realize. In this case, an expert witness testified on behalf of the defendant. During his sworn testimony, this expert testified that he had graduated from the Massachusetts Institute of Technology in 1972, with a degree in electrical engineering, and from Texas A & M in 1982, with a Ph.D. in the same subject. He rendered learned expert opinions in the case.

Some time after cross-examination of this expert, plaintiff's attorney and defendant's attorney (not defendant's present counsel) entered into a stipulation that no one with the witness' name had graduated from MIT in 1972 and that no one with the witness' name had ever graduated from Texas A & M or had received a doctorate from that school in 1982 or any other year. This stipulation apparently precipitated defendant's offer to confess judgment, as referred to in the majority opinion.

I feel that such information is appropriately disseminated to the bar, to at least reduce the chances that similar misfortunes may occur to unsuspecting lawyers. It would seem not only that Caesar's wife must be above suspicion, but that the careful lawyer should check to determine if she was legally married to Julius.

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## WILLIAM H. NORTHWALL, APPELLEE, V. ROSEMARY K. NORTHWALL, APPELLANT.

469 N.W.2d 136

Filed May 10, 1991. No. 89-159.

1. **Modification of Decree: Alimony: Appeal and Error.** Modification of an alimony award is a matter initially entrusted to the discretion of the trial court, and such a decision on appeal is reviewed de novo on the record and affirmed in the absence of an abuse of discretion.

2. **Modification of Decree: Alimony: Good Cause.** An order for alimony may be revoked or modified for good cause shown. Good cause is demonstrated by a material change in circumstances.
3. **Modification of Decree: Alimony.** Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that result from the mere passage of time, do not justify a change or modification in alimony.
4. _____: _____. An increase in income is a circumstance that may be considered in determining whether an award of alimony should be modified.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for further proceedings.

Sarah J. Shofstall, of Sidwell & Shofstall, for appellant.

Thomas W. Tye II, of Tye, Hopkins & Tye, for appellee.

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

BOSLAUGH, J.

This is an appeal from the order of the district court denying the appellant's application to modify a decree in a marriage dissolution proceeding. The respondent's application requested an increase in alimony and child support.

The marriage of the parties was dissolved on January 15, 1986. The decree of dissolution incorporated the terms of the parties' property settlement agreement. At the time the decree was entered, the parties had two minor children, who have since reached the age of majority.

The property settlement agreement and decree divided the substantial assets of the marriage and obligated the appellee to pay $2,000 a month in alimony to the appellant for 120 months and child support of $500 per month per child. The appellant was awarded several parcels of real estate, including an Omaha apartment property, securities, and $55,000 in cash.

The agreement stated that the appellee would have future income of $120,000 a year from his medical practice and that the appellant, in entering into the agreement, was relying upon the appellee's statement that his income from his medical practice would be approximately $120,000 a year.

On August 15, 1988, the appellant filed the application for modification, alleging there had been a material change in

circumstances since the time of the decree in that the appellee's income had increased and the appellant's income had decreased. The application to modify was heard on December 20, 1988.

At the time of the modification hearing, the appellant was taking classes to obtain a master's degree in agency counseling. She was working at three part-time jobs and anticipated she would earn approximately $1,500 in 1988 from those jobs. The appellant had not sought full-time employment because she wanted to be at home over the lunch hour and after school for her son, who was then 16 years old and a junior in high school. Her daughter, who would be 19 years old on February 3, 1989, was attending college in New York, and her expenses were being paid by the appellee and from a trust fund.

The appellant is a certified elementary teacher but has not pursued a teaching career since the birth of her first child. At the time of the hearing, she had completed approximately 20 hours of college credits beyond her bachelor's degree.

The appellant testified that the base salary for teachers in the Kearney public school district was $14,700 and that the salary for a teacher with a bachelor's degree plus 18 hours was $16,895. The appellant was unable to work as a teacher in the Kearney school district because she was a member of the school board.

The appellant had anticipated a monthly income of $1,000 from the Omaha apartment property; however, she received no income from the property in 1988 and had invested approximately $10,000 to keep the property in repair. The expenses were incurred for ordinary repair costs, and part of the decreased income was caused by an increase in the interest rate on the debt. At the time of the decree, the appellant was aware of the debt on the property, the increase in interest expense for it, and the normal expenses incurred in owning that type of asset.

The appellee is a radiologist who practices with Great Plains Radiology and Nuclear Medicine in Kearney, Nebraska. His W-2 form wages were $169,750 for 1985, $137,686 for 1986, and $396,115 for 1987. The appellee testified the income increase was partially the result of a reduction in the number of

radiologists employed by Great Plains Radiology and that the business was anticipating hiring one or two more radiologists. Great Plains Radiology contributes 25 percent of the appellee's salary, up to $120,000 a year, which is tax deferred, to his pension and profit-sharing plan.

At the time of the dissolution, the parties were anticipating a decrease in the appellee's income because of changes in medicare payments, because Great Plains Radiology had lost contracts with four hospitals, and because of a federal antitrust lawsuit pending against the appellee personally and Great Plains Radiology.

At the modification hearing, the appellee, his accountant, and a radiologist from Grand Island testified concerning the effect on income from changes in medicare payments which were to go into effect in 1989. All three witnesses estimated that the changes would decrease the appellee's income by approximately 20 percent because the medicare changes would decrease payments to Great Plains Radiology by about 50 percent, and 40 percent of Great Plains Radiology's patients were medicare patients.

The trial court found the appellee's gross wages, including corporate equity, averaged $227,521 for 1984 and 1985, and $228,284.50 for 1986 and 1987, based on wages which for 1984 were $164,652, for 1985 were $290,390, for 1986 were $149,270, and for 1987 were $307,299. Based on these averages, the trial court concluded that there had not been a substantial change in the appellee's income which would justify increasing the child support or alimony.

The appellant argues the trial court erred in denying her application to modify because it did not consider the $120,000 figure contained in the property settlement agreement in determining whether there had been a material change in circumstances.

Both children have now reached the age of majority and have not required child support for some time. Their college and living expenses are paid by the appellee and from trust funds. Therefore, it is unnecessary to consider the request for an increase in child support.

Modification of an alimony award is a matter initially

entrusted to the discretion of the trial court, and such a decision on appeal is reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985).

Neb. Rev. Stat. § 42-365 (Reissue 1988) provides that an order for alimony may be revoked or modified "for good cause shown." Good cause is demonstrated by a material change in circumstances. *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985).

"Any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not arise to the level to justify a change or modification of the order." *Id.* at 66, 361 N.W.2d at 204. An increase in income is a circumstance that may be considered in determining whether alimony should be modified. *Kelly, supra.*

Apparently, the only evidence as to income which was before the trial court in this case at the time of the decree was contained in the property settlement agreement, and the parties are bound by that stipulation. See *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972). The agreement stated that the appellee's earnings would be approximately $120,000 per year. The property settlement agreement awarding the appellant alimony of $2,000 a month for 120 months was entered into by the parties and approved by the court based upon the amount stated in the agreement.

The evidence at the hearing on the application to modify shows there was a substantial increase in the appellee's income in 1987 over the $120,000-a-year figure stated in the agreement. In 1987, the appellee's taxable income was $396,115, in addition to the $98,125 deferred income credited to his retirement account. This increase in income demonstrated that there had been a material and substantial change in circumstances and that the trial court abused its discretion in denying the appellant's application to modify.

We believe it would be inadvisable to modify the alimony provisions in the decree based upon the information available to us at this time. The record contains evidence as to the appellee's income since the decree for only 1986 and 1987. We

think it is important that evidence be submitted to the trial court as to the appellee's income for 1988, 1989, and 1990 so that a determination can be made on the past 5 years' experience. At the hearing on the application to modify, the appellee testified that his salary from the professional corporation would be "approximately $120,000 per year or less."

The judgment is reversed and the cause remanded for further proceedings to determine an appropriate amount of alimony. All costs are taxed to the appellee, and the appellant is allowed $2,500 for services of her attorney in this court.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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ARNOLD A. SCHULZE, APPELLEE, V. ROSE E. SCHULZE, APPELLANT.
469 N.W.2d 139

Filed May 10, 1991. No. 89-207.

1. **Modification of Decree: Child Custody: Child Support: Visitation: Proof.** A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting the best interests of the child.
2. **Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
3. **Child Support.** Parental earning capacity is a factor to be considered with the best interests of a child in determining the amount of child support.
4. **Child Custody.** Child visitation rights for a parent are considered and determined in relation to the best interests of the child or children.
5. **Child Custody: Evidence: Stipulations.** A determination of the best interests of a child or children includes a judicial decision based on evidence, not exclusively on a parental stipulation for disposition of a question concerning the parties' child or children.

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

Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellant.

Jerome J. Ortman for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Rose E. Schulze appeals from the judgment of the district court for Douglas County, which modified a marital dissolution decree concerning child support to be paid by Arnold A. Schulze. We reverse and remand with direction.

## CIRCUMSTANCES AT ENTRY OF DECREE

On March 26, 1987, the district court entered its decree dissolving the marriage of Rose and Arnold Schulze. Under the dissolution decree, Arnold was granted custody of Schulzes' 16-year-old daughter, while Rose was granted custody of the other three Schulze children, whose ages ranged from 12 to 2 years. The decree set child support payments for the children in Rose's custody at $200 per month per child.

## CIRCUMSTANCES REGARDING MODIFICATION

On March 25, 1988, Arnold filed an application to reduce the child support payments and claimed that there was a material change in circumstances after the decree because he was unemployed. Also, Arnold requested "such other and further relief as may be just and equitable in the premises."

At entry of the marital dissolution decree, Arnold was in partnership with Joseph Jones in the painting business and had an adjusted gross income of $37,522. Rose earned $12,000 as a clerk-typist. In 1987, subsequent to the Schulze decree, Arnold and Jones dissolved their partnership. After the partnership dissolution, Arnold kept all his painting equipment, including a truck, and had an income of approximately $25,000 for 1987, including nearly $22,000 in income which was attributable to Arnold's painting business and was reported on his 1987 federal income tax return. However, in 1988 Arnold accepted employment as a nurse's aide and received wages of $7,400 in 1988.

Before reception of evidence at the modification hearing, the parties stipulated to a change of child visitation rights, that is, a change from the dissolution decree's provision for Arnold's "reasonable and liberal visitation" of the Schulze children.

At the time of the modification hearing, Arnold, notwithstanding his allegation that he was "not currently working," as expressed in his application to modify the marital dissolution decree, was receiving $4.32 per hour from his employment as a nurse's aide. Also, Arnold, who enjoyed good health, still had his painting equipment. Arnold has a bachelor's degree in elementary education and, through refresher courses, could obtain a teaching certificate. Arnold was substantially in arrears in his child support payments; for example, arrearages of $460 for 1987 and $5,465 for 1988.

During the modification hearing, Arnold was asked questions about his employment:

> Q. In 1988, did you attempt to go to work as a painter for another contracting company?
>
> [Schulze:] No.
>
> Q. You've made no attempts in that regard?
>
> [Schulze:] No.
>
> Q. Did you make any attempts in that regard in 1987?
>
> [Schulze:] No.
>
> Q. Did you attempt to work — to find work in any other business or trade other than painting or the nursing care trade that you're in now at the nursing home?
>
> [Schulze:] No.
>
> Q. What experience did you have to get the job as a nurse's aide? Do you have some training?
>
> [Schulze:] I had — I was under court order to find a job or go to jail.

Jones, Arnold's former partner in the painting business, testified that, immediately after dissolution of his partnership with Arnold, Jones obtained employment as a painter at the rate of $11.50 per hour with an average of 40 hours per week.

Rose continued to earn $12,000. One of the Schulze children in Rose's custody, 4-year-old Timothy, has cerebral palsy and is myelencephalic, with hearing and visual difficulties. Rose receives Social Security benefits which are strictly and solely for

Timothy's needs. If Arnold were paying child support for Timothy in accordance with the initial decree, Rose would not receive any Social Security benefits for Timothy. Current living expenses for Rose and the three Schulze children are $1,758, but Rose must borrow from her family and a credit union to help pay those expenses.

Based on the foregoing evidence, the district court reduced Arnold's child support payments to $75 per month per child, that is, a total of $225 per month for the three Schulze children in Rose's custody, and, in accordance with the parties' stipulation without supporting evidence, altered the visitation rights previously allowed in the initial dissolution decree of March 26, 1987.

## ASSIGNMENTS OF ERROR

Rose Schulze appeals and contends that the district court erred in modifying the dissolution decree by reducing Arnold Schulze's child support payments.

## STANDARD OF REVIEW

> "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, *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

## CHILD SUPPORT PAYMENT: MODIFICATION OF DECREE

A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting

the best interests of the child. See, *Huffman v. Huffman, supra*; *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985); *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984).

> To justify a modification of a divorce decree, there must be a showing of a material change in the circumstances subsequent to the entry of the dissolution decree. . . .
>
> "Material change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." . . . "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. . . . Alteration and passage from one condition to another is essential for a material change in circumstances.

(Citations omitted.) *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984). See, also, *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969) (one may in good faith make an occupational change even though that change may reduce financial ability to satisfy child support obligations, unless such change is made to avoid child support obligations or made in bad faith).

The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

Neb. Rev. Stat. § 42-364(4) (Reissue 1988) provides in part: "In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each

parent . . . ." Consequently, we hold that parental earning capacity is a factor to be considered with the best interests of a child in determining the amount of child support.

Although the amount of Arnold's income has changed from entry of the initial decree, we find that his earning capacity has not altered and diminished after the initial decree. Also, Jones' testimony indicates that Arnold could have earned reasonably substantial income as a painter after dissolution of the Schulze-Jones partnership and before the modification hearing. As far as we can determine, the reduction in Arnold's income is attributable to his personal wishes and not the result of unfavorable or adverse conditions in the economy, Arnold's health, or other circumstances affecting Arnold's earning capacity. Consequently, we conclude that there is no change of circumstances warranting a modification of the child support payments prescribed by the dissolution decree of March 26, 1987. For that reason, the district court abused its discretion when it modified the Schulze dissolution decree concerning child support. See *Ensrud v. Ensrud, supra* ("abuse of discretion" characterized; child custody question).

## CONCLUSION

Since we have set aside the district court's modification order or judgment, we accordingly reinstate the schedule and amount of child support payments prescribed in the Schulze dissolution decree of March 26, 1987.

Also, we find no evidence to support a change in the visitation rights reflected in the dissolution decree. Although the parties stipulated for a change in Arnold's child visitation rights, nevertheless, "[c]hild visitation rights for a parent . . . are considered and determined in relation to the best interests of the child or children." *Huffman v. Huffman*, 236 Neb. 101, 109, 459 N.W.2d 215, 221 (1990). See, also, § 42-364. The record reflects only the parties' stipulation for disposition of child visitation rights, but no evidence concerning the best interests of the Schulze children in reference to Arnold's child visitation rights. A determination of the best interests of a child or children includes a judicial decision based on evidence, not exclusively on a parental stipulation for disposition of a

question concerning the parties' child or children. Hence, we set aside the district court's order modifying the child visitation rights contained in the March 26, 1987, dissolution decree.

We order Arnold A. Schulze to pay Rose E. Schulze $750 to be applied toward her attorney fees for services in this court.

Finally, the district court is directed to dismiss Arnold A. Schulze's application for modification of the dissolution decree.

REVERSED AND REMANDED WITH DIRECTION.

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JERRY DOBIAS ET AL., APPELLANTS, V. SERVICE LIFE INSURANCE COMPANY OF OMAHA, APPELLEE.

469 N.W.2d 143

Filed May 10, 1991. No. 89-231.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, this court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for further proceedings.

John Thomas and Gregory M. Neuhaus for appellants.

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

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

WHITE, J.

The plaintiffs, Jerry and Anne Dobias and their daughter Pam, appeal the order of the district court overruling their motion for new trial. The Dobiases had filed this action against

the defendant, Service Life Insurance Company of Omaha, for its failure to pay benefits under a health insurance policy. The district court entered judgment for the defendant, finding that the policy did not cover the services received by Pam Dobias when she was a patient at the Immanuel Medical Center's rehabilitation center.

In August 1987, Pam, then 18, was thrown from a pickup truck which overturned. She was taken to a local hospital. She had fractured a vertebra in her back and was flown by Life Flight to Nebraska Methodist Hospital in Omaha. She remained there for 15 days following surgery (a decompression laminectomy and the insertion of Harrington rods to stabilize and support her spine).

Because of her spinal cord injury, Pam was paralyzed from the waist down and faced a number of complications. Her doctors then transferred her to the rehabilitation center at Immanuel Medical Center (Immanuel).

At Immanuel, Pam was placed on the eighth floor, where she received 24-hour acute nursing care and treatment for the complications from the spinal cord injury and paralysis. She suffered from a paralyzed bladder, multiple urinary tract infections, and neuropathic pain due to damage in the spinal cord. She needed training to regulate her bowels, she was given heparin to prevent blood clotting in the legs, and she was placed on a tilt table to regulate her blood pressure. She received treatment for spasticity, and she was observed for the development of decubitus ulcers of the skin, stress ulcer, and occult head injuries such as subdural hematoma. Pam also received anesthetic skin care training and other therapy before she was released to go home on October 30, 1987, after 74 days at Immanuel.

Pam's father had purchased a health insurance policy from the defendant in 1984. Upon submission of a claim, Service Life paid $12,303.91 for Pam's treatment at Methodist, but denied the claim for $42,757.49 for services and care at Immanuel. The insurance company contended that Pam received rehabilitative care, which is not covered by the policy. The Dobiases filed suit in district court, where judgment was entered for the defendant. This appeal followed.

At issue are two definitions in the policy—part E, paragraphs 14 and 15:

(14) "Hospital" means a place which:

(a) is legally operated for the care and treatment of sick and injured persons on an in-patient basis at their expense;

(b) is primarily engaged in providing medical, diagnostic, and major surgical facilities on its own premises or has them available on a prearranged basis;

(c) has continuous 24-hour nursing services by or under the supervision of registered graduate professional nurses (R.N.'s);

(d) has a staff of one or more doctors available at all times.

(15) "Hospital" does not mean:

(a) convalescent, nursing, rest, custodial, self-care, educational, or rehabilitative homes or units of hospitals used for such care;

(b) facilities primarily treating the mentally ill, aged, drug addicts, or alcoholics.

In finding that the charges were not covered, the trial court held that the policy was clear and unambiguous and that the Immanuel rehabilitation center was not a "hospital," but a separate and distinct unit of Immanuel devoted exclusively to rehabilitation. The plaintiffs-appellants assert as error the trial court's finding that the policy clearly and unambiguously excluded the Immanuel rehabilitation center from the definition of "hospital." The Dobiases suggest that the trial court should have found that the policy was fairly subject to two interpretations and that the trial court should have chosen the interpretation favorable to coverage of Pam's treatment at Immanuel.

When, as in this case, the facts were submitted by stipulation, "we review this case as if trying it originally in order to determine whether the facts warranted the judgment." *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 731, 420 N.W.2d 273, 275 (1988).

We note first the standards we use in reviewing an insurance policy.

An insurance policy is to be construed as any other

> contract to give effect to the parties' intentions at the time the contract was made. . . . Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. . . . On the other hand, where a clause in an insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.

(Citations omitted.) *Malerbi v. Central Reserve Life*, 225 Neb. 543, 550-51, 407 N.W.2d 157, 162 (1987).

Evidence was received from Patrick Beste, the administrative director of the Immanuel rehabilitation center, who indicated that the center is made up of 78 beds licensed as rehabilitation acute care beds on the eighth floor of Immanuel, which is licensed as a hospital. The eighth-floor rooms are similar to acute care hospital rooms, and Beste testified that the eighth floor meets the Service Life policy definition of a hospital. He said that Pam could have been housed on another floor of the hospital, but she would not have received the same level of care. When the eighth floor is filled, rehabilitation patients may be housed on other floors of the medical center.

Dr. Kip Burkman, a rehabilitation physician at Immanuel who treated Pam, testified that the eighth floor is a part of the medical center. He stated that Pam needed acute inpatient rehabilitation care when she arrived at Immanuel, including 24-hour nursing to monitor for possible multiple complications. Dr. Burkman testified that an internal medical doctor was asked to consult on Pam's case to screen for major medical problems. While at Immanuel, Pam received therapy which was medically necessary and not available at other health care facilities, Dr. Burkman said.

Jerry and Anne Dobias both testified that they were not consulted about Pam's transfer to Immanuel. Both said they understood the insurance policy to cover everything except nursing home and convalescent care.

Barry Malone, vice president for corporate compliance for Service Life, testified that the Dobias claim was denied because Pam received rehabilitation services. The company did not have the medical records reviewed by a physician or ask Pam's doctors whether she was receiving acute care. Malone stated

that no definition of rehabilitative home is provided in the policy and admitted that Service Life would have paid for Pam's coverage if she had stayed at Methodist after August 17, 1987.

It is clear from the evidence presented to us that the eighth-floor rehabilitation center at Immanuel meets the criteria of the policy definition of "hospital": It is legally operated for the care and treatment of sick and injured persons on an inpatient basis; it is primarily engaged in providing medical, diagnostic, and major surgical facilities on its own premises; it has continuous 24-hour nursing services; and it has a staff of doctors available at all times.

When Pam was transferred to Immanuel, she was still in need of acute medical care in order to keep her alive. Any rehabilitative care which she received at Immanuel was incidental to the acute hospital care necessary to avoid the life-threatening complications she faced as a result of the spinal cord injury and paralysis. She received the services while she was a patient on a particular floor of a hospital which met the requirements of the hospital definition in the insurance policy. A hospital, by any other name, still provides acute medical care, and Pam received acute medical care at Immanuel. It follows that Immanuel qualifies as a hospital under the policy definition.

We must reconcile the provisions of the insurance policy. In doing so, we are asked if Pam was primarily rendered rehabilitative care in a facility which has coincidentally been named a "rehabilitation center." Our answer is no. At Immanuel, Pam received primarily acute care for treatment of her paralyzed bowel and bladder and of multiple urinary tract infections, for prevention of skin ulcers and stress ulcers and of blood clotting in her legs, for regulation of her blood pressure, and for observation of possible later developing occult head injuries.

The care received at Immanuel was care received in a hospital as it is defined in the policy. The trial court's finding was in error, and we reverse and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# STATE OF NEBRASKA, APPELLEE, V. MICHAEL A. TWOHIG, APPELLANT.

469 N.W.2d 344

Filed May 10, 1991. No. 90-019.

1. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment.
2. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** If there is no detention or seizure within the meaning of the fourth amendment to the U.S. Constitution, then the fourth amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer.
3. _____: _____: _____. Every encounter between a police officer and another individual in a public place, such as a public street, does not necessarily constitute a seizure of the individual.
4. _____: _____: _____. A police officer's merely questioning an individual in a public place, such as a request for the individual's identification, is not a seizure which is subject to the safeguard of the fourth amendment.
5. _____: _____: _____. A police officer may question a person without bringing about a seizure when the interrogation is carried on without interrupting or restraining the questioned person's movement.
6. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
7. **Police Officers and Sheriffs: Search and Seizure: Search Warrants: Motions to Suppress: Proof.** If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
8. **Constitutional Law: Police Officers and Sheriffs: Arrests: Search and Seizure: Search Warrants.** If there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested, and such search is reasonable under the fourth amendment to the U.S. Constitution.
9. **Search and Seizure: Arrests.** A search incident to a lawful arrest need not be made immediately on arrest.
10. **Search and Seizure: Arrests: Search Warrants: Warrants: Probable Cause.** A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.

11. **Search and Seizure: Police Officers and Sheriffs: Words and Phrases.** "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way.
12. **Constitutional Law: Trial: Convictions: Appeal and Error.** An error which constitutes a violation or deprivation of a defendant's constitutional right and which enters into the defendant's conviction does not necessarily or always require automatic reversal of the conviction, if the error was harmless.
13. **Criminal Law: Trial: Appeal and Error.** Harmless error exists in a bench 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 court in a judgment adverse to a substantial right of the defendant.
14. **Trial: Convictions: Evidence: Appeal and Error.** Error by admission of constitutionally inadmissible evidence against a defendant is not reversible error unless, from all the evidence introduced in the defendant's trial, it appears that the defendant's conviction is realistically and highly more probable with the evidence and conversely improbable without the evidence.
15. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a court as the fact finder, since such matters are within a fact finder's province for disposition. A conviction in the bench trial of a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support a finding of guilty.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JACK B. LINDNER, Judge. Judgment of District Court affirmed.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

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

SHANAHAN, J.

Michael A. Twohig appeals from the judgment of the district court for Lancaster County, which affirmed Twohig's county court conviction for drunk driving, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988).

Before trial in county court, Twohig timely moved to

suppress his statements to a police officer and physical evidence obtained from Twohig, including results of a breath test for alcohol in Twohig's body. See Neb. Rev. Stat. §§ 29-115 (suppression of defendant's statement) and 29-822 (suppression of physical evidence) (Reissue 1989). After the court denied the suppression motion, Twohig's case proceeded to a bench trial on the charge that Twohig had driven a motor vehicle on November 13, 1988, while he was "under the influence of alcoholic liquor . . . or when [Twohig had] a concentration of .10 of one gram or more by weight of alcohol per 210 liters of his breath . . . ." See § 39-669.07.

## BACKGROUND FOR CHARGE

*The Accident.*

Around 11:40 p.m. on November 13, 1988, while on cruiser patrol south of Lincoln, Deputy Kirk Price of the Lancaster County Sheriff's Department responded to a radio dispatch for assistance of an officer at an automobile accident near 91st Street and Pioneers Boulevard. At the accident scene, Deputy Price saw a 1975 Chevrolet Impala headed west in the north ditch along Pioneers Boulevard. As evidenced by damage on the Chevrolet's front end, the car had struck and sheared a wooden "power pole," which was "hanging . . . from [its] wires." Also at the accident site was a driver or lineman from Lincoln Electric System, since the collision had caused a "power outage." From Lincoln Electric, Price found out that "there had been a person walking in the area." Shortly thereafter, David F. Brumagen, another deputy sheriff, arrived on the scene. As the result of a registration check, Price learned that the Chevrolet was registered to a "Michael Twohig" of Lincoln. However, Price obtained no physical description for the Chevrolet's owner, Twohig.

*Price's Encounter with Twohig.*

Price left the accident site and set out to locate anyone "who may have been involved in that accident." After driving west on Pioneers, Price turned north from Pioneers on 70th Street and traveled a little over a quarter mile in an area which was generally "bushy and hilly . . . not a smooth terrain [with] some fences." The time was 11:55 p.m. when Price, still northbound

in his cruiser, noticed a man "limping" northward along 70th Street at a point which was about a quarter mile north of Pioneers Boulevard and "just short of two miles" from the automobile accident which Price had just left. As Price's northbound cruiser approached, the man, now facing south, "was standing right at the edge of the roadway . . . at the edge of the road, right at the curb, off the roadway but right at the curb." Price stopped his cruiser, got out, and immediately engaged in a conversation with the man. During this conversation, Price asked the man "who he was" and "what he was doing and where he was coming from." Price found out that the man was "Twohig," who, in response to Price's inquiries, replied that he "had been walking . . . because he had left his vehicle at a friend's house [since] he was too drunk to drive." Next, Price "[f]risked him down for weapons just for safety purposes. And at that time [Price] also smelled a strong odor of alcohol about him." During this "patdown" search, Price "ended up finding keys on [Twohig's] person."

After finding the keys, Price placed Twohig in the cruiser and resumed the conversation, which was tape-recorded by Price and later transcribed. During this recorded conversation, Twohig admitted that he owned a "75 Chevy," which was at a friend's house about "8 miles from here," and that he was "too drunk to drive." In the course of the conversation, Twohig recited the alphabet, leaving out the letter *e*; counted backward from 100 to 85; and then asked: "[H]ow long we gotta do this?" However, Twohig generally denied driving any vehicle and being involved in any collision with a "power pole." According to Price, throughout the conversation in the cruiser, Twohig was not free to leave. There were no field sobriety tests beyond Twohig's recital of the alphabet and counting backward. Throughout this time, Price noticed that Twohig "had a strong alcohol odor. His face was kind of flushed, reddish." At the conclusion of the conversation with Twohig, Price arrested Twohig for "driving while intoxicated" because, according to Price, "based on the information and observations I — I made and gained [and] on the information that he provided with me, I felt there was probable cause to believe that he was the operator of the vehicle involved with the accident." As related

by Price, "I at some point obtained his driver's license" and informed Twohig: "I'm going to take you down for a breath test."

*At the Sheriff's Headquarters.*

In the cruiser Twohig and Price proceeded to the sheriff's headquarters, where Price read an "Implied Consent Advisement" form to Twohig concerning the breath alcohol test, which indicated ".18" for Twohig's breath. Price also administered the *Miranda* warning or admonition to Twohig. In further conversation with Price, Twohig admitted that he had started drinking around 8:30 p.m. on November 13 and had five or six drinks of rum that evening before meeting Price.

Price delivered the automobile keys, obtained from Twohig at 70th Street, to Deputy Brumagen, who used the keys to unlock and start the Chevrolet which had been involved in the power pole collision. During the course of making an inventory of the Chevrolet's contents, Brumagen discovered a "set of dentures" or "false teeth" on the driver's side of the Chevrolet, "directly underneath the steering wheel." Brumagen left the dentures in the Chevrolet, but later handed the car keys over to Twohig, who acknowledged that "those were his keys." On delivery of the Chevrolet's keys, Brumagen noticed that Twohig "didn't have any teeth in. . . . He didn't have any false teeth in . . . ."

## TWOHIG'S TRIAL

The prosecutor and Twohig's lawyer stipulated that the vehicle-power pole accident occurred at 11:10 p.m. on November 13, 1988; that the result of Twohig's breath alcohol test was ".180" of 1 gram of alcohol per 210 liters of Twohig's breath; and that the test was administered to Twohig in compliance with state health regulations pertaining to a breath alcohol test. In conjunction with the stipulation, Twohig's lawyer preserved the objection that the test and its results were obtained through an unconstitutional search and seizure regarding Twohig. When the transcription of the recorded Twohig-Price conversation in the cruiser was offered, Twohig objected and claimed that the "statement was taken in violation of [Twohig's] constitutional rights." Notwithstanding Twohig's

objections, the court considered the breath test results and received the transcription of the recorded conversation between Twohig and Price in the cruiser at 70th Street. The State's case consisted of evidence reflected in "BACKGROUND FOR CHARGE."

In his case in chief, Twohig testified that after driving his car to a party around 6 p.m. on November 13, he did not operate a motor vehicle that evening. At the party, Twohig determined that he "was too drunk to drive" and enlisted the services of "this guy at the party" to drive Twohig's car and take Twohig home. With Twohig as the passenger, the "other fellow" was driving Twohig's car when Twohig decided "to stop and have a drink" at a friend's home in a "trailer park in Pioneers Boulevard." When Twohig's friend did not "feel like doing any partying," Twohig, with his unidentified driver, continued to travel in Twohig's car down Pioneers Boulevard to the point where the Twohig vehicle struck the "light pole" near 91st and Pioneers. After the collision, the "other fellow" took off. Twohig started walking down Pioneers Boulevard and was walking along 70th Street when he saw "a set of headlights coming." Twohig "stopped and watched the headlights approach [him]." Eventually, Twohig discovered that the vehicle was driven by Deputy Price. Price asked where Twohig was going, to which Twohig responded "home." When Price asked, "Why are you walking?" Twohig said, "I gotta walk. I'm too drunk to drive."

At the conclusion of all evidence, the court found that Twohig was "guilty as charged" and later sentenced Twohig for drunk driving.

## ASSIGNMENTS OF ERROR

Twohig's seven assignments of error may be distilled into the following: (1) "[T]he initial stop of [Twohig] violated [his] Fourth and Fourteenth Amendment rights and the Terry Doctrine"; (2) Twohig's arrest was "without probable cause"; (3) the court erred by (a) receiving Deputy Price's testimony "about the keys seized from Twohig in violation of his Fourth and Fourteenth Amendment rights" and (b) receiving into evidence the "custodial interrogation of Twohig" in violation of

Twohig's constitutional rights; and (4) the evidence is insufficient to sustain Twohig's conviction for drunk driving.

## THE CONSTITUTIONALITY OF TWOHIG'S "STOP" AND ARREST

*The Initial Encounter with Twohig.*

Twohig and the State argue back and forth on whether an articulable suspicion of criminal activity existed for a "*Terry* stop" when Price encountered Twohig on 70th Street. Neither Twohig nor the State addresses the primary and basic question: Was the initial encounter between Twohig and Price a "stop" within the purview of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), in which the U.S. Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime— "arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

392 U.S. at 16.

The Court continued in *Terry*:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

392 U.S. at 30.

However, in *Terry* the Court also noted:

> We thus decide nothing today concerning the

> constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

392 U.S. at 19 n.16.

As we observed in *State v. Staten, ante* p. 13, 18, 469 N.W.2d 112, 116 (1991): "[U]nder *Terry v. Ohio* . . . police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment."

Thus, in Twohig's case, the crucial question is whether there was a "seizure" and, therefore, the fourth amendment safeguard against an unreasonable seizure, when Deputy Price encountered Twohig on 70th Street, stopped the cruiser, approached Twohig, and, in substance, asked Twohig: "Who are you? Where are you going? What are you doing?"

In *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the Supreme Court stated:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Later, in *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), the U.S. Supreme Court considered a

situation involving two police officers who approached an individual suspected of transporting narcotics as the suspect was walking in an airport concourse. The detectives identified themselves as police officers, asked to speak to the suspect, and, when Royer agreed, obtained his plane ticket and driver's license and then, while retaining those documents, asked Royer to accompany them to a security room in the airport. According to the Court:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *United States v. Mendenhall* [citation omitted]. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio* [citation omitted]. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. *United States v. Mendenhall* [citation omitted]. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

460 U.S. at 497-98.

In *Royer*, the Court concluded:

> Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth

> Amendment. These circumstances surely amount to a show of official authority such that "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* 446 U.S., at 554 . . . .

460 U.S. at 501-02.

Shortly after *Royer*, the Court, in *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984), made the following observations and comments about an encounter between a citizen and police:

> As we have noted elsewhere: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio* [citation omitted]. . . .
>
> Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer* [citation omitted], plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. . . .
>
> . . . [P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. . . . Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

466 U.S. at 215-17.

Later, in *Michigan v. Chesternut*, 486 U.S. 567, 108 S. Ct.

1975, 100 L. Ed. 2d 565 (1988), the U.S. Supreme Court reaffirmed the *Mendenhall* test, namely, police have seized an individual

> "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [466 U.S. at 554]. . . .
>
> The [*Mendenhall*] test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. . . .
>
> While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure § 9.2(h), pp. 407-408 (2d ed. 1987 and Supp. 1988). This "reasonable person" standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.

486 U.S. at 573-74. See *California v. Hodari D.*, ____ U.S. ____, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (crack cocaine tossed away by Hodari, who was fleeing from a police officer and was later tackled by the pursuing officer, was not obtained through a seizure of Hodari).

According to the *Mendenhall-Royer* test, enunciated and reaffirmed by the U.S. Supreme Court, if there is no detention or seizure within the meaning of the fourth amendment to the U.S. Constitution, then the fourth amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer.

Thus, every encounter between a police officer and another individual in a public place, such as a public street, does not necessarily constitute a seizure of the individual. From *INS v. Delgado, supra*, we conclude that a police officer's merely questioning an individual in a public place, such as a request for the individual's identification, is not a seizure which is subject to the safeguard of the fourth amendment. A police officer may question a person without bringing about a seizure when the interrogation is carried on without interrupting or restraining the questioned person's movement. 3 W. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 9.2(h) (2d ed. 1987). As one court has observed:

> The mere knowledge by the person questioned that the person asking the questions is a police officer cannot in itself constitute a factor of threatened force because, were that so, every question put to a person under any circumstances by a self-identified police officer on duty would by that very fact constitute a *Terry* stop.

*People v. Jordan*, 43 Ill. App. 3d 660, 662-63, 357 N.E.2d 159, 162 (1976). See, also, *U.S. v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990) (so long as an encounter is not a detention, the fourth amendment is not implicated; a mere request for identification is not a seizure in relation to the fourth amendment); *U.S. v. Edwards*, 898 F.2d 1273 (7th Cir. 1990) (federal agents walked with defendant in the concourse of an Amtrak station and asked defendant questions which he voluntarily answered; no seizure); *State v. Culbreath*, 300 S.C. 232, 387 S.E.2d 255 (1990) (officer's request for defendant's identification and to see defendant's driver's license while defendant was seated in a parked vehicle; no seizure); *U.S. v. Gray*, 883 F.2d 320 (4th Cir. 1989) (federal agents walked with defendant in the stream of pedestrian traffic inside an airport and, without verbal or physical abuse or intimidation, asked for defendant's identification, which defendant delivered to the officers; no seizure); *State v. McGee*, 381 N.W.2d 630 (Iowa 1986) (officer's approach of suspect as the suspect was getting into a car, and simultaneously calling out the suspect's name, was not a seizure); *United States v. Barnes*, 496 A.2d 1040 (D.C. 1985) (without intimidating circumstances beyond the natural sense

of obligation almost anyone feels when a police officer asks a question, there is no *Terry* stop); *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983) (officer encountered defendant, seated in a car parked on a street, and asked the reason for defendant's presence and his address; no seizure); *United States v. Regan*, 687 F.2d 531, 535 (1st Cir. 1982) (no seizure where police "did not order him to stop" and "did not block his path," but only asked to speak with him); *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982) (officer approached defendant's car on a public street late at night and talked with defendant; no seizure); *People v. King*, 72 Cal. App. 3d 346, 348, 139 Cal. Rptr. 926, 927 (1977) (officer called out, "Danny, stop, I want to talk to you"; no seizure).

Twohig generally and essentially substantiated Price's description of the roadside encounter and did not dispute any particular detail in that event recounted by Price. Consequently, while Deputy Price's cruiser was approaching on 70th Street and was being driven in a manner apparently indistinguishable from a citizen's operation of a private vehicle, that is, without any display of official capacity such as activated rotating or oscillating emergency lights, Twohig stood at the roadside to see who was approaching and stopping. When Price stepped out of his vehicle and approached Twohig, Price made inquiries which, in substance and content, were: "Who are you? Where are you going? What are you doing?" In that manner, Price simply asked Twohig for some identification. Price did not direct Twohig to stay in place or otherwise issue some command that Twohig remain stationary and not move away from the officer. In the early stage of the encounter, Price never blocked Twohig's path for departure or in any way physically restrained Twohig's freedom of movement. Price's inquiries, as far as the record reflects, were neither intense nor repetitive and were not presented in a threatening tone. Nothing in the setting suggests an atmosphere of intimidation or pressure brought to bear on Twohig, whose responses to Price's inquiries cannot reasonably be characterized as anything but voluntary. Moreover, before being "frisked" and placed in the cruiser, Twohig was free to walk away and continue his trek down 70th Street. We need not embark on a discussion about

the hypothetical situation and consequences of Twohig's attempt to leave and some form of responsive restraint by Price. In the final analysis, we find nothing to indicate that a reasonable person, in the circumstances of Twohig's case, would believe that the individual was prevented from leaving the officer's presence. Thus, in the initial encounter, before Price frisked Twohig and placed him in the cruiser, Price never "seized" and, therefore, never "detained" Twohig; hence, an articulable suspicion of criminal activity required for a "*Terry* stop" was unnecessary as a prerequisite for the initial encounter between Twohig and Price. For that reason, Twohig's first assignment of error is without merit.

In reviewing the setting for the initial encounter, we are not indicating that any particular circumstance, present in or absent from Twohig's case, determines whether there is a seizure, detention, or stop. Rather, we conclude that, in view of all the circumstances, the initial encounter in Twohig's case did not constitute a seizure within the meaning of U.S. Const. amend. IV or Neb. Const. art. I, § 7. Thus, we point out that there may be encounters or contacts between citizens and law enforcement officers without a resulting seizure, detention, or stop implicating the constitutional safeguard against unreasonableness in those situations.

*The Arrest.*

Having determined that there was no "*Terry* stop," we proceed to the question whether Price had probable cause for his arrest of Twohig.

Before arresting Twohig for drunk driving, Price knew that there had been an automobile accident relatively near the site where Price encountered Twohig, that is, a collision in which a car belonging to a "Michael Twohig" had been driven from a public roadway into an adjacent ditch, where the vehicle sheared a power pole. Price's information also indicated that someone had been seen walking in the area of the accident. Within a short time after the accident, Price discovered a man "limping" northward along 70th Street away from the general area of the accident. Price embarked on a preliminary inquiry about the pedestrian's identity and the man's reason for

ambling near the edge of a road at midnight in an apparently unimproved area. As a result of that inquiry, Price found out that the man was "Twohig," the surname corresponding with the name of the registered owner of the vehicle which had collided with the power pole. Additionally, through the conversation with Twohig, Price learned that Twohig was "too drunk to drive."

"When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Blakely*, 227 Neb. 816, 821, 420 N.W.2d 300, 304 (1988). Accord, *State v. Staten, ante* p. 13, 469 N.W.2d 112 (1991); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

From all the circumstances, we conclude that Price had probable cause to arrest Twohig for drunk driving.

## CONSTITUTIONAL ADMISSIBILITY OF EVIDENCE FROM TWOHIG

*Search of Twohig's Person Without a Warrant.*

> If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. . . .
>
> In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court held that if there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested and that such search is reasonable under the fourth amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.

(Citations omitted.) *State v. Staten, supra* at 21, 469 N.W.2d at 118. Accord, *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202

(1989); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). See, also, *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

"A search incident to a lawful arrest need not be made immediately on arrest." *State v. Staten, supra* at 21-22, 469 N.W.2d at 118.

In *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), the Supreme Court stated: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." In reference to the preceding language, the *Rawlings* Court added: "The fruits of the search of [Rawlings'] person were, of course, not necessary to support probable cause to arrest [Rawlings]." 448 U.S. at 111 n.6. Therefore, a search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search. See, *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990); *U.S. v. Hernandez*, 825 F.2d 846 (5th Cir. 1987); *United States v. Gay*, 774 F.2d 368 (10th Cir. 1985); *United States v. Ilazi*, 730 F.2d 1120 (8th Cir. 1984); *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977); *Lee v. State*, 311 Md. 642, 537 A.2d 235 (1988); *State v. DeGrenier*, 128 N.H. 547, 517 A.2d 814 (1986); *People v Landy*, 59 N.Y.2d 369, 452 N.E.2d 1185, 465 N.Y.S.2d 857 (1983); *State v. Valenzuela*, 121 Ariz. 274, 589 P.2d 1306 (1979); *State v. Meadors*, 177 Mont. 100, 580 P.2d 903 (1978); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955). However, a search before an arrest, and claimed to be an incident of the arrest, cannot serve as a basis for the validity of the arrest. *Smith v. Ohio*, 494 U.S. 541, 110 S. Ct. 1288, 108 L. Ed. 2d 464 (1990); *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948). " '[J]ustify[ing] the arrest by the search and at the same time . . . the search by the arrest,' just 'will not do.' " *Smith v. Ohio, supra* at 494 U.S. at 543. See, also, *State v. Roach, supra*.

As we previously expressed in this opinion under the heading "*The Arrest*," Price had probable cause to arrest Twohig for drunk driving. Therefore, Price's arrest of Twohig is constitutionally sustainable. Hence, Price's search of Twohig's person, even though the search occurred before the subsequent valid arrest, produced constitutionally admissible physical evidence, namely, the keys for Twohig's Chevrolet.

*Twohig's Custodial Statements.*

Twohig contends that his statements made to Price while the pair were in the cruiser should have been suppressed because Price did not administer the *Miranda* warning and admonition before the statements in question. In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court characterized "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." See, also, *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

> Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. *Miranda v. Arizona, supra.* If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant.

*State v. Norfolk*, 221 Neb. 810, 814-15, 381 N.W.2d 120, 125 (1986). Accord, *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988); *State v. Brown, supra.*

Deputy Price testified that Twohig was not free to leave the cruiser during the time when Twohig made the statements sought to be excluded. Under the circumstances Twohig was in police custody inasmuch as he had been deprived of his freedom

to leave the cruiser. Therefore, without the *Miranda* warning or admonition, Twohig's statements to Price in the cruiser are constitutionally inadmissible.

An error which constitutes a violation or deprivation of a defendant's constitutional right and which enters into the defendant's conviction does not necessarily or always require automatic reversal of the conviction, if the error was harmless. In a situation involving the erroneous admission of constitutionally inadmissible evidence, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

"Harmless error exists in a bench 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 court in a judgment adverse to a substantial right of the defendant." *State v. Schroder*, 232 Neb. 65, 71, 439 N.W.2d 489, 493 (1989). Accord, *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989); *State v. Snodgrass*, 230 Neb. 119, 430 N.W.2d 55 (1988). "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). See *State v. Snodgrass, supra*.

Error by admission of constitutionally inadmissible evidence against a defendant is not reversible error unless, from all the evidence introduced in the defendant's trial, it appears that the defendant's conviction is realistically and highly more probable with the evidence and conversely improbable without the evidence. See *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983).

During custodial interrogation in the cruiser, Twohig acknowledged that he owned a "75 Chevy" and that he was "too drunk to drive." However, from our examination of Twohig's custodial statements to Price, we conclude that

Twohig's other custodial statements were generally exculpatory inasmuch as in those other statements Twohig denied driving any automobile involved in an accident. Twohig's custodial statements which tended to establish his guilt on the drunk driving charge were repetitious of statements made to Price before the custodial statements in question. Although Twohig did make the custodial statement "If I had hit a power pole, I wouldn't be walking," that statement is ambiguous at best. Nevertheless, we shall disregard Twohig's custodial statements to Price in the cruiser and examine the sufficiency of evidence supporting Twohig's conviction.

## SUFFICIENCY OF THE EVIDENCE

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a court as the fact finder, since such matters are within a fact finder's province for disposition. A conviction in the bench trial of a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support a finding of guilty. See, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990); *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989); *State v. Vejvoda, supra.*

"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. Blue Bird, supra* at 339, 440 N.W.2d at 476. Accord, *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

" 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

We will not reiterate all the salient facts supporting a finding that Twohig was guilty of drunk driving. Those facts have been stated, and quite likely restated, elsewhere in this opinion.

Although the evidence is somewhat questionable in reference to a conviction for driving "under the influence," the charge against Twohig was stated in the alternative, that is, Twohig's driving while under the influence of alcoholic liquor or when he had a "concentration of .10 of one gram or more by weight of alcohol per 210 liters of his breath." See § 39-669.07. The results of the test on Twohig's breath clearly establish a violation of the breath alcohol provision in § 39-669.07. We conclude that the evidence supports a finding, beyond a reasonable doubt, that Twohig violated § 39-669.07 and that Twohig was "guilty as charged." Consequently, we conclude that introduction of Twohig's custodial statements as evidence in the trial on the drunk driving charge was harmless beyond a reasonable doubt.

## CONCLUSION

Twohig's conviction is constitutionally sustainable, with sufficient evidence to support his conviction for drunk driving.

AFFIRMED.

FAHRNBRUCH, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. JERRY A. SMITH, JR., APPELLANT.

469 N.W.2d 146

Filed May 10, 1991. No. 90-114.

1. **Trial: Rules of Evidence: Witnesses.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.
2. **Trial: Evidence: Proof: Appeal and Error.** Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the

exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence, and the ruling will not be overturned on appeal except for a clear abuse of discretion.

3. **Ordinances: Presumptions: Judicial Notice: Appeal and Error.** When an ordinance charging an offense is not a part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged and will not otherwise take judicial notice of the ordinance.
4. **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 York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

Bruce E. Stephens for appellant.

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

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

BOSLAUGH, J.

The defendant, Jerry A. Smith, Jr., was found guilty of driving under the influence, disorderly conduct, violating a stop sign, and driving under suspension, all violations of city ordinances of York, Nebraska. He was sentenced to 12 months' probation, fined $550, and had his operator's license suspended for 60 days. Upon appeal to the district court the judgment was affirmed.

The defendant has now appealed to this court and has assigned as error (1) the trial court's sustaining the State's objection to the defendant's examination of the State's witness concerning the chain of custody procedures used by the York Police Department, (2) the admission in evidence of the test results of defendant's urine, and (3) the sufficiency of the evidence to sustain the conviction for disorderly conduct.

The record discloses that on December 4, 1988, at approximately 11:30 p.m., Officer Todd Yost of the York Police

Department observed the defendant's green Ford Maverick turn at an intersection without stopping at a stop sign. Officer Yost activated the red lights on his cruiser and stopped the defendant's vehicle. Shortly thereafter, Officer Roger Wolfe, Jr., arrived on the scene to assist Officer Yost.

Officer Wolfe immediately noticed that the defendant's vehicle was leaking antifreeze and that it had damage to the right front passenger door. Officer Wolfe asked the defendant if he had been involved in an accident. The defendant responded by saying that he had hit a pole several days ago. Officer Wolfe then explained there appeared to be fresh wood fragments with fresh sap on his headlight. The defendant then admitted that he had hit a nearby pole. Officer Wolfe entered his cruiser and proceeded back to the site where, according to the defendant, he had hit the pole. Meanwhile, Officer Yost returned to his cruiser to write a citation for violating the stop sign. At this point, the defendant became very irate and disorderly. According to Officer Yost, the defendant began to slam his fist on the roof and trunk of defendant's car and began yelling profanities at people in cars as they drove past. Officer Yost then asked the defendant to sit in defendant's car. The defendant entered his car, started the motor, and began racing the engine, honking the horn, and making gestures at people.

At that point, Officer Wolfe returned from the site of the defendant's accident. His investigation revealed that the defendant had been involved in an accident and had left the accident scene without stopping, in violation of a York city ordinance. In addition, Officer Wolfe had been informed by the police department dispatcher that the defendant was driving under suspension, a violation of another York city ordinance. Officer Wolfe then arrested the defendant and took him to the police station.

En route to the police station, Officer Wolfe detected a strong odor of alcohol coming from the defendant. At the police station he asked the defendant to undergo sobriety tests. According to Officer Wolfe, the defendant staggered when he attempted to walk a straight line, erred several times when he attempted to recite the alphabet, and failed the finger-to-nose test. Further, Officer Wolfe noticed that the defendant's

clothing was disorderly, his eyes were bloodshot and watery, and his speech was slurred. Officer Wolfe then decided to give the defendant a breath test, but when he was about to administer the test, the defendant became ill. Consequently, Officer Wolfe gave defendant the choice of either a blood or a urine test. The defendant selected a urine test.

Officer Wolfe testified that at 12:54 a.m., he obtained a urine sample from the defendant, a portion of which was poured into a glass "mailing sample tube." The mailing sample tube was sealed and placed in a "mailer tube," which was then signed, dated, and labeled by the officer; sealed and placed in an envelope; and placed in the refrigerator at the police department. The following day, December 6, 1988, the urine sample was sent by certified mail to the Nebraska state health laboratory. On December 7, 1988, Margaret Vencil, a laboratory scientist, tested the urine sample and found that the defendant had a concentration of .209 grams or more by weight of alcohol per hundred milliliters of his urine, in violation of a York city ordinance.

The defendant's first assignment of error contends that the trial court improperly sustained the State's objection to the defendant's examination of the State's witness, Vencil, concerning the chain of custody procedures used by the York Police Department.

Rule 104 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-104 (Reissue 1989)) provides that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge . . . ."

At the trial, Vencil testified as to the receipt of the sample and tests performed on it. On direct examination, the State's counsel asked Vencil if there was any indication that the sample had been tampered with and what the chain of custody procedures were that she used in regard to the sample. When the State offered the sample in evidence, defense counsel requested permission to examine the witness as to foundation. The defense counsel then asked the following question: "And did you hear him [Officer Wolfe] testify that the sample was not placed in a locked area after he took the sam- - -[?]" Counsel for

the State then objected as follows: "I'm [going to] object to this, judge. This is not foundational for this witness at this time." The defendant contends the trial court erred in sustaining the State's objection. There is no merit in this contention.

The record fails to show that Vencil had any personal knowledge as to chain of custody procedures used at the York police station.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of section 27-703, relating to opinion testimony by expert witnesses.

Neb. Evid. R. 602 (Neb. Rev. Stat. § 27-602 (Reissue 1989)). As a laboratory scientist at the Nebraska state health laboratory, Vencil had personal knowledge regarding procedures used by the state health laboratory to preserve evidence. She, however, had no personal knowledge of the custody procedures used by the York Police Department. Under these circumstances, the objection was properly sustained.

The defendant's next assignment of error is that evidence as to the test results of his urine sample was improperly admitted because the prosecution failed to show a complete chain of custody in regard to the urine sample. Defendant argues there is a gap in the chain of custody between the point where Officer Wolfe placed the urine sample in the refrigerator at the police station and the time when the sample was received at the state health laboratory. He points out that after the urine sample was collected, it was placed in an unlocked refrigerator at the police station, that the refrigerator was not guarded or controlled by a property officer, and that all members of the police force had access to the refrigerator. Finally, there was no log to record when the sample was removed from the refrigerator and a failure to identify the officer who mailed the sample to the state health laboratory. The defendant contends there were inadequate safeguards to ensure that no one had tampered with the sample and the foundation evidence for the admission of

the urine sample was insufficient.

Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978); *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

In prior cases involving similar chain of custody issues, this court has held: "Important in such situations are the nature of the exhibit, the circumstances surrounding preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition *is reasonably probable*, the trial court may receive the exhibit in evidence." (Emphasis supplied.) *State v. Huffman*, 181 Neb. 356, 359, 148 N.W.2d 321, 323 (1967). Accord *State v. Langer*, 192 Neb. 525, 222 N.W.2d 820 (1974).

This court examines the evidence supporting the trial court's ruling admitting the urine sample exhibit in evidence because if the urine sample was properly admitted in evidence, then the test results were admissible. The record shows that the urine sample was collected from the defendant at the York police station by Officer Wolfe on December 5, 1988. Officer Wolfe testified that he took the defendant to the bathroom, provided a plastic cup, and witnessed the defendant provide the urine sample. Officer Wolfe testified that a portion of the defendant's urine sample was then poured into a glass "mailing sample tube." The glass mailing sample tube was sealed and placed in a "mailer tube," which was then signed, dated, and labeled by Officer Wolfe; sealed and placed in an envelope; and placed in the refrigerator at the police department. The following day, December 6, 1988, the urine sample was sent by certified mail from the police station to the Nebraska state health laboratory. On December 7, 1988, the state health laboratory received the sample and promptly performed an alcohol analysis on it, using the standard gas chromatography procedure.

The laboratory scientist at the Nebraska state health laboratory testified that on December 7, 1988, she received the urine sample with the seals intact. She further stated there was no evidence of tampering with the sample. Officer Wolfe identified the mailing container as the same container in which

he placed the sealed glass tube containing the urine sample on December 5, 1988, and which was the container identified by Vencil as received by the state health laboratory on December 7, 1988, containing the glass tube with the seal intact.

In *State v. Huffman, supra*, the evidence in question had been stored in an unlocked room at the police station, where it was potentially accessible to employees, to janitors, and at times even to strangers. Nevertheless, this court held the exhibits were admissible in evidence and it was a question for the fact finder to determine under all the circumstances whether there had been sufficient intermeddling or tampering with the exhibits to destroy their credibility.

In this case there was no legally fatal deficiency in the chain of custody. The evidence was sufficient to make it "reasonably probable" that the urine sample analyzed by the laboratory scientist was that of the defendant. The method of storing the evidence eliminated any reasonable likelihood that it had been tampered with by intermeddlers. The rule is well established that "proof that an exhibit remained in the custody of law enforcement . . . officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence." *State v. Langer, supra* at 527, 222 N.W.2d at 822. See, also, *State v. Gutierrez*, 187 Neb. 383, 191 N.W.2d 164 (1971); *State v. Bullard*, 186 Neb. 709, 185 N.W.2d 864 (1971); *State v. Huffman, supra*. It was not error to receive the test results of the defendant's urine sample in evidence.

In his final assignment of error, the defendant contends that the evidence was insufficient to support his conviction of disorderly conduct.

The complaint filed against Smith alleges that he violated city ordinance 24-25, the disorderly conduct provision of the York city ordinances. The disorderly conduct ordinance is not in the record. When an ordinance charging an offense is not 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." *State v. Topping*, 237 Neb. 130, 131, 464 N.W.2d 799, 800 (1991) (citing *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986)).

In *State v. Topping, supra*, the defendant was convicted of disorderly conduct under a city of Omaha ordinance. On appeal he alleged that the evidence was insufficient to support his conviction. As in the present case, the disorderly conduct ordinance was not in the record. Citing *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987), this court held that "when the applicable municipal ordinance is not in the record, this court will presume that the evidence supports the findings of the trial court." *Topping, supra* at 131, 464 N.W.2d at 800.

There being no error, the judgment is affirmed.

AFFIRMED.

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LEE OWEN KOENIG, APPELLANT, V. RON POSKOCHIL, SHERIFF OF SAUNDERS COUNTY, NEBRASKA, APPELLEE.

469 N.W.2d 523

Filed May 10, 1991. No. 90-140.

1. **Extradition and Detainer: Habeas Corpus: Evidence.** A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.
2. **Extradition and Detainer: Words and Phrases.** To be deemed a fugitive, one must have been physically present in the demanding jurisdiction on the date when the crime is said to have been committed.
3. **Extradition and Detainer.** A misstatement as to a petitioner's status as a fugitive in extradition documents does not afford petitioner his right under the Uniform Criminal Extradition Act to have the question of whether he should be extradited from the asylum state properly determined by the governor of that state and, therefore, requires that he be dismissed from custody.

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

James Martin Davis for appellant.

Loren L. Lindahl, Saunders County Attorney, and Robert M. Spire, Attorney General, and William L. Howland for appellee.

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

GRANT, J.

Lee Owen Koenig, petitioner, appeals from an order of the Saunders County District Court, dismissing his request for release under a writ of habeas corpus directed to respondent, the sheriff of Saunders County, Nebraska. Koenig sought his release on the grounds that he was being detained under insufficient and invalid extradition documents. We reverse and order that petitioner be discharged from custody.

On May 15, 1989, a grand jury in Yankton County, South Dakota, indicted the petitioner on the following charges:

COUNT I.

That on or about the 30th day of October, 1987, in the County of Yankton, State of South Dakota, LEE O. KOENIG did commit the public offense of CONSPIRACY TO MANUFACTURE, DISTRIBUTE, COUNTERFEIT OR POSSESS SUBSTANCES WITH POTENTIAL FOR ABUSE (SDCL 22-42-2) in that he did conspire to possess with intent to manufacture, distribute or dispense a substance listed in Schedule I or II, to-wit: Cocaine. (Class 4F)

COUNT II.

That on or about the 2nd day of December, 1987, in the County of Yankton, State of South Dakota, LEE O. KOENIG did commit the public offense of CONSPIRACY TO MANUFACTURE, DISTRIBUTE, COUNTERFEIT OR POSSESS SUBSTANCES WITH POTENTIAL FOR ABUSE (SDCL 22-42-2) in that he did conspire to possess with intent to manufacture, distribute or dispense a substance listed in Schedule I or II, to-wit: Cocaine. (Class 4F)

A warrant was issued for petitioner's arrest. After it was

determined that the petitioner was located in Nebraska, the Yankton County state's attorney submitted a writ of extradition application directed to the Governor of South Dakota. The Governor of South Dakota signed a requisition addressed to the Governor of Nebraska, requesting extradition of the petitioner from Nebraska. Both documents, in addition to setting forth the charges in the indictment, stated that the petitioner was present in South Dakota on the two dates set out in the indictment and had committed the alleged crimes in that state, but had fled the state to Nebraska as a fugitive from justice. The Governor of Nebraska signed an extradition warrant for the petitioner's arrest, and the petitioner was taken into custody.

On September 20, 1989, petitioner filed his petition for a writ of habeas corpus in the district court for Saunders County, Nebraska. The petition stated that the extradition documents were insufficient because the petitioner was not in South Dakota on the dates in question, had not fled from South Dakota, and was not a fugitive from justice. On January 12, 1990, the district court for Saunders County dismissed the petition. Petitioner appeals from this dismissal.

The extradition of criminals is governed by the Uniform Criminal Extradition Act. Both South Dakota and Nebraska have adopted that act. The provisions of the act are codified in Nebraska at Neb. Rev. Stat. §§ 29-729 to 29-758 (Reissue 1989) and in South Dakota at S.D. Codified Laws Ann. §§ 23-24-1 to 23-24-39 (1988). Two sections of the act are particularly relevant to the present case.

Section 29-730 provides:

> Subject to the provisions of sections 29-729 to 29-758, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

Section 29-734 provides:

> The Governor of this state may also surrender, on demand of the Executive Authority of any other state, any

> person in this state charged in such other state in the manner provided in section 29-731 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand, and the provisions of sections 29-729 to 29-758 not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

The documents in this case do not state under which of these provisions petitioner's extradition was sought. The fact that petitioner is labeled a fugitive in the extradition documents, however, which documents also state that defendant "was present in [South Dakota] at the time of the commission of the crime and thereafter fled from [South Dakota]," makes it apparent that petitioner's extradition was sought pursuant to the terms of the Uniform Criminal Extradition Act set out in § 29-730.

Petitioner contends that the extradition documents are insufficient because those documents are incorrect in alleging that petitioner is a fugitive from justice. Petitioner and respondent stipulated that "the underlying transactions surrounding the extradition of Mr. Koenig [on] the dates in question, those being October 30, 1987, and December 2, 1987, took place in Hartington, Cedar County, Nebraska, and not in South Dakota." It is clear that the parties agree that petitioner committed certain acts in Nebraska, which acts allegedly resulted in a criminal conspiracy in South Dakota.

Initially, it must be noted that once the governor of the asylum state has granted extradition, matters which may be considered by courts of the asylum state upon an application for a writ of habeas corpus are very limited. *Radant v. Vargason*, 220 Neb. 116, 368 N.W.2d 483 (1985). This court has consistently applied the following rule enunciated by the U.S. Supreme Court in *Michigan v. Doran*, 439 U.S. 282, 289, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978):

> A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. [Citation omitted.] Once the governor has granted extradition, a court considering

> release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

See, *Radant, supra*; *Nash v. Miller*, 223 Neb. 605, 391 N.W.2d 143 (1986); *Scaggs v. Miller*, 221 Neb. 98, 375 N.W.2d 140 (1985).

Because petitioner challenges his alleged status as a fugitive, a court of the asylum state has jurisdiction to consider the issue. See, *State v. Smith*, 232 Kan. 128, 652 P.2d 703 (1982); *In re Rowe*, 67 Ohio St. 2d 115, 423 N.E.2d 167 (1981). We therefore consider whether identifying petitioner as a fugitive affects his rights.

This court has said that to be a fugitive one need only have left the demanding state after allegedly having committed a crime under the laws of that state. *Nash v. Miller, supra*; *Kujala v. Headley*, 193 Neb. 1, 225 N.W.2d 25 (1975); *Gorgen v. Tomjack*, 160 Neb. 457, 70 N.W.2d 514 (1955); *Finch v. West*, 106 Neb. 45, 182 N.W. 565 (1921).

We have also stated that "[o]rdinarily, in statutes relating to extradition the term 'fugitive from justice' has reference to one who has committed an offense in one state or jurisdiction and is afterwards found in another." *Colling v. State*, 116 Neb. 308, 310-11, 217 N.W. 87, 88 (1927). We have further stated that "the term 'fugitive from justice,' as used in statutes pertaining to extradition, applies when [the accused] has gone from the jurisdiction where the offense was committed." *Taylor v. State*, 138 Neb. 156, 161, 292 N.W. 233, 235 (1940).

It has been said:

> "When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding State, then the court will discharge the defendant. . . ."

*DeGenna v. Grasso*, 413 F. Supp. 427, 433 (D. Conn. 1976),

*aff'd sub nom., Carino v. Grasso*, 426 U.S. 913, 96 S. Ct. 2617, 49 L. Ed. 2d 368 (quoting from *Munsey v. Clough*, 196 U.S. 364, 25 S. Ct. 282, 49 L. Ed. 515 (1905)).

In *State of Kansas v. Holeb*, 188 Neb. 319, 322, 196 N.W.2d 387, 389 (1972), cited in respondent's brief, we stated:

> Historically, to be a fugitive from justice, one had to be in the state where the crime was committed at the time of its commission. Prior to the adoption of provisions contained in the Uniform Criminal Extradition Act, status as a fugitive was essential to extradition. This is no longer the case. One who commits an act in one state intentionally resulting in a crime in another state may now be extradited. See § 29-734, R.R.S. 1943. Although not within the formerly adhered to strict definition of a fugitive, one who thus seeks to evade the administration of justice in the state where the offense was perpetrated is, in essence, a fugitive from the justice of such state.

Respondent seems to suggest that one who commits an act in one state which intentionally results in a crime in another state becomes, "in essence, a fugitive." This is not an appropriate interpretation. What § 29-734 accomplishes is that it allows for extradition of persons charged with a crime who are not fugitives—it does not statutorily confer fugitive status on such persons. We affirm the proposition that to be deemed a fugitive, one must have been physically present in the demanding jurisdiction on the date when the crime is said to have been committed.

Respondent contends that it is irrelevant whether or not petitioner is labeled a fugitive, because in any event he committed an act which resulted in a crime in the demanding state. Respondent argues that whether or not petitioner is a fugitive, there is a statutory provision which authorizes his extradition.

It is true that the Uniform Criminal Extradition Act provides for extradition of petitioner, whether he is labeled a fugitive or not. However, the separate statutory provisions call for different standards for granting extradition by the governor of the asylum state. Section 29-730 states that it is the duty of the governor of the asylum state to turn over a fugitive to the

demanding state, that is, it is mandatory. This result is required by the extradition clause of the U.S. Constitution. See, U.S. Const. art. IV, § 2, cl. 2; *Wise v. State*, 197 Neb. 831, 251 N.W.2d 373 (1977).

By contrast, under § 29-734, the governor of the asylum state may surrender on demand any person charged with committing an act intentionally resulting in a crime in the demanding state, that is, it is discretionary. The governor of the asylum state is afforded discretion to accept or reject the demand in nonfugitive situations.

It is clear that petitioner's rights were prejudiced by the effect the mislabeling of his status as that of a fugitive had upon the power of the Governor of Nebraska to accept or reject the demand of extradition by South Dakota. Because it appeared on the face of the documents that petitioner was a fugitive, the governor of the asylum state had no choice but to honor the demand. Despite the fact that defendant could have been extradited under § 29-734, the fact is that extradition was sought under § 29-730. The misstatement as to his status as a fugitive in the extradition documents did not afford petitioner his right under the Uniform Criminal Extradition Act to have the question of whether he should be extradited from the asylum state properly determined by the governor of that state and, therefore, requires that he be dismissed from custody. See *Dutil v. Rice*, 34 Conn. Supp. 78, 376 A.2d 1119 (1977).

It should be noted that the Supreme Court of South Dakota has also held that one who was not present in the demanding state when crimes were said to have been committed there cannot be extradited as one who committed an act intentionally resulting in a crime in the demanding state if he is incorrectly named as a fugitive from that state in the extradition documents. *Ex parte Kaufman*, 73 S.D. 166, 39 N.W.2d 905 (1949). See, also, *In re Ropp*, 149 Vt. 269, 541 A.2d 86 (1988); *State v. Reinke*, 398 N.W.2d 53 (Minn. App. 1986); *State ex rel. Walker v. Ramsey Cty. Dist. Ct.*, 368 N.W.2d 28 (Minn. App. 1985).

This cause is remanded with directions to the district court to release petitioner from custody.

REVERSED AND REMANDED WITH DIRECTIONS.

# STATE OF NEBRASKA, APPELLEE, V. RANDALL S. WHITMORE, APPELLANT.

469 N.W.2d 527

Filed May 10, 1991. No. 90-495.

1. **Postconviction: Proof: Appeal and Error.** 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 set aside unless they are clearly wrong.
2. **Effectiveness of Counsel: Proof.** A defendant has the burden of demonstrating ineffective assistance of counsel.
3. **Postconviction.** One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable.
4. **Criminal Law: Effectiveness of Counsel: Conflict of Interest.** In criminal proceedings, a defendant's right to effective counsel includes a lawyer's representation free from conflicting interests.
5. **Effectiveness of Counsel: Conflict of Interest: Words and Phrases.** "Conflict of interest" designates a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
7. _____: _____. The purpose of affording postconviction relief is not to permit the defendant endless appeals on matters already decided. Rather, the purpose is to correct errors of constitutional proportion which could not otherwise be raised on direct appeal, such as ineffectiveness of counsel who brought the direct appeal.
8. **Effectiveness of Counsel: Appeal and Error.** Where appellate counsel's performance is not constitutionally ineffective, there is no inequity in requiring defendant to bear the risk of attorney error that results in a procedural default.
9. **Appeal and Error.** Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.

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

Jerry L. Soucie for appellant.

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

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

Randall S. Whitmore appeals from an order of the district court for Douglas County denying him postconviction relief upon his contention that his lawyer at trial and his other lawyer at sentencing had a conflict of interest arising from their representation of a codefendant.

Whitmore, who was convicted of five felony violations of Nebraska's controlled substance act, sought postconviction relief under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989).

Because Whitmore had different lawyers upon his direct appeal and the conflict issues could have been raised at that time, we affirm.

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 set aside unless they are clearly wrong. *State v. Britt*, 237 Neb. 163, 465 N.W.2d 466 (1991); *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990). See, also, *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990) (a defendant has the burden of demonstrating ineffective assistance of counsel). One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990). In criminal proceedings, a defendant's right to effective counsel includes a lawyer's representation free from conflicting interests. *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990). "Conflict of interest" designates a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988).

This is the defendant's second postconviction motion before

this court. Jurisdiction was denied in response to the first motion when the defendant was not in actual custody in Nebraska but, rather, in the Federal Bureau of Prisons. See *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990). Whitmore now alleges that he has been released from federal custody and has been in the actual physical and legal custody of the Department of Correctional Services for the State of Nebraska continuously since August 26, 1989. This court will consider this as defendant's first motion because the issues raised in the prior motion were not actually litigated. See *State v. Svoboda*, 199 Neb. 452, 259 N.W.2d 609 (1977) (for postconviction purposes, issues raised on direct appeal but disposed of procedurally were not "already litigated").

The core issue in Whitmore's case relates to an admission by Whitmore of which the factual background is well described in his direct appeal:

> This admission had to do with the defendant's ownership of certain keys which included keys to a 1971 brown Plymouth Valiant automobile and a toolbox located in the trunk.
>
> On November 23, 1981, the police searched that particular automobile, pursuant to a search warrant. The warrant had been issued on the strength of an affidavit which recited in substance that, according to informants, this particular automobile was used by the defendant and John White to cache illicit drugs, and which, although registered in the name of a fictitious Mark Salem, was nevertheless owned by the defendant. The search revealed several items which, upon analyzation, were found to be controlled substances. It was necessary for the State to somehow tie the defendant into the ownership or use and control of this automobile. . . .
>
> On November 23, 1981, the police executed a search warrant permitting the search of the defendant's person and the premises at 2722 North 64th Street. The premises were entered by way of the front door through a glass panel that had been kicked out. The defendant was placed under arrest, which was on the strength of probable cause, without the issuance of an arrest warrant. He was not

given *Miranda* warnings.

Nevertheless, the officers asked the defendant if he was the owner of a specific set of keys found on the dresser in the room in which the defendant was located, and he answered that he was. Two of the keys were found to fit the trunk and door lock of the 1971 Valiant, and one fit a toolbox in the trunk.

*State v. Whitmore*, 221 Neb. 450, 454, 378 N.W.2d 150, 153 (1985).

Further, the record reveals that a small vial containing cocaine was found in Whitmore's pants, the question officers asked Whitmore was ruled a neutral question, and a fourth key opened White's apartment. The purported ownership of the keys was used to connect Whitmore to the drugs.

Whitmore now contends that his trial attorney, who represented both Whitmore and White, had an actual conflict of interest because the defendants had antagonistic defenses. The defense of each was claiming that the keys were owned by the other. The history of legal representation in this case is amply described in the district court's order concerning Whitmore's postconviction motion.

> The thrust of Defendant's Motion is an alleged conflict of interest resulting from Attorney James M. Davis' representation of the Defendant and one John White. Essentially the two had been charged with possession with the intent to deliver the same drugs.
>
> When the respective Informations were filed in January, 1982, Attorney Davis was retained by Defendant John White. Defendant Whitmore retained Attorney Ralph Smith.
>
> . . . .
>
> On June 21, 1984, and June 25, 1984, Defendant John White's, case was tried to the Court by Mr. Davis without the intervention of a jury. The Court took the case under advisement and while same was under advisement, Defendant Whitmore appeared in Court with Attorney Davis on June 28, 1984. Attorney Smith was granted leave to withdraw and on motion of Attorney Davis, the Defendant Whitmore was granted leave to withdraw his

previous waiver of trial by jury. Jury trial was set for July 9, 1984. A Miranda hearing was also held on June 28, 1984 and ruled on July 6, 1984.

There is no doubt but that White's case was still under advisement when Defendant Whitmore's trial commenced on July 9, 1984, or when it concluded by verdicts finding Defendant guilty of each charge and count on July 13, 1984.

On December 4, 1984, Defendant appeared for sentencing with Attorney J. William Gallup and was sentenced.

. . . .

Defendant hired new Counsel Taylor, Fabian, Thielen & Thielen to prosecute his appeal to the Supreme Court, and although the issue of conflict of interests was serious the issue of the conflict was not raised in or addressed by the Supreme Court in the direct appeal.

Allegedly, Davis spoke with the trial judge, who responded that there would be no conflict by the time of trial, presumably because White was being tried first. Whitmore now claims that Davis, at the suppression hearing and trial, did not present evidence to rebut the State's arguments that Whitmore possessed the cocaine in his pants or that he owned the keys. At the sentencing hearing Whitmore was represented by attorney Gallup, who Whitmore now alleges had an undisclosed conflict because he represented White at his preliminary hearing. The convictions were affirmed on direct appeal in *State v. Whitmore, supra*. Related cases are *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983) (motion to suppress resulting in one-judge opinion later adopted by full court in *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985)), and *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990) (postconviction motion dismissed for lack of jurisdiction).

On March 7, 1990, Whitmore filed this motion for postconviction relief. The district court for Douglas County denied the motion, finding that (1) "the issue of the conflict of interests involving attorney Davis was available to Defendant and his appellate Counsel for direct review by the Supreme

Court and that it should have been raised on direct review," (2) "from the files and records that an evidentiary hearing is not required," and (3) "there was a waiver of any infringement of the rights of the Defendant such that the judgment was neither void nor voidable under the Constitution of the State of Nebraska or the Constitution of the United States."

Whitmore assigns three errors: (1) Defendant was denied the right to effective and conflict-free representation, as guaranteed by the 6th and 14th amendments, because of his trial counsel's simultaneous representation of the adverse interest of the codefendant; (2) the trial court erred in failing to conduct a hearing on the issue of conflict of interest despite being aware and on notice that special circumstances existed indicating that a conflict of interest existed in regard to the joint representation; and (3) the trial court erred in failing to grant an evidentiary hearing on defendant's motion for postconviction relief.

Although the issues are adequately presented, this court need not address the merits of Whitmore's motion. This court has consistently applied the procedural bar rule whereby " '[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.' " *State v. Otey*, 236 Neb. 915, 926, 464 N.W.2d 352, 360 (1991), quoting *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989). See, *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990) (where defendant had opportunity to present a defense antagonistic to his codefendants and failed to do so, the procedural bar rule applies); *State v. Cole*, 224 Neb. 10, 395 N.W.2d 532 (1986); *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980) (although an assigned error on postconviction may raise a constitutional question, it is still subject to the rule that where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the issue is waived). See, also, *U.S. ex rel. Henderson v. Thieret*, 671 F. Supp. 1193 (N.D. Ill. 1987), *aff'd* 859 F.2d 492 (7th Cir. 1988), *cert. denied, Henderson v. Greer*, 490 U.S. 1009, 109 S. Ct. 1648, 104 L. Ed. 2d 163 (1989) (alleged ineffectiveness of counsel at pretrial proceedings, at trial, and at sentencing could

have been presented on direct appeal, and failure to do so was procedural default which barred review in federal habeas corpus proceeding).

A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). The purpose of affording postconviction relief is not to permit the defendant endless appeals on matters already decided. Rather, the purpose is to correct errors of constitutional proportion which could not otherwise be raised on direct appeal, such as ineffectiveness of counsel who brought the direct appeal. *State v. Pope*, 218 Neb. 361, 355 N.W.2d 216 (1984).

Clearly, Whitmore could have raised the issue of conflict of interest by his trial attorney on direct appeal. At his direct appeal, Whitmore was represented by attorneys Fabian and Thielen, different counsel than he had at trial. Thus, this court is not faced with the problem whereby trial counsel and appellate counsel are identical. See, *Hopkinson v. Shillinger*, 866 F.2d 1185 (10th Cir. 1989) (habeas petitioner's failure to present argument as to ineffectiveness of trial counsel to state supreme court on direct appeal does not bar consideration of claim in habeas corpus proceeding *where trial counsel also represented petitioner on direct appeal*); *Riner v. Owens*, 764 F.2d 1253 (7th Cir. 1985), *cert. denied* 475 U.S. 1055, 106 S. Ct. 1282, 89 L. Ed. 2d 589 (1986) (identity of trial and appellate counsel can constitute sufficient "cause" to meet the first element of the "cause and prejudice standard" for federal habeas corpus review). Cf. *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990) (except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court; if not so raised, it will be considered to have been waived). Furthermore, even with new counsel in this appeal for postconviction relief, Whitmore has not assigned as error that his direct appeal counsels' oversight amounted to ineffective assistance of

counsel. See *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (where appellate counsel's performance is not constitutionally ineffective, there is no inequity in requiring defendant to bear the risk of attorney error that results in a procedural default).

There is no question that Whitmore knew of the conflict of interest at the time of his direct appeal. As early as February 22, 1984, in a hearing on the State's motion to consolidate, attorney Davis, with Whitmore present, objected to the consolidation, stating that "there's a probability of antagonistic defenses." Davis told the court that because the defendants were charged with possession of the same controlled substances, a determination would have to be made as to who exercised dominion and control over the contraband. Smith, Whitmore's own attorney at the time, concurred in the objection. In three affidavits attached to the motion for postconviction relief, Whitmore, Mary Whitmore, and Julie Davis state that when visiting attorney Gallup within a few weeks after the trial, which was concluded by jury verdicts on July 13, 1984, they were advised that there was a serious conflict of interest on the part of attorney Davis. It would appear that Gallup's advice was given in time to raise the conflict issue in Whitmore's direct appeal. Whitmore was not sentenced until December 4, 1984. This court takes judicial notice that Whitmore's direct appeal brief, which is the vehicle for claiming errors at trial, was not filed until April 30, 1985, and that the cause was not argued before this court until September 19, 1985.

Whitmore also raises the argument that his sentencing counsel had a conflict of interest. However, no such argument was raised at the district court hearing on this motion. Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). Even if Whitmore's argument had been raised in the district court below, it also would fall prey to the procedural bar. The same is true of the second and third assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

TERRY STAMAN, APPELLANT, V. YEAGER & YEAGER, P.A., AN UNINCORPORATED PROFESSIONAL ASSOCIATION, ET AL., APPELLEES.
469 N.W.2d 532

Filed May 17, 1991. No. 88-713.

1. **Judgments: Appeal and Error.** The trial court's order will be sustained if it reaches the correct result even if a wrong reason is assigned.
2. **Attorney and Client.** An attorney's duty arises when the attorney accepts employment and 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.
3. **Attorney and Client: Negligence.** The negligence of counsel must affect the viability of the client's interest and be shown to do so.

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

Robert G. Pahlke, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellant.

Fredric H. Kauffman and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

WHITE, J.

This is an appeal from the granting of a motion for judgment notwithstanding the verdict in a legal malpractice action. The plaintiff appeals to this court.

An extended recitation of the path this litigation followed is necessary for an understanding of the issues presented to us for decision. The appellant, Terry Staman, a resident of Crawford, Nebraska, began working for the Burlington Northern Railroad in 1980. In 1981, Staman began to experience respiratory problems and, in June 1982, injured an elbow in a fall at work.

In late 1983, the appellees Louis Jungbauer and Yeager & Yeager, P.A. (Yeager), an attorney and his law firm whose members are licensed to practice law in Minnesota but not in Nebraska, through agents (runners), solicited the appellant to retain the firm to represent him in a claim against Burlington. A lawsuit was filed against Burlington by Yeager on January 30,

1985, seeking damages for Staman's respiratory problems arising from a single incident of January 20, 1984.

Subsequently, in the fall of 1985, Yeager was discharged and the firm of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister of Scottsbluff, Nebraska, was retained by appellant. A series of amended petitions were filed. The essential charge in the last petition is the recitation of medical problems as a result of a series of exposures to noxious substances during Staman's employment, instead of the single incident alleged in the original petition. The object of the petition amendments was to raise the issue of a safe workplace and to accurately reflect the effect of exposure to noxious substances on Staman's asthmatic condition.

Burlington's answer raised a statute of limitations defense. A separate trial on that issue was held, resulting in an interlocutory decision that Staman's claim against the railroad accrued in December 1983 and was not barred by the 3-year statute of limitations. Appellant's new counsel considered that the court's decision, although favorable, was questionable, possibly wrong, and difficult to defend on appeal.

Before trial was scheduled to begin, appellant's new counsel negotiated a settlement of $361,000 from Burlington and the petition was dismissed. Thereafter, Staman filed this action against Yeager, alleging a disability arising from his exposure to noxious odors in the course of his employment with Burlington. The petition further urged that Yeager failed to investigate Staman's complaints and that a full nonnegligent investigation would have discovered a series of exposures to harmful substances and would not therefore have averred a single incident in the original petition. To rectify this oversight and disclose the earlier exposures, appellant's new counsel necessarily raised, in the minds of Burlington's counsel, the possibility that the action was barred by the statute of limitations. Staman asserted that the subsequent decision of the trial court holding the action not to be barred did not remove the damage done to the value of the case by settlement.

At trial, the court directed the jury to find Yeager and Jungbauer guilty of legal negligence and to find Burlington was also negligent and the proximate cause of the injuries and

damages to Staman. The jury found the total damages to Staman to be $1,403,000. The previous substantial settlement with Burlington was deducted from the total, and a judgment of $1,044,051.06 was entered for Staman.

A motion for judgment notwithstanding the verdict and, alternatively, a motion for new trial, consisting of some 35 alleged errors during the trial, was filed by the defendants. Fortunately, the court did not pass on the individual errors, but sustained the motion for judgment notwithstanding the verdict. In its order the court, dismissing the petition, observed as follows:

> The court concludes that the law does recognize the existence of a cause of action for negligent impairment of the value of a lawsuit that has been settled. However, in this case, the value of the underlying lawsuit was not impaired even though it was negligently investigated. The negligent investigation was not a proximate cause of any damage to the plaintiff. The plaintiff's underlying claim for damages against the Burlington Northern ("BN") as a result of occupational disease was ultimately pleaded properly in the underlying lawsuit, and the court in that action determined that the underlying claim was not barred by the statute of limitations. This ruling cut off the effect of any attorney negligence so that as a matter of law the plaintiff has no cause of action for legal malpractice. The motion of the defendants for summary judgment should have been sustained.

Although the appellant assigns a number of errors relating to the trial court's volunteered comments concerning the necessity of the granting of a new trial, since the trial court did not grant a new trial, we will consider only the propriety of the action that the trial court did take, i.e, the granting of the motion to overturn the verdict and the subsequent dismissal of the petition.

Assuming, as the trial court directed the jury to find, that Yeager indeed failed to adequately investigate the basis of the claim and thus sloppily pled a cause of action inconsistent with the facts, according to the record before us the negligence was not fatal. We do not have a judicial determination of the statute

of limitations bar; indeed, we have a determination to the contrary. The appellant does not allege in this court that the trial court in the Burlington case was wrong, nor did he so allege in the petition in this case.

We are not called on to review a finding of the bar or nonbar of the statute of limitations. Admittedly, a finding that the statute had run by reason of Yeager's poor pleading would constitute actionable negligence. *Bourke v Warren*, 118 Mich. App. 694, 325 N.W.2d 541 (1982). Were we called on to do so, we would be at a severe loss to justify the court's nonbar finding in view of our opinion released subsequent to the trial court's determination. See *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W.2d 327 (1988).

While we do not agree with the trial court's holding that the interlocutory finding somehow proves fatal to Staman's present cause of action, the trial court's order will be sustained if it reaches the correct result, even if a wrong reason is assigned. See *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

We are asked to hold that the psychological impact of a counsel's mistake on opposing counsel justifies a cause of action against one's own attorney, even though it is not established that the mistake indeed affected the viability of the plaintiff's claim. In order for a plaintiff to recover against an attorney in a professional malpractice action, the plaintiff must prove the attorney's employment, the attorney's neglect of a reasonable duty, and that the negligence was the proximate cause of loss to the client. *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987), citing *Wooddy v. Mudd*, 258 Md. 234, 265 A.2d 458 (1970). An attorney's duty arises when the attorney accepts employment and " ' "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. . . ." ' " *Stansbery, supra* at 496, 412 N.W.2d at 450.

The negligence of counsel must affect the viability of the client's interest and be shown to do so. *Steele v. Smalley*, 141 Me. 355, 44 A.2d 213 (1945); *Bourke v. Warren, supra*. The mere perception by opposing counsel of a possible fatal error

does not complete the causative chain.

The judgment of the trial court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. KEVIN R. GROVES, APPELLANT.
469 N.W.2d 364

Filed May 17, 1991. No. 90-282.

1. **Speedy Trial: Waiver.** The primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.
2. **Speedy Trial: Proof.** The State has the burden of proving that one or more of the excluded periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

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

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Defendant, Kevin R. Groves, was arrested on December 22, 1988, and taken into custody. A complaint charging defendant with the crime of possession of a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), was filed in the county court for Douglas County on December 23, 1988. Defendant, with counsel, appeared before the county court, and on December 23 the court signed an "Order of Release from Custody" conditioned

on the defendant's execution of an appearance bond and the deposit of 10 percent of $10,000 in cash. Defendant acknowledged he understood the "conditional release." Preliminary hearing was set for January 9, 1989.

Defendant appeared with counsel for the preliminary hearing. No record of that hearing is in the record before us, but the transcript shows that defendant was bound over to district court for trial. On January 9, 1989, in county court, defendant signed an appearance bond, which provided in part:

> I acknowledge that I've been charged with the offense of Possession of Controlled Substance [handwritten] and in consideration of my release from custody agree to appear in the County Court of said County on Jan. 19 1989, at 9 A.M. [date and time handwritten] and thereafter as directed by the Court, to answer the charges against me. In the event that the offense charged is a felony, and I am bound over to the District Court upon preliminary hearing, I further agree to appear in the District Court of said County forthwith or as so ordered, which court shall then have jurisdiction.

After his signature, defendant wrote his address, "8402 Blondo."

On January 10, 1989, an information was filed in the district court charging the same crime set out in the complaint. On January 19, 1989, the district court made the following docket entry: "Defendant failed to appear, Clerk of Court directed to issue capias for the arrest of the defendant." The same day, a capias was issued, and on April 24, 1989, defendant was taken into custody by the sheriff.

On June 7, 1989, defendant was arraigned and pled not guilty. The court's docket entry also showed, "Cause set for trial to the next jury panel or as soon thereafter as it may be reached."

On August 18, 1989, defendant filed a motion in the district court "for an order granting him an absolute discharge from the offense charged in the information . . . for the reason that more than six (6) months has expired since the filing of the information and none of the periods of exclusion contained in § 29-1207, R.R.S. 1943 are applicable . . . ." On August 30,

1989, defendant filed a motion seeking a continuance of the trial, which motion was granted by the trial court on the same day.

On January 3, 1990, a hearing was held in the district court on defendant's motion for discharge. On January 30, 1990, the court entered an order denying defendant's motion for discharge. On February 14, 1990, defendant waived a jury trial and stipulated the case could be tried by the trial judge on stipulated police reports. Defendant was found guilty and on March 1, 1990, was sentenced to 1 to 2 years, concurrent with any other sentence already imposed. The bill of exceptions shows that defendant was previously sentenced on the same day, on other charges, to 2 to 4 years in prison plus an additional 13 months. Defendant timely appealed his conviction in this case.

In this court, defendant assigns a single error: The trial court erred in not sustaining defendant's motion to dismiss "for the State's failure to bring him to trial within six months after the information was filed . . . ."

Neb. Rev. Stat. § 29-1207 (Reissue 1989) provides:

> (1) Every person . . . informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date . . . the information [is] filed.
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant . . . .

Defendant contends that since the information was filed on January 10, 1989, the case against him had to be tried within 6 months of that date. The time after August 30, 1989, cannot be counted in computing the time, since this delay resulted "from a continuance granted at the request . . . of the defendant." § 29-1207(4)(b). The time from the filing of the information (January 10, 1989) to the time of defendant's filing of the motion for continuance (August 30, 1989) is the determinative

period. That period consists of 7 months 20 days, a time in excess of the 6-month limitation set out in § 29-1207. The State contends, however, that the time from the arraignment on January 19, 1989, to defendant's arrest on April 24, 1989, must be excluded as "resulting from the absence or unavailability of the defendant," as allowed by § 29-1207(4)(d). Thus, the sole issue before this court is whether, under the facts set out above, defendant had made himself unavailable for trial during the time from January 19 to April 24, 1989. The trial court determined that "[b]y his own actions the defendant rendered himself unavailable for trial for a period of 90 days within the six month period, i.e., the date from the time of his arraignment to the date of his arrest."

The problem in this case obviously stems from the use of a county court form which was not appropriate for use in this case unless properly modified. The form used did not reflect the facts before the county court. Those facts included the fact that defendant had been bound over after a preliminary hearing. Nonetheless, the defendant was specifically told in writing to appear in the county court on January 19, 1989, at 9 a.m. Apparently, at 9 a.m. on January 19, 1989, defendant did not appear in district court, and a capias was issued for his arrest. There is no other evidence in the record before us, as there has been in previous similar cases, such as *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988), *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985), and *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982).

In *McKenna*, the defendant's own testimony showed she was aware of where and when she was supposed to appear. Testimony of her counsel also added to the facts before the court in determining the extent of McKenna's knowledge. In *Bennett*, Bennett's trial counsel testified that she had told Bennett of the trial date. In *Beck*, a county judge testified as to his custom in advising defendants, and defendant's counsel testified that he had been notified of a hearing, but had failed to reach the defendant.

No such additional evidence was offered in this case. The record does not show that defendant's counsel was in district court on January 19, 1989. No testimony from defendant, his

attorney, or the county judge handling this matter was offered. The bare record before us does not support the trial court's finding that "[b]y his own actions the defendant rendered himself unavailable for trial . . . ." Defendant was ordered specifically to appear in county court on a day certain. There is no evidence that he did not so appear. There is no evidence that defendant was ordered to appear on a day certain in district court. Defendant's address, as shown on the bond, was known to the court. Defendant's attorney was known to the court. The record does not show any information conveyed to defendant or his counsel as to a specific date for defendant's appearance in district court. It should also be noted that there is nothing in the record to explain the delay between the time of defendant's arrest on the capias issued herein and the expiration of the 6-month period set out in § 29-1207.

If the State is to complain of a defendant's failure to appear at a certain time and place as ordered, the State must first obtain a court order directing defendant where and when to appear. The State cannot shift that burden by obtaining an order specifically directing the defendant to appear in the wrong place, and then contending that defendant should know the proper place to appear. If the State is to enforce a court's written orders, those orders should be accurate. We stated in *State v. Beck, supra* at 704, 325 N.W.2d at 150:

> This court has previously held: "[T]he primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute." *State v. Bolton*, [210 Neb. 694, 697, 316 N.W.2d 619, 621 (1982)]; *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980).

The State also has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action. *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

The State has failed to meet its burden of proof under *State v. Beck, supra*, and *State v. Johnson, supra*. Defendant's

conviction is not legal and must be set aside. The judgment is reversed, and the cause is remanded to the district court with directions to dismiss the charge against defendant in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

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## STATE OF NEBRASKA, APPELLEE, V. PHILLIP A. ALLISON, APPELLANT.

469 N.W.2d 360

Filed May 17, 1991. No. 90-340.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme 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.
2. **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.
3. **Criminal Law: Self-Defense.** The use of deadly force is justifiable when the actor believes that such force is necessary to protect himself against death or serious bodily harm unless the actor knows that he can avoid the necessity of using such force with complete safety by retreating.
4. **Criminal Law: Self-Defense: Words and Phrases.** Deadly force is force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.
5. **Criminal Law: Self-Defense.** A person using force to protect himself may estimate the necessity of such use of force under the circumstances as he believes them to be when the force is used.
6. **Criminal Law: Self-Defense: Evidence.** Evidence of the victims' violent or aggressive behavior which occurred 4 months after the defendant shot the victims was not relevant to the circumstances as the defendant believed them to be at the time he shot the victims.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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.

BOSLAUGH, J.

The defendant, Phillip A. Allison, was charged with one count of first degree assault, two counts of second degree assault, and three counts of use of a firearm to commit a felony. The first degree assault involved the shooting of Eric Meeks. The second degree assault counts involved the shooting of Michael Suggs and Kelly R. Hollingsworth.

A jury convicted the defendant of both counts of second degree assault and two counts of use of a firearm to commit a felony. The defendant was found not guilty of first degree assault and the third count of use of a firearm to commit a felony. On appeal, the defendant claims that the evidence was insufficient to sustain his convictions, that the trial court erred by sustaining the State's motion in limine, and that the sentences imposed are excessive.

In the late hours of Sunday, June 25, 1989, a large gathering of youths took place at the 7 Eleven store at 42nd Street and Ames Avenue in Omaha, Nebraska. The defendant was present at this location with his sister, two of his cousins, and his sister's boyfriend. There was another group of youths consisting of Suggs, his sister and brother, Hollingsworth, Meeks, Brian Keith Anderson, and Keith Ward. The young men in the latter group belong to an organization known as the Vice Lords.

The defendant did not know any of the members of the Suggs group, and the members of the Suggs group did not know the defendant prior to the night in question.

The defendant had recently moved to Omaha from Atlanta and, prior to the evening in question, had a run-in with members of the "Bloods" gang. At that time they had damaged his car and threatened his life. Because of those threats, the defendant carried a loaded handgun, which he had in his

possession on the night of June 25, 1989.

While the members of each group were visiting with each other, the defendant's cousin Tyresa Ritchie went over to the Suggs group because she wanted to learn the Vice Lords handshake. When she returned, the young men in the Suggs group started "throwing up" Vice Lords signs and saying Vice Lords sayings indicating that the area was Vice Lords territory. Tyresa told the defendant this behavior was directed at him.

The defendant testified that Suggs threatened him and said that if he wanted to get the "gat," he could get the gat, meaning he could get the gun. Then, Ward pulled out a gun, after which the defendant pulled out his gun, asking "what's up." At that point, Meeks lunged at the defendant, and the defendant shot him.

After he had shot Meeks, the defendant ran toward Hollingsworth's car. He shot into the car because he thought he saw Suggs reaching under the seat for something and assumed it was a gun. Both Suggs and Hollingsworth were hit by the defendant's gunshots.

The defendant claims that the trial court erred in sustaining the State's motion in limine, which prohibited the defendant from introducing evidence of turbulent or aggressive behavior by the victims that occurred 4 months after the shooting. The defendant asserts the evidence was admissible in order to corroborate the defendant's reasonable belief that deadly force was necessary on the night in question to protect himself against death or serious bodily harm. He argues the evidence was relevant to justify the type of force the defendant believed was necessary for the purpose of protecting himself the night of the shooting.

Neb. Rev. Stat. § 28-1409 (Reissue 1989) describes the use of force permissible in order to protect oneself. As it relates to this case, § 28-1409(4) provides that the use of deadly force is justifiable when the actor believes that such force is necessary to protect himself against death or serious bodily harm; however, deadly force is not justifiable if "[t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . ." Deadly force is defined as

> force which the actor uses with the purpose of causing or

> which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

Neb. Rev. Stat. § 28-1406(3) (Reissue 1989). A person using force to protect himself may estimate the necessity of such use of force "*under the circumstances as he believes them to be when the force is used.*" (Emphasis supplied.) § 28-1409(5).

Relevant evidence is evidence which has any tendency to make the existence of any fact that is significant to the outcome 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. . . . 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. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991).

In this case, the issue was whether under the circumstances as the defendant believed them to be at the time of the shooting the defendant was justified in employing deadly force to protect himself. Evidence of the victims' violent or aggressive behavior which occurred 4 months after the defendant shot the victims was not relevant to the circumstances as the defendant believed them to be the night he shot the victims. Accordingly, the trial court did not err in sustaining the State's motion in limine.

Citing to the statutes discussed above regarding justification for use of force and to NJI 14.33, the defendant contends that the evidence was insufficient to support the jury's verdicts because the evidence is clear that the defendant was justified in the force he used. This argument is without merit.

At the time that the defendant shot the victims, he did not know them. The circumstances as the defendant believed them to be at the time of the shooting show that the Suggs group was making gang signals and threats directed at the defendant and that Suggs said something about getting a gun. This made the defendant nervous; however, he did not leave the scene. After the defendant saw Ward pull out a pistol, he drew his own gun, asking "what's up," at which time Meeks lunged at the

defendant, and the defendant shot him.

After the defendant shot Meeks, the defendant ran toward Hollingsworth's car. He shot into the car because he thought he saw Suggs reaching under the seat for something and assumed it was a gun.

As to whether the defendant was justified in using deadly force by shooting into the car, the evidence is that the defendant was not surrounded by members of the Suggs group, and there was nothing to prevent him from retreating or entering the store. No witness saw Suggs with a gun, and no one saw guns coming from the car, including the defendant.

> In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme 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.

(Syllabus of the court.) *State v. Cogswell*, 237 Neb. 769, 467 N.W.2d 680 (1991).

> 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.

*Id.*

The evidence in this case, when examined in the light most favorable to the State, shows that the defendant could have avoided shooting into the car by retreating from the scene. He was not justified in that use of deadly force, and his argument to the contrary is without merit.

The defendant also argues that the evidence was insufficient for a conviction of second degree assault against Suggs because Suggs' testimony regarding his injury was so lacking in probative force that it cannot be said as a matter of law that the evidence supports a finding a guilt beyond a reasonable doubt.

The elements of second degree assault as applied to this case

are bodily injury to another person caused knowingly, intentionally, or recklessly by the defendant's use of a dangerous instrument. See Neb. Rev. Stat. § 28-309 (Reissue 1989). Suggs testified that he was shot and injured and that he had a scar from the wound. The defendant admitted that he shot into the car.

The defendant is asking this court to pass on the credibility of the witnesses. This is not the province of the Supreme Court, but, rather, the province of the fact finder. See *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989). The evidence supports the jury's conviction of the defendant for second degree assault against Suggs.

Finally, the defendant argues that the sentences imposed are excessive. The trial court sentenced the defendant to terms of 20 months' to 4 years' imprisonment, to be served concurrently, for the assault convictions and to concurrent terms of 2 to 4 years on the use of a firearm convictions. The sentences for the use of a firearm convictions run consecutively to the sentences for the assault convictions.

Second degree assault is a violation of § 28-309 and is a Class IV felony. It is punishable by imprisonment for up to 5 years, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985).

Use of a firearm in the commission of a felony is a Class III felony distinct from any accompanying felony, and a sentence for it must be consecutive to the sentence for any accompanying felony. Neb. Rev. Stat. § 28-1205(2) and (3) (Reissue 1989). A Class III felony is punishable by imprisonment for a minimum of 1 year and a maximum of 20 years, a $25,000 fine, or both. § 28-105.

As we have stated many times, "a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court." *State v. Cogswell, supra* at 772, 467 N.W.2d at 682. The crimes involved in this case were violent and senseless. The sentences imposed were within the statutory limits and were not an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

# IN RE INTEREST OF LARRY DICKSON, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
# STATE OF NEBRASKA, APPELLEE, V. LARRY DICKSON, APPELLANT.

469 N.W.2d 357

Filed May 17, 1991. No. 90-1103.

1. **Mental Health: Pleadings: Proof: Evidence.** Upon a filing of a petition by the county attorney declaring his or her belief that the subject of the petition is a mentally ill dangerous person, the mental health board must hold a hearing and determine by clear and convincing evidence that the subject of the petition is mentally ill and dangerous.
2. **Mental Health: Proof: Evidence.** The mental health board may order involuntary hospitalization or other treatment if it finds clear and convincing evidence exists that an individual is mentally ill and dangerous.
3. **Mental Health: Proof.** Neb. Rev. Stat. § 83-1046 (Reissue 1987) provides that the care or treatment of a subject may be modified or stopped if any person shows that cause exists to stop or change the subject's treatment.
4. **Mental Health: Proof: Evidence.** When the State petitions to have an individual declared mentally ill and dangerous under Neb. Rev. Stat. § 83-1009 (Reissue 1987), the State must prove by clear and convincing evidence that the individual poses a substantial risk of harm to others or to himself.
5. _____: _____: _____. Upon review of a commitment under Neb. Rev. Stat. § 83-1046 (Reissue 1987), the State must prove by clear and convincing evidence that the individual remains mentally ill and dangerous.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Martin G. Cahill, Chief Deputy Hall County Public Defender, for appellant.

Susan M. Koenig, Chief Deputy Hall County Attorney, for appellee.

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

WHITE, J.

Larry Dickson is currently incarcerated at the Lincoln Regional Center under the provisions of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987). On December 19, 1986, the Hall County Mental Health Board (board) found Dickson to be a mentally ill dangerous person under the definition of § 83-1009(1) and

ordered him committed for treatment. It is alleged that Dickson caused the death of his mother, Delilah Dickson, by strangulation on January 7, 1984, while under a hypnosis-induced delusion that he had been authorized to kill her pursuant to a death warrant. Dickson was not tried for the homicide.

On July 12, 1990, the board held a hearing pursuant to Dickson's motion under § 83-1046 for review of his commitment. After hearing testimony from Dickson himself and from Dr. Charles Richardson, a psychiatrist who has cared for Dickson in the regional center since June 28, 1988, the board found that pursuant to § 83-1046 no cause had been shown that there no longer existed need for continued care or treatment of Dickson or that less restrictive treatment alternatives existed for him, and denied the motion for rehearing. Dickson timely appealed to the district court, which affirmed the findings of the board, stating that "[t]he Court finds that the subject failed to show cause no longer exists for commitment or that a less restrictive environment exists for a person committed as a mentally ill dangerous person . . . ."

Dickson assigns as error the district court's determination that the subject of the proceeding bears the burden of showing that he is no longer a mentally ill dangerous person and therefore eligible for release or a less restrictive form of treatment.

Section 83-1009(1) defines a mentally ill dangerous person as a person who presents "[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."

Upon the filing of a petition by the county attorney declaring his or her belief that the subject of the petition is a mentally ill dangerous person, the mental health board must hold a hearing and determine by clear and convincing evidence that the subject of the petition is mentally ill and dangerous. See §§ 83-1024, 83-1025, and 83-1035. The board may order involuntary hospitalization or other treatment if it finds such clear and convincing evidence exists. § 83-1037. Section 83-1046 provides that the care or treatment of the subject may be modified or

stopped if any person shows that cause exists to stop or change the subject's treatment.

These statutes do not expressly state which party bears the burden of initially proving that the subject of the petition is a mentally ill dangerous person, nor do they specify which party must show that cause no longer exists for the hospitalization or treatment of the subject. Dickson argues that the burden should be on the State to prove that he remains mentally ill and dangerous and thus subject to involuntary hospitalization. We agree.

In *Tulloch v. State*, 237 Neb. 138, 465 N.W.2d 448 (1991), this court analyzed the statutes governing the commitment of persons acquitted of crimes because of insanity. Under Neb. Rev. Stat. § 29-3702 (Reissue 1989), at the expiration of the evaluation period, the court must find by clear and convincing evidence that the individual remains dangerous in order to continue holding him. We interpreted this statute to mean that the burden is on the State to prove by clear and convincing evidence that the individual remains dangerous.

We adopt a similar interpretation of the burden of proof requirements of the Nebraska Mental Health Commitment Act. When the State petitions to have an individual declared mentally ill and dangerous under § 83-1009, it must prove by clear and convincing evidence that the individual poses a substantial risk of harm to others or to himself. It follows that upon review of the commitment under § 83-1046, the State must also prove by clear and convincing evidence that the individual remains mentally ill and dangerous. We interpret the "any person" language of § 83-1046 to require the State to show cause why the subject of the petition should remain incarcerated under the act.

In this case, the district court was incorrect in its determination that Dickson had failed to show sufficient cause why he should be released from the regional center. The State was charged with that burden. However, the district court's error proved harmless.

We have reviewed the record of Dickson's review hearing and find that despite the district court's determination that Dickson did not show cause why he should be released, the State proved

by clear and convincing evidence that Dickson remains mentally ill and dangerous. Dickson testified on his own behalf and stated that he wanted to be released because he thought it was a good idea. He also stated that his delusional state was a result of being hypnotized by use of a strobe light; that the hypnosis had "expired" after 3 years, and he was fine now; and that the death of his mother was due to his hypnotized state and was not his fault. The State offered the testimony of Dr. Richardson, who stated numerous times that although Dickson's condition had improved over the years, he still remained delusional concerning the cause and circumstances of his mother's death. Richardson felt that Dickson had not yet accepted the fact that he was mentally ill, and in particular had not admitted that he was ill at the time he attacked his mother. Richardson also stated that he would not recommend releasing Dickson or placing him in a less restrictive setting, such as a "halfway" or transitional living situation, at this time.

We find clear and convincing evidence in the record to support the State's contention that Dickson remains mentally ill and dangerous. The district court's error, placing the burden of proof on Dickson, in affirming the decision of the board was harmless.

AFFIRMED.

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ROLAND F. WAITE, APPELLANT AND CROSS-APPELLEE, V. A. S. BATTIATO CO., INC., FORMERLY KNOWN AS A. S. BATTIATO CONSTRUCTION CO., INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, AND A. S. BATTIATO, APPELLEE.

469 N.W.2d 766

Filed May 24, 1991. No. 89-005.

1. **Equity: Appeal and Error.** In an appeal in equity this court tries factual questions de novo on the record.
2. **Appeal and Error.** In actions at law, factual findings of the trial court in a jury-waived case have the effect of a jury verdict and will not be set aside unless clearly wrong.

3. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Motions for New Trial: Evidence: Proof.** The proof in support of granting a motion for a new trial based on newly discovered evidence must show that such evidence was then available which neither litigant nor counsel could have discovered before by exercise of reasonable diligence.
6. **Employment Contracts: Wages: Words and Phrases.** Where an employment agreement provides for the sharing of possible financial losses, sums collected under such a provision are not "benefits" which could be considered "wages" under Neb. Rev. Stat. § 48-1229(3) (Reissue 1984).
7. **Contracts.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Richard A. DeWitt and Larry J. Steier, of McGill, Parsonage & Lanphier, P.C., for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee A. S. Battiato Co.

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

GRANT, J.

Plaintiff-appellant, Roland F. Waite, and defendant-appellee A. S. Battiato Co., Inc. (the corporation), entered into an employment agreement in 1966. Among other things, this agreement provided for a yearly bonus to be paid to Waite and provided for a termination bonus to be paid to Waite when he left employment with the corporation. Waite left the corporation's employ on July 31, 1987. Waite later filed suit against the corporation and A.S. Battiato (Battiato) for his yearly bonuses for the fiscal year ending March 31, 1987, and the short period from April 1 to July 31, 1987, and for his termination bonus. The two issues were bifurcated for trial to the district court for Douglas County. At the conclusion of plaintiff's case on the yearly bonus issue, the court granted

Battiato's motion to dismiss. No appeal was taken from that dismissal. Ultimately, judgment in the amount of $1,001,306.75 as Waite's termination bonus calculated under the employment agreement was entered in favor of Waite against the corporation, and judgment in the amount of $132,534.35 was entered in favor of Waite for yearly bonuses due Waite for the year ending March 31, 1987, and the "short year" ending July 31, 1987.

Waite has appealed from the court's judgment on his claim for a termination bonus. The corporation does not cross-appeal from that judgment. Waite also appeals from the judgment on his claim for yearly bonuses on various grounds set out below. The corporation cross-appeals on various grounds, set out below, from the judgment on Waite's claims for yearly bonuses. We affirm the judgment of the trial court in all respects.

With regard to Waite's appeal on the issue of the termination bonus, Waite assigns as error the actions of the trial court in (1) failing to grant Waite's motion for new trial based on newly discovered evidence and (2) finding that "James Grove's appraisals most accurately reflected the value of the subject properties" and adopting the values set out in those appraisals as the court's findings. With regard to Waite's appeal from the judgment entered on the yearly bonus issue, Waite assigns as error the actions of the trial court in (1) finding that his claim was not a claim for wages under Neb. Rev. Stat. § 48-1231 (Reissue 1988) and (2) denying his motion for sanctions.

On the termination issue, the corporation does not contend there was any error in the trial court proceedings. On the yearly bonus issue, the corporation assigns as error the actions of the trial court in (1) finding that the employment agreement between the parties was modified by the actions of the parties, (2) finding that the decisions of defendant's board of directors relating to bonuses was not binding on Waite, (3) finding that certain expenditures were not to be considered in determining Waite's bonus for the year ending March 31, 1987, (4) failing to find that the decision of the corporation's independent accountants as to the computation of Waite's bonus for the year ending March 31 was binding on Waite, and (5) "awarding Waite a bonus for the short year ending July 31, 1987." As

stated above, we determine that none of the assignments of error raised by Waite or the corporation have merit.

The record before us shows the following: Waite was hired by the corporation in 1950 as a laborer. He steadily rose through the corporation ranks, taking over responsibility for most of the corporation's construction operations by the early 1960's. At that time, the chairman of the board, Battiato, relegated most of the construction business to Waite so that Battiato could pursue other business interests. In 1966, Waite was named vice president of the corporation and was elected to the board of directors. In 1968, he was elected president and treasurer. The parties have stipulated that Waite left the corporation's employ on July 31, 1987.

The first issue in this case is whether the case presented to the district court was one in equity or in law. Despite the fact that the traditional distinctions between law and equity have generally been abolished, see Neb. Rev. Stat. § 25-101 (Reissue 1989), those distinctions do control in determining this court's standard of review. See Neb. Rev. Stat. § 25-1925 (Reissue 1989); *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973). In an appeal in equity this court tries factual questions de novo on the record. *In re Estate of Widger*, 235 Neb. 179, 454 N.W.2d 493 (1990). In actions at law, factual findings of the trial court in a jury-waived case have the effect of a jury verdict and will not be set aside unless clearly wrong. See *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 456 N.W.2d 474 (1990).

Waite contended that the action to determine the disputed value of the properties for the purpose of calculating his termination bonus is in the nature of an equitable accounting and should be reviewed de novo. Waite also argued, however, that the action to determine the amounts of his annual bonuses should be viewed as a legal action for a declaratory judgment. Waite contended that he had to style the yearly bonus claim as one for declaratory judgment instead of one for breach of contract because he was still employed by the corporation at the time his petition was filed.

At oral argument Waite conceded that his action to value the disputed properties for the purpose of determining his

termination bonus was an action at law. At that time Waite asked this court to review both of his claims as law issues.

The corporation agrees that Waite's action to value the disputed properties is one at law, but contends in its cross-appeal that the claim seeking the calculation of the annual bonus payments is necessarily one for an equitable accounting because of the complexity of the facts to be determined in the annual bonus calculation.

With regard to the corporation's cross-appeal, on the issue of the yearly bonus payments, this court has held that both accounting actions and actions for declaratory judgment can be deemed either law actions or suits in equity, depending upon the nature of the underlying dispute. In *In re Estate of Widger, supra* at 181, 454 N.W.2d at 496, we said that "[a]n action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity." In *Jelsma v. Colonial Penn Ins. Co.*, 232 Neb. 49, 52, 439 N.W.2d 479, 480 (1989), we said that "[a] suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both. [Citation omitted.] Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute."

The dispute on the corporation's cross-appeal is in the nature of an action to determine the amount of a bonus due under an employment contract. We have held that where the essence of the dispute sounds in contract, the action is to be treated as one at law. *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990).

Both Waite's claim for annual bonus payments and for termination compensation were based on the employment contract, and, therefore, issues of law were presented. In that situation the factual findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Union Ins. Co., supra.* We do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party on each of the issues. That party is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Id.* Finally, in a bench trial, the judge sitting

as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal. *Id.*

I

On the issue of Waite's termination bonus, the employment contract entered into by the parties provided that upon termination Waite would receive 25 percent of any net increase or be liable for 25 percent of any net decrease in the value of all real estate which was owned by the company at termination and which was acquired on or after January 1, 1964. The employment contract further provided that within 60 days of termination, the parties would endeavor to agree upon the fair market value of all of the subject real estate. Disputes as to fair market value were to be resolved by a provision which called for an independent appraisal. The corporation was to select three proposed appraisers, all of whom were to be residents of Omaha and members of the Nebraska chapter of the American Institute of Real Estate Appraisers. From these three names, Waite was to choose the independent appraiser, whose opinion was to be binding upon the parties. The parties were to split the cost of engaging the appraiser.

The parties entered into a comprehensive stipulation before trial. The stipulation set values for two properties, but the parties could not agree on the value of six office buildings and one tract of unimproved land. The stipulation also supplemented the contractual procedure for valuing the disputed properties. It provided that if either party was dissatisfied with the results of the independent appraisal, that party could hire its own appraiser. It further provided for the parties to submit any dispute regarding the appraisals to the courts for final determination.

H. James Grove was selected as the independent appraiser under the original procedure outlined in the employment agreement. He submitted a report in June 1988, valuing the disputed properties using an income approach. He valued the six office buildings at $9,910,000 and the unimproved tract at $149,500, for a total of $10,059,500.

In approximately April 1988, Waite engaged Robert J.

Wilson, a qualified appraiser, to do a separate appraisal. Wilson testified that he completed his appraisal before he received Grove's figures. Wilson valued the six office buildings at $11,835,000 and the unimproved tract at $303,000, for a total of $12,138,000.

In August 1988, the corporation also retained its own expert, Charles A. Rasmussen, also a qualified appraiser. Rasmussen primarily used a sales or market approach as opposed to an income approach. Rasmussen valued the six office buildings at $9,535,000. He also testified that he did not rely on Grove's report. He did not appraise the unimproved land.

At trial, the three appraisers, Waite, and Battiato testified. On October 20, 1988, the court issued its judgment order. The order stated in part:

> By way of clarification for the parties to determine the method reached by the Court in arriving at the above valuations, the Court has adopted the valuations placed upon the properties by the appraiser James Grove, since the Court determines that his testimony and evidence was the most credible of the appraisers who testified in this trial, and therefore the Court has placed great weight in the valuations submitted by the appraiser James Grove.

In an order nunc pro tunc dated October 21, 1988, the court valued Waite's share at $1,001,306.75. This figure represented 25 percent of the net increase in market value of the disputed properties appraised by Grove plus the valuations stipulated.

Waite assigns as errors the court's reliance on Grove's valuations and the court's denial of his motion for new trial.

When this record is viewed as a case at law, there is ample evidence to support the district court's adoption of Grove's valuations. Grove had been an appraiser in Omaha for over 30 years and was a member of the American Institute of Real Estate Appraisers. Both parties stipulated as to his credentials. Grove was the appraiser chosen by Waite's counsel from the list of three appraisers provided by the corporation according to the original employment agreement. Grove had prepared appraisals for one of Waite's attorneys on previous occasions.

Although Grove's valuation of the six office buildings was 16.3 percent lower than the valuation of Waite's expert, Wilson,

Grove's valuation was 3.9 percent higher than that of the corporation's expert, Rasmussen. Waite offers a number of arguments as to why Wilson's appraisal methods were superior to Grove's methods. However, the corporation has as many, if not more, arguments supporting Grove's figures over Wilson's. It is not the province of this court to reweigh the complex and voluminous evidence nor to make determinations as to the credibility of the witnesses. The record shows no clear error on the part of the district court in arriving at its judgment.

Waite's other assignment of error on the termination bonus issue concerns the district court's refusal to grant his motion for new trial on this issue. The primary impetus for this motion was a billing statement sent from Grove to the corporation's counsel a week after the trial. The letter sent with this billing stated, "Here is presented the billing for the trial and pre-trial work in the captioned case, which work was accomplished exclusively for you, Mr. Douglas and Mr. Stouffer." The $1,440 billed to the corporation included "[r]eview of Wilson appraisal reports for areas of weakness and comparative analysis against Grove appraisal reports. Two (2) days @ $420. = $840." Waite stated in his affidavit in support of his motion that he was provided a copy of the letter by the corporation's counsel. Two days earlier Grove had sent each party identical bills for $705, representing each party's one-half share of the cost of Grove's trial testimony and pretrial review of his own appraisal reports.

Waite contends that a new trial should have been granted because the trial court's findings in its judgment order were based on the premise that Grove was a neutral arbitration appraiser and that his opinions were intrinsically more objective. Waite contends that the evidence in the letter shows that Grove was in fact not impartial, and thus the trial court erred in giving "great weight" to his testimony and appraisal reports.

The corporation's counsel contends that Grove was consulted after counsel had received the reports of both Grove and Wilson, in an effort to understand the discrepancy between the valuations in the two reports. The corporation's counsel stated that it needed Grove's assistance in order to be adequately prepared for trial.

The corporation's counsel also argues that Waite was aware at the time of trial that the corporation had consulted Grove independently. In this connection, the bill of exceptions shows the following questions and answers from Grove's testimony on direct examination on the first day of trial, when he was called as a witness by Waite:

> Q. [by Waite's counsel] Mr. Grove, after completing and delivering your appraisal reports, or subsequent to that time, have you done any preparation for your appearance today?
>
> A. [by Grove] Sure.
>
> Q. And did you have any meetings with anybody in preparation?
>
> A. Yes.
>
> Q. Who did you meet with?
>
> A. Ah, opposing — your opposing counsel, Mr. Tjaden and —
>
> MR. DOUGLAS: Jack Douglas.

Later, when the corporation recalled Grove as a witness on the second day of trial, the record shows the following testimony by Grove:

> Now you ask me to test this, prepare this worksheet. Now related to Mr. Wilson's value estimate . . . .
>
> . . . .
>
> . . . Well, you had asked me to come up with some calculations that show in my opinion the reason for the differences between Mr. Wilson's value and my value. That's what this is designed to do.
>
> . . . .
>
> . . . [T]he basics in the processing of the method in each report indicates, in my opinion, our differences of opinion and why they are like they are. And that's what you asked me to do.
>
> . . . .
>
> . . . Ah, you asked me to review some of his reports, which I did.

The worksheet referred to was marked as two exhibits, each of which contained Grove's penciled notes explaining the difference between his appraisal and Wilson's appraisal. The

following occurred during cross-examination of Grove by Waite's counsel:

> Q. Well, as I understand your testimony this morning, based on the work you did for Mr. Douglas last night, as opposed to your report that you did for both parties?
>
> A. Yes.
>
> . . . .
>
> A. . . . The technique that I testified to, the material that Mr. Douglas asked me to work up . . . .

Waite's counsel contend that the references made on the second day of trial referred to some computations Grove did the previous evening for the corporation's counsel to help clarify some of Grove's earlier testimony. Waite's counsel contend that they in no way imagined that Grove had spent 2 full days probing Wilson's reports for "areas of weakness." Reply brief for appellant at 4. The facts remain, however, that on the first day of the trial Waite's counsel knew the corporation's counsel had talked to Grove before the trial and on the second day of trial knew that Grove had prepared pencil memorandums explaining the difference in the valuations. Waite's counsel, knowing those facts, permitted the matter to be submitted to the court for decision and did not challenge Grove's testimony until after the trial court had rendered a decision that Waite did not like.

A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). The proof in support of granting a motion for new trial based on newly discovered evidence must show that such evidence was then available which neither litigant nor counsel could have discovered before by exercise of reasonable diligence. *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989).

A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990). Applications for new trial are to be entertained with reluctance and granted with caution. *Smith v. Erftmier*, 210 Neb. 486, 315

N.W.2d 445 (1982).

In considering this motion, the trial court was in a unique position to judge whether Waite's counsel was aware of the extent of Grove's consultations with the corporation's counsel. The court also was in a position to judge whether Grove's comments should have caused Waite's counsel to inquire further when examining Grove as to the nature of the consultations. Finally, the court was in a position to judge the extent Waite was prejudiced by Grove's consultations with the corporation's counsel.

The question whether ex parte consultation with an expert who has been retained by both parties and who is understood by the parties to be neutral is an acceptable practice need not be decided in this case. In this instance, the determination as to whether the disputed consultation was so prejudicial as to require the granting of a new trial was a matter to be determined within the trial court's discretion. The court's judgment was based not only on the credibility of the testimony, but on the evidence contained in Grove's appraisal reports. Those reports were all prepared and delivered to counsel for both parties before any possible impropriety on the part of the corporation's counsel. Most importantly, as stated above, Waite's counsel was aware of the questioned consultation before the matter was submitted to the court and did not raise the issue. Denial of the motion for new trial was within the discretion of the trial court. There was no error in connection with the determination of Waite's termination bonus.

II

Waite raises two issues on his appeal on the yearly bonus issue. The court denied his claim for attorney fees under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissues 1984 & 1988), and Waite contends that determination is erroneous. The parties state that the court denied appellant's motion for sanctions due to an alleged frivolous counterclaim that was dismissed immediately before trial, and Waite contends that denial was erroneous.

The trial court denied Waite's claim for attorney fees under the Nebraska Wage Payment and Collection Act, §§ 48-1228 et

seq. Waite contends that § 48-1231 (Reissue 1988) entitles him to minimum attorney fees of 25 percent of the judgment on the yearly bonus issue, plus 25 percent of the judgment on appeal. Waite also contends it would be appropriate to award a matching amount to the common schools under § 48-1232 (Reissue 1988).

In both contentions, Waite cites *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988). In *Suess*, this court held that an employee's share of the profits of his employer under a profit-sharing plan can be wages within the meaning of § 48-1229(3) (Reissue 1984). We have also held that a bonus may be wages under the Nebraska Wage Payment and Collection Act. *Knutson v. Snyder Industries, Inc.*, 231 Neb. 374, 436 N.W.2d 496 (1989).

The business arrangement in this case is distinguishable from the profit-sharing and bonus arrangements in the above-cited cases.

Paragraph 7 of the employment contract provides:

> In the event that any such computation shall disclose that the company sustained a net loss rather than a net profit for any year, then the company shall have the right to deduct from Waite's salary for the following year an amount equal to 25% of such loss. If such salary is not sufficient to cover said 25%, Waite shall pay to the company on demand any portion of said 25% that is not deducted or deductible from such salary.

This sort of an agreement is not a "bonus" as we have used that term in *Knutson v. Snyder Industries, Inc., supra*, nor is it a usual "profit-sharing" plan as defined in *Suess v. Lee Sapp Leasing, supra*. The risk-sharing aspect of the agreement makes it somewhat like a joint venture, although obviously the employment agreement contemplates more than a single transaction.

Although Waite was never a shareholder in the company, his status was also somewhat akin to that of a partner, considering the fact that he shared in 25 percent of all profits and losses. It is also significant that Waite earned well over $1 million in bonuses and was liable on personal guaranties for millions of dollars loaned to the corporation during the time that he served

as an executive officer of the corporation. This type of business relationship is certainly not the typical employment relationship embodying a disparity of economic power that the statute seeks to regulate.

The court is aware that § 48-1229 of the Nebraska Wage Payment and Collection Act defines an employee as "any individual permitted to work by an employer." This definition is broad enough to include Waite. However, we affirm the district court's finding that Waite's bonus did not constitute wages under the act, because the risk of loss associated with those sums prevents them from meeting the definition of wages under § 48-1229(3).

Section 48-1229(3) provides: "Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." Using this definition of wages, it is clear that this aspect of Waite's compensation cannot be considered a "fringe benefit" for the purpose of the Nebraska Wage Payment and Collection Act. A benefit has been defined as an "[a]dvantage; profit . . . gain" or "something to advantage of, or profit to, recipient." Black's Law Dictionary 158 (6th ed. 1990). Where an employment agreement provides for the sharing of possible financial losses, sums collected under such a contractual provision are not "benefits" which could be considered "wages" under § 48-1229(3).

Finally, we must consider appellant's argument that he should be awarded attorney fees and costs incurred in defending an alleged frivolous counterclaim dismissed just before trial. There is no evidence in the record of any effort or expense undertaken in defending the counterclaim. We affirm that determination.

## III

We now address the corporation's cross-appeal. The contract provision at issue in this case is denominated as paragraph 6. That provision states:

6. The term "net profits", as used in paragraph 5

> hereof, shall mean those net profits actually realized by the company after deduction therefrom of the fixed annual salary due Waite hereunder, taxes (excluding taxes on income) and interest, but without any provision for the depreciation of buildings or other improvements on land and without taking into account any net profits or net losses with respect to any property or assets acquired by the company before January 1, 1964. The books and accounts of the company shall be audited and such net profits shall be computed by the independent public accountant then regularly employed by the company, within ninety (90) days after the end of each year for which net profits are to be determined hereunder. Such computation shall be made in conformity with generally accepted accounting principles and shall be final, binding and conclusive upon the parties hereto. When such computation has been made for each year, the company shall deliver to Waite a full and correct itemized report, duly certified by such accountant, showing the company's net profits for such year, computed in accordance herewith, and Waite's percentage thereof by way of additional compensation and shall remit to him the amount of such additional compensation. In the event of the termination of this agreement during the course of any year, such computation shall be made on a pro rata basis for that fraction of the year up to the date of termination.

The testimony of the parties shows that from 1966 to 1986, the computation of Waite's bonus varied from the above provisions. Both Waite and Battiato testified that in order to avoid the expense of an audit, Waite's bonus was always computed on the basis of a profit-and-loss recap prepared by the corporation bookkeeper. The format for this recap had been in place before Waite's employment with the corporation and had been used in calculating other employees' bonuses. Battiato and Waite would discuss the recap and tentatively determine the 25-percent bonus. The accountant hired by the corporation to compile the corporation's annual financial statements would then go over the books, prepare a draft, and prepare a worksheet. Waite and Battiato would then go

over the final figures with the accountant and all bonuses would be approved.

In 1977, the corporation approved an agreement providing for deferred compensation for Battiato in the case of his death, disability, or retirement. A copy of the minutes of that meeting shows that Battiato assured Waite that the deferred compensation would not affect the computation of Waite's bonus, but that only Battiato's basic salary would be deducted before computation of the bonus, as was the past practice. In the period between 1966 and 1986, no bonuses of any employee, including Battiato, were ever deducted before the computation of Waite's bonus.

On September 17, 1979, Waite entered into an amendment to the 1966 employment contract. In addition to recognizing Waite as president of the corporation, the amendment stated that "[i]n determining 'net profits' under paragraph 5, all ordinary and usual operating expenses, including the fixed annual salary of Roland F. Waite and Anthony S. Battiato shall be deducted."

Waite gave notice in October 1986, that he would be leaving the company. The parties have stipulated that Waite actually left the company on July 31, 1987.

The controversy on the corporation's appeal concerns the computation of Waite's bonus for the fiscal year ending March 31, 1987, and the computation of Waite's bonus for the additional 4 months he was with the corporation up to July 31, 1987.

The evidence shows that the company bookkeeper, then Maralee Battiato, prepared a profit-and-loss recap for the fiscal year ending March 31, 1987, as had been the past practice. The recap showed a net profit of approximately $500,000. However, Waite's bonus was not computed based upon this profit-and-loss recap. Instead, the accountants hired by the company to compile the corporation's annual financial statements prepared an alternative computation of Waite's bonus without any reference to the profit-and-loss recap prepared by the bookkeeper.

Alden Awerkamp of Awerkamp & Associates, the accounting firm retained by the company, testified that in

January or February of 1987, he was approached by Battiato with a copy of Waite's employment agreement. Awerkamp testified that Battiato asked him to review the agreement and give an opinion as to how it should be interpreted. This occurred only a few months after Waite had announced he would be leaving the company. Awerkamp had also reviewed Waite's agreement in 1981, and no changes had been made in the procedure in calculating the bonus after that time.

Awerkamp directed one of his associates, Thomas Schwaller, to review the employment agreement. Schwaller testified that his review of the contract led him to believe that the past bonus computations had not been made in accord with the terms of the employment agreement. Schwaller made his own computations, and they were presented to Battiato. In contrast to the large net profit obtained under the traditional recap computation made by the company bookkeeper, Schwaller's computation showed a net loss.

On March 27, 1987, a special shareholders' meeting was convened. Present at the meeting were shareholders Battiato; his wife, Rose L.; his son, Anthony J. (who by then had been elected vice president and secretary of the corporation); and his daughter, Maralee (who had been made the company bookkeeper on July 3, 1986). Also present were Awerkamp and corporate legal counsel. The first act at this meeting was to remove Waite from the board of directors and replace him with Battiato's daughter. Waite testified that he was not informed that he had been removed from the board until this litigation commenced several months after the meeting. The shareholders then voted to set up an account to charge the substantial impending termination compensation due Waite against net profits. The minutes state that "the account to be established for compensation which may be due Mr. Waite would be taken into account in considerating [sic] the computation of all employees' bonuses."

Immediately following the shareholders' meeting, a special meeting of the board of directors was held with the same parties present. Waite had no notice of either of these meetings. The board authorized substantial bonuses to Anthony J. Battiato and Maralee Battiato. No bonus was authorized for Waite. The

board also estimated the total probable liability due Waite upon termination to be $900,000.

Waite testified that in March 1987 he began to urge Battiato that they should sit down with the bookkeeper and determine the annual bonuses. The bonuses had to be paid by March 31 for tax purposes. Battiato informed Waite that he had already paid the bonuses. Waite testified that when he inquired as to his own bonus, Battiato told him that the accountant would take care of it. Waite testified that in the past he had always delivered the corporation's books to the accountant.

Waite testified that after several evasive encounters, Awerkamp gave him a slip of paper with figures on it that Awerkamp said Battiato had told him to deliver. The slip showed a loss of $27,150.48 for purposes of computing Waite's bonus. Waite rejected that computation and told Awerkamp he wanted a more detailed computation, in the same format as had been used in the past. Awerkamp then delivered a sheet showing a net loss of $47,867.72. Waite testified that Awerkamp told him that he did not know why the two figures differed. Following that encounter, Waite hired counsel and commenced this action.

Both parties adduced evidence during 3 days of testimony on this issue. The court served as the trier of fact. On the issue of the yearly bonus, the court found generally in favor of Waite. Specifically, the court found that (1) the parties entered into an employment agreement dated March 1966 and amended September 17, 1979, providing for a bonus to be paid to the plaintiff in the sum of 25 percent of net profits, as computed by an independent public accountant after the books had been audited; (2) the parties by their actions did not have the books audited during the entire length of the contract but, instead, computed the bonus from a profit-and-loss recap prepared by the corporation bookkeeper; (3) the net profits were determined to be profits actually realized by the corporation after deductions for ordinary and usual operating expenses; (4) the practice of the parties and the manner in which the contract was treated by the parties modified the employment agreement to provide for the computation of Waite's bonus by an unaudited profit-and-loss recap by the corporation

bookkeeper; (5) bonuses were not to be charged against profits before the computation of Waite's bonus, so that the unilateral decision of the board of directors to charge all employees' bonuses against profits and to set up an account to charge deferred compensation as an expense in determining Waite's bonus was of no binding effect on Waite; (6) since the corporation had consistently over the years of the contract computed net profits on income actually realized and expenses actually incurred during the fiscal year, the corporation could not unilaterally change the method of accounting in computing the bonus; and (7) $101,000 in bonuses to the Battiatos, $300,000 of the impending termination payment owed Waite, and $112,664 of income realized in 1987 for the sale of property in 1985 were not to be excluded from income in computing Waite's bonus in 1987. The trial court also found that $40,104 in partnership losses should not have been deducted from net profits in computing Waite's bonus.

The court therefore increased the amount to be used by the corporation in calculating Waite's bonus. The court determined that Waite's share amounted to $126,475.22. The court further determined that the amount of Waite's bonus for the short year ending July 31, 1987, was 25 percent of $24,236.51, or $6,059.13.

The corporation asserts that the trial court's finding that the employment agreement was modified by the parties was an error at law in that the trial court applied a rule of law for the interpretation of ambiguous agreements when the evidence established there was no ambiguity in the agreement as it related to the computation of bonuses. However, the question whether the original written contract contains ambiguities does not arise where the parties have affirmatively modified or assented to change in the specific terms of the agreement.

This court has held that a written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

In *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 322, 466 N.W.2d 73, 78 (1991), we said:

> 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).

It is undisputed that the parties so acted as to establish an agreement not to compute Waite's bonus on the basis of an audited profit-and-loss statement prepared by a hired accountant, as was required by the original written agreement. Instead the bonus was always computed by a profit-and-loss recap prepared by the corporation bookkeeper. There is sufficient evidence to support the fact that Battiato agreed to the computation of bonuses in this manner and that he in fact went over the numbers before the bonuses were approved. The record supports the trial court's finding that the employment contract was modified to replace the method contemplated by the original written contract with this method of bonus computation. Therefore the court correctly included certain sums under net income for the computation of Waite's bonus that were excluded under the computation presented to Waite.

There are dual criteria for affirming the district court's inclusion in net income for bonus calculation purposes of the $101,000 in bonuses paid to the Battiatos. The testimony at trial was that under the profit-and-loss recap method, no bonuses were to be deducted before the computation of Waite's bonus. Additionally, the 1979 amendment to Waite's employment agreement requires that only ordinary and usual expenses, including fixed salaries, would be deducted before the computation of Waite's bonus.

The court also correctly included in net income the $300,000 which was ordered deducted by the board of directors. This

speculative amount, which the board wished to deduct from net income to reflect its pending termination obligation to Waite, cannot reasonably be considered an "ordinary and usual operating expense" which could be deducted before computation of Waite's bonus. The board of directors is of course without power to unilaterally abrogate the contractual obligations of the corporation. The board therefore could not change the method of computing Waite's bonus without Waite's assent, because such a change would amount to a modification of the contract between Waite and the corporation without Waite's consent.

The argument that the employment contract required that this amount be deducted under "generally accepted accounting principles" is also inapposite. The agreement was modified by the conduct of the parties, so that the bonus was to be computed on the basis of the profit-and-loss recap, and not on the basis of an accountant's audit prepared in accord with generally accepted accounting principles. In addition, Roy Thylin, one of the corporation's experts, testified that generally accepted accounting principles generally apply in the context of presentation of financial reports for use by third parties. He testified that there are no "generally accepted accounting principles" which provide guidance on how to interpret an agreement to determine an employee's bonus.

The corporation alternatively argues that the court must nevertheless accept the decision of the company's independent accountants as binding, because that was also a term of the original employment agreement. But this argument also ignores the court's finding that the agreement was modified with respect to the means of computation of Waite's bonus.

The evidence also supports the court's inclusion of $112,664 from an installment sale in 1985 in net profits for the fiscal year ending March 31, 1987. The court heard testimony to the effect that the entire sale should have been recognized in 1985 under generally accepted accounting principles. However, the court found that the method of bonus computation as modified by the parties based net income on profits actually realized and expenses actually incurred during the fiscal year. The $112,664 payment was not actually realized, that is, received, until the

year ending March 31, 1987. Waite did not receive his share of that payment in 1985. The corporation's counsel conceded at oral argument that Waite's share of that payment was owed him in some manner. Because the agreement of the parties was modified to recognize profits when they were actually realized, the profit on the installment sale was properly included in net profits for the fiscal year ending March 31, 1987.

The district court also found that $40,104 in partnership losses should not have been deducted from net profits for the purpose of computing Waite's bonus. The court found that "[t]he sum of $40,104.00 styled as partnership loss should not be considered in arriving at net profits since this is derived from partnerships between Roland Waite and A.S. Battiato and is not a holding of the corporation and the Court does not recall any evidence to the contrary."

It appears from the record that the court was mistaken in finding that the corporation was not a party to these partnerships. However, the evidence still supports the court's refusal to deduct these losses from net profits before computing Waite's bonus. The figures for losses to the partnerships were computed by tax accounting methods, which differ from accounting methods used to determine profits and losses in compiling financial statements. The partnership tax losses reflect substantial deductions for depreciation on real estate. Deductions for depreciation are specifically excluded under Waite's employment agreement. It was therefore proper to refuse to deduct these amounts in computing Waite's bonus.

We affirm the district court's determination that Waite's bonus for the fiscal year ending March 31, 1987, is $126,475.22. We also affirm the court's finding that Waite's bonus for the short year ending July 31, 1987, is $6,059.13. This latter figure was ascertained by taking 25 percent of the net profits computed under the bookkeeper's profit-and-loss recap for that 4-month period. The district court's total judgment of $132,534.35 on this issue is affirmed.

The judgment of the trial court is affirmed in its entirety.

AFFIRMED.

WHITE, J., dissenting in part.

I disagree with the majority's interpretation of the Nebraska

Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissues 1984 & 1988) in regard to Waite's claim for attorney fees under the act.

Section 48-1229(3) (Reissue 1984) defines wages as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."

The majority's analysis of the statute is limited to a discussion of whether Waite's bonus constitutes a fringe benefit. I agree that it does not. However, the majority has failed to apply the plain language of the statute, in that Waite's bonus may be considered "compensation for labor or services . . . whether the amount is determined on a time, task, fee, commission, *or other basis*." (Emphasis supplied.)

Waite's bonus certainly fits within this definition. His bonus was part of his compensation for labor or services and was previously agreed to by Waite and the corporation. Waite met the conditions for payment of the bonus, and the bonus was calculated on a basis not specifically mentioned, but not excluded by the statute. The fact that Waite's bonus agreement included risk assumption on his part does not summarily exclude him from the statutory definition.

The majority's statement that this type of business relationship "is certainly not the typical employment relationship embodying a disparity of economic power that the statute seeks to regulate" is not supported by any authority delineating the intent or legislative history of the statute. Absent clear legislative intent to the contrary, we must follow the plain language of the statute. Waite's claim for his bonus fits within the statutory definition, and he should be awarded attorney fees as mandated by § 48-1231 (Reissue 1988).

SHANAHAN, J., joins in this dissent.

# DENNY D. PETERSON AND NANCY K. PETERSON, APPELLANTS, V. CORNHUSKER CASUALTY COMPANY ET AL., APPELLEES.

469 N.W.2d 553

Filed May 24, 1991. No. 89-064.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.
2. **Insurance: Contracts: Words and Phrases.** Cancellation of an insurance policy means the termination of the policy prior to the expiration of the policy period by act of one or all of the parties, while termination of a policy means expiration of the policy by lapse of the policy period.
3. **Insurance: Contracts: Notice.** An insurer has no duty to notify the insured of the expiration date of a policy or of its intention not to renew the policy, unless such notice is required by agreement of the parties or by statute, or unless the insurer has by custom or course of dealing with the particular insured led him to believe such notice would be given.
4. **Insurance: Contracts.** The insured is charged with knowledge of the expiration date stated in the policy when that date is clearly stated.

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

Richard L. Kuhlman, of Kuhlman Law Office, and John G. Tomek, of Tomek & Tomek, for appellants.

William H. Selde, of Sodoro, Daly & Sodoro, for appellee Cornhusker Casualty Co.

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

WHITE, J.

Denny D. and Nancy K. Peterson filed suit in Dodge County District Court against the insurance company, its agent, and other parties to collect on an insurance policy which covered property the Petersons had sold on a land contract. They now appeal the grant of summary judgment to the defendants-appellees. We affirm.

In May 1985, the Petersons entered into a contract to sell their home in North Bend, Nebraska, to Robert Mullally. Along with the sale, the Petersons and Mullally executed an

assignment of the contract of insurance to Mullally and executed a contract of sale endorsement to the insurance policy, which purported to give the Petersons an insurable interest in the property. The assignment provided that the policy would cover a single-family owner-occupied dwelling and that the named insured in the policy declarations was Mullally.

Mullally paid the remainder of the premium due to keep the policy in force from May 15, 1985, to January 10, 1986. When the policy expired, it was renewed by the agency for the term of 1 year from January 10, 1986, to January 10, 1987. The premium of $101, which provided $12,000 coverage for the dwelling and $6,000 coverage for personal property, was prepaid by representatives of the agency on behalf of Mullally.

The agency notified Mullally on January 8, 1987, that the policy had lapsed because he had not paid for the previous year's coverage. Mullally was told that he could renew the policy by paying the back premium and 50 percent of the new premium. Mullally apparently took no action, and on March 23, 1987, the home was damaged by fire.

The Petersons brought suit against the insurance company, Cornhusker Casualty Company; the agency, Wolf Insurance Agency, and its owners; the agent, Steve Grueber; the Petersons' mortgagee, Equitable Federal Savings and Loan Association of Fremont; and the vendee, Mullally. The demurrers of the agency and its owners, the agent, and the bank were sustained, and the motion for summary judgment by Cornhusker was granted and the petition dismissed. The Petersons do not appeal from the dismissal of the action as to the sustaining of the demurrers of these parties, but appeal only the grant of summary judgment for Cornhusker.

> "A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990); *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682

(1990). . . ."

*First Corporate Fin. v. Rogers*, 237 Neb. 727, 727-28, 467 N.W.2d 853, 854 (1991), quoting *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990).

The Petersons contend that they were named insureds of the policy and held an insurable interest in the property based on the contract of sale clause appended to the insurance policy. As such, they argue that they were not given the required notice of the cancellation of the policy and were not able to obtain other coverage prior to the fire. The Petersons assert that they "relied upon the Defendant notifying them if the premium was unpaid." Brief for appellants at 10.

However, as Cornhusker points out, there is no provision in the policy which entitles the Petersons to notice of the expiration. The policy has a provision which provides that the mortgagee shall be given 10 days' notice if the policy is canceled by the company, but we are not dealing here with a cancellation. As the Missouri Court of Appeals has stated, cancellation means the "termination of a policy prior to the expiration of the policy period by act of one or all of the parties," while termination means "expiration of the policy by lapse of the policy period." *Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W.2d 218, 220 (Mo. App. 1973). The court held that a policy which was in force for 12 months terminated or expired by the lapse of the policy period.

> No duty rests upon an insurer to notify the insured of the expiration date of his policy, or of its intention not to renew the policy, unless such notice is required by agreement of the parties or by statute, or unless the insurer has by custom or course of dealing with the particular insured led him to believe such notice would be given.

*Waynesville Security Bank, supra* at 222.

We have been provided no evidence of an arrangement, custom, or course of dealing which would place a duty on Cornhusker to notify the Petersons of the policy's expiration date. "[N]either the insurer nor its agent has a legal duty to give notice of the expiration of a policy, generally on the cogent ground that the insured is charged with knowledge of the expiration date stated in the policy." *Citta v. Camden Fire*

*Insurance Assoc., Inc.*, 152 N.J. Super. 76, 78, 377 A.2d 779, 780 (1977).

As we have earlier noted: "[A] custom to renew, even if established, does not bind the insurer unless it is also binding upon the insured. There must be a contract to renew as distinguished from a mere custom." *Siewerdsen v. United States F. & G. Co.*, 184 Neb. 870, 872, 173 N.W.2d 27, 28 (1969).

The policy also included a provision that the named insured would be given 30 days' notice if the company elected not to renew. We do not find that Cornhusker elected not to renew, but that the policy lapsed and that Mullally chose not to renew by his failure to pay the premiums for 1986-87 and 1987-88. The plaintiffs have provided no evidence that Cornhusker made the determination not to renew which would invoke the duty to give the named insured 30 days' notice of the policy's expiration date.

The Iowa Supreme Court has held that when the policy language defines the policy period as a definite and specific term, the policy automatically expires at the end of that term, and no notice is required. *First Nat. Bank in Sioux City v. Watts*, 462 N.W.2d 922 (Iowa 1990). In that case, the court found that the bank did not have an automatic termination provision, nor was it given the opportunity to renew, but it did have the declaration page of the policy which clearly specified the date of the end of the policy period.

> Where there is a clearly stated expiration date, the insured is charged with knowledge of it. . . .
>
> . . . .
>
> . . . [A]bsent a policy or statutory provision to the contrary, an insurer is under no inherent duty to notify a loss payee of the policy's expiration date or that the insured has failed to renew.

*First Nat. Bank in Sioux City, supra* at 927.

The agreement for the sale of real estate entered into between the Petersons and Mullally also contained a provision concerning insurance:

> It is agreed the Buyer shall maintain insurance on the premises for loss against storm, wind, fire and other losses

> in an amount not less than Twelve Thousand Dollars ($12,000.00), loss payable to the parties hereto as their interests appear. Said Buyer shall furnish a certificate of said insurance to the Sellers not less than annually.

This agreement was signed by the parties on May 8, 1985. There is no evidence that Mullally ever supplied the necessary certificate of insurance prior to the fire on March 23, 1987, or that the Petersons ever inquired about the insurance. They suggest that they were always willing and able to pay the premium on demand by Cornhusker, but there is no provision which requires Cornhusker to make that demand.

We agree with the defendant's assertion that the provisions, conditions, terms, and definitions in the contract clearly provide that if Cornhusker had determined that it would not renew the policy, then any notice sent 30 days before expiration would have been issued to Mullally. The named insured on the declarations page is Mullally, and the named mortgagee is Equitable Federal Savings and Loan. As we noted in *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 608, 150 N.W.2d 114, 117 (1967), "Courts are ordinarily reluctant to hold that third persons have higher rights under a policy of insurance than the insured in the absence of express contractual or statutory provisions."

We agree with the trial court's findings that no genuine issue of material fact remained and that the defendant was entitled to judgment as a matter of law. We affirm the trial court's grant of summary judgment for the defendant.

AFFIRMED.

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ANTHONY ABBOUD AND ROBERT DOYLE, APPELLANTS, V. H. MICHAEL CUTLER AND BETTY F. CUTLER, APPELLEES.

469 N.W.2d 763

Filed May 24, 1991. No. 89-122.

1. **Court Rules: Pretrial Procedure.** Where a certificate of readiness or similar document is required by local rules of practice to be prepared and filed and may

provide the basis for judicial action, it shall be filed in the office of the clerk of the court rather than with a court administrator, a bailiff, or other official.

2. **Motions for New Trial: Time: Appeal and Error.** The time in which to file an appeal cannot be extended by successive filings of motions for new trial.
3. **New Trial: Words and Phrases: Motions to Vacate: Motions for New Trial.** A new trial is a reexamination in the same court of an issue of fact after a decision by the court. Therefore, as a general rule, a motion to vacate an order of dismissal is equivalent to a motion for a new trial.
4. **Records: Appeal and Error.** Where evidence does not appear in the record, it cannot be considered on appeal.
5. _____: _____. It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
6. **Courts: Judgments: Appeal and Error.** Trial courts have the inherent power to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.

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

Richard F. Welling, Kelle J. Westland, and Alan M. Thelen, of Breeling & Welling, for appellants.

James D. Sherrets and Mark A. Weber, of Sherrets & Smith, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

This is yet another example of "a procedural nightmare, brought about by the simple expediency of counsel's ignoring or failing to abide by the time restrictions ordered by the court." See *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10, 11 (1987).

Plaintiffs filed their petition in this case on November 16, 1987. Defendants' demurrers were filed on December 1, 1987, and overruled on January 7, 1988. The record discloses no order respecting the filing of answers, but defendants did in fact file their answers on March 3, 1988. Plaintiffs served interrogatories on defendants on May 10, 1988, and on July 27, 1988, plaintiffs' motion to compel answers to interrogatories was sustained. A letter dated August 18, 1988, advising

plaintiffs that their case would be dismissed unless a certificate of readiness was filed within 30 days was mailed by the court. Defendants served answers to interrogatories on August 29, 1988, and on September 12, 1988, the court entered an order excusing the filing of a certificate of readiness until January 12, 1989. The court made a docket entry on January 13, 1989, which stated, "Case dismissed w/o prejudice. Progression Letter."

Plaintiffs, on January 18, 1989, filed a "Motion to Vacate Dismissal," alleging that an attempt was made to file a certificate of readiness on January 17, 1989, which filing was refused by the court administrator because it was out of time.

On January 25, 1989, the court entered its docket entry as follows: "Parties appeared by counsel. Arguments heard. Defendants[']motion to vacate dismissal overruled. Case stands dismissed."

Plaintiffs filed on January 26, 1989, a "Motion for Reconsideration & Motion for New Trial," which was overruled on February 13, 1989. Plaintiffs' notice of appeal states that they "give notice of such appeal of this Court's dismissal of their cause of action, and the Court's subsequent denial of vacation of such dismissal." The notice of appeal was filed on February 13, 1989.

The bill of exceptions consists of the record of a hearing held February 8, 1989, on the plaintiffs' *motion for reconsideration of the dismissal.* The evidence included an affidavit from one of plaintiffs' attorneys, alleging that on January 9, 1989, another member of that firm submitted a memo to her stating that the certificate of readiness had to be filed by January 12, 1989. The attorney goes on to state that on January 12, 1989, she learned one of her clients was being investigated by the Department of the Treasury's Secret Service division for alleged credit card fraud and that she spent that day and the next on that matter. Finally, on Tuesday, January 17, following a Monday holiday, she filed a certificate of readiness with the court administrator, who later discarded the certificate as being out of time. Although the court administrator is without authority to refuse the tender of a certificate of readiness, the fact remains that the tender was out of time. Nevertheless, since the certificate is a

document that may provide the basis for judicial action, as in this case, it should have been filed with the clerk of the district court. The local practice of handing the certificate to the administrator for filing is disapproved.

The bill of exceptions also contains a copy of the trial docket in the district court for Douglas County, docket 839, page 414, in the case entitled "Anthony Abboud and Robert Doyle vs Forrest R. Michals, Jr., ~~H. Michael Cutler and Betty F. Cutler~~ and Twin Towers, Ltd, a Nebraska limited partnership." This was received in evidence over the objection of plaintiffs' counsel as to relevancy to the instant case, which objection was disregarded by the court with the statement "As I recall, they're pretty well interlocked. This one came out of the present case." The court went on to state that "[m]y recollection was that Judge Buckley said something about you didn't have a shot in one way but maybe you would in another, something like that."

Plaintiffs also pointed out at this hearing that the statute of limitations had in all probability run and that an attempt to refile the case would be met with that objection.

Plaintiffs' assignments of error are that the trial court abused its discretion in dismissing plaintiffs' action and refusing to reinstate it and in receiving in evidence the docket sheet from the other case.

By filing a motion to vacate and later filing a motion to reconsider and for a new trial, plaintiffs have unduly complicated the procedure. Defendants suggest that this court is without jurisdiction to hear this appeal because of the failure of plaintiffs to file a motion for new trial within 10 days of the order of dismissal (January 13 to January 26) and, in the absence of a motion for a new trial, to file a notice of appeal within 30 days of the order of dismissal (January 13 to February 13). They argue that the time for appeal cannot be extended by a party with successive filings of motions for new trial. This is a correct statement of the law. See *State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113*, 200 Neb. 525, 264 N.W.2d 422 (1978).

However, defendants overlook the motion to vacate dismissal which was filed by plaintiffs on January 18, well within 10 days of the January 13 order of dismissal. That

motion is equivalent to a motion for a new trial. See, *Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 196 Neb. 158, 241 N.W.2d 674 (1976). "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. . . ." Neb. Rev. Stat. § 25-1142 (Reissue 1989).

The defendants also ignore the fact that February 12, 1989, fell on a Sunday, therefore a notice of appeal filed on Monday the 13th would be in time.

As previously pointed out, the bill of exceptions relied upon by both parties was in connection with a hearing on the overruling of plaintiffs' motion to reconsider and has no relationship to the motion to vacate. Therefore, we have no bill of exceptions to examine. Where evidence does not appear in the record, it cannot be considered on appeal. *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990). It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court is to be affirmed. *Howard v. Howard, supra.*

Trial courts have the inherent power to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978). No such showing appears in the record properly before us.

The judgment of the district court is affirmed.

AFFIRMED.

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COLLECTION SPECIALISTS, INC., A DIVISION OF GENERAL SERVICE BUREAU, INC., APPELLANT, V. GEORGIA L. VESELY, APPELLEE.

469 N.W.2d 549

Filed May 24, 1991. No. 89-143.

1. **Dismissal and Nonsuit.** Any time before final submission of the case to the fact finder, plaintiff may dismiss an action, without prejudice, as a matter of right.

2. **Motions to Dismiss.** A trial court, after submission of a case, has discretion to grant a plaintiff's motion to dismiss without prejudice, depending on the facts and circumstances of the case before the court.
3. **Judges.** Justice is better served when judges remember they are adjudicators, not litigators.

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

William V. Brown for appellant.

Lowell R. Johnson and Dennis E. Martin, of Martin & Martin, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiff, Collection Specialists, Inc., appeals from an order of the Sarpy County District Court reversing and remanding a decision of the county court for Sarpy County. The cause was remanded to the county court with directions to deny plaintiff's motion to dismiss without prejudice, made at the conclusion of all the evidence in the case, and to grant defendant's motion for a directed verdict. Plaintiff timely appealed to this court, assigning as error the actions of the district court in determining that the case had been finally submitted to the county court and in finding that the county court abused its discretion in allowing the plaintiff to dismiss its petition without prejudice. We affirm the judgment of the district court.

The record shows the following: Plaintiff, as assignee of a claim by Lutheran Medical Center against the defendant, Georgia L. Vesely, commenced this action in the county court for Sarpy County. Plaintiff's petition, as filed, alleged that "[t]he defendant is indebted to the following creditors who have assigned their claim against the defendant to the plaintiff and who have provided necessaries of life: Lutheran Medical Center $3393.40."

At trial in county court, only one witness testified. That witness identified two exhibits. Exhibit 1 was a detailed bill of

hospital charges totaling $13,972.65 incurred by a James M. Horst. This bill identified Horst as the patient and defendant as the "Guarantor." There was no evidence submitted as to a guaranty. The business manager of Lutheran testified that the medical center had received payments of $10,579.25 from Crown Life Insurance Company. No evidence was submitted as to any connection between the defendant and Horst, the defendant and Crown Life, or Horst and Crown Life. Plaintiff then rested.

Defendant then moved to strike certain parts of the bill, and stated to the court, "You're going to need a guarantee. It's a statute of frauds, that if you're going to guarantee the debt of another . . . ." Counsel for plaintiff then stated to the court, "As to the objection to the guarantor, I believe the hospital uses that phrase a little differently than a cosignor on a note which would fall under statutes of frauds. Guarantor, I believe, will mean the person [who] the insurance is billed to."

Defendant then proceeded to cross-examination and directed two questions to the business manager, who testified that the patient's name was James Horst and that the services were provided for Horst. The court then asked counsel for plaintiff if there was "anything else." Counsel replied, "Nothing further, Your Honor." Defendant's counsel then stated, "Defendant rests." The court then asked, "Any rebuttal evidence Mr. Brown [plaintiff's counsel]?" Counsel replied, "No, Your Honor."

Counsel for defendant then stated, "After he [plaintiff] rested I meant to make a motion for a directed verdict . . . ." Counsel for both parties then argued to the court.

Defendant's motion was based on plaintiff's failure to establish any relationship between defendant and Horst and on plaintiff's failure to produce any writing signed by defendant guaranteeing the debt. Counsel for plaintiff responded as follows:

> Well, Your Honor, the fact is that Miss Vesely — You say that we didn't have anybody testify to the fact that she had — That we have had testimony to the fact that she had the account billed to her insurance, that $10,000 were [sic] paid from her insurance company for that patient. And

that the account was billed to her and her responsibility. Other than that I have nothing further.

This response was purely argument. There was no testimony concerning defendant's insurance, nor was there any testimony concerning defendant's "responsibility." Without ruling on defendant's motion for a directed verdict, the county court suggested to plaintiff that its petition was deficient. The following proceedings ensued:

THE COURT: Okay. Your petition doesn't allege that you're suing on a guarantee either. Does it?

MR. BROWN: No, Your Honor. But this isn't - - -

THE COURT: I'll give you leave to amend it, if you wish, to say that that's what you are doing.

MR. BROWN: Okay. If I may.

THE COURT: But you're not — You don't allege that in your petition. If you're suing on a guarantee, so.....

MR. BROWN: Okay. Well - - -

THE COURT: That's the evidence and I'll let him amend. I understand you're going to object to it.

. . . .

THE COURT: But I'm going to — I'm going to let him go ahead and amend anyhow. So, I'll go ahead and let you amend instanter by interlineation to show that you're suing on a guarantee, so — I take it, Mr. Martin [defendant's counsel], you must have known that?

MR. MARTIN: Not really. I — There's no guarantee around to see. I've never seen a guarantee. . . .

THE COURT: Well, I presume your client must have known that — that she wasn't hospitalized during that period of time and that she didn't have — incur a bill for her own medical care or hospitalization that - - -

MR. MARTIN: That's right. That's why she's not liable for this gentleman's bill.

THE COURT: - - - that visit in the hospital. Well, I — That's another question. But — So, I take it your client must have known that they were suing on some kind of guarantee. The evidence is that her insurance company did pay $10,000 on the bill. - - -

MR. MARTIN: Now - - -

THE COURT: - - - So, I presume that they must have known — she must have known something about that, so.....

MR. MARTIN: There was evidence that Crown Life paid, but no evidence of — what the relationship was between her and Crown Life.

THE COURT: Well, that's true, but it was indicated that it was her insurance company I believe, so at least — billed to her address, so - - -

Over defendant's objection, the court then allowed plaintiff to amend its petition by interlineation to read the Lutheran Medical Center "provided necessaries of life *to James Horst whose account was guaranteed by Georgia L. Vesely.*" (Emphasized words are those added by the permitted interlineation.)

Defendant then moved to amend her answer to allege a statute of frauds defense. The court granted a short recess to allow defendant to find the proper statutory reference. Sometime before the court reconvened, defendant's answer was amended to allege that the "purported Guarantee must be in writing in accordance with 36-202 of the Neb. Statutes." The record is unclear as to when this amendment was made, but clearly indicates that immediately after the recess, plaintiff orally moved to dismiss without prejudice. Defendant objected to plaintiff's motion to dismiss the petition, on the grounds that the case had been submitted to the trier of fact.

The county court concluded that the matter had not been finally submitted and that the plaintiff had "a right to have [the petition] dismissed on his motion at his expense at any time before a decision is rendered . . . ." The court then sustained plaintiff's motion to dismiss without prejudice, finding that "it's discretionary, in any event . . . ."

Defendant timely appealed to the district court for Sarpy County. The district court found that "[u]nder these facts and circumstances . . . there had been a final submission of the case, and whether or not plaintiff's motion to dismiss should be granted would be a discretionary act on the part of the County Judge." The district court further found that the county court's action in sustaining plaintiff's motion to dismiss without

prejudice was an abuse of discretion, and ordered that the judgment "be reversed, and the matter remanded with directions to deny the plaintiff's motion to dismiss and grant the defendant's motion for a directed verdict."

Neb. Rev. Stat. § 25-601 (Reissue 1989) provides, "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court . . . ." This statute has long been interpreted to mean that any time before final submission of the case to the fact finder, plaintiff may dismiss an action, without prejudice, as a matter of right. *Schroeder v. Schroeder*, 223 Neb. 684, 392 N.W.2d 787 (1986); *Duffy v. Cody*, 129 Neb. 737, 262 N.W. 828 (1935); *Reams v. Sinclair*, 97 Neb. 542, 150 N.W. 826 (1915).

The right of a plaintiff to dismiss without prejudice after submission of the case has been held to be a discretionary matter for the trial court. In *Bee Building Co. v. Dalton*, 68 Neb. 38, 43, 93 N.W. 930, 932 (1903), we said, "The discretionary power of the district court to set aside a submission and receive further evidence, or to postpone the trial, or even to permit a dismissal of the case, is not doubted . . . ." The *Bee Building Co.* case also held that if a plaintiff attempts to dismiss his action as a matter of right after it has been finally submitted and the court grants plaintiff's motion on those grounds, the dismissal would be erroneous.

Defendant contends that the plaintiff in this case had no right to dismiss without prejudice after defendant's motion for directed verdict was made and that the court was without authority to grant plaintiff's motion to dismiss without prejudice. Defendant relies on language in *Rhode v. Duff*, 208 F. 115 (8th Cir. 1913), and *Spies v. Union Pac. R. Co.*, 250 F. 434 (8th Cir. 1918), for this proposition. We agree that in this case, after defendant moved for a directed verdict and argument of both counsel on that motion had been completed, the case was under submission and plaintiff lost its absolute right to dismiss without prejudice. The trial court's holding to the contrary that the plaintiff has "a right to have [the petition] dismissed on his motion at his expense at any time before a decision is rendered" is specifically rejected.

We hold that the trial court has discretion to grant a plaintiff's motion to dismiss without prejudice when the case is under submission but before it is decided. *Rhode, supra*, and *Spies, supra*, state that after final submission, a plaintiff's motion to dismiss without prejudice "comes too late." We reject the holdings in *Rhode* and *Spies* and hold that a trial court, after submission of a case, has discretion to grant a plaintiff's motion to dismiss without prejudice, depending on the facts and circumstances of the case before the court. See *Bee Building Co. v. Dalton, supra*. The dispositive issue in this case is whether the trial court abused its discretion in granting plaintiff's motion to dismiss after the case was taken under submission.

The facts show that plaintiff put on its evidence and rested and that defendant rested and then moved for a directed verdict. Both parties argued the merits of defendant's motion.

The record shows that plaintiff had a theory concerning what a "guarantor" was for his case, and argued to the court in support of that theory. The plaintiff did not, at any time, move to amend its petition, but was, in effect, directed to do so by the trial court. Before that direction, plaintiff had explained its theory to the court and stated, "Other than that I have nothing further." Without ruling on the defendant's motion for a directed verdict, the court suggested that plaintiff amend its petition, and then granted leave to defendant to amend her answer.

We have the situation, then, where each party has completed its evidence and where the law in favor of each party has been argued to the court. Rather than decide the issue thus squarely presented to it, the court undertook to have the pleadings revised, apparently to present the case in a fashion the trial court thought proper. The amendment suggested by the court was not granted to permit plaintiff to conform its pleadings to the proof adduced, but instead introduced a basic theory of recovery not shown by the evidence. At this point, the plaintiff realized the evidence presented could not support the petition as filed or as the court suggested it to be amended, and therefore moved for dismissal without prejudice.

The trial court's intervention was inappropriate. See, *State v.*

*Ferris*, 212 Neb. 835, 840, 326 N.W.2d 185, 188 (1982) (Caporale, J., concurring) ("justice is better served when judges remember they are adjudicators, not litigators"); *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967). The court's later action in granting plaintiff's motion to dismiss without prejudice constituted an abuse of discretion.

Since we have determined that the trial court erred in granting plaintiff's motion to dismiss, we then must consider whether the trial court erred in refusing to grant defendant's motion for a directed verdict. In the case before the court, there was no evidence adduced by plaintiff which would have entitled plaintiff to judgment against defendant. No evidence established any legal responsibility of defendant to plaintiff. We affirm the determination of the district court, in its appellate capacity, holding that the judgment of the trial court should be reversed and the cause remanded to the county court with directions to deny plaintiff's motion to dismiss without prejudice and to grant defendant's motion for a directed verdict.

AFFIRMED.

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RUTH SPILKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLARD P. SPILKER, DECEASED, ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, DOING BUSINESS AS LINCOLN WATER SYSTEM, ET AL., APPELLEES.

469 N.W.2d 546

Filed May 24, 1991. No. 89-189.

1. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
2. **Legislature: Statutes.** The wisdom, justice, policy, or expediency of a statute is for the Legislature alone.
3. **Constitutional Law: Statutes: Proof.** A party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional.
4. **Constitutional Law: Limitations of Actions.** Neb. Rev. Stat. § 25-224(2) (Reissue 1989) is constitutional.

5. **Limitations of Actions.** A statute of repose is a type of statute of limitations; it prevents recovery on stale demands. Its effect is that it may prevent what otherwise might be a cause from ever arising.

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

Gordon D. Ehrlich, of Cobb, Hallinan & Ehrlich, P.C., and, on brief, John V. Hendry and Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellants.

Donald R. Witt and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Westinghouse Electric Corp.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

In this products liability case, plaintiffs' amended petition was dismissed as to defendant Westinghouse Electric Corporation, upon its sustained demurrer that claimed the suit was barred by the statute of limitations. See Neb. Rev. Stat. § 25-224(2) (Reissue 1989). The main issue here is the constitutionality of § 25-224, which provides in part:

> (1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

Section 25-224 was originally enacted in 1978. It was amended in 1981 to include a provision (subsection (5)) which relates to injuries caused by exposure to asbestos.

There is no dispute in these essential facts alleged in the amended petition: Defendant City of Lincoln, Nebraska (City),

purchased outdoor switchgear equipment from defendant Westinghouse, which equipment was delivered to the City in November 1963, together with blueprints and an instruction book. The switchgear was installed in the City's pumping station no later than March 1964. On October 14, 1986, Willard P. Spilker, a regular employee of plaintiff Colin Electric Motor Service, in Lincoln, Nebraska, pursuant to a request made by the City, was sent to the pumping station to investigate and service a reported short in the electrical wiring of the switchgear. An employee of the City, after having reviewed the instruction book and blueprints, identified the location of the safe repair receptacles in the switchgear, and Spilker, as directed by the employee, inserted testing equipment therein, resulting in a fire caused by a clear error in the instruction book, which improperly designated a live high-voltage energized receptacle as deenergized. The resulting fire caused burns and injuries to Spilker resulting in his death approximately 2 weeks later. Ruth Spilker, as the personal representative of the estate of Spilker, filed her petition alleging product liability injuries and praying for damages.

These basic facts are clear: The City came into possession of the switchgear, blueprints, and the instruction book no later than March 1964, and Spilker was fatally injured more than 22 years later, on October 14, 1986. When Westinghouse's demurrer was sustained and the amended petition was dismissed as to Westinghouse, plaintiffs elected to appeal.

The parties agree that these proceedings are allegations of product liability defined in Neb. Rev. Stat. § 25-21,180 (Reissue 1989):

> As used in sections 25-224, 25-702, and 25-21,180 to 25-21,182, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect

> against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.

See, also, *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981). It is appellants' theory, and they argue without objection, that the blueprints and instruction book are included as items of "labeling" recited in § 25-21,180, the same as if they were imprinted upon the switchgear.

In simple terms, these proceedings, and like cases later discussed, present a legal paradox of the general rule that "for each injury sustained the law provides a remedy," as follows: The City received a switchgear in March 1964, and Spilker's fatal injury on October 14, 1986, was a type of a products liability cause of action, as described in § 25-21,180. However, as claimed by Westinghouse and sustained by the trial court, the 10-year statute of limitations, § 25-224(2), began to run in favor of Westinghouse in March 1964, when the switchgear was received by the City, see *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), and any possible remedy for Spilker's death was barred 10 years after March 1964. We have said that a statute of repose is a type of statute of limitations, *id.*, it prevents recovery on stale demands, *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), and, as to Neb. Rev. Stat. § 25-222 (Reissue 1989), its effect is that it may prevent what otherwise might be a cause from ever arising, that is, there may be a wrong for which the law affords no redress, see *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). Recently, we said:

> The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. . . . These are substantive rights recognized by Nebraska law and protected by its Constitution.

*Givens v. Anchor Packing*, 237 Neb. 565, 569, 466 N.W.2d 771, 773-74 (1991).

Appellants' seven assigned errors are summarized as follows: Section 25-224(2) is unconstitutional as violating the due process clauses and the equal protection provisions in the U.S.

and Nebraska Constitutions and the "access to courts" provision of the Nebraska Constitution, and it was contrary to law and an error to sustain Westinghouse's demurrer and dismiss plaintiffs' amended petition as to Westinghouse.

In making their constitutional challenges, appellants admit that the Legislature is free to create and abolish rights so long as no vested right is disturbed, see *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976), and this power includes imposing reasonable time limitations upon actions. However, they argue that the 10-year period of limitations in § 25-224(2) is arbitrary and unreasonably short in time because it fails to take into account the average, useful, and expected life of the broad array of manufactured products. They advocate as reasonable § 110 of the Model Uniform Product Liability Act, see 44 Fed. Reg. 62714, 62732 (1979), which would make the 10-year statute of limitations subject to a rebuttable presumption that the harm occurred after the product's "useful safe life" expectancy.

A party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional. See *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990). The wisdom, justice, policy, or expediency of a statute is for the Legislature alone. In every constitutional challenge there attaches 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, 443 N.W.2d 566 (1989).

Although this court has not directly considered the constitutionality of § 25-224(2), other similar statutes of repose, § 25-222 and Neb. Rev. Stat. § 25-223 (Reissue 1989), have been reviewed. In *Colton v. Dewey, supra*, a medical malpractice case, this court upheld as constitutional the 10-year statute of repose found in § 25-222 against challenges that it constituted special legislation, that it violated the due process clause of the Nebraska Constitution and the equal protection clause of the U.S. Constitution, that it violated the open court provision of the Nebraska Constitution, and that it was an invalid exercise of legislative power. See, also, *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983). Later, in *Williams v.*

*Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987), a suit relating to the building industry, the 10-year statutes of repose found in both §§ 25-222 and 25-223 were declared constitutional, citing *Colton, supra*, and *Smith, supra*.

The constitutionality of § 25-224(2) has been upheld in the following federal cases: *Groth v. Sandoz, Inc.*, 601 F. Supp. 453 (D. Neb. 1984), *Brown v. Eli Lilly and Co.*, 690 F. Supp. 857 (D. Neb. 1988) (holding that the classification made by § 25-224(2) was neither unreasonable nor arbitrary), and *Peterson v. Fuller Co.*, 807 F.2d 151 (8th Cir. 1986).

Plaintiffs failed to show that the 10-year time limitation in § 25-224(2) was either unreasonable or arbitrary. Whatever merit there may be in their claim that the 10-year limitation is unreasonably short may be a matter for legislative consideration.

The relative reasoning and authority previously expressed by this court in *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), *Smith, supra*, and *Williams, supra*, are adopted as controlling in the case at bar. Upon the passing of the 10-year period following March 1964, Westinghouse acquired a substantive vested right protected by statute, and § 25-224(2) is constitutional as against all challenges made by plaintiffs.

The order sustaining Westinghouse's demurrer and dismissing plaintiffs' amended petition against Westinghouse was proper. See *Pohle v. Nelson*, 108 Neb. 220, 187 N.W. 772 (1922).

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. BOB PALSER, APPELLANT.
469 N.W.2d 753

Filed May 24, 1991. No. 90-242.

1. **Rules of Evidence: Witnesses.** Unavailability as a witness includes situations in which the declarant persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so, or testifies to lack of memory of the subject matter of his statement.

2. **Rules of Evidence: Witnesses: Hearsay.** Subject to the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1989), the following is not excluded by the hearsay rule if the declarant is unavailable as a witness: a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
3. **Constitutional Law: Rules of Evidence: Hearsay.** When hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation.
4. _____: _____: _____. The essential confrontation issues are whether the hearsay is, under all the circumstances, sufficiently reliable and trustworthy, and whether there is a demonstrated need for the evidence. The availability of cross-examination is simply one of the means by which the quality of reliability is tested.
5. _____: _____: _____. To meet the constitutional confrontation clause reliability standards the statement must possess some particularized guarantees of trustworthiness.
6. **Motions for Mistrial.** A mistrial is properly granted only when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
7. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

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

Gary J. Krajewski, of McQuillan & Spady, P.C., for appellant.

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

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Bob Palser, appeals his conviction for distribution of a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), and his

sentence of 5 to 10 years' imprisonment. He assigns seven errors: (1) and (2), admitting into evidence the out-of-court written statement of John Armstrong (exhibit 1); (3), (4), and (5), failing to grant a mistrial for (a) statements made by witness Patrick Aufdengarten, (b) discovery of contact between the prosecuting attorney and one of the jurors, and (c) prosecutor misconduct during the trial; (6) failing to give defendant's requested instruction No. 13; and (7) imposing an excessive sentence. We affirm.

## FACTS

In 1988, the police arrested Patrick Aufdengarten for possession of cocaine. He thereafter became a cooperating police informant, advising the police that he could buy cocaine from John J. Armstrong, who worked at the Armstrong's station, located on the edge of Ogallala and owned by John's father. A controlled purchase was arranged for Aufdengarten to make a drug buy from John Armstrong.

On November 18, 1988, at about 6:30 p.m., Lt. Kent Bolejack, a Keith County Deputy Sheriff; Joshua I. Barton, police officer; and Aufdengarten met at the city dog pound. Aufdengarten was body searched for drugs and money, and he was given $120 to make a drug buy according to discussed plans. Barton drove to the Armstrong's station, where he conducted a surveillance from the east side of the station. He could not see the inside of the station. Aufdengarten and Bolejack drove to the station in a borrowed pickup. Aufdengarten entered the station, where he met Armstrong, who told him he had no drugs but Aufdengarten should return in about 45 minutes. Aufdengarten, Bolejack, and Barton returned to the dog pound, where they remained for about 1 hour, and then they returned to the station. Bolejack got out of the pickup, but he could not see into the station. Aufdengarten entered the station. Barton positioned himself in the parking lot on the west side of the station, where he had a view of the station business counter area as seen through the front of the store; he could see Armstrong and Aufdengarten. After some delay, Aufdengarten again contacted Armstrong to buy drugs. In about 20 minutes, Palser entered the station. Palser and

Armstrong went to a back room in the station, and shortly thereafter, Palser left the station. After about 20 minutes, Armstrong sold cocaine to Aufdengarten, which cocaine was later delivered to the officers. Aufdengarten, Bolejack, and Barton returned to the dog pound. Neither Aufdengarten, Bolejack, nor Barton saw any exchange of either money or drugs between Armstrong and Palser. At trial, the only evidence of such exchange is exhibit 1, dated December 22, 1988, which is the statement of John J. Armstrong, as follows:

Page 1 of 1

VOLUNTARY STATEMENT
(Not Under Arrest)

John J. Armstrong, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to, Kent Bolejack J. Barton without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

I am 28 years of age, and reside at 911 W. 8th Ogallala

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I got the coke ~~xxx~~ JA [language crossed out and initialed] from Bob Palser the night Pat Aufdengarden bought it from me at Armstrongs. Pat, he told me he needed some for a birthday party Nov. 18 1988. So I got a hold of Bob, and got a gram JA ~~xxxx xxx xx~~ for Pat from Bob Palser. I JA ~~xx~~ told Pat before hand to come back to Armstrongs in fourty five min. or so. I call Bob Palser to get it. He brought it up himself, then ~~xxxx~~ JA I took it and sold it to Pat myself for $100.~~00~~ cash. I do not rem~~x~~ JA ember if I give the cash to Bob at that time or later. I did give Bob the money.

I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at 11:40 am/~~pm~~. Location KCSD this 22 day of Dec., 1988.
Witness /s/ K. Bolejack
Witness /s/ J. I. Barton OPD#5
/s/ John J. Armstrong
Signature of person giving statement

(Signatures and Armstrong's printed parts of statement emphasized.)

When the trial was commenced on September 20, 1989, John Armstrong was called as a State witness. He claimed fifth amendment protection, and pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 1989), the court granted Armstrong immunity from prosecution. However, Armstrong continued to refuse to testify, and the court found him in contempt, remanded him to jail, and declared the trial in recess. The trial resumed on September 26, 1989, with a jury present. Armstrong was recalled as a witness; however, he could not recall any activity or conversation that occurred on November 18, 1988, and particularly could not recall either the contents, details, or execution on December 22, 1988, of exhibit 1.

Since the testimony of Armstrong indicated the possible prosecution use of exhibit 1 in the evidence, the court, on its own motion, conducted a "*Denno*"-type reliability hearing (jury not present) to test the reliability and trustworthiness of exhibit 1. See *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983).

Officer Barton testified that on December 22, 1988, Armstrong voluntarily came to the sheriff's office, where he was interviewed for about 2 hours in the presence of the county attorney, Bolejack, Investigator Reddinger of the Nebraska State Patrol, and Barton. Armstrong was told what the officers knew of his participation in the drug buy and that Armstrong had the option of cooperating with the prosecuting authorities or a criminal complaint might be filed against him for that crime. The nature of being a cooperating witness was explained to him. Armstrong agreed to act as a cooperating witness, and he signed such an agreement. Thereafter, he composed and wrote the statement, now exhibit 1. Prior to making the statement, Armstrong was advised that he could have an

attorney present; however, he declined to do so. No threats or promises were made to Armstrong, and he was never held in custody. Lieutenant Bolejack testified that Armstrong prepared exhibit 1 in his own handwriting.

At the conclusion of the State's evidence in the reliability hearing, defendant's counsel asked leave to call Armstrong as a witness, which request was denied by the court's saying that Armstrong had previously testified he had no recollection of any of those events, that "you can cross examine him on the witness stand," and, after counsel argument, that "[h]e's out in the hall. He's here subject to a full and complete and absolute cross examination." Thereafter, the court found that the test of exhibit 1 for indicia of reliability had been met. Trial resumed with the jury present.

Witness Armstrong was recalled by the State, and he continued to deny signing the statement, exhibit 1. His examination of exhibit 1 did not refresh his recollection as to any events of November 18, 1988. He was not sure if either his signature or his initials appeared on the statement. However, on cross-examination, he testified that on December 22, 1988, he was called to the police station for a meeting with the county attorney and members of the State Patrol, county sheriff's office, and the city police, who told him he had sold cocaine to someone; that his request to contact an attorney was denied; that he was threatened by the officers that if he did not cooperate he would be sent to the penitentiary and his father would lose his business; that he was not allowed to contact anyone during the entire 4-hour interview (it ended about 11:40 a.m.); and that he was "scared and shook-up," and he "would have signed anything" they told him to sign.

Officer Barton was recalled and generally restated to the jury the circumstances surrounding Armstrong's interview and his execution of exhibit 1. In addition, he denied that Armstrong asked to call an attorney. Armstrong was made aware of the statutory forfeiture laws. Armstrong was not threatened with confinement; rather, the option of becoming a cooperating witness was more appealing than the obvious possible criminal prosecution. Armstrong made no request to contact anyone; however, he did receive one telephone call, but was not

permitted to answer it by one of the other officers present.

Over defendant's objection, exhibit 1 was offered and received into the evidence as an exception to the hearsay rule, as provided in Neb. Rev. Stat. § 27-804 (Reissue 1989):

> (1) Unavailability as a witness includes situations in which the declarant:
>
> . . . .
>
> (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
>
> (c) Testifies to lack of memory of the subject matter of his statement . . . .
>
> . . . .
>
> (2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement . . . .

The court ruled that from Armstrong's testimony, he was an unavailable witness, § 27-804(1)(b) and (c), and the statement, exhibit 1, was admissible as an exception to the hearsay rule, § 27-804(2)(c), because the statement was plainly against Armstrong's penal interests, since it tended to expose him to criminal liability and a "reasonable man in Armstrong's position would not have made the statement unless he believed it to be true."

## THE STATEMENT

The first and second errors are discussed together.

"[T]he mission of the confrontation clause is to advance

practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement." *State v. Roy*, 214 Neb. 204, 207, 333 N.W.2d 398, 401 (1983).

When hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation. The essential confrontation issues are whether the hearsay is, under all the circumstances, sufficiently reliable and trustworthy, and whether there is a demonstrated need for the evidence; the availability of cross-examination is simply one of the means by which the quality of reliability is tested. See *State v. Roy, supra.*

The primary interest secured by the confrontation clause is the right of cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). "The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).

In *Ohio v. Roberts, supra* at 448 U.S. at 66, the Court said:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

See, also, *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

Here, the declarant, John Armstrong, was a witness at trial and subject to cross-examination; however, he was unavailable by virtue of his inability to recall the subject matter of the statement. See § 27-804(1)(c). Defendant admits that Armstrong qualifies as being unavailable.

The question presented is whether the State has carried its burden of proving that Armstrong's written statement bore

sufficient "indicia of reliability" to satisfy the requirements of the confrontation clause.

We agree that the statement was an exception to the hearsay rule. However, under the conflicting evidence here, there is no inference of reliability, and to meet the constitutional confrontation clause reliability standards the statement must possess some "particularized guarantees of trustworthiness." See *Olson v. Green*, 668 F.2d 421 (8th Cir. 1982). The U.S. Supreme Court has declined to endorse a mechanical test for particularized guarantees; rather, they "must be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, ____ U.S. ____, 110 S. Ct. 3139, 3149, 111 L. Ed. 2d 638 (1990).

Defendant relies heavily on *U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988), where the statement of a third-party codefendant, John McMahon, was held to be invalid when offered to inculpate Boyce, because the context of the statement indicated that it was unreliable. That case can be distinguished. McMahon gave his statement to an FBI agent and a police officer while he was in custody and before he had benefit of counsel. The only surrounding circumstance in the record concerning his arrest, confinement, and presigning interrogation was that he had been advised of his constitutional rights. The court also noted that there was no showing that the statement was not motivated by a desire to create favor. See *United States v. Palumbo*, 639 F.2d 123 (3d Cir. 1981).

Here, Armstrong voluntarily reported to the sheriff's office and participated in a conference with known official criminal law investigators; he was not in custody; after the purposes of the interview were made known, he was informed of the evidence against him, including the corroborating evidence from the drug buyer, Aufdengarten, relating to the drug buy, and he was given the option of cooperating as a witness or the obvious duty of the prosecuting attorney to file charges against him; he elected to become a cooperating witness and signed such an agreement; and he then composed the statement that openly admits his part in the crime, without attempting to place the blame on some other person. Witness Barton testified that

he saw Aufdengarten and Armstrong together in the station. Officers Bolejack and Barton testified that the statement was freely made and executed by Armstrong, absent any threats or force.

Defendant suggests that the officers' statements to Armstrong that he would be sent to the penitentiary and his father would lose his business were threats and coercion. It is public knowledge that a possible penalty for a convicted drug felon is to be incarcerated in the penitentiary and that there are State forfeiture laws. Bringing that knowledge to Armstrong's attention, along with knowledge of the evidence against him, may have been a useful interrogation tool, but it was neither a threat to nor coercion of Armstrong under the circumstances.

From the record these particular circumstances show that the statement, exhibit 1, was reliable, trustworthy, and worthy of belief and that defendant's right of confrontation was not violated.

## MISTRIAL MOTIONS

A mistrial is properly granted only when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. The test is this: Did the remark which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint the entire proceedings that the accused did not have a fair trial? See *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989).

*Witness Statements.*

The first motion relates to the testimony of the first witness, Aufdengarten, a State cooperating witness, as follows:

> Q Do you remember what time you got to Armstrong's . . . for the first time on the evening of November 18th,

1988?

A I don't really want to answer these questions because I've received threats against me and my family.

Q Would you mind telling me what kind of threats you've received?

Defendant's objection to the last question was sustained and was followed by a motion to strike from the record; however, no ruling was made on the motion. Defendant made no request to admonish the jury. Later, Aufdengarten refused to answer a question, and when directed to answer, he said, "Can't do that, Your Honor. Things that have happened in the last month." No objection was made to that statement; however, the court promptly declared a recess and conducted an in camera hearing concerning the claimed threats to the witness and to his family, none of which were shown to be attributed to defendant. When trial was resumed, the jury was admonished by the court to disregard Aufdengarten's testimony about any threats to either himself or his family. Aufdengarten was temporarily excused, subject to recall.

After reviewing the testimony, the court's in camera hearing, and the court's admonition to the jury, we determine that there is no showing that any prejudicial effects remained. The court did not abuse its discretion in denying a subsequent motion for mistrial.

*Juror Misconduct.*

The next motion for mistrial alleged prosecutor misconduct relating to a conversation between the prosecutor and a juror while both were attending a regular meeting of the local Optimist Club. The prosecutor reported that conversation to the trial judge immediately. The juror was examined with counsel present, outside the presence of the jury, to determine if defendant's right to a fair trial had been violated. See *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988). The evidence revealed a brief exchange between the juror and the prosecutor about a future club program. The juror testified that the incident would not affect his ability to continue serving as an impartial juror. Although the better professional conduct of the prosecutor would have been served by avoiding all contacts

with jurors, the denial of the motion did not deprive defendant of either an impartial jury or a fair trial, and there was no error.

*Prosecutor Misconduct.*

Lastly, defendant's third motion for mistrial alleged prosecutor misconduct when propounding the following questions to Officer Barton: "Q Did Mr. Aufdengarten say anything to you while you were examining this particular item?" Defendant's hearsay objection was sustained for relevancy. "Q . . . Officer Barton, did Mr. Aufdengarten say anything to you regarding what happened at Armstrong's during the second visit?" Defendant's objection was sustained. "Q . . . Officer Barton, did Mr. Aufdengarten tell you that he was present when Mr. Armstrong gave Mr. Palser the $100 that you had given him?" Again, defendant's objection was sustained. Defendant did not move to either strike the questions or admonish the jury. However, the court was asked to admonish the prosecutor, and the court did so, saying, "You don't need to go any further Mr. Erickson. That line of questioning will cease." Defendant's motion for a mistrial was denied, and the examination of the witness continued.

In the absence of a request to admonish the jury to disregard the three questions and of any showing that the questions were so damaging that a fair trial was impossible, there was no abuse of discretion in denying the motion. See *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990).

## JURY INSTRUCTION

It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988).

At the court's instruction conference, the judge refused to give defendant's requested instruction No. 13, which stated in part: "No conviction of guilt shall be based solely upon the uncorroborated testimony of a cooperating individual."

Defendant's claim is based on Neb. Rev. Stat. § 28-1439.01 (Reissue 1989), "No conviction for an offense punishable under sections 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual." The

rule is that it is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. See *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

"The corroboration required by . . . § 28-1439.01 . . . may be supplied by observation that the meeting between the subject and the cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place." (Syllabus of the court.) *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988).

Here, there was independent evidence that cooperating witness, Aufdengarten, was bodily searched three times for drugs and money; he was observed by an investigating officer while Aufdengarten met with Armstrong, and the witness later delivered cocaine to the officers. That evidence sufficiently corroborated Aufdengarten's testimony, making § 28-1439.01 inapplicable, and the issue of credibility was for the jury, as guided by all of the court's instructions. See *State v. Knoefler, supra*. The tendered instruction No. 13 was properly refused.

## EXCESSIVE SENTENCE

Other than the assignment of error, defendant's brief fails to discuss any reasons supporting this claimed error except that from the presentence report he claims "it is readily apparent the court abused its discretion." Brief for appellant at 22. We can only assume that reference is made to these facts: Defendant, age 36 years, is married, living with his wife and family in Ogallala. He works for a bean company and is a self-employed fishing guide. He neither admitted nor denied personal drug usage; he has no prior criminal record; and the investigating probation officer indicated defendant was cooperative and would probably successfully complete a probation program. A sentence imposed within the statutory limit will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. *State v. Kitt*, 231 Neb. 52, 434 N.W.2d 543 (1989). The crime charged here had a maximum penalty of 50 years and a minimum of 1 year. The sentence imposed was within the statutory limits.

From our reading of the presentence report and the record, we conclude there was neither error nor an abuse of discretion in the sentence imposed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DEMETRIUS A. JOHNSON, APPELLANT.
469 N.W.2d 761

Filed May 24, 1991. No. 90-267.

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 Denise E. Frost for appellee.

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

SHANAHAN, J.

A jury in the district court for Douglas County convicted Demetrius A. Johnson of four felonies: count I—first degree assault of one victim; count II—use of a firearm for commission of that assault; count III—attempted first degree assault of another victim; and count IV—use of a firearm in the attempted assault specified for count III.

In his two assignments of error, Johnson contends that because of a "total lack of positive identification evidence," brief for appellant at 5, there is insufficient evidence to sustain the convictions and that the district court abused its discretion by imposing an excessive sentence.

## STANDARD OF REVIEW

> "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) (quoting *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987)). Accord *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (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 (quoting *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986)). Accord *State v. Reynolds, supra*.

## BASIS FOR CONVICTIONS AND SENTENCES

As reflected by the salient evidence at Johnson's trial, the two assault victims were standing at the side of an Omaha street as an automobile passed by. Johnson, previously known to the victims, was identified by both victims as an occupant of the passing vehicle. Johnson was the vehicle's only occupant who discharged a firearm from the car. A shot struck and paralyzed one victim, while other shots struck the other victim's shoe or narrowly missed the victim. In addition to the assault victims, another eyewitness, who also personally knew Johnson, observed the shooting and identified Johnson as the perpetrator. Johnson claimed that at the time of the shooting, he was at a barbecue with his family.

After Johnson's convictions for the four felonies and subsequent to a presentence report, the court sentenced Johnson to imprisonment for the convictions, namely, 3 to 6 years on count I; 20 months to 4 years on count II, to be served consecutively to the sentence for count I; 1 to 3 years on count III, to run concurrently with the sentences imposed for counts I

and II; and 20 months to 4 years on count IV, to run consecutively to the sentence for count III, but concurrently with the sentences imposed on counts I and II. Johnson received credit for time in custody while he was awaiting trial and eventual sentencing.

Examining the evidence, which is construed most favorably to the State in light of Johnson's convictions, we conclude that the evidence is sufficient to sustain each of Johnson's convictions; hence, Johnson's convictions are affirmed.

Pursuant to Neb. Rev. Stat. § 28-1205(3) (Reissue 1989), use of a firearm to commit a felony "shall be treated as a separate and distinct offense from the felony being committed . . . ." A sentence imposed under § 28-1205(3) must be consecutive to any sentence imposed for conviction of the predicate felony. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

Each sentence imposed on Johnson is within the statutorily prescribed limits. "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. Staten, ante* p. 13, 469 N.W.2d 112 (1991); *State v. Zitterkopf, supra*; *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). In view of the nature of the crimes and the relevant information contained in the presentence investigation report and presented at the sentence hearing, we cannot state that the district court abused its discretion in any sentence imposed on Johnson. For that reason, the sentences imposed on Johnson are affirmed.

AFFIRMED.

# FLOYD E. MAXSON, APPELLANT, V. MICHAEL TODD & CO., INC., APPELLEE.

469 N.W.2d 542

Filed May 24, 1991. No. 90-342.

1. **Workers' Compensation.** The compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the definition of accident contained in Neb. Rev. Stat. § 48-151(2) (Reissue 1988).
2. _____. The cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, within a reasonably limited period of time, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury within the purview of Neb. Rev. Stat. § 48-151(2) (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael J. Lehan, of Kelley, Kelley & Lehan, P.C., for appellant.

Michael K. High and Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The plaintiff-appellant employee, Floyd E. Maxson, challenges the dismissal of his action for workers' compensation benefits from the defendant-appellee employer, Michael Todd & Co., Inc. He asserts, in summary, that the tribunal below erred in concluding the evidence failed to establish that he sustained a loss of earning power as the result of either an accident or occupational disease which arose out of and in the course of his employment. We affirm.

In his petition Maxson alleged that he, on March 18, 1988, sustained personal injuries and disability as the result of repeated trauma and strain over a substantial period of time from activity required by his employment.

Maxson was born on December 25, 1940, has a high school education, and has engaged in very heavy work during most of his working life. The record shows him to be an honest and stoic man with an excellent work history and a highly developed

work ethic.

After working in construction for 3 or 4 years, followed by a 3-year stint in the Army, during which period he worked as a diesel and gas mechanic, Maxson in 1970 started working for Todd, which is engaged in the business of supplying construction equipment repair parts. Maxson's duties throughout the 18 years he worked for Todd as a combined shipping, receiving, and warehouse worker required him to unload trucks and to otherwise stoop, bend, lift, climb, and reach. For a period of time, he was not provided with a forklift, and he, with but the help of a "two-wheeler," moved and otherwise worked on items weighing up to 1,000 pounds.

In the earlier years of his employment with Todd, but not during the last half decade, Maxson worked part time for two other employers. For one he drove a truck and checked the condition of construction barricades, and for the other he pumped gasoline.

Throughout the period of his employment with Todd, Maxson experienced back, shoulder, and arm discomfort, which he treated with rest, heat, and analgesics. The discomfort became progressively more severe, especially during the last 5 years, and in 1987 he was hospitalized for back discomfort. Other than during that period of hospitalization, Maxson continued to treat his condition in much the same way as he had in earlier years.

In January 1988, Maxson underwent a routine physical examination by an internist. At this time Maxson complained of a painful shoulder and back, conditions which were exacerbated by heavy lifting and bending. Examination revealed that he had an irregular heartbeat, and the internist referred him to an orthopedist and a heart specialist.

The orthopedist concluded that Maxson suffers from a combination of musculoskeletal problems, including degenerative lumbar spondylosis, probably some neurogenic claudication secondary to lateral recessed spinal stenosis, a degenerative problem in his right shoulder suggestive of a rotator cuff tear, and lateral epicondylitis on his right elbow. This physician also expressed the view that Maxson's shoulder complaints were aggravated, if not directly caused, by repeated

heavy lifting and the fact that he was " 'hit by a can' " in 1985 or 1986. The orthopedist also opined that the heavy lifting required by his employment aggravated, but probably did not solely cause, his degenerative back problems. In the orthopedist's view, sedentary activities are preferable, with lifting limited to slightly above waist level. The orthopedist also observed that as Maxson's conditions are progressive, it seems unlikely he will be released to return to unrestricted warehouse-type activities.

In the internist's opinion, the repeated lifting and bending during the course of Maxson's employment with Todd caused his shoulder and elbow problems and caused or aggravated his back condition. The internist is of the additional view that Maxson is not now able to lift. According to Maxson, the cardiologist also advised that he not lift more than 20 or 25 pounds.

On March 22, 1988, Todd delivered a letter to Maxson, thanking him for his "excellent and loyal service" and terminating his employment because he could no longer perform the required duties. Maxson last worked for Todd on the preceding Friday, March 18, 1988.

Maxson thereafter studied automated accounting in a 3-month program of vocational rehabilitation. As a result, he learned to perform some automated accounting tasks, use a 10-key adder by touch, and type at a rate of approximately 25 to 30 words per minute. At the time of trial he was employed by a drugstore, performing automated accounting work at a salary of about half of his earnings at Todd.

According to a rehabilitation counselor, Maxson has sustained a 60-percent-total reduction of earning power, 50 percent due to his back condition. However, the counselor is also of the view that Maxson's heart condition alone produces a 50-percent loss of earning power.

Neb. Rev. Stat. § 48-151(2) (Reissue 1988) defines "accident," unless a different meaning is clearly indicated by the context, as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." "Occupational disease" is defined by § 48-151(3) as meaning

"only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed." Although the statute does not define "disease," the term is generally understood to mean

> an impairment of the normal state of the living animal or plant body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors (as malnutrition, industrial hazards, or climate), to specific infective agents (as worms, bacteria, or viruses), to inherent defects of the organism (as various genetic anomalies), or to combinations of these factors.

Webster's Third New International Dictionary, Unabridged 648 (1981).

While it is thus quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease, this court has concluded that the compensability of such a condition is to be tested under the statutory definition of accident. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980).

As noted earlier, within the purview of § 48-151(2) an accident takes place when an injury occurs "suddenly and violently," which, at the time, produces "objective symptoms." We have held that the sudden and violent requirement is met "if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment." *Sandel v. Packaging Co. of America*, 211 Neb. 149, 158, 317 N.W.2d 910, 916 (1982). Thus, in *Sandel* this court held evidence that the employee's arm began to swell at 11:30 on a particular morning as the result of approximately 5 months of repeated work-related flexion and extension of her arm supported the compensation court's finding of an accidental injury arising out of and in the course of her employment. In so ruling, the *Sandel* court noted that the immediacy of the onset of symptoms which required the employee to stop work and seek medical attention distinguished the case from those

instances involving chronic conditions which developed over a period of years and could not be traced to a particular activity. Accord, *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990) (repeated kneeling over an approximately 2-month period resulting in sudden onset of pain while lifting, for which employee sought medical attention the following day and later terminated her employment, supported finding of accidental injury); *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985) (snap in hand, seeking of medical attention, and employer termination of relationship, all occurring within 17 days of employment involving repeated pulling motion, supported finding of accidental injury); *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985) (evidence symptoms developed over 2½-hour period following snap in elbow after 9 years of repetitive arm and hand movements, for which employee sought medical aid and which required temporary cessation of employment, supported finding of accidental injury); *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982) (pain and numbness in hand developing after approximately 4 months of repeated crimping requiring discontinuance of employment and medical treatment supported finding of accidental injury); *Crosby v. American Stores, supra* (evidence symptoms developed in 1 day as result of repeated striking of hands and became progressively worse in succeeding 5 to 10 days, after which period employee sought medical aid, supported finding of accidental injury).

Thus, the tribunal below correctly concluded the cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, within a reasonably limited period of time, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury within the purview of § 48-151(2).

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. This is obviously a close case, but it appears to me that in affirming the judgment of the

compensation court, we are diluting our holding in *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). In *Sandel* we stated, referring to the work of "[t]he noted workmen's compensation authority, Larson," as follows:

> In 1B Larson, Workmen's Compensation Law § 39.49 (1980), Larson suggests that the occurrence of pain and the need for medical attention is sufficient to designate the occurring of an accident "suddenly and violently" even though the initial effect of the pain and the subsequent injury may have been much earlier and simply continued to build until it reached the point at which the employee could no longer perform the required work.

*Sandel, supra* at 161, 317 N.W.2d at 917.

Later, in *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 582, 400 N.W.2d 244, 246 (1987), we stated that "in Nebraska the definition of 'accident,' as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability."

In this case, plaintiff, while seeing his doctor for what plaintiff describes as "a routine physical," told the doctor that his shoulder, elbow, and back had been "more sore lately than it ever has been, and my shoulder hurt, and my back was giving me problems . . . ."

The doctor sent plaintiff to an orthopedic surgeon. Plaintiff further testified: "[H]e told me that all the discs in my back were flatting [sic], and that I've got a torn rotator cuff in my shoulder, and he said I had to — couldn't be lifting the heavy stuff anymore because my back was out."

The internist who examined plaintiff stated in his report:

> It's hard to say that he may not have had some degenerative arthritis of his spine given time, but I certainly feel that the wear and tear of heavy lifting have hastened progress, aggravated the situation, and now he is at the point where he is unable to lift, or in fact do much bending over without a tremendous amount of low back pain.

In other words, it seems to me that a hard, conscientious worker just keeps working until the worker reaches "the point

where he [or she] is unable to lift." That point should be sufficient to constitute an accident in the same manner a carpal tunnel or "tennis elbow" injury results in a compensable accident.

This plaintiff's injury may be likened to "tennis elbow" or carpal tunnel injuries, such as those in *Sandel v. Packaging Co. of America, supra*, and in *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980). The obvious difference is that it took this worker longer to break down than it took the plaintiffs in those cases. I do not think, however, we should, in effect, punish the tough worker who does not drop to the floor in pain and grab his or her back or shoulder every time pain results from the job being done.

I would reverse.

SHANAHAN, J., joins in this dissent.

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IN RE INTEREST OF C.W., K.W., M.W., AND J.W., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.W., APPELLANT.
469 N.W.2d 535

Filed May 24, 1991. No. 90-356.

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

Sandra Hernandez Frantz for appellant.

Alicia B. Henderson, Deputy Lancaster County Attorney, for appellee.

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

WHITE, J.

D.W. appeals the March 12, 1990, order of the separate juvenile court of Lancaster County staying its own order of January 10 as amended nunc pro tunc on January 31, 1990. The

January 10 order terminated the parental rights of D.W. and the respective fathers of her four children, pursuant to Neb. Rev. Stat. § 43-292(1), (2), (4), or (6) (Reissue 1988), and transferred the case to the Rosebud Sioux Tribal Court for placement of the children. Recognizing that an appeal from its order would likely be filed, the juvenile court stayed any change in placement of the children until a final order was issued on appeal. The court entered a nunc pro tunc order on January 31, 1990, amending its original order to provide for the stay. On March 12, the juvenile court granted another stay of the January 10 order as amended January 31, pending appeal and final decision by this court. D.W. filed her appeal of the March 12 stay in the separate juvenile court of Lancaster County on April 12.

We dismiss this appeal for lack of jurisdiction. Neb. Rev. Stat. § 43-2,126 (Reissue 1988) provides that any order or judgment entered by a separate juvenile court may be reviewed by this court within the same time and in the same manner prescribed by law for review of an order or judgment of the district court. Neb. Rev. Stat. § 25-1912(1) (Reissue 1989) requires that the proceedings for reversal, modification, or vacation of judgments rendered or orders made by the district court shall be by filing a notice of appeal in the district court within 30 days of rendition of the judgment or order. Thus, an appeal from an order of a separate juvenile court must be filed within 30 days.

Following the statutory method for computing time found in Neb. Rev. Stat. § 25-2221 (Reissue 1989), we find that D.W. filed her notice of appeal on the 31st day following the March 12 order. Beginning computation on the day following issuance of the order, March 13, 1990, the 30th and last day for appeal fell on Wednesday, April 11, 1990. We therefore dismiss this appeal for lack of jurisdiction by this court.

APPEAL DISMISSED.

# STATE OF NEBRASKA, APPELLEE, V. MICHELLE S. WILSON, APPELLANT.

469 N.W.2d 749

Filed May 24, 1991. No. 90-433.

1. **Convictions: Circumstantial Evidence.** A criminal conviction may rest upon circumstantial evidence.
2. **Convictions: Appeal and Error.** Upon review of a criminal conviction, an appellate court will not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; these matters are entrusted to the finder of fact, whose findings are to be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support them.
3. **Criminal Law: Appeal and Error.** The findings of a trial court sitting as the finder of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Harlan County, BERNARD SPRAGUE, Judge, on appeal thereto from the County Court for Harlan County, JACK ROBERT OTT, Judge. Judgment of District Court affirmed.

Richard L. Alexander, of Alexander, Alexander & Alexander, 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.

Upon complaint of the plaintiff-appellee State, the county court, following a bench trial, adjudged the defendant-appellant, Michelle S. Wilson, guilty of violating Neb. Rev. Stat. § 53-180 (Reissue 1988), which provides: "No person shall sell, give away, dispose of, exchange, or deliver, or permit the sale, gift, or procuring of any alcoholic liquors, to or for any minor or to any person who is mentally incompetent." The conviction was later affirmed by the district court. Wilson urges the district court erred in failing to find error on the record in that the evidence assertedly fails to support the charge. We affirm.

At approximately 11:24 p.m. on May 27, 1989, Trooper Douglas Carmichael of the Nebraska State Patrol stopped a vehicle being driven in excess of the speed limit by Mike D. Kyle. The vehicle proved to be registered to Wilson, who was one of five passengers. Kyle and all of the passengers save Wilson were under 21 years of age and, thus, were minors for the purposes of § 53-180. See Neb. Rev. Stat. § 53-103(23) (Reissue 1988). Carmichael detected the odor of both alcohol and burning marijuana as he reached the driver's side of the vehicle.

While Carmichael had the driver withdraw from the vehicle, a deputy sheriff conducted a search. One passenger, Rennae Lehning, was discovered to be concealing four cans of beer under her blouse. Three of these cans were open and partially full, and the fourth was unopened.

Passenger James Jones testified he did not see Wilson give alcoholic beverages to any of the occupants of the vehicle and that he was sure Wilson had not done so. Jones further testified that Lehning brought some beer into the vehicle but that it was not Wilson's beer.

Wilson admitted that earlier in the day she had consumed "three or four" cans out of a six-pack of beer while in her vehicle. She testified that this beer was of the same brand as that found on Lehning's person that evening and that the balance of that six-pack was in her vehicle when Jones, Mike Kaiser, and the driver entered it.

Wilson further testified that she saw Lehning bring only one can of beer into the vehicle prior to its being stopped. She denied giving beer to any occupant of the vehicle at any time.

The crux of Wilson's argument is that because there was no testimony declaring that she had given alcoholic beverages to any of the occupants of the vehicle and, further, that because there was testimony she had not done so, her guilt was not established beyond a reasonable doubt. This position finds no support in the law.

A criminal conviction may rest upon circumstantial evidence. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Jones*, 230 Neb. 968, 434 N.W.2d 333 (1989). In addition, this court, upon review of a criminal conviction, will

not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Twohig, ante* p. 92, 469 N.W.2d 344 (1991); *Fellman, supra.* These matters are entrusted to the finder of fact, whose findings are to be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support them. *Id.* Finally, where the trial court sits as the finder of fact in a criminal case, its findings will not be disturbed on appeal unless clearly wrong. *State v. Fellman, supra.* With those standards in mind, we move on to consider the facts at hand.

The uncontradicted evidence is that Lehning, upon departing from Wilson's vehicle, was in possession of four cans of beer. Wilson herself admitted that she had earlier left in her vehicle two or three cans of the same brand of beer as that found on Lehning's person. Finally, Wilson testified that she had seen Lehning bring only one can of beer into her vehicle. From these circumstances an impartial finder of fact could reasonably conclude that some of the minors had partially consumed the three open cans of beer found on Lehning and that Wilson had delivered the cans to one or more of those minors.

Accordingly, the evidence is sufficient, Wilson's denials notwithstanding, to support a finding that she violated the terms of § 53-180. That being so, the judgment of the district court is hereby affirmed.

AFFIRMED.

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## LISA A. WILSON, APPELLEE, V. HAROLD B. WILSON, APPELLANT.

469 N.W.2d 750

Filed May 24, 1991. No. 90-1060.

**Divorce: Trial: Witnesses: Testimony: Depositions.** In dissolution of marriage cases, Neb. Rev. Stat. § 42-356 (Reissue 1988) provides that hearings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions.

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

Harold B. Wilson, pro se.

No appearance for appellee.

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

GRANT, J.

Petitioner-appellee, Lisa A. Wilson, acting pro se, filed a petition for divorce in the district court for York County, Nebraska. The petition alleged that the marriage between petitioner and respondent was irretrievably broken and should be dissolved. Respondent-appellant, Harold B. Wilson, also acting pro se, filed an "Appearance and Responsive Pleading of Respondent" alleging, in part, that "[t]he parties are both serving lengthy sentences, so lengthy that subsequent marriage by either is unlikely, and/or unlikely to be ever consemated [sic]." Respondent requested that the court "transfer this proceeding to a concilation [sic] court per Neb Rev. Stat. 42-360" and prayed that "the court will not find that this marriage is irretrievably broken."

On August 28, 1990, the trial court ordered, "This matter is set down for trial September 18, 1990 at 11:00 a.m." Respondent then moved for an order that he be transported from the Nebraska State Penitentiary to York County for the trial. This motion was denied. Apparently, petitioner requested transportation also, and this request was also denied.

On October 16, 1990, the court entered a decree dissolving the marriage of the parties. On October 24, 1990, respondent appealed to this court, assigning three errors, contending the district court abused its discretion in (1) not "allowing the parties to appear in person at the final divorce hearing, or by not providing an alternate means for the parties to submit evidence and testimony at the hearing"; (2) rendering a decision "solely upon the parties' pleadings, which were not substantive evidence"; and (3) not "affording the parties an opportunity to effect reconciliation of the marriage." We reverse the judgment of the district court.

Our standard of review in an appeal involving an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, giving due weight to the fact that the trial judge, after hearing testimony and observing the witnesses, accepted one version of the facts rather than another. *LaBenz v. LaBenz*, 237 Neb. 231, 465 N.W.2d 726 (1991).

The record before us includes a transcript containing, among other pleadings, a verified petition, a verified response, and a decree, and a bill of exceptions. The entire bill of exceptions is as follows:

> ([I]n the District Court of York County . . . neither of the parties being present either in person or by counsel, the following proceedings were had:)
>
> THE COURT: This 14548. Lisa Wilson versus Harold Wilson. The matter comes on for trial on dissolution. The Court finds it has jurisdiction of the parties and of the subject matter. The Court judicially notices the petitioner's sworn petition, accept the matter — and accepts those facts alleged in therein [sic] as being true, finds that the marriage should be and is dissolved. We'll prepare a decree.

We find that to proceed with a "trial" on the petition and response alone, in which "trial" neither party appeared in person and no evidence was adduced through testimony or by deposition, constitutes error on the part of the trial court. The purpose of the pleadings is to frame issues upon which a cause is to be tried and to advise the adversary as to what he must meet. *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984). The pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. Appellee's petition and appellant's response to it set out only a factual and legal dispute. Neb. Rev. Stat. § 42-356 (Reissue 1988) provides that in dissolution actions "[h]earings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions."

In this case, no oral testimony was adduced, nor were any depositions introduced, in any of the various forms permitted by statute, including affidavits or written interrogatories. The

court was faced with only pleadings on behalf of petitioner, seeking dissolution of the marriage, and pleadings on behalf of respondent, opposing that dissolution. There were several evidentiary matters on which evidence should have been submitted in some form before the court could act. While petitioner prayed for the restoration of her maiden name, there was no evidence submitted on that issue, and therefore no evidence showing that the name "Lisa Ann Hoisington," set out in the decree, was petitioner's maiden name.

In addition, Neb. Rev. Stat. § 42-361(2) (Reissue 1988) provides:

> If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

Without some form of evidence, it is not possible for the court to "consider all relevant factors" and make an appropriate finding whether the marriage is irretrievably broken. The court's decree was therefore without any factual basis. In that situation, of course, a de novo review by this court is impossible. The decree is reversed and the cause remanded.

In so holding, we recognize that prison inmates have a right to marry under certain conditions. See *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1971). We also recognize that indigents have a right to pursue marriage dissolution actions and be given a meaningful opportunity to be heard. See *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). We assume, then, that a prison inmate must be given a meaningful opportunity to be heard in responding to a marriage dissolution action.

We also reaffirm our earlier holding that prison inmates have no constitutional right to be released from prison so that they may be present in person at the trial of a civil court action. See *Caynor v. Caynor*, 213 Neb. 143, 327 N.W.2d 633 (1982).

REVERSED AND REMANDED.

# ROGER R. HOLTHAUS, APPELLEE, V. THEODORE W. PARSONS, JR., AND MARY A. PARSONS, APPELLANTS.

469 N.W.2d 536

Filed May 24, 1991. No. 90-1145.

1. **Debtors and Creditors: Conveyances: Fraud: Equity: Appeal and Error.** A creditor's action to declare a conveyance fraudulent invokes the equity jurisdiction of the trial court and on appeal is reviewed de novo on the record.
2. **Actions: Conveyances: Statutes: Time.** When a statute has been repealed, its repeal does not affect pending actions. In the case of a conveyance, the substance of the law in effect at the time of the transaction governs, not the later enacted statutes.
3. **Actions: Debtors and Creditors: Conveyances.** Under the Uniform Fraudulent Conveyance Act, an action to set aside a conveyance cannot be maintained unless injury is sustained, i.e., the conveyance put beyond the creditor's reach property which would be subject to the payment of his debt.
4. **Real Estate: Valuation: Witnesses.** In the case of real estate, an owner shown to be familiar with the value of the land is competent to testify as to that value.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions to dismiss.

Thomas P. Kenny, of Batt & Associates, for appellants.

Roger R. Holthaus, pro se.

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

WHITE, J.

This is an appeal from a judgment of the district court for Sarpy County, Nebraska, which denied a request to set aside a conveyance in fraud of a creditor, but nevertheless ordered the plaintiff's judgment to be a lien on the subject real estate. The defendants appeal. We reverse.

A creditor's action to declare a conveyance fraudulent invokes the equity jurisdiction of the trial court and on appeal is reviewed de novo on the record. *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988).

Appellants Theodore W. Parsons, Jr., and Mary A. Parsons were formerly husband and wife. They were divorced on April 18, 1980. In the property settlement agreement approved by the decree, Mary Parsons was awarded $10,000, which was

specifically declared to be a lien on "Lot 110 South Woods, a subdivision of Sarpy County, Nebraska," which property was awarded to Theodore Parsons. The $10,000 award has not been paid and remains a lien on the real estate. In addition, the home is subject to a lien for both unpaid and unaccrued child support in the amount of $47,000 and an unpaid real estate mortgage balance in the amount of $24,000.

In 1986, Theodore Parsons was convicted of the offenses of first degree murder and use of a weapon to commit a felony. Subsequent to his arrest, Parsons engaged appellee to defend him, but shortly thereafter Parsons discharged appellee and replaced him with another lawyer.

On February 26, 1987, Theodore Parsons transferred his interest in the real estate to Mary Parsons as trustee for their two minor children. On December 29, 1988, appellee was awarded a judgment for unpaid legal fees against Theodore Parsons in the amount of $6,183.40, which sum plus interest remains uncollected.

Although all circumstances giving rise to this action arose prior to the August 25, 1989, effective date of the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. §§ 36-701 to 36-712 (Cum. Supp. 1990), the parties and the court treated the act as controlling. We do not do so, as the substance of the law in effect at the time of the transaction governs, not the later enacted statutes. *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979); Neb. Rev. Stat. § 49-301 (Reissue 1988).

Generally, the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1988) (repealed 1989), which was in effect at the time of the transaction, prohibited transfers of real property by an insolvent for less than fair consideration. See § 36-604. However, the courts which have interpreted the act have held that an action to set aside a conveyance cannot be maintained unless injury is sustained, i.e., the conveyance put beyond the creditor's reach property which would be subject to the payment of his debt. *Haskins v. Certified Escrow & Mtge. Co.*, 96 Cal. App. 2d 688, 216 P.2d 90 (1950); *Kopf v. Engelke*, 240 Wis. 10, 1 N.W.2d 760 (1942). See *Territorial Sav. & Loan Ass'n v. Baird*, 781 P.2d 452 (Utah App.

1989).

The only evidence of the value of the real estate was that of Theodore Parsons, who, as an owner shown to be familiar with the value, is competent to testify. See *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982). That value is $58,000. In view of the acknowledged amounts of the liens, i.e., a $24,000 mortgage, a $10,000 lien in favor of a divorced spouse, and the child support lien of $47,000, it is obvious that appellee was not injured by the conveyance and therefore was not entitled to relief under the Uniform Fraudulent Conveyance Act. The judgment is reversed, and the cause is remanded to the district court with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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STATE OF NEBRASKA, APPELLEE, V. CHARLES R. McLAIN, APPELLANT.

469 N.W.2d 539

Filed May 24, 1991. No. 90-1257.

1. **Sentences: Appeal and Error.** Sentencing is within the discretion of the trial court, and the Supreme Court reviews a sentence on appeal for an abuse of discretion.
2. **Sentences: Restitution.** As part of a sentence, a trial court may order the perpetrator of a crime to reimburse his or her victim for the victim's income loss due to bodily injury resulting from the crime.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Sentence of restitution as to loss of wages vacated, and cause remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

FAHRNBRUCH, J.

Charles R. McLain appeals that portion of his sentence wherein the district court for Douglas County ordered him to pay restitution for lost wages suffered by the victim of his second degree assault.

In his sole assignment of error, McLain asserts that the sentence imposed by the district court is excessive because it includes an order for restitution which is not supported by proper documentation.

We vacate the restitution order in regard to the victim's lost wages and remand the cause for a new sentencing hearing.

On September 25, 1990, McLain appeared with counsel before the district court for Douglas County and, pursuant to a plea agreement, entered a plea of guilty to a reduced charge of assault in the second degree. He had originally been charged with assault in the first degree. A person commits assault in the second degree if he or she intentionally or knowingly causes bodily injury to another person with a dangerous instrument. Neb. Rev. Stat. § 28-309 (Reissue 1989). Assault in the second degree is a Class IV felony. *Id.* It carries a penalty of up to 5 years' imprisonment, a fine up to $10,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989).

Prior to accepting McLain's plea, the trial court advised McLain of his rights as prescribed in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The trial court found that McLain's guilty plea was entered voluntarily, knowingly, and intelligently. No error has been assigned with respect to entry of that plea.

A factual basis for the plea was entered in the record. McLain admitted that on April 6, 1990, in Douglas County, he and his victim, Thomas Morris, engaged in a fistfight and that he broke Morris' jaw. McLain's attorney told the court that the State's investigation reflected that McLain was wearing boots on the evening in question and kicked Morris while Morris was on the ground. The attorney conceded that McLain was the instigator of the altercation.

Following a presentence investigation, McLain was sentenced to prison for not less than 15 months nor more than 3 years, and he was ordered to pay restitution to the victim in the amount of $9,600, payable at the rate of $160 per month for 60 months, commencing with his release from prison.

At McLain's sentencing hearing, Morris, without being sworn, stated that he had suffered losses in the amount of $9,759.20 due to medical expenses and lost wages. Morris said that his lost earnings amounted to $2,880. The victim arrived at that figure by multiplying the period of time during which he allegedly missed work, 8 weeks, by his claimed hourly wage of $9. The presentence report (PSR) contains a handwritten note which is not signed or dated and which states: "Lost wages [at] 9.00 per hour average 40 hours per week for 8 weeks. 2880.00 in total lost wages." Nothing else appears on that note. In an unsworn victim impact statement, Morris related that he had no insurance with respect to the foregoing damages.

McLain argues that the documentation regarding Morris' lost wages was insufficient. No argument is raised concerning Morris' medical expenses. Therefore, we address only the documentation necessary to show Morris' lost wages.

This court's standard of review in cases such as this has been cited often. Sentencing is within the discretion of the trial court, and the Supreme Court reviews a sentence on appeal for an abuse of discretion. *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990).

Restitution in a criminal case is provided for in Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1989). Prior to the enactment of those sections, sentencing courts did not have the authority to order a defendant to pay restitution except as part of an order of probation. *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987).

As part of a sentence, a trial court may order the perpetrator of a crime to reimburse his or her victim for the victim's income loss due to bodily injury resulting from the crime. See § 29-2282.

> A sentencing court may order the defendant to make restitution for the actual physical injury . . . sustained by the victim as a direct result of the offense for which the

> defendant has been convicted. Whenever the court believes that restitution may be a proper sentence . . . the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

§ 29-2280. "The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record." § 29-2281. Section 29-2281 further provides that a court may hold a hearing at the time of sentencing.

In *Yost, supra*, the defendant admitted that he agreed to and did act as a lookout while another person set fire to a building owned by Mr. and Mrs. Anderson. Fire completely destroyed the Andersons' building and an adjoining building owned by Mr. and Mrs. Barton. The defendant was ordered to pay the Andersons $75,000 and the Bartons $30,000 in restitution. The sole basis for the damages determination was the PSR prepared by a probation officer. In the PSR, it was stated that the Andersons reported damages in excess of their insurance in the amount of $75,000. The PSR further contained the statement that Mr. Barton estimated his loss at $30,000. The PSR included a fire incident report wherein the damages to the two properties was estimated. Another fire incident report related what an insurance agent told a fire investigator regarding the Andersons' fire insurance coverage on the property.

In regard to the foregoing evidence concerning the amount of damages in the *Yost* case, this court observed:

> [W]e have serious concerns whether, without an evidentiary hearing, the bare statements contained in the PSR are sufficiently reliable to meet § 29-2281, which requires that "[t]he amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."

*Yost, supra* at 329, 455 N.W.2d at 164. Although this court expressed its concerns about the sufficiency of the evidence of damages, the sentence was vacated and the cause remanded because the trial court failed to meaningfully consider the

defendant's ability to pay the restitution.

It would appear that the law of damages would offer guidance on the present question. Contrary to McLain's assertions, pay stubs, tax forms, or employer letters are not required to prove lost wages. In *Caster v. Moeller*, 176 Neb. 30, 125 N.W.2d 89 (1963), this court held that when a plaintiff suffers personal injury, his or her testimony regarding his or her hourly base pay and average weekly wages is sufficient proof to permit the jury to award damages for the plaintiff's lost earnings. However, in this case, the only evidence of Morris' lost wages is his unsworn, uncorroborated statements offered at the sentencing hearing and the handwritten note contained in the PSR, which note is neither signed nor dated. Furthermore, statements in the presentence report reflect a conflict as to whether Morris was even employed on the date of the assault and whether his absence from work, assuming he was employed, was due to the injuries he sustained from the assault. The record here lacks sufficient documentation of Morris' lost earnings and fails to comport with the requirement prescribed in § 29-2281 that the victim's actual damages be supported by evidence in the record. We, therefore, find that the trial court abused its discretion in ordering McLain to pay restitution to Morris in the amount of $2,880 for his lost wages.

This court is aware that in *State v. McClanahan*, 194 Neb. 261, 264, 231 N.W.2d 351, 353 (1975), we held, "Restitution and reparation are not limited to the market value of the stolen property nor is the State required to establish the exact amount of the 'loss or damage' caused by the crime." *McClanahan* is easily distinguishable. Its holding was based on Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1974), which provided that a court, as a condition of probation, could require that the offender make restitution of the fruits of his or her crime or make such reparation as the court determined to be appropriate for the loss or damage caused thereby. That language has been stricken from § 29-2262 (Reissue 1989), and, as stated, § 29-2280 limits restitution to actual damages supported by the record.

The restitution order in this case is vacated with respect to the payment of Morris' lost wages, the cause is remanded for a new

sentencing hearing on Morris' loss of income, and the judgment in all other respects is affirmed.

SENTENCE OF RESTITUTION AS TO LOSS OF WAGES VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

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WILLIAM J. KOUTH, APPELLEE AND CROSS-APPELLANT, V. LINDA F. KOUTH, APPELLANT AND CROSS-APPELLEE.

469 N.W.2d 791

Filed May 31, 1991. No. 88-1001.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed as modified.

Gary B. Randall, P.C., of Marks & Clare, for appellant.

Thomas C. Emery, of Emery, Penke & Blazek, for appellee.

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

PER CURIAM.

Linda F. Kouth appeals from the judgment of the district court for Douglas County in a proceeding to dissolve her marriage with William J. Kouth. In her appeal, Linda Kouth contends that the district court erred in the division of Kouths' marital estate and by failing to award alimony to her. William Kouth cross-appeals and claims that the district court improperly awarded an attorney fee for Linda Kouth's lawyer.

> "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).

We find that a statement of the evidence in this case will neither serve a useful purpose nor provide precedential value. However, after our de novo review of the record, we conclude that the district court's decree shall be, and hereby is, modified as follows: (1) William J. Kouth is awarded his pension plan under the Iowa Public Employees Retirement System, and (2) Linda F. Kouth is awarded alimony in the amount of $1 per year for a period of 10 years, that is, the first payment of $1 is due on October 1, 1988, and an additional payment of $1 shall be made on October 1 of each year succeeding 1988, to and including October 1, 1997, unless this provision for alimony shall have been modified according to law.

In all other respects, the decree of the district court is affirmed.

We decline to award an attorney fee for the appearance of counsel in proceedings before this court.

AFFIRMED AS MODIFIED.

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CAROLINE DONOVAN, APPELLEE, V. DANIEL J. DONOVAN II, APPELLANT.

469 N.W.2d 791

Filed May 31, 1991. No. 88-1027.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, upon the recommendation of the Appellate Division of the District Court, KORTUM, EMPSON, and MERRITT, District Judges. Affirmed as modified, and remanded for further proceedings.

James L. Stanton for appellant.

Warren S. Zweiback and Mary Lou Perry, of Zweiback, Lamberty & Silver, P.C., for appellee.

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

PER CURIAM.

Upon consideration of the recommendation of the Appellate Division of the District Court and upon a de novo review of the files and records, this court modifies the judgment of the district court in the following manner:

(1) The appellee wife shall be assigned 37.5 percent of the appellant husband's disposable U.S. Air Force pension, which percentage, as of the date of the decree, amounts to $894.75 per month (37.5 percent times $2,386 equals $894.75). (a) This award is subject to applicable federal regulations and shall be payable monthly through the clerk of the district court for Douglas County, beginning the first day of December 1988. (b) The share of the pension so awarded is to be subject to cost-of-living increases, i.e., it shall be varied to reflect such adjustments. (c) The award of pension rights shall be absolute and not subject to termination by remarriage or any other event except by the terms of 10 U.S.C. §§ 1408 et seq. (1988).

(2) The husband is ordered to pay the wife $300 per month alimony beginning December 1, 1988, for a term of 36 months, and thereafter to pay alimony at the rate of $200 per month for 84 successive months or until the death or remarriage of the wife if one of those events occurs before the expiration of the monthly periods. The alimony payments shall be income to the wife and shall be deductible for tax purposes by the husband.

It is further ordered that this matter be remanded to the district court, which shall conduct a hearing to adjust between the parties all payments, credits, arrearages, and overpayments made, received, and which may be due by and from the parties and the wife's contribution to the Survivor's Benefit Plan under the original decree of the trial court, all without interest.

The husband is ordered to pay the sum of $1,000 to apply on the wife's attorney fees.

AFFIRMED AS MODIFIED, AND REMANDED FOR FURTHER PROCEEDINGS.

# NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE, V. ERVIN HANSEN, APPELLANT.

470 N.W.2d 170

Filed May 31, 1991. No. 89-387.

1. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 81-1319 (Reissue 1987), an appeal from a decision of the State Personnel Board is governed by the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987).
2. _____: _____. An appeal to the district court of a decision by the State Personnel Board is reviewed on the record of the agency if the petition was filed in district court before July 1, 1989. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1990).
3. _____: _____. An appeal to the Supreme Court under the Administrative Procedure Act, if filed in the district court before July 1, 1989, shall be heard de novo on the record. Neb. Rev. Stat. § 84-918 (Cum. Supp. 1990).
4. **Administrative Law: Evidence: Appeal and Error.** If evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency or hearing officer observed the witnesses and accepted one version of the facts rather than another, and will make independent findings of fact.
5. **Administrative Law: Words and Phrases.** An agency's actions are arbitrary or capricious if taken in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

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

J. Murry Shaeffer for appellant.

Robert M. Spire, Attorney General, Charles E. Lowe, and George D. Green for appellee.

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

WHITE, J.

Ervin Hansen, the defendant, appeals from a district court decision which reversed a finding by the State Personnel Board (board). The end result was termination of Hansen's employment at the Nebraska State Penitentiary, a facility operated by the Department of Correctional Services (DCS), the plaintiff-appellee.

Hansen had worked at the penitentiary as a correctional officer for 10 years when, in the early morning hours of

November 15, 1987, while on duty as a hospital officer, he was observed by a sergeant who believed that Hansen was asleep at his post. Hansen met with the sergeant at the end of Hansen's shift and reportedly admitted that he had "nodded off," but suggested that it was a result of pain medication he was taking for an arthritic knee. On November 17, Hansen was presented with a written statement of charges, alleging that he had violated 273 Neb. Admin. Code, ch. 13, § 001.03 (1987), which provides that disciplinary action may be taken for an offense involving "[i]nefficiency, incompetence or negligence in the performance of duties."

A meeting was held in the warden's office on November 23, at which Hansen's union representative delivered a written document containing admissions that Hansen was sitting at his post with his head down and that he had nodded off for a few seconds because of the medication. The warden then recommended to the DCS director that Hansen be terminated, with 2 weeks' pay in lieu of notice. The DCS director approved the termination on December 16.

Hansen appealed the termination to the board, which held a hearing on February 18, 1988, to determine the stipulated issues of whether or not the DCS failed to consider mitigating circumstances and whether or not the discipline imposed was progressive discipline. Hansen requested reduction of the dismissal to a 2-day suspension and restoration of his job with backpay.

The board found that Hansen was asleep at his post as alleged by the DCS, a serious violation of agency policy, but that the offense was not commensurate with the discipline imposed when the mitigating factors were considered. The mitigating factors included Hansen's physical condition, his 10-year record of good service, and the fact that the offense did not create a great security risk in the area where it occurred. Finding that progressive discipline should have been imposed, the board ordered that Hansen be reinstated effective April 21, 1988, without backpay, and that he be placed on disciplinary probation for 1 year.

The DCS appealed to the Lancaster County District Court, which reviewed the board's decision on the record of the agency.

See Neb. Rev. Stat. § 84-917(5) (Reissue 1987). The trial court reversed the board and found that Hansen should be terminated from his employment. The trial court stated:

> It is an unconstitutional usurpation of power by the Personnel Board for them to substitute their judgment for that of the director by means of mitigating factors or otherwise. The Personnel Board exceeds their constitutional authority and their scope of review under the Nebraska State Personnel Rules, Title 273 NAC Chapter 14.008.030 when they seek to reinstate an employee who has been terminated by an agency head.

Hansen's motion for new trial was overruled, and this appeal followed.

Because this petition on appeal was filed on May 20, 1988, we are governed by the case law and statutes in effect at that time. Under Neb. Rev. Stat. § 81-1319 (Reissue 1987), an appeal from a decision of the board is governed by the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), which provides that judicial review in the district court may result in a reversal or modification of the decision

> if the substantial rights of the petitioner may have been prejudiced because the agency decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
>
> (f) Arbitrary or capricious.

§ 84-917(6). An appeal to this court, however, "shall be heard de novo on the record." § 84-918.

We held in 1985 that the standard of review for the Supreme Court, found in § 84-918, prescribes a review of an agency's decision de novo on the record, without the limitations imposed on the district court under § 84-917(6)(e) and (f). *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). Since that time, we

have noted on several occasions that this statutory scheme was illogical.

> In *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985), we concluded that regardless of the incongruity of a true de novo review of a district court review for error only, we had no choice save to follow the legislative mandate. Whether this review in fact constitutes this court as a super-agency as to the administrative decisions of the agencies subject to § 84-918 is beside the point. We therefore proceed to review the matter de novo, reaching a decision independent of all dispositions that have gone before.

*Department of Health v. Columbia West Corp.*, 227 Neb. 836, 838, 420 N.W.2d 314, 316 (1988). See, also, *In re Application A-15738*, 226 Neb. 146, 151, 410 N.W.2d 101, 105 (1987) ("[a]lthough perhaps recognizing the absence of logic in requiring this court to review de novo a judgment of the district court which never did have an opportunity to make de novo findings, see concurrences of Shanahan, J., and Boslaugh, J., we nevertheless felt compelled to follow the unambiguous language prescribed by the Legislature"); *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 183, 425 N.W.2d 884, 887 (1988) ("regardless of the incongruity of a true de novo review of a district court decision wherein the review was for error only, the legislative mandate of the Administrative Procedure Act must be acknowledged").

Our difficulty with the statute has been eased by its amendment, which now governs petitions filed on or after July 1, 1989. The amendment provides that review in the district court is "de novo on the record of the agency." § 84-917(5)(a) (Cum. Supp. 1990). The review in this court is "for errors appearing on the record." § 84-918(3) (Cum. Supp. 1990). Because this petition was filed in 1988, we must review it de novo on the record of the agency.

The record includes a statement of charges and the report of Sgt. Bob McPherson, who stated that he found Hansen asleep at his post. McPherson testified that he had been in the hospital to assist a nurse in administering oxygen, and when he returned about 30 minutes later, he found Hansen with his back to

McPherson. "So I walked around in front of him; he was sitting in the chair with his eyes shut, and I watched him for a couple of seconds, and I walked over and shook him on the shoulder and when I did that he jumped up." McPherson said he observed Hansen for at least 5 seconds and "it was obvious to me he was asleep."

Hansen's duties in the hospital included "making sure all the inmates are doing okay in their cells," McPherson said. Hansen was to make a fire watch every half hour, be alert for suicide attempts, and assist the nurse if she needed to enter a cell. Hansen had a radio and keys at the time of the incident.

McPherson testified that when Hansen came to McPherson's office at the end of Hansen's shift, McPherson said, "I caught you sleeping, didn't I Erv?" and Hansen responded, "Yeah, but I just dozed off for a few minutes."

At the hearing before the board, Hansen testified that he was sitting at his desk rubbing his knee when he heard McPherson coming. Hansen stated that McPherson "come around the corner and he took his hand just as hard as he could and he pushed me right into the desk and hit my knee on that—my sore knee on the desk." When Hansen went to McPherson's office at the end of his shift, Hansen said, he denied sleeping but replied that he was rubbing his knee.

Hansen claimed that the document prepared by the union representative, which indicated that it was Hansen's contention that he "nodded off" for a few seconds, did not contain Hansen's words, but the words of the union representative. Hansen again denied sleeping and stated that McPherson was lying.

Frank Hopkins, deputy warden at the penitentiary at the time of the board hearing, testified that it is the policy of the penitentiary to terminate employees found sleeping on duty because all employees at the penitentiary are responsible for security.

> In the event a person is sleeping they [sic] cannot be responsible for security, as it requires supervision of areas and/or inmates in events that may take place, and it is considered to be a violation of gross negligence with the potential for significant and severe consequences, and one

that is not felt that is possible to be tolerated.

Hopkins stated that in determining that Hansen should be terminated, he took into account Hansen's 10-year record at the penitentiary, including his performance evaluations, "which were average to slightly above average," and the seriousness of the infraction.

The DCS personnel administrator, Gary Burger, testified that discharge is the typical discipline for penitentiary correctional officers found sleeping on the job, although that may not be the case at all the DCS institutions.

While there is a conflict between what Hansen testified to at the hearing and what he is alleged to have admitted to the sergeant on the day of the incident, we "will consider and may give weight to the fact that the agency or hearing officer observed the witnesses and accepted one version of the facts rather than another." *Monie v. State Personnel Board*, 229 Neb. 27, 30, 424 N.W.2d 874, 877 (1988). We are required to make "independent findings of fact without reference to those made by the agency whose action is being reviewed . . . and reach our decision independent of all dispositions that have gone before." *Monie, supra*.

As we noted in a case which involved the termination of an employee at another DCS facility, "[t]he appropriate discipline was a matter within the discretion of the director." *Kemper v. State*, 230 Neb. 740, 743, 433 N.W.2d 497, 499 (1988).

Under the administrative regulations which govern state personnel, "an employee's conduct which compromises the security of a departmental program or constitutes an offense of 'serious magnitude' renders the progressive discipline policy inapplicable." *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 511, 446 N.W.2d 211, 213 (1989). "Although progressive discipline of a correctional facility's employee is authorized under both the state rule and departmental regulation, whether progressive discipline should be imposed and implemented is discretionary with the director of the department." *Percival, supra* at 512, 446 N.W.2d at 213.

In order to reverse the agency's decision, we must find that its actions were arbitrary or capricious, "taken in disregard of facts or circumstances and without some basis which would

lead a reasonable person to the same conclusion." *Id.* It is not unreasonable to expect that security guards at a maximum security prison will remain awake and alert during their tour of duty. Hansen asserted that he missed none of his required fire checks, and he complains that the department's concern about a fire or suicide is based solely on speculation and conjecture. As we stated in *Percival*, "[A]ctual harm is not required to impose discipline; an employee's violation of a departmental rule, thereby compromising the security or integrity of [the facility], is sufficient for disciplinary action." *Percival, supra* at 513, 446 N.W.2d at 214.

The district court's judgment reversing the decision of the State Personnel board is therefore affirmed.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DOUGLAS VEITH, RESPONDENT.

470 N.W.2d 549

Filed May 31, 1991. No. 90-461.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, 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 referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof: Appeal and Error.** The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding.
3. **Disciplinary Proceedings.** Every attorney admitted to practice law in Nebraska shall take and subscribe an oath swearing to support the Nebraska and U.S. Constitutions and to faithfully discharge the duties of an attorney and counselor to the best of his or her abilities. An attorney's violation of a disciplinary rule and failure to act competently by neglecting a matter entrusted to him or her is conduct violative of an attorney's oath as a member of the bar. The oath requires lawyers to observe the established codes of professional ethics.
4. **Disciplinary Proceedings: Conversion: Words and Phrases.** In attorney

discipline proceedings, conversion refers to an attorney's misappropriation of a client's property to the attorney's own use or some other improper use.

5. **Disciplinary Proceedings: Words and Phrases.** Misappropriation is any unauthorized use of clients' funds entrusted to a lawyer, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
6. **Disciplinary Proceedings: Intent: Words and Phrases.** An attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing.
7. **Disciplinary Proceedings: Proof.** The mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports a finding of misappropriation.
8. **Disciplinary Proceedings: Conversion.** An act of conversion is complete when the clients' trust account is overdrawn or when, through mismanagement or misconduct on the part of the attorney, the balance of the account is less than the clients' interest in it.
9. **Disciplinary Proceedings: Fraud: Intent.** An attorney's intent to defraud or lack thereof is irrelevant when drawing checks on clients' trust account to pay personal expenses.
10. **Disciplinary Proceedings.** An attorney has a duty to keep separate and properly account for client trust funds entrusted to the attorney and to promptly pay over and deliver such funds to the client upon request.
11. _____. An attorney may not use client trust funds to cover business expenses.
12. _____. To determine whether and to what extent discipline should be imposed it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his present or future fitness to continue in the practice of law.
13. _____. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment.
14. _____. In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list.
15. _____. Misappropriation affects both the bar and the public because it is a serious offense involving moral turpitude.
16. **Disciplinary Proceedings: Conversion.** Receiving a client's funds and converting them to personal use by placing them in an office account without consent of the client is illegal conduct involving moral turpitude.
17. **Disciplinary Proceedings.** Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession.
18. _____. The paramount purpose of the "moral turpitude" standard is not to punish practitioners but to protect the public, the courts, and the profession

against unsuitable practitioners.

19. _____. Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney violating the Code of Professional Responsibility.
20. **Disciplinary Proceedings: Intent: Circumstantial Evidence.** Intent to misappropriate client funds may be inferred from circumstantial evidence.
21. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
22. **Disciplinary Proceedings: Intent.** If a misappropriation occurs through an attorney's laxity rather than wrongful intent, and if this lack of intent is reinforced by the attorney's having taken remedial action immediately upon discovery of the problem, less discipline than disbarment may be appropriate.
23. **Disciplinary Proceedings.** The fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction.
24. _____. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.

Original action. Judgment of disbarment.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

Jon S. Reid and Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for respondent.

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

PER CURIAM.

In this attorney disciplinary proceeding, we find that since he knowingly and willfully transferred and commingled client trust funds with funds in his and his associated lawyers' law office business account, and because he misappropriated some of those funds to his own use and to other improper purposes, Douglas Veith should be disbarred.

Specifically, we find that the record reveals by clear and convincing evidence that Veith violated his oath of office as an attorney and Canon 1, DR 1-102, and Canon 9, DR 9-102, of the lawyers' Code of Professional Responsibility. We agree with the relator, the Nebraska State Bar Association (NSBA), that the 8-month suspension recommended by the referee is

inappropriate under the circumstances of this case. The 2-year suspension suggested by the NSBA Counsel for Discipline is also too lenient.

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, 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 referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990), *cert. denied* ____ U.S. ____, 111 S. Ct. 153, 112 L. Ed. 2d 119. The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding. *Id.*

## FACTUAL BACKGROUND

The undisputed facts in the record here reveal that Veith was admitted to the practice of law in the State of Nebraska in June 1982. At all times relevant, Veith was the managing attorney in a five-attorney office-sharing arrangement in Bellevue, Nebraska. As managing attorney, Veith received the monthly bank statements regarding the general law business and client trust accounts. Each of the attorneys used the trust account for his respective clients' trust funds.

In July 1988, Veith was informed by the bank that it had transferred funds from the trust account to the general law business account to cover a shortage of funds. At various other times Veith transferred or authorized the transfer of funds to the business account from the client trust account.

During the period of August 1988 through February 1989, Veith, although he was generally aware of periodic deficits in both the trust and business accounts, failed to reconcile the accounts or take other action to avoid the deficit problem. Between September 1988 and March 1989, the trust account had negative balances. At a minimum, throughout this period, it should have contained $16,900 in client trust funds. Between

July 1988 and March 1989, Veith withdrew as income $70,000 from the business account. On March 3, 1989, one of the associated attorneys questioned Veith about the trust account balance. Veith acknowledged that the trust account had over a $3,000 negative balance. He secured a $10,000 personal loan from a bank and deposited that money into the trust fund that same day to cover the deficiency in the client trust fund account of the complaining associated lawyer. Subsequently, Veith borrowed $25,000 from a friend to cover deficiencies in the other associated attorneys' trust funds. On March 27, 1989, Veith secured a loan from a relative in the amount of $10,600, which he deposited in the trust account to cover trust funds for which Veith was accountable to his own clients.

Meanwhile, on March 9, 1989, all the attorneys in the office-sharing arrangement, including Veith, made a conference call to the NSBA Counsel for Discipline, explaining the matter and setting in motion an investigation.

The Committee on Inquiry of the Fourth Disciplinary District, after an October 16, 1989, hearing, recommended that formal charges be filed against Veith. These charges were reviewed by the Disciplinary Review Board and were filed as an original action in this court on May 29, 1990. The formal charges allege that the actions of Veith, as set forth above, constitute a violation of his oath of office, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1987), and of DR 1-102 and DR 9-102.

Section 7-104 provides that every attorney admitted to practice law in Nebraska shall take and subscribe an oath swearing to support the Nebraska and U.S. Constitutions and to faithfully discharge the duties of an attorney and counselor to the best of his or her abilities. An attorney's violation of a disciplinary rule and failure to act competently by neglecting a matter entrusted to him or her is conduct violative of an attorney's oath as a member of the bar. *State ex rel. Nebraska State Bar Assn. v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982). See *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984) (the oath requires lawyers to observe the established codes of professional ethics). DR 1-102 and DR 9-102 provide as follows:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein [with exceptions not applicable here].

(B) A lawyer shall:

. . . .

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding time.

Following a formal hearing on November 16, 1990, a referee, on December 7, 1990, filed her report with this court. The referee found that Veith had violated the disciplinary rules under which he was charged. The referee recommended, among five components, that Veith be suspended from the practice of law for a period of 8 months. The NSBA filed an exception to the report, arguing that the referee's recommendation of suspension for a period of 8 months was too lenient under the facts and circumstances as established by the record of this case.

In his answer to the formal charges, Veith admits violating DR 1-102(A)(1) and DR 9-102(B)(3) but none of the other enumerated provisions of DR 1-102 or DR 9-102. In essence,

Veith admits to commingling the business and client trust fund accounts but attributes it to negligence. He denies attempting to intentionally or dishonestly convert the funds, perpetrate a fraud, or deceive or misrepresent matters to his associated counsel or clients. In contrast, the NSBA argues that Veith has gone beyond commingling and has converted or willfully misappropriated the client trust funds.

## COMMINGLING AND MISAPPROPRIATION

In attorney discipline proceedings, conversion refers to an attorney's misappropriation of a client's property to the attorney's own use *or some other improper use*. See ABA/BNA Lawyers' Manual on Professional Conduct 45:106 (1985). Misappropriation is "any unauthorized use . . . of clients' funds entrusted to [a lawyer], including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Wilson*, 81 N.J. 451, 455 n.1, 409 A.2d 1153, 1155 n.1 (1979). See *Baca v. State Bar of California*, 52 Cal. 3d 294, 801 P.2d 412, 276 Cal. Rptr. 169 (1990) (an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation). Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing. *Edwards v. State Bar of California*, 52 Cal. 3d 28, 801 P.2d 396, 276 Cal. Rptr. 153 (1990). See, *Giovanazzi v. State Bar of California*, 28 Cal. 3d 465, 619 P.2d 1005, 169 Cal. Rptr. 581 (1980) (mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports a finding of misappropriation); *Matter of Iversen*, 51 A.D.2d 422, 381 N.Y.S.2d 711 (1976) (an act of conversion is complete when the clients' trust account is overdrawn or when, through mismanagement or misconduct on the part of the attorney, the balance of the account is less than the clients' interest in it). Thus, under DR 9-102, wrongful or improper intent is not an element of misappropriation. See, *In re Wilson, supra*; *Archer v. State*, 548 S.W.2d 71 (Tex. Civ. App. 1977) (DR 9-102 does not require elements of fraud, culpability, or willfulness); *State*

*v. Stoveken*, 68 Wis. 2d 716, 229 N.W.2d 224 (1975) (attorney's intent to defraud or lack thereof is irrelevant when drawing checks on clients' trust account to pay personal expenses).

We have held that an attorney has a duty to keep separate and properly account for client trust funds entrusted to the attorney and to promptly pay over and deliver such funds to the client upon request. See *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984). See, also, DR 9-102. An attorney may not use client trust funds to cover business expenses. See, *In re Lewis*, 118 Ill. 2d 357, 515 N.E.2d 96 (1987) (professional corporation's operating account); *Edmondson v. State Bar of California*, 29 Cal. 3d 339, 625 P.2d 812, 172 Cal. Rptr. 899 (1981) (business debts); *Bar Assn. v. Thompson*, 69 Ohio St. 2d 667, 433 N.E.2d 602 (1982) (overhead and operating expenses). Based upon Veith's admissions and other clear and convincing evidence in the record, this court finds that Veith, by knowingly commingling and misappropriating trust funds, inexcusably breached his oath of office and his duty to his clients and to the clients of the lawyers sharing office space with him. In short, the clear and convincing evidence reflects that Veith is guilty of each of the charges brought against him.

## DISCIPLINE

The next step is to determine the appropriate sanction. To determine whether and to what extent discipline should be imposed it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990), *cert. denied* ____ U.S. ____, 111 S. Ct. 153, 112 L. Ed. 2d 119.

There is no question that misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment. See, *State, ex rel. Hunter, v. Hatteroth*, 134 Neb. 451, 279 N.W. 153 (1938) (misappropriation by an attorney of

money belonging to his client is such a disregard of duty as to warrant disbarment); *State, ex rel. Hunter, v. Boe*, 134 Neb. 162, 278 N.W. 144 (1938) (an attorney is subject to disbarment because of delinquency in accounting to clients for money received in his professional capacity, in violation of his duty to the public); *State, ex rel. Spillman, v. Priest*, 118 Neb. 47, 223 N.W. 635 (1929) (delinquency in accounting for money received in professional capacity is ground for disbarment as violating duty to maintain respect due courts). " 'In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list.' " *The Florida Bar v. McShirley*, 573 So. 2d 807, 808 (Fla. 1991), quoting *The Florida Bar v. Tunsil*, 503 So. 2d 1230 (Fla. 1986).

Misappropriation affects both the bar and the public because it is a serious offense involving moral turpitude. See, *In re Phillips*, 767 S.W.2d 16 (Mo. 1989) (receiving client's funds and converting them to personal use by placing them in office account without consent of client is illegal conduct involving moral turpitude); *Bambic v. State Bar of California*, 40 Cal. 3d 314, 707 P.2d 862, 219 Cal. Rptr. 489 (1985) (misappropriation of client funds involves moral turpitude and undermines public confidence in legal profession); *In re Patt*, 81 Ill. 2d 447, 410 N.E.2d 870 (1980) (conversion of a client's funds is an act involving moral turpitude). "Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession." *Grim v. State Bar of California*, 53 Cal. 3d 21, 29, 805 P.2d 941, 943, 278 Cal. Rptr. 682, 684 (1991). " 'The most common definition of an act of moral turpitude is one that is "contrary to honesty and good morals." [citations.]' . . . ' "The paramount purpose of the 'moral turpitude' standard is not to punish practitioners but to protect the public, the courts, and the profession against unsuitable practitioners. . . ." ' " *In re Scott*, 52 Cal. 3d 968, 978, 802 P.2d 985, 991, 277 Cal. Rptr. 201, 207 (1991).

This court disagrees with Veith's assessment that his violation did not involve moral turpitude. At various times, by his own admission, Veith knowingly transferred money from the client trust account to the business account of his law office. He

admitted that during this period 20 percent of the money from the trust fund was used by him personally and 80 percent was used for salaries and other office expenses. During this period he bought himself an automobile, provided a telephone for his automobile, furnished his law office with a new leased computer system that cost $2,000 per month, and updated his law library, all so he would appear successful.

This court also disagrees with Veith's assessment that his conduct does not affect his present or future fitness to continue in the practice of law. In his new partnership arrangement Veith has taken steps so that he cannot sign checks on either the trust or business account. While admirable, this situation creates a paralogism. Veith asks this court and his clients to trust him, yet he apparently has some question as to his own trustworthiness.

## MITIGATING FACTORS

This court must next determine whether there are factors which would mitigate the sanction of disbarment, suggesting that a lesser sanction may be more appropriate. Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney violating the Code of Professional Responsibility. *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

Respondent presents an array of arguments, starting with a lack of intent. "As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability." *Edwards v. State Bar of California*, 52 Cal. 3d 28, 38, 801 P.2d 396, 402, 276 Cal. Rptr. 153, 159 (1990). Therefore, misconduct, although technically willful, may be less culpable if committed as a result of negligence and not as a result of a deliberate act. Veith's argument is that he negligently rather than deliberately breached his duty. The record does not support this contention. He was aware that the bank transferred funds from the trust account to the business account but he took no action. He also transferred or authorized some transfers from the client trust fund account to the business account. That Veith knowingly and intentionally misappropriated trust funds is evidenced by his conversations with his minister. He told his minister that he

transferred funds from the trust account to the law office business account because he was running short on money. The minister understood Veith considered the transfer to be a temporary "quick-fix" which he would fix later.

Intent to misappropriate client funds may be inferred from circumstantial evidence. See *In re Phelps*, 306 Or. 508, 760 P.2d 1331 (1988). See, also, NJI 14.11 ("Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct"). Perhaps the initial transfer of funds was due to Veith's negligence. However, the first transfer was not an isolated incident. There were repeated incidents in which Veith knew that the bank was transferring funds from the client trust fund account to the business account after the initial transaction. There were various times he authorized a transfer or personally transferred funds from the trust account to the business account. See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989) (cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions). Veith never made an accounting over the period in question. At the same time he received a salary of approximately $70,000.

Veith's next argument is that no client was injured because he made full restitution. He relies upon *State ex rel. NSBA v. Fitzgerald*, 227 Neb. 90, 416 N.W.2d 28 (1987), for the proposition that restitution of the misused funds prior to being faced with accountability may mitigate the discipline to be imposed and apparently evidences a lack of wrongful intent. The problem for Veith is that, although he was not yet faced with formal accountability, the restitution he provided was not made until after he was confronted by an associated lawyer. At that point any motivation to make restitution came from the fear of being detected and punished rather than from a surge of conscience. The California Supreme Court has recognized the principle that if the misappropriation occurs through the attorney's laxity rather than wrongful intent, *and* if this lack of intent is reinforced by the attorney's having taken remedial

action immediately upon discovery of the problem, less discipline than disbarment may be appropriate. See *Waysman v. State Bar of California*, 41 Cal. 3d 452, 714 P.2d 1239, 224 Cal. Rptr. 101 (1986); *Palomo v. State Bar of California*, 36 Cal. 3d 785, 685 P.2d 1185, 205 Cal. Rptr. 834 (1984). Even if this court were to accept Veith's position that he was merely negligent, he would not fall within this sound principle because over a course of almost 8 months, although he knew and participated in the transfer of funds from the trust account to the law office business account, he took no action to restore the trust funds. It was not until he was confronted that he confessed to any wrongdoing. Cf. *State ex rel. NSBA v. Miller, supra* (attorney made restitution of converted funds more than 2 years prior to a complaint filed against him and without threat of disciplinary action).

One of the purposes of DR 1-102 and DR 9-102 of the Code of Professional Responsibility is to protect innocent persons from suffering any financial loss because of any misappropriation of funds by lawyers. In this case, Veith's contention that any sanction should be mitigated because no lawyer's client suffered any financial loss is not persuasive. Veith borrowed $10,000 from a bank, $25,000 from a friend, and $10,600 from a relative to restore those funds in the trust account which he had misappropriated. On October 16, 1989, when asked by a member of the Committee on Inquiry where he stood on these loans, Veith replied: "Very seriously within the last 48 to 72 hours my wife and I have seriously sat down and talked about bankruptcy and that's a very serious consideration to the point where we've formulated a plan to potentially do that."

Because Veith borrowed money and reimbursed the funds he misappropriated, the clients of Veith and his associated lawyers have not suffered a financial loss. But that does not mean that innocent parties might not suffer financial loss because of Veith's misappropriations. Veith filed bankruptcy both personally and for his business on January 13, 1990. His innocent lenders may or may not suffer a financial loss. Regardless of whether the lenders are or are not reimbursed, the fact that no client suffered any financial loss is no excuse for a

lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction. See, *In the Matter of Galloway*, 278 S.C. 615, 300 S.E.2d 479 (1983) (restitution of converted funds may have little or no effect in mitigating the sanction); *Greenbaum v. State Bar*, 15 Cal. 3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1976) (fact that client was not and would not be harmed by attorney's action was irrelevant); *Heavey v. State Bar*, 17 Cal. 3d 553, 551 P.2d 1238, 131 Cal. Rptr. 406 (1976) (fact that client suffers no harm is mere fortuity). But see, *Louisiana State Bar Ass'n v. Larré*, 457 So. 2d 649 (La. 1984) (repayment of funds along with severe depression and lack of prior disciplinary record may act as mitigating factors); *The Florida Bar v. Whitlock*, 426 So. 2d 955 (Fla. 1982) (depositing personal funds into client trust accounts to bring them back to their proper balances will not excuse the lawyer of his conversion, but where there is no permanent financial loss to client a lighter sanction may be imposed).

Factors which do favor mitigation are that Veith (1) was in good standing and free from disciplinary complaint or penalty, (2) has exhibited an attitude of regret and remorse, (3) has sought and received counseling, (4) has a good reputation in the community, (5) has cooperated fully with the Counsel for Discipline, and (6) has apparently provided many pro bono hours.

## CONCLUSION

Veith cites a myriad of cases comparing various misconduct violations and their resulting sanctions. None of those are binding on this court's decision. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987). Disbarment has been, and continues to be, a viable sanction in cases involving serious breach of disciplinary rules.

There has been a trend in recent years toward lighter sanctions, a trend this court is convinced must be reversed. The correlation between the decline of public confidence in the legal

profession and the trend toward lighter attorney discipline sanctions is no coincidence.

> "[Excuses such as] a 'lack of intent to deprive the client of his money' or 'personal hardship' . . . stand out like an invitation to the lawyer who is in financial difficulty for one reason or another. All too often he is willing to risk a slap on the wrist, and even a little ignominy, hoping he won't get caught, but knowing that if he is he can plead restitution, but [sic] duly contrite, and escape the ultimate punishment. The profession and the public suffer as a consequence. The willful misappropriation of client funds should be the Bar's equivalent of a capital offense. The [sic] should be no excuses."

*The Florida Bar v. Breed*, 378 So. 2d 783, 784 (Fla. 1979) (Florida Supreme Court quoting a referee and giving notice that it would not be reluctant to disbar an attorney for this type of offense, reversing past trend of suspension as only discipline).

Notwithstanding the mitigating factors in Veith's favor, the facts that Veith commingled trust funds with his law office funds and willfully misappropriated them lead this court to conclude that in this case disbarment is the only appropriate sanction. Veith is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1987).

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

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## STATE OF NEBRASKA, APPELLEE, V. DALE KRAMER, APPELLANT.

469 N.W.2d 785

Filed May 31, 1991. No. 90-575.

1. **Criminal Law: Directed Verdict.** In a criminal case, a court can sustain a defendant's motion for a directed verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
2. **Convictions: Witnesses: Testimony: Corroboration.** Neb. Rev. Stat.

§ 28-1439.01 (Reissue 1989) requires only that a conviction be based on something more than only a cooperating individual's testimony. It is sufficient if the cooperating individual's testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.

3. **Motions for Mistrial: Appeal and Error.** A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and would result in preventing a fair trial. The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion.
4. **Rules of Evidence: Witnesses: Prior Convictions: Time.** Under Neb. Evid. R. 609(2), Neb. Rev. Stat. § 27-609(2) (Reissue 1989), cross-examination of a witness regarding the witness' previous felony convictions and the number thereof is proper, but only if 10 or fewer years have elapsed since the date of conviction or the release of the witness from confinement.
5. **Trial: Evidence: Appeal and Error.** Where evidence is excluded, an offer of proof is generally a prerequisite to review on appeal.
6. **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 Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Mark J. Young, Deputy Hall County Attorney, for appellee.

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

GRANT, J.

After a jury trial, defendant-appellant, Dale Kramer, was convicted of one count of distribution of marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986), which subsection was later amended in an immaterial manner. See § 28-416(1)(a) (Reissue 1989). Defendant was sentenced to a term of 18 to 24 months' imprisonment. He timely appealed to this court, contending the district court erred in overruling his motion for directed verdict, in overruling his motions for mistrial, in failing to allow defendant to impeach one of the State's witnesses with a second felony conviction, and in imposing an excessive sentence.

In a criminal case, a court can sustain a defendant's motion

for a directed verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990); *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990). Defendant contends there was a complete failure of evidence to establish the fact that he was the person who sold the marijuana to a confidential informant, because the informant's testimony was not corroborated as required by Neb. Rev. Stat. § 28-1439.01 (Reissue 1989), which provides, "No conviction for an offense punishable under sections 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual."

The record shows that Michael Drugsvold testified at trial that in December 1987 he had agreed to work with the Nebraska State Patrol as a confidential informant. Drugsvold further testified that he had known defendant since high school and "[u]sed to get drugs from [defendant] all the time." There was no objection to this testimony. On December 15, 1987, Drugsvold made two telephone calls from the Nebraska State Patrol office to the defendant's residence. He recognized the voice answering the second telephone call as that of the defendant and asked defendant if he could purchase an ounce of marijuana. Defendant said, "Yeah. Come on over."

The record shows that Investigator Steven Kolb of the Nebraska State Patrol then searched Drugsvold for money and contraband, gave him money to purchase marijuana, equipped him with an audio transmitter (a "wire"), and drove him to a house "where Kramer was living." When Drugsvold arrived at defendant's residence, he knocked on the door and someone let him in. There were approximately 10 people in the house. While inside the residence, Drugsvold spoke to defendant about purchasing marijuana. Defendant said, "Hold on for a minute," went into the bedroom, and asked Drugsvold to come in. Drugsvold followed defendant into the bedroom and asked if he could "bring somebody in" who wanted to purchase an ounce of marijuana. Defendant said he did not want to meet

anybody then. Drugsvold testified that he then purchased half an ounce of marijuana from the defendant for $45 or $50. Drugsvold then left the house, met Kolb, and gave Kolb the marijuana. They returned to the patrol office, where Drugsvold was again searched.

Kolb, a drug investigator for the Nebraska State Patrol, testified that he saw Drugsvold on December 15, 1987, at the State Patrol office in Grand Island. Kolb was present when Drugsvold made the two telephone calls to defendant. After the second call, Kolb and Investigator Vincent Hernandez searched Drugsvold for money and contraband and equipped him with an audio transmitter. Drugsvold was to ask defendant if Kolb could come into defendant's house and purchase an ounce of marijuana.

Kolb testified that he and Drugsvold drove to defendant's residence in a van. Drugsvold got out, went into the house, returned to the van about 12 minutes later, and gave Kolb two plastic bags of marijuana.

Investigator Hernandez testified that on December 15, 1987, he was assisting Kolb in Hall County. Hernandez followed Kolb and Drugsvold to the defendant's residence, parked about a block west of the house, and monitored the conversations of the people inside defendant's house. The tape recordings of the conversations were not received in evidence.

We have addressed the corroboration requirement of § 28-1439.01 on several occasions. In *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982), the appellant argued that any testimony of a cooperating individual on the essential elements of a crime which was not corroborated by other evidence should be excluded pursuant to § 28-439 (Reissue 1979), which was the statute then in effect and is identical to § 28-1439.01. We held, however, that "[t]he statute only requires that a conviction be based on something more than only a cooperating individual's testimony." *State v. Beckner, supra* at 446, 318 N.W.2d at 892.

In *State v. Taylor*, 221 Neb. 114, 118, 375 N.W.2d 610, 614 (1985), we set out facts similar to those in the case before us: "In addition to the undercover agent's testimony, a State Patrol investigator testified that before the agent approached Taylor he had no marijuana in his possession and that upon his return

he possessed an ounce of the substance." We then held that the testimony of a cooperating individual need not be corroborated on every element of the crime.

In *State v. Cain*, 223 Neb. 796, 801, 393 N.W.2d 727, 731 (1986), we said, "It is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue." Accord *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988).

The record shows that the material facts of Drugsvold's testimony were sufficiently corroborated. The physical evidence of the marijuana and the testimony of the State's other witnesses support Drugsvold's testimony that he purchased the marijuana from the defendant. Defendant's assertion to the contrary is without merit.

In his second assignment of error, defendant contends the trial court erred in failing to grant his motions for mistrial. On this issue, the record shows that defense counsel impeached Drugsvold on several occasions with Drugsvold's prior deposition testimony. Drugsvold also testified on cross-examination that he had not wanted to testify against defendant. On redirect, the prosecutor asked if Drugsvold was scared when he gave his deposition. Drugsvold answered, "Yes. My life had been threatened by this guy." Defense counsel objected and moved for a mistrial on the basis of Drugsvold's statement that his life had been threatened by the defendant, and claimed the testimony was irrelevant. During a conference held outside the presence of the jury, the prosecutor explained that he was trying to elicit testimony concerning reasons why some of Drugsvold's statements at trial were inconsistent with his deposition testimony. The court ultimately overruled defendant's motion for mistrial and instructed the jury to disregard the statement.

In this appeal, the State argues that the trial court properly overruled defendant's motion for mistrial because Drugsvold's statement was relevant and admissible under our decision in *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). In *State v. Clancy, supra* at 500, 398

N.W.2d at 716, we held that under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), "a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed, and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged." In *Clancy*, the defendant threatened to kill the State's witness and her husband or to have their house blown up. The record in *Clancy*, however, showed that the defendant made the threat after the witness reported defendant to the authorities for stealing an outboard motor. In the present case, the record is silent as to when defendant allegedly threatened to kill Drugsvold. Absent this vital information, the State has failed to demonstrate that the threat was relevant evidence concerning defendant's "conscious guilt that a crime has been committed." The threat could conceivably have been made before any crime was committed. The statement was not admissible under rule 404(2).

That determination, however, does not require that we hold that defendant's second assignment of error requires reversal. We have held that a mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and would result in preventing a fair trial. The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989).

We have already determined that Drugsvold's testimony was corroborated by physical evidence and by the testimony of the State's other witnesses. Drugsvold also testified he had known defendant since high school and had purchased drugs from him "all the time." There was no objection to this testimony. The record also shows that Drugsvold did not waver in his testimony that he had purchased marijuana from the defendant. The jury was instructed to disregard Drugsvold's testimony regarding the alleged death threat. Under the circumstances, the trial court

did not abuse its discretion in overruling defendant's motion for mistrial.

Defendant next claims the trial court erred in failing to allow him to impeach Drugsvold with a second felony conviction. On this point, the record shows that Drugsvold testified on direct examination that he resided in the Hall County jail and had been convicted of a felony within the last 10 years. On cross-examination, the following exchange took place:

> Q. Mr. Drugsvold, you testified that you have been convicted of a felony once within the last ten years, is that correct?
>
> A. Yes.
>
> Q. As a matter of fact, you have been convicted of two felonies?

The State objected to this question as improper impeachment, and, after a bench conference, the objection was sustained. Defendant did not make an offer of proof regarding Drugsvold's prior felony convictions. He contends the district court's evidentiary ruling was erroneous, quoting our holding in *State v. Boss*, 195 Neb. 467, 473, 238 N.W.2d 639, 644 (1976), that "[w]hen a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof . . . ." Accord, *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989); *State v. Craig*, 192 Neb. 347, 220 N.W.2d 241 (1974).

Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1989), provides in part:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted . . . .
>
> (2) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.

Under rule 609(2), cross-examination of a witness regarding

the witness' previous felony convictions and the number thereof is proper, but only if 10 or fewer years have elapsed since the date of conviction or the release of the witness from confinement. The State contends that defendant is precluded from raising this issue because he failed to make an offer of proof showing that the foundational requirements of rule 609 were met. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1989), provides:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

In *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976), we said rule 103 did not change the rule that where evidence is excluded, an offer of proof is generally a prerequisite to review on appeal. The purpose of an offer of proof is to bring to the attention of the trier of fact, and the appellate court on review, the substance of the evidence offered so that both the trial court and the appellate court may determine whether the refusal to accept the evidence was error. *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977). "When the condition of the record and form of the question itself shows that it is relevant *and competent*, no offer of proof is necessary." (Emphasis supplied.) *Id.* at 360, 258 N.W.2d at 926. See, also, *State v. Fonville, supra*. Competent evidence is evidence that is admissible and relevant on the point in issue. *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987).

In this case, the condition of the record fails to show that the evidence regarding Drugsvold's alleged second felony conviction was competent. Drugsvold testified on direct examination that he resided in the county jail and had been convicted of a felony within the past 10 years. Even if we assume Drugsvold had been convicted of a second felony, there was no foundation laid to establish that the alleged second felony conviction occurred within the 10-year period required

by rule 609(2).

The trial court properly sustained the State's foundational objection, and defendant failed to provide the required foundational information either by further examination of the witness or by making an offer of proof. Lacking this information, we cannot say that the trial court erred in excluding evidence of Drugsvold's alleged second felony conviction. This assignment of error is without merit.

Finally, defendant contends the district court erred in sentencing him to 18 to 24 months' imprisonment. The offense of which defendant was convicted is a Class III felony, punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both. We have often held that a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990). The presentence report shows that defendant has a lengthy criminal record and recurring problems with drug and alcohol abuse. During his sentencing hearing, defendant admitted to the court that he had "dealt a lot of drugs." The sentence imposed is well within the statutory limits and does not constitute an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

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## IN RE INTEREST OF C.E.E., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.A.E., APPELLANT.

469 N.W.2d 782

Filed May 31, 1991. No. 90-762.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof.** Termination of parental rights must be by clear and convincing evidence.

3. **Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated.
4. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.
5. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

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

Richard Harter and, on brief, William B. Zastera, Otoe County Public Defender, for appellant.

Max J. Kelch, Otoe County Attorney, for appellee.

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

BOSLAUGH, J.

The parental rights of the appellant and the father of their son were terminated by the Otoe County Court. The father's appeal was dismissed on January 4, 1991. The mother, who is the appellant, assigned three errors, which can be summarized as follows: (1) The trial court erred in finding that she was afforded a reasonable time in which to comply with the plan of rehabilitation, and (2) the trial court erred in finding there was clear and convincing evidence to support the termination of her parental rights, which was in the best interests of the child.

> In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. [Citation omitted.] In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights must be by clear and

> convincing evidence. [Citation omitted.] A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. [Citation omitted.]

*In re Interest of L.P.B.*, 237 Neb. 806, 807, 467 N.W.2d 687, 688-89 (1991); *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990); *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990).

The record shows that the child was born on May 28, 1987. On May 6, 1988, he was removed from the family home and placed with the Nebraska Department of Social Services. He has remained in the custody of the department since that date.

A juvenile petition was filed on May 6, 1988. Between May 1988 and February 1989, the department and the parents unsuccessfully attempted to resolve the matter without an adjudication. On February 22, 1989, the parents both admitted the allegations of the petition, and the child was found to be a juvenile within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). On May 24, 1989, the child was formally placed in the custody of the department, and an evidential hearing was ordered to determine the corrective measures required to rehabilitate the parents. A plan of rehabilitation was adopted and ordered by the court on June 14, 1989. Under the plan, the appellant was required to (1) attend marital counseling; (2) obtain counseling for (a) parenting skills, (b) discipline and guidance of children, (c) coping with stress, (d) marital strife, (e) finances, and (f) individual improvement; (3) maintain suitable employment; (4) obtain adequate housing, maintain suitable housekeeping standards, and cooperate with the conducting of a home study; (5) develop a monthly budget; (6) abstain from the use of alcohol; (7) complete an alcohol codependency program; (8) maintain stable living conditions and obtain the department's approval before moving; (9) visit the child at least once a week; and (10) assist in supporting him by paying $50 each week to the clerk of the district court.

A motion to terminate parental rights was filed, and evidence was heard on August 1 and 22, 1990. On August 24, 1990, the court terminated the father's and the appellant's

parental rights. The trial court found that the State had shown by clear and convincing evidence that both parents had willfully failed to comply with the plan and that it was in the best interests of the child that the parental rights be terminated.

The evidence shows that the appellant failed to comply with any of the provisions of the plan except for two: (5) developing a monthly budget and (9) visiting the child once a week. The appellant admitted that she had not complied with provisions (1), (2), (3), (6), (7), (8), and (10) of the plan. Regarding provision (4), suitable housekeeping standards, a family support worker with the department testified that the surroundings provided for the child were unsafe and unhealthy. The support worker noted that there were always dirty dishes and dirty clothes lying around and that there were dog feces on the floor.

At the termination hearing, the appellant offered little explanation for her failure to comply with the plan other than a lack of financial ability. In rebuttal, the support worker testified that the appellant was informed that she probably could attend counseling free because of her financial situation. Further, the support worker noted that she encouraged the appellant weekly to participate in parental counseling; alcohol counseling; alcohol codependency programs; counseling for the discipline and guidance of children, coping with stress, marital strife, and finances; and individual counseling. The appellant, however, failed to make any effort to comply with the rehabilitation plan.

Neb. Rev. Stat. § 43-292(6) (Reissue 1988) provides for termination of parental rights when the court finds such action to be in the best interests of the juvenile and "[f]ollowing a determination that . . . reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

> A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child

require termination of parental rights.

*In re Interest of V.M.*, 235 Neb. 724, 727, 457 N.W.2d 288, 291 (1990).

The appellant argues that she was not given a reasonable amount of time in which to comply with the rehabilitation plan. The juvenile petition was filed on May 6, 1988. Between that date and February 1989, the department worked with the appellant to resolve the matter without an adjudication. When those efforts proved unsuccessful, an adjudication hearing was held on February 22, 1989, and the child was found to be a juvenile within § 43-247(3)(a). A plan of rehabilitation was adopted on June 14, 1989. Over 1 year 2 months later, the appellant had exhibited very little if any willingness to comply with the court-ordered plan. She failed to attend parental, personal, and alcohol counseling programs as required by the plan. She neglected to advise the social workers when she moved to a different location. She failed to obtain any type of employment. She had the opportunity to become involved in a vocational rehabilitation program, but left after a short period. She has never taken any responsibility to support her son. The fact is that the appellant failed to show any willingness to rehabilitate herself within a reasonable period of time.

The child is now 4 years old. He has spent the last 3 years of his life in foster care. A child " 'cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " *In re Interest of R. W.*, 236 Neb. 420, 429, 461 N.W.2d 545, 551 (1990) (quoting *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275 (1990)).

From our de novo review of the record, we find that the evidence is clear and convincing that it is in the best interests of the child to terminate the parental rights of the appellant because of her unwillingness to rehabilitate herself, although she was afforded a reasonable amount of time in which to comply with the rehabilitation plan.

The order terminating the parental rights of the appellant is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TODD A. SPAHNLE, APPELLANT.
469 N.W.2d 780

Filed May 31, 1991. No. 90-1217.

1. **Pleas.** Prior to sentencing, a court should allow the defendant to withdraw his plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea.
2. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
3. **Pleas: Appeal and Error.** A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, MARY L. DOYLE, Judge. Judgment of District Court affirmed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Susan R. Tast for appellant.

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

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

WHITE, J.

Todd A. Spahnle pled guilty to four misdemeanors in county court after waiving his right to counsel, and he was sentenced to a total of 9 months in county jail and fined $100. On appeal to the district court, he asserted that his pleas had not been entered knowingly, intelligently, and voluntarily and that he should have been allowed to withdraw his pleas. The district court affirmed, and he appeals to this court. We affirm.

Spahnle was charged following an incident at Branched Oak Lake, near Lincoln, Nebraska, in June 1990, in which a car driven by Spahnle struck another man, who stepped in front of the car. Spahnle did not stop to give assistance, and the man died as a result of the accident. The defendant was charged with violation of duty following an accident, see Neb. Rev. Stat. § 39-6,104.01 (Reissue 1988); fictitious plates, see Neb. Rev. Stat. § 60-323 (Reissue 1988); no valid registration, see Neb.

Rev. Stat. § 60-302 (Cum. Supp. 1990); and no proof of insurance, see Neb. Rev. Stat. § 60-570 (Reissue 1988).

At his arraignment on July 18, 1990, Spahnle was informed of the charges against him, the possible penalties, and the possibility that the sentences could be consecutive. The prosecution provided a factual basis for the charges. Spahnle waived his right to an attorney and entered his guilty pleas. The court found that the pleas were knowingly, voluntarily, and intelligently entered, and a presentence investigation was ordered.

After Spahnle met with a probation officer, he returned to court on his own motion and asked to change his pleas. The public defender was appointed, and at a hearing on the motion Spahnle said that he wished to change his pleas. He said he entered the guilty pleas only because the victim's family was present at the arraignment and he "felt bad." He told the court that he did not realize the full impact of his possible sentences until he met with the probation officer. The court denied his request.

Spahnle renewed his request to change his pleas prior to sentencing, and the motion was again overruled. The trial court found, based on the presentence report, that Spahnle was not a good candidate for probation, and he was sentenced to 6 months in jail for the violation of duty charge and 3 months in jail for no proof of insurance. He was fined $50 each for the other two charges. On appeal, the district court affirmed the county court.

Spahnle's assignments of error combine to assert that the district court erred in affirming the county court's finding that his guilty pleas were entered knowingly, voluntarily, and intelligently, and in refusing to allow him to withdraw his pleas.

We find that the county court followed the requirements for accepting the guilty pleas, as specified in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). We must then determine if Spahnle should have been allowed to withdraw those pleas at a later date.

We have held that prior to sentencing, a court should allow the defendant to withdraw his plea "for any fair and just reason, provided that the prosecution would not be

substantially prejudiced by its reliance upon the plea." *State v. Nearhood*, 223 Neb. 768, 770, 393 N.W.2d 530, 532 (1986). "The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea." *Nearhood, supra* at 771, 393 N.W.2d at 533. The withdrawal of a plea "is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion." *Id.*; *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

The only reasons that Spahnle gave for his request to withdraw his guilty pleas are that he entered them because the family of the victim was present in the courtroom and a friend advised him to "plead guilty to get it done with faster." He was not represented by counsel at the time of the entry of the pleas, but the record clearly shows that he waived the right to counsel on three occasions. His asserted explanation for withdrawing the pleas does not constitute a "fair and just reason."

The defendant has not met his burden of demonstrating a basis for withdrawing his pleas, and we do not find any evidence of an abuse of discretion on the part of the trial court.

We find, however, that the county court did not order a revocation of Spahnle's license for 1 year following his release from jail, as required by Neb. Rev. Stat. § 39-6,104.03 (Reissue 1988). We therefore remand to the district court with directions to remand to the county court to impose a 1-year license revocation. The decision of the county court, affirmed by the district court, is affirmed in all other respects.

AFFIRMED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating.

## STATE OF NEBRASKA, APPELLEE, V. AARON C. GIBBS, APPELLANT.

470 N.W.2d 558

Filed June 7, 1991. Nos. 81-920, 82-026, 82-027.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. **Criminal Law: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
3. **Pleas.** It is sufficient for a trial court to explain the possible range of penalties for each crime, and it is not necessary to explain that each sentence might run concurrently or consecutively to any other sentence imposed.
4. **Speedy Trial: Waiver.** Neb. Rev. Stat. § 29-1209 (Reissue 1989) provides: "Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial."
5. _____: _____. Under the provisions of Neb. Rev. Stat. § 29-1209 (Reissue 1989), it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute.
6. **Speedy Trial.** An unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right to speedy trial in the absence of prejudice.
7. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, 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 proceedings would have been different.
8. **Effectiveness of Counsel: Proof.** A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel.
9. _____: _____. Defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim.
10. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.

Appeal from the District Court for Douglas County: JOHN E. CLARK and DONALD J. HAMILTON, Judges. Affirmed.

Michael J. Lehan, of Kelley, Kelley & Lehan, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a consolidated appeal of four separate Douglas County felony convictions of defendant, Aaron C. Gibbs, that were reinstated as direct appeals by virtue of the decision from the U.S. Court of Appeals for the Eighth Circuit, based on ineffective assistance of counsel, finding that "Gibbs has never had a full adversarial briefing on all arguable issues before the state court much less a meaningful appellate determination as to whether any exist." *Gibbs v. Dahm*, No. 88-2319, slip op. at 3 (8th Cir. May 30, 1989).

Gibbs challenges his 1981 convictions of burglary in case No. 81-920, see Neb. Rev. Stat. § 28-507(1) (Reissue 1989); of escape in case No. 82-027, see Neb. Rev. Stat. § 28-912(1) (Reissue 1989); and of two counts of receiving stolen property in case No. 82-026, see Neb. Rev. Stat. §§ 28-517 (Reissue 1989) and 28-518 (Reissue 1979). Gibbs received an aggregate sentence of 10 to 19 years' imprisonment. We affirm.

In Gibbs' direct appeals of the escape and receiving stolen property convictions, his appointed counsel filed a motion and brief seeking to withdraw, following the procedure in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). The motion was granted and Gibbs' sentences were affirmed by this court. See *State v. Gibbs*, 211 Neb. xxi (case Nos. 82-026, 82-027, May 12, 1982).

In Gibbs' direct appeal of the burglary conviction, his appointed counsel in like manner filed a motion and brief. This court advised Gibbs of his right to respond, to which Gibbs personally replied with a motion to dismiss the appeal without prejudice. Accordingly, Gibbs' appeal was dismissed. See *State v. Gibbs*, 212 Neb. xxii (case No. 81-920, Sept. 8, 1982).

After the state district court denied Gibbs postconviction relief on all four convictions, Gibbs filed a federal habeas corpus action. The federal district court ordered that the writ of habeas corpus be granted on the basis of Gibbs' ineffective assistance of counsel. The U.S. Court of Appeals for the Eighth Circuit affirmed, and this court has since reinstated each of

Gibbs' direct appeals.

Gibbs' seven assignments of error combine to urge error, (1) in the burglary conviction, in the trial court's not suppressing an identification tainted by unnecessarily suggestive pretrial identification procedures; (2) in the escape and receiving stolen property convictions, in the trial court's accepting guilty pleas that were not intelligently and voluntarily made because Gibbs was not advised at the time that he entered each guilty plea that each sentence could be imposed consecutively; (3) in the burglary and receiving stolen property convictions, in the trial court's not affording Gibbs a speedy preliminary hearing and trial; (4) in all four convictions, in denying Gibbs effective assistance of counsel; and (5) in all four convictions, in the trial court's imposition of excessive sentences.

## I. FACTUAL SUMMARIES

### 1. BURGLARY CONVICTION, CASE NO. 81-920 (JURY TRIAL)

On the morning of December 15, 1980, the home of Karen Mason and her two sons, Robert, age 13, and John, age 8, was burglarized. At approximately 7 a.m., Robert left home to catch the schoolbus. The bus stop is only two houses away from the Mason residence. At the bus stop, Robert met his friend, Cathy Batter. Cathy told Robert that while she was walking to the bus stop, a car had followed her. She informed Robert that she got scared and ran to the bus stop after the occupants of the car had rolled down their window.

They boarded the schoolbus, and as the bus passed in front of the Mason residence, Cathy pointed out to Robert that the car was parked near his house. Looking out the bus window, Robert noticed that there were three men standing next to the car, who were pointing at his house. Robert testified that the schoolbus came within 5 feet of the three men. He further testified that as the bus passed, he got a 30-second look at their faces and, as a result, would be able to recognize two of them again if he were to see them.

Robert became suspicious. He and Cathy exited the bus at its next stop. While walking toward his house, Robert saw a man, later identified as Gibbs, walking toward the car he had previously observed. Robert testified that he came within 10 or

15 feet of Gibbs and that he had an opportunity to see him for approximately 1 minute. Robert then hid behind a bush that was located across the street from his house. He observed Gibbs walk into his driveway, and he saw someone open the garage door.

Alarmed, Robert hurriedly went to a friend's house, and the police were called. Next, he returned to his hiding place in the bushes, and then, having determined that everyone was gone, Robert entered his house and discovered that it had been burglarized.

The next day, on December 16, 1980, Robert identified Frederick Perkins and Gibbs in a five-man photographic array, prepared by Officer Wolf, as being two of the men seen in front of his house. The array consisted of separate photos of the faces and upper torsos of five individuals, one of whom was Gibbs. As a result of the identification, Gibbs was arrested on December 30, 1980.

At a suppression hearing, Robert again identified Gibbs as the man he had seen outside his house on the morning of December 15, 1980. The trial court then ruled that the "photograph identification by Robert Mason was not unduly suggestive and is admissible at time of trial." On October 29, 1981, at trial, Robert Mason again identified Gibbs as a perpetrator of the burglary.

Following the jury trial, Gibbs was found guilty, and Gibbs was sentenced to 4 to 6 years' imprisonment, with credit for 141 days served.

2. Escape Conviction, case No. 82-027 (guilty plea)

On September 15, 1981, Gibbs was charged with escape after he ran out of a courtroom on September 3, 1981. Gibbs was arrested in the hall and returned to custody.

On November 24, 1981, Gibbs pled guilty to the escape charge. The court determined that there was a factual basis for the charge and accepted Gibbs' plea. On December 18, 1981, Gibbs was sentenced to 2 to 5 years' imprisonment, with credit for 108 days served. The escape sentence was to run consecutively to the receiving stolen property and burglary sentences.

### 3. Receiving Stolen Property Convictions, Case No. 82-026 (Guilty Pleas)

On October 20, 1981, Gibbs was charged with two counts of receiving stolen property. Count I charges Gibbs with the possession on October 15, 1980, of a 1979 Mercury Cougar stolen from Rosen Novak Chevrolet. Count II charges Gibbs with the possession on October 23, 1980, of a 1980 Buick Century sedan stolen from Barbara Magnuson.

On November 24, 1981, pursuant to a plea bargain, Gibbs entered pleas of guilty to both counts of receiving stolen property. The court determined that there was a factual basis for both counts and accepted Gibbs' guilty pleas. On December 18, 1981, the court sentenced Gibbs to 2 to 4 years' imprisonment on each of the receiving stolen property counts. The sentences for the receiving stolen property counts were to run consecutively to each other as well as to the burglary sentence.

Additional facts are later discussed.

## II. ANALYSIS

### 1. Suppression of Photographic Identification

In his first assignment of error, Gibbs contends that the use of the photographic array was so unduly suggestive that his suppression motion should have been sustained.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990); *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). In making this determination, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions. *State v. Garcia, supra*; *State v. Sardeson, supra*.

At the suppression hearing, Robert Mason testified as to the identification procedures used by Officer Wolf for the photographic array on December 16, 1980. Officer Wolf laid out five photographs on a table face up and asked Robert if he

could identify any of the photos as being of a person at the scene. According to Robert's testimony, he was able to identify Gibbs from the burglary because he remembered Gibbs' face structure and his nose and eyes.

With regard to the use of photographic arrays, this court has held that whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988), citing *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), which also held that "an array of five photographs is sufficient to constitute a fair and adequate array when attempting to identify a single perpetrator." 223 Neb. at 918, 395 N.W.2d at 504.

Gibbs claims the photographic array was unduly suggestive because, in the five photographs, Gibbs was the only individual depicted without facial hair. There is nothing in the record to indicate that the lack of facial hair was the method by which Robert Mason differentiated between the five photographs. Robert testified that he remembered Gibbs from the burglary because of Gibbs' face, nose, and eyes. He stated that he remembered Gibbs' nose because it was flared. Officer Wolf testified that Robert picked out Gibbs after looking at the photographs for a couple of minutes. An examination of the five photographs shows that Gibbs' dress, height, weight, age, and hairstyle in no way singled him out from the other four individuals. Even if the array had been improper, Robert's identification of Gibbs at trial was completely supported, independently, by Robert's observations at the time of the burglary. In that connection, the totality of circumstances supports a finding that the identification was based on his observation of Gibbs during the burglary and was the basis for the subsequent identification. See *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988). There was no error in denying the motion to suppress.

### 2. Intelligent and Voluntary Pleas

The second summarized assignment of error contends that

Gibbs' guilty pleas to the charges of escape and theft by receiving stolen goods were not made intelligently and voluntarily because the court failed to inform Gibbs that the sentences for his convictions might run consecutively.

In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). We also held in *Irish* that it was sufficient for the trial court to explain the possible range of penalties for each crime and that it was not necessary to explain that each sentence might run concurrently or consecutively to any other sentence imposed.

In the instant case, Gibbs argues that *State v. Irish, supra*, was not the law in effect at the time he entered his guilty pleas. Gibbs points out that in 1981, the year in which his pleas were entered, *State v. Irish, supra*, had yet to be decided. Therefore, according to Gibbs, this court must apply *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), because it was the law in effect at the time of his pleas. See *State v. Schaeffer*, 218 Neb. 786, 359 N.W.2d 106 (1984).

Gibbs asserts that under *State v. Turner, supra* at 426, 183 N.W.2d at 765, this court held that the ABA Standards Relating to Pleas of Guilty "outline what should be the minimum procedure in the taking of such pleas." Further, he asserts that the ABA standards provide that a defendant pleading guilty should be advised of the effect which may result from the possible imposition of consecutive sentences.

As ingenious as Gibbs' argument may appear, we are not persuaded. In *State v. Turner, supra*, this court stated that the ABA standards outline what *should* be the minimum procedure, which suggests that the ABA standards are discretionary and not mandatory in nature. Therefore, the trial court's failure to inform Gibbs that the sentences for his convictions might run consecutively does not constitute reversible error. Furthermore, Gibbs presumes that this court

would not have explicitly rejected the ABA standards as a guideline in this area if it had been given an earlier opportunity. This court may well have rejected the ABA standards in 1981 had Gibbs' cases been heard.

### 3. Failure to Receive a Speedy Preliminary Hearing and Trial on the Burglary Charge or the Receiving Stolen Property Charges

Gibbs' third summarized error contends that he was not afforded a speedy preliminary hearing and trial on either the burglary charge (case No. 81-920) or the receiving stolen property charges (case No. 82-026), contrary to Neb. Rev. Stat. § 29-1207 (Reissue 1989) and to the Constitutions of the United States and Nebraska. Section 29-1207 requires trial within 6 months from the filing of the information.

#### (a) Burglary Charge

The original municipal court complaint charging Gibbs with burglary was filed on January 2, 1981. Although there is no explanation, the record indicates that Gibbs' preliminary hearing was continued on February 25, 1981, until August 7, 1981. On August 7, 1981, Gibbs' preliminary hearing was held, wherein probable cause was found and Gibbs was bound over. On August 11, 1981, the information was filed against Gibbs charging him with burglary. The jury trial commenced on October 29, 1981, and Gibbs was found guilty. Gibbs now claims there was more than a 6-month delay between the filing of the original complaint and the preliminary hearing, the filing of the information, and the jury trial, constituting a violation of his constitutional right to a speedy trial and a violation of his right to an absolute discharge, as provided in Neb. Rev. Stat. § 29-1208 (Reissue 1989).

Neb. Rev. Stat. § 29-1209 (Reissue 1989) provides: "Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial."

> It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207 [Reissue 1989]. However, under the provisions of section 29-1209 [Reissue 1989], it

> is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute.

(Syllabus of the court.) *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974). Gibbs failed to timely raise his right to discharge under the statute.

Under the provisions of the U.S. and Nebraska Constitutions, the right to a speedy preliminary hearing and trial is relative and depends upon existing circumstances; it is not denied where the delay is satisfactorily explained by the government and the defendant was brought to trial as soon as was reasonably possible. *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984) (construing U.S. Const. amend. VI and Neb. Const. art. I, § 13). Moreover, even the "unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right of speedy trial in the absence of prejudice." *SapaNajin v. Johnson*, 219 Neb. 40, 41-42, 360 N.W.2d 500, 501 (1985), citing *State v. Ellis*, 184 Neb. 523, 169 N.W.2d 267 (1969).

Here, there was a search and review by counsel of all available records; however, there is no showing as to the reason or reasons for the delay, nor a showing that the delay was purposeful or oppressive. Furthermore, Gibbs makes no showing that the pretrial delay caused substantial prejudice to his right to a fair trial. Any claim of possible prejudice to Gibbs resulting from the delay in the preliminary hearing and trial is speculative. There is no merit to this claimed error except as may relate to ineffective counsel.

(b) Receiving Stolen Property Charges

Gibbs further contends that his convictions for receiving stolen property violated his right to a speedy trial.

The record indicates that on October 20, 1981, Gibbs was charged in a two-count information with two counts of receiving stolen property. The first count charges Gibbs with the possession on October 15, 1980, of a 1979 Mercury Cougar stolen from Rosen Novak Chevrolet. The second count charges Gibbs with the possession on October 23, 1980, of a 1980 Buick Century sedan stolen from Barbara Magnuson. The record

shows that on November 24, 1981, Gibbs pled guilty to both counts, which pleas were made 2 months after the filing of the information. There was no delay.

4. INEFFECTIVE ASSISTANCE OF COUNSEL

Gibbs' fourth assignment of error and the basis for reinstatement of this appeal is the claim that he was denied effective assistance of counsel at the time of his appeals in 1981 and 1982.

At issue here are the motions supported by briefs of the public defender's office asking for leave to withdraw as counsel for Gibbs in the direct appeals. The motions attempted to comply with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); however, the U.S. Court of Appeals for the Eighth Circuit found them insufficient, since "they do not refer with advocacy to all claims which might have arguably supported Gibbs' appeal," *Gibbs v. Dahm*, No. 88-2319, slip op. at 3 (8th Cir. May 30, 1989), and no prejudice need be shown in light of *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). As arguable error has now been briefed as required in *Penson*, we review all of the records and proceedings.

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, 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 proceedings would have been different. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel. *Id.* Defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim. *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990). *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), provides:

> First, the defendant must show that counsel's performance was deficient. This requires showing that

> counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

An examination of the record reveals that Gibbs has failed to meet the two-pronged test described in *State v. Chapman, supra*. Gibbs' argument does not show how counsel either was deficient or made serious errors, or that there is a reasonable probability that, but for deficiencies of counsel, the outcome of his cases would have been different. Counsel does argue that defendant's cases were prejudiced by counsel's inaction, since defendant has already served most of his sentences, and the only proper decision of this court is to reduce the sentences imposed, as provided in Neb. Rev. Stat. § 29-2308 (Reissue 1989). There is no showing that Gibbs did not receive a fair hearing, and there is no showing that Gibbs was prejudiced by his counsel's actions concerning the failure of counsel to file a timely motion for discharge, see § 29-1209, in the burglary case. There is no record before us from which we can fully consider the fact question that required an evidentiary hearing; therefore, we cannot consider it. See, *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974); *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986). Gibbs has not shown that he was denied effective assistance of counsel except in the instance of his direct appeals to this court, and that has been remedied by the reinstatement of these appeals.

### 5. Excessive Sentences

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. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990); *State v. Garza*, 236 Neb. 215, 459 N.W.2d 747 (1990).

A review of the presentence report shows that Gibbs has a lengthy criminal record beginning as a juvenile, age 15 years, including a felony conviction for burglary and juvenile violations involving burglary and auto theft. At the time of his guilty pleas for the escape and receiving stolen property charges, three other felony charges were dismissed as a part of the plea bargain. There was no error in the sentences imposed.

AFFIRMED.

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MARLENE DENISE DRUBA, APPELLEE, V. JOHNNIE LEE DRUBA, APPELLANT.

470 N.W.2d 176

Filed June 7, 1991. No. 89-029.

1. **Divorce: Appeal and Error.** In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. When the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
3. **Divorce: Child Support.** Both parents have the duty to support their minor children.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Lyle Joseph Koenig for appellant.

Wayne L. Garrison, of Garrison & Garrison, for appellee.

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

GRANT, J.

This is an action for dissolution of marriage. After trial, the district court for Nuckolls County dissolved the marriage of the parties and ordered respondent-appellant husband, Johnnie Lee Druba, to pay child support, alimony, and medical and dental expenses for the parties' three minor children. The husband has appealed to this court, assigning as error the actions of the trial court (1) in awarding alimony and (2) "in requiring respondent to pay medical and dental expenses in addition to child support because such an award exceeds the child support guidelines." We affirm.

In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. 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. *LaBenz v. LaBenz*, 237 Neb. 231, 465 N.W.2d 726 (1991).

The record shows that the parties were married on May 31, 1975, and are the parents of three minor children, one of whom requires medical care for petit mal seizures. No medical insurance was ever carried for the children during the marriage, and the husband has been paying the children's medical expenses.

Both parties have high school educations. The husband owns a trash-hauling business and is self-employed, and the wife operates a child-care service in her home. The wife's child-care service earned net profits of $1,039 in 1987. The husband purchased the trash-hauling business from his father on November 1, 1987, for $30,000. The husband and his father did not execute any formal documents or payment schedule regarding the sale of the business, but agreed that the husband would pay the money back "as soon as [he] could." As of the date of trial, November 30, 1988, the balance owed on the

business was $25,000. The husband testified that he earned a net income of approximately $31,496 between November 1, 1987, and November 1, 1988. This figure does not reflect any payment to the husband's father for the purchase of the business. No evidence was offered as to the present value of the trash-hauling business.

During the marriage, the parties accumulated approximately $23,467.10 in savings and checking accounts. The wife testified that she withdrew half of this money ($11,733.55) and deposited it in her own account after she filed the petition for dissolution. The parties also own a $20,000 house in Superior. There is no mortgage or debt on the house, and no evidence of any debt was presented other than the $25,000 balance due on the trash-hauling business.

In the decree, the district court awarded custody of the three minor children to the wife, ordered the husband to pay child support of $250 per month per child, and ordered the husband to pay alimony of $350 per month for 60 months. Because neither the wife nor the husband wanted to live in the house, the parties were ordered to sell it, with the proceeds of the sale to be divided 35 percent to the wife and 65 percent to the husband. Finally, the husband was ordered to "pay and be responsible for the reasonable and necessary medical bills of each of his children" until each child became of age, became self-supporting, or was otherwise emancipated.

In connection with his first assignment of error, the husband contends the district court did not properly consider the criteria set out in Neb. Rev. Stat. § 42-365 (Reissue 1988), which provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any

> minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

See, also, *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988); *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988).

In this case, the parties were married for approximately 13 years. The wife worked in a bakery for 1 1/2 years before the parties' first child was born in June 1978. Since that time, she has worked as a homemaker and operated a child-care service in the home, earning net profits of $1,039 in 1987. Since the parties separated, the wife has been working weekends at a restaurant, earning approximately $40 per weekend. She does not wish to continue with this work. At the hearing, the wife observed that "you can't really make much on baby-sitting," and told the court she wanted to attend a technical school to acquire other job skills.

Although the husband's earnings reached the current level only after he purchased the business in November 1987, his potential for earning income far exceeds that of the wife. For most of the marriage, the wife worked in maintaining the parties' home and caring for the children and could not make large financial contributions to the family. Under the circumstances, the district court did not abuse its discretion in awarding alimony, in that the wife must receive further education or training in order to engage in gainful employment without interfering with the interests of the parties' children, the youngest of whom is now 5 years old. The trial court's order as to alimony to be paid by the husband to the wife is affirmed.

In his second assignment of error, the husband contends the district court erred in requiring him to pay medical and dental expenses as well as child support because such an award exceeds the child support guidelines. In his brief, the husband does not contend the child support award of $250 per month per child is

excessive, nor does the wife complain it is too little. We do not have before us the calculations of the parties or the court as to the determination of this figure, but since all concerned are satisfied, we will not consider the child support amount except for the issue presented by the husband as to the court order concerning the payment of medical expenses.

In connection with this assignment of error, we have asked the parties to brief the issue of whether *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988), applies or should apply to awards for future medical expenses.

In *Brandt v. Brandt, supra* at 326, 417 N.W.2d at 340, the district court ordered the petitioner to secure health insurance and "pay 68 percent of 'any unpaid medical or dental expenses . . .' " for two minor children. The record in *Brandt* did not show the amount of the future expenses, which were unknown. We held: "Insofar as the order required petitioner to pay 68 percent of the medical and dental expenses, there is nothing in the record which would show the amount of these unknown future expenses. That part of the order is not enforceable and is set aside." *Id.* at 328, 417 N.W.2d at 341.

This part of the *Brandt* opinion is incorrect and must be overruled. We adhere to the holding in *Brandt* that if expenses are known, it is improper to order a party to pay a percentage of those expenses. In that situation, the court should apply the percentage to the known expenses and reflect that dollar amount in its order.

With regard to future medical and dental expenses, however, the *Brandt* opinion is not correct. In *Brandt*, the petitioner was ordered to provide health insurance, and the opinion was directed to amounts remaining unpaid after application of the insurance. We now hold that a trial court may make appropriate orders as to the manner in which expenses, after the insurance payments, are to be shared. While such an order could not result in the issuance of an execution by a clerk, the order is enforceable through the contempt power of the court. There is no other way that unknown future expenses can be handled. The portion of the *Brandt* opinion to the contrary is overruled.

The situation in this case is somewhat different in that the

husband has never provided insurance for the wife or the children. This cavalier attitude on the part of the husband was never explained during the trial. When the husband was asked as to the reason he did not have health insurance on the children, his attorney unsuccessfully interposed an objection of immateriality. The trial court stated, "I think it is material. He can answer the question." The matter was not pursued, however, and the record is silent on the issue.

We note that the child support guidelines in effect at the time of the trial provided that among the appropriate deductions before calculating monthly net income of a party is "Health Insurance." The husband has not furnished health insurance and has not explained that lack. He has not adduced any evidence on that issue and has not alleged any credit he claims in that regard. He is, therefore, not entitled to any credit such as allowed by the guidelines. It is obvious that in this day and age, if a parent does not wish to provide such insurance for his children, that parent must be ready to pay for health care for the children. In the case before us, the disparity in income between the husband and wife is obvious and great. The responsibility of a parent to fully care for his or her children goes beyond anything a court can order. We determine, in this case, that the trial court did not abuse its discretion in ordering the husband herein to pay the possible future medical and dental bills of his children.

In so holding, we note that at least one of the parties' children requires regular medical attention for a specific illness and that the husband has paid for this health care in the past. Both parents have the duty to support their minor children, *Coffey v. Coffey*, 205 Neb. 191, 286 N.W.2d 753 (1980), and the children's need for future necessary medical services may not be ignored by either parent.

The wife is awarded the sum of $500 to be applied on her attorney fees in connection with this appeal. The judgment of the district court is affirmed.

AFFIRMED.

JOHN P. DINOVO, APPELLANT, V. BEVERLY D. DINOVO, APPELLEE.
470 N.W.2d 174

Filed June 7, 1991. No. 89-047.

1. **Alimony: Property Division: Appeal and Error.** Awards of alimony are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. The same standard of review applies to the division of property.
2. **Trial: Appeal and Error.** An abuse of discretion requires the reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice.

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

Jerome J. Ortman for appellant.

Gordon R. Hauptman, of Hauptman, O'Brien, Wolf, Hadley & Lathrop, P.C., for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage, divided the marital property, and awarded alimony and attorney fees to the respondent wife.

The petitioner husband has appealed and alleges as error (1) the duration of the alimony award; (2) the condition that the alimony is not subject to revision, amendment, or modification; (3) the division of property; (4) the valuation of his Bell System savings account; and (5) the award of attorney fees.

> In appeals involving actions for dissolution of marriage, the Supreme Court reviews the record de novo to determine if the district court abused its discretion. In the absence of such an abuse, the trial court's findings will not be reversed. When the evidence conflicts, this 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.

*Rogers v. Rogers*, 231 Neb. 313, 314, 435 N.W.2d 915 (1989).

The parties were married on February 10, 1962. The petitioner brought to the marriage his three children from a prior marriage, and the parties had one child, who was born in 1964. The petition for dissolution was filed on April 9, 1987.

At the time of trial on May 24 and July 25, 1988, the petitioner was 57 years old and had worked at AT&T for 18 years. He has an engineering degree from the University of Nebraska at Omaha and a master's degree from Drake University.

The petitioner hoped to be able to work for at least 2 more years. His income for 1987 was approximately $4,130.84 per month, and his net after taxes was approximately $2,869.05. His monthly living expenses were estimated to be about $1,792.49.

The petitioner also owns a bakery in Elk Horn, Iowa, which he bought for $5,000. The bakery has lost money every year since he bought it, but he has not sold it because he hopes to make it operate successfully and because his sister needs the job it provides her.

The respondent was 48 years old at the time of trial. She quit her job shortly after the marriage to raise the petitioner's children and the parties' daughter after she was born. Starting in 1970, the respondent worked seasonally to earn money for Christmas presents, and in 1983, she returned to work on a part-time basis at an optometrist's office.

The petitioner suffers from gastrointestinal difficulty and has back problems due to degenerated disks in his lower back. His back condition causes extreme limitation of range of motion. The petitioner testified that if he were forced to retire because of his health, he would receive no pension until he had 20 years in his savings plan, and if he retired prior to age 65 but after his savings plan had vested, he would receive only a small pension. At age 65, he would receive $970.82 per month from his pension fund at Bell System savings.

The respondent has had breast cancer and two major surgeries to remove her breasts. She also had a hysterectomy in 1982 and a tumor removed from her left breast in 1985. She has high blood pressure and was treated for early signs of diabetes. Because of her health problems, her doctors do not think she

should work more than 14 to 16 hours a week. At the time of trial, she was working about 16 hours a week for an optometrist and earning approximately $300 a month take-home pay from that job.

The evidence regarding the valuation of the marital property was in conflict. The marital property of the parties was divided as follows:

| | |
|---|---|
| To petitioner: | |
| Bell System savings | $72,000 |
| IRA | 7,364 |
| Bakery money account | 2,300 |
| Life insurance cash value | 10,000 |
| Total | $91,664 |
| To respondent: | |
| House | $62,500 |
| IRAs | 9,313 |
| Chevy | 100 |
| FirsTier savings | 1,100 |
| Total | $73,013 |

In addition, the parties were awarded the household goods in their respective possession except that the petitioner was also awarded one-half of the pictures of the children, a radio, a desk, handtools, and clothing which was left in the parties' home. The trial court determined that the household goods awarded equate based upon the difference in the parties' incomes.

The petitioner was awarded all equity in the bakery in Elk Horn and a mobile home he purchased with funds borrowed against his life insurance policy.

The federal and state income tax refunds for the tax year of 1986 in the sum of $5,222 and for the tax year of 1987 in the sum of $6,535 were ordered to be divided equally between the parties.

The petitioner testified that he took the 1986 refund money to pay bills. In 1987, the petitioner filed a separate tax return and used the refund from that year to pay bills.

The respondent was awarded alimony in the total sum of

$120,000, payable in monthly installments of $1,000. It does not terminate upon the death of the petitioner or remarriage of the respondent, but does terminate upon the respondent's death. The judgment provides that the provisions for alimony are final and complete and are not subject to revision, amendment, or modification. The petitioner is required to maintain $75,000 in life insurance, with the respondent the irrevocable beneficiary until the alimony obligation is fulfilled.

> Awards of alimony are initially entrusted to the discretion of the trial judge and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. . . . The same standard of review applies to the division of property. . . . An abuse of discretion requires the "reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice."

(Citations omitted.) *Burhoop v. Burhoop*, 221 Neb. 657, 660, 380 N.W.2d 254, 256 (1986).

Neb. Rev. Stat. § 42-366(7) (Reissue 1988) provides that the trial court may preclude or limit modification of terms in the decree of dissolution except for custody and child support.

From our de novo review of the record, we find no abuse of discretion by the trial court except with respect to the provision that the award of alimony is not subject to revision or modification.

In view of the evidence concerning the health of the parties, it is important that there be some opportunity for modification in the event there is a material change in the circumstances of the parties.

If the petitioner is forced to retire before the age of 65 because of ill health, it appears probable that he would not have sufficient income to make the required payments. The judgment is modified by deleting the provision that the award of alimony is not subject to revision or modification. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

# MARGARET L. SIKYTA, APPELLANT AND CROSS-APPELLEE, V. ARROW STAGE LINES, INC., APPELLEE AND CROSS-APPELLANT.

470 N.W.2d 724

Filed June 7, 1991. No. 89-091.

1. **Pleadings: Appeal and Error.** In its review, an appellate court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage.
4. **Negligence: Proof: Circumstantial Evidence.** A plaintiff's knowledge of danger, as an element in assumption of risk, may be proved by circumstantial evidence, since knowledge is a state of mind or a mental process.
5. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of evidence in the plaintiff's case in chief and who, when the court overrules the directed verdict motion, proceeds with trial and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for directed verdict.
6. **Rules of the Supreme Court: Trial: Testimony.** The tenor of Neb. Ct. R. of Discovery 32 (rev. 1989) is to prefer "live" testimony, that is, oral testimony adduced in a courtroom within the presence and hearing of a jury.
7. **Rules of the Supreme Court: Trial: Evidence: Witnesses.** A party seeking to admit or use a deposition on the basis that the witness is unavailable must establish that the requirements of Neb. Ct. R. of Discovery 32(a)(3) (rev. 1989) are satisfied.
8. **Rules of the Supreme Court: Trial: Witnesses.** A showing of witness unavailability may be made through counsel's statements to the court.
9. **Rules of the Supreme Court: Trial: Witnesses: Appeal and Error.** Determination that a witness is unavailable, thereby authorizing use of the witness' deposition pursuant to Neb. Ct. R. of Discovery 32(a)(3)(E) (rev. 1989), is within the discretion of a trial court, whose ruling will be upheld on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for a new trial.

Patrick W. Healey and K. Kristen Witter, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellee.

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

SHANAHAN, J.

Margaret L. Sikyta appeals from a judgment in the district court for Lancaster County on the verdict for Arrow Stage Lines, Inc., in her negligence action for bodily injury sustained when she, as a passenger in an Arrow bus, fell on account of the bus driver's sudden application of the bus' brakes. Sikyta claims that reversible error resulted from the instruction on contributory negligence based on Sikyta's standing in the moving bus and submission of assumption of risk as a defense under the circumstances.

## THE BUS TRIP

On the morning of November 10, 1984, Margaret Sikyta and her husband, Curtis, a "semiretired" contractor, were on a chartered Arrow bus which was carrying passengers from Ashland, Nebraska, to Lawrence, Kansas, for the Kansas-Nebraska football game that day. The bus departed Ashland at 7:30 a.m.

*Interior of the Bus.*

Passengers entered the bus through its right front door and stairwell, climbed three steps toward the driver's area, and then turned left into the bus' interior, which contained rows of double seats along an aisle which was 18 inches wide. Each bus seat had a shoulder-high back for a seated passenger. The bus' two right front seats, immediately adjacent to the stairwell, were separated from the stairwell by a waist-high metal partition and railing. Margaret and Curtis Sikyta were seated in the right front seats adjacent to the stairwell. Herman W. Campbell was driving the bus and its 42 passengers bound for Lawrence. At the extreme rear of the bus was a bathroom.

*The Accident.*

The bus was apparently moving in occasionally heavy southbound traffic on the highway. The day was clear with no moisture on the road surface. Some passengers noted that the

bus was being driven "fast," perhaps around 65 miles per hour, while others described the bus' operation as nothing unusual. Margaret Sikyta, located in the window seat near the stairwell partition, was reading a morning paper and from time to time glanced at the road ahead. Somewhere in the course of the trip, Margaret observed that the bus had closely followed a car for a "few miles." Curtis, seated next to Margaret, was generally concerned that the bus, somewhere "down the road," might become involved in an accident in view of the traffic and the bus' speed.

Later in the trip, which had now taken approximately 1½ hours, Margaret decided to use the bathroom in the rear of the bus. Since Sikytas' location afforded little space for an exit maneuver from the window seat, it was necessary that Curtis Sikyta stand and move into the aisle so that Margaret might then step into the aisle and proceed to the bus bathroom. After Curtis had positioned himself in the aisle, Margaret stood and turned "sideways," facing the left or driver's side of the bus as she steadied herself by holding the back of the front seat. Meanwhile, from his vantage point in the aisle, Curtis, standing while facing forward and looking through the bus' windshield, was able to see "everything out the front of the bus" and saw that the bus was overtaking a southbound "black car." When the bus was about 18 to 20 feet behind the black car, the car suddenly turned right to leave the highway. In Curtis Sikyta's view of Campbell's driving the bus, "there's no way I could tell whether he's going to hit a car or whether he's going to get slowed down in time or not." Campbell "slammed on" the bus brakes which "just threw everything about in the bus." When Campbell applied the bus brakes "suddenly," Margaret Sikyta "flew around and hit the dash and bounced down the steps head first." Curtis Sikyta grabbed the railing at the stairwell partition, but hit his head and shoulder on the bus windshield. Margaret landed in the stairwell with her head near the door and her feet on the stairs toward the driver. Curtis retrieved Margaret from the stairwell and assisted her to a seat as the bus continued toward Lawrence. As Curtis Sikyta later explained, he had feared that there would be an accident as a result of Campbell's driving, but "[n]ot necessarily that [black] car, with

another car." After Curtis had stepped into the bus aisle and had the opportunity to observe the imminence of a collision between the bus and the black car, apparently everything happened so quickly that he was unable to call out a warning to Margaret.

Among the passengers, only Curtis Sikyta noted the bus' proximity to the vehicle being overtaken. One passenger, who had peered forward down the aisle somewhere in the trip, observed that the bus, while overtaking a vehicle, was so close to the overtaken vehicle that the passenger was unable to see the rear license plate on the preceding vehicle. However, this passenger was unable to verify that the overtaken vehicle observed by the passenger was the same vehicle overtaken just before the sudden application of the bus' brakes and could not determine the time interval between the passenger's observation and the application of the brakes which led to Margaret Sikyta's fall, that is, the time element might have been a "second or five minutes later."

Although none of the other passengers, with the exception of Curtis Sikyta, saw Margaret fall into the bus stairwell, some passengers recounted their movements after Campbell "stepped on his brakes." In one passenger's description, "my head went down in my lap and my back hit against the seat in front of me." Another passenger was en route to the bus bathroom and had taken "about two steps when he [Campbell] put on the brakes, and I would have fallen, but I was able to grab ahold of the seat by me."

## MARGARET SIKYTA'S TRIAL

*Depositions and Sikyta's Back Problems.*

In her deposition, Margaret Sikyta stated that she had never seen a physician for back pain before the bus accident, although she did state that she had seen Dr. William Fulcher for "pain in [her] hip area once" before the accident.

The morning that trial commenced, the parties' counsel met with the judge and discussed the prospects of a videotape deposition by Dr. Fulcher because the doctor would be performing surgery the next morning. The substance of the discussion was prospective use of Dr. Fulcher's deposition in

lieu of the physician's oral testimony adduced through his personal attendance at Sikyta's trial. Regarding a time for obtaining Dr. Fulcher's videotape deposition, the court inquired and commented:

> What about this evening?
>
> . . . .
>
> . . . Well, I mean, this is in lieu of having him here. This is not a discovery deposition, this is a trial deposition. . . .
>
> . . . .
>
> . . . Would it be possible for us to talk to Dr. Fulcher's office and see if they would schedule that deposition . . . at the end of the day today? Is that agreeable with —
>
> . . . .
>
> . . . With everybody's agreement, I'll talk to him.

The judge, in counsels' presence, then telephoned Dr. Fulcher's office and talked with someone about the prospective deposition, but the content of that conversation is undisclosed.

Later that same day, the court remarked to counsel: "Gentlemen, it is now 4:15, and I know that you have a deposition to take tonight at 5 o'clock in this case. At this time, we will therefore be in recess until 9 o'clock tomorrow." In Dr. Fulcher's deposition taken at the doctor's office in Lincoln, Sikyta's lawyer conducted direct examination, Arrow's lawyer the cross-examination.

On the morning of the second day in the trial, Sikyta's lawyer sought to introduce the videotape deposition of Dr. William Fulcher, an orthopedic surgeon who had treated Margaret Sikyta. Dr. Fulcher's deposition was taken on the first day of Sikyta's trial. Sikyta's lawyer told the court that use of the Fulcher videotape deposition at trial was necessary and, concerning a showing of Dr. Fulcher's "unavailability," commented to the court and Arrow's counsel:

> Well, I thought we dealt with that yesterday when we decided that we were going to proceed and take a videotape deposition for use at trial, because he [Dr. Fulcher] is unavailable due to surgery commitments this week, as he has advised me several times. I can't represent that he's out of the city, but I think that the Court has discretion . . . to permit use of videotape even if the

> witness may technically be in the environs, if he's not able to be here at trial.

Arrow's counsel referred to Neb. Ct. R. of Discovery 32(a) (rev. 1989), which provides:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> . . . .
>
> (E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used . . . .

Arrow's lawyer then objected to use of the videotape deposition because Dr. Fulcher's "unavailability" had not been established as a "pre condition for use of [Dr. Fulcher's] deposition at trial." On the basis of the "representation" by Sikyta's lawyer, the court concluded that "Dr. Fulcher is presently in surgery and is in surgery today and unavailable to testify [and] that constitutes an exceptional circumstance, and, therefore, the deposition can be used under [Rule 32(a)(3)(E)]."

Dr. Fulcher testified that Margaret Sikyta had been his patient in 1981 when he found "severe degenerative arthritis" in Sikyta's low back at the fourth and fifth lumbar vertebrae depicted in x rays shown to the jury. In 1981 and later, in reference to Margaret Sikyta's injuries from the bus accident, Dr. Fulcher diagnosed Sikyta's condition as "lumbar radicular syndrome," that is, radiation of pain due to nerve irritation, as a result of Margaret Sikyta's arthritic condition. In Dr. Fulcher's opinion, Margaret Sikyta's condition had been "asymptomatic," but the bus accident aggravated any preexisting condition in Margaret Sikyta's lumbar spine; hence, Margaret Sikyta's permanent disability was caused by the bus accident.

On cross-examination, when confronted with her deposition denial of any back problem before the bus accident, Margaret Sikyta testified that she had "completely forgotten about" her previous back condition. As Margaret Sikyta explained, her family physician had referred her to Dr. Fulcher in 1981 on

account of her hip pain, a condition which she had mentioned in her deposition. Margaret's referral to Dr. Fulcher was prompted by her sister's death from cancer which had been accompanied by pain in the hip. Consequently, Margaret Sikyta had "completely forgotten about" her back problem, which was overshadowed by the possibility of cancer.

At the conclusion of Margaret Sikyta's case in chief, Arrow moved for a directed verdict. After the court overruled Arrow's directed verdict motion, Arrow presented its case in chief, which began with Dr. Patrick W. Bowman, an orthopedist who examined Margaret Sikyta at Arrow's request. Through his examinations, Dr. Bowman determined that Margaret Sikyta suffered from "cervical spondylosis . . . degenerative cervical disease or degenerative spine disease," which is manifested by symptoms such as "mechanical type achiness, aggravated by activity, relieved to some extent by rest and recumbency . . . ." However, when Dr. Bowman asked Margaret Sikyta whether she had "suffered from any of the symptoms," aforementioned, if we assume that Margaret Sikyta was versed in the medicalese used by Dr. Bowman, she answered that her "symptoms dated exclusively from that injury" sustained in the bus accident. Nevertheless, Dr. Bowman concluded that Margaret Sikyta suffered from "longstanding degenerative spine disease," which had existed "at least since 1981, and probably before that . . . ." Arrow called other witnesses, including the busdriver, Herman Campbell, who testified that the trip to Lawrence, Kansas, on November 10, 1984, was "uneventful" and "routine" and that he did not recall making a "sudden or abrupt stop" during the trip or Margaret Sikyta's being thrown into the bus stairwell.

*Instructions and Verdict.*

Over Margaret Sikyta's objection, the court instructed that Arrow claimed specific acts of negligence by Sikyta, which included her "standing while the bus was moving," and that if Arrow proved that Margaret Sikyta was standing in the moving bus, the jury should consider her contributory negligence in arriving at a verdict. Also over Sikyta's objection, the court submitted assumption of risk.

The jury returned a verdict in favor of Arrow.

Margaret Sikyta appeals; Arrow cross-appeals. We note that Sikyta's trial was disposed of on the basis that Arrow was a common carrier, a dispositional basis unchallenged in this appeal. In its review, an appellate court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). Accord, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985).

> INSTRUCTIONS AND REVERSIBLE ERROR
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> In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. . . .
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> . . . .
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> Regarding the claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning instructions and necessitating a reversal. [Citations omitted.] "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury."

*Rose v. City of Lincoln*, 234 Neb. 67, 74-75, 449 N.W.2d 522, 528 (1989).

> CONTRIBUTORY NEGLIGENCE
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> A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.

*Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 850, 438 N.W.2d 485, 490 (1989). Accord *Jensen v. Archbishop Bergan*

*Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). See, also, *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

> "One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious danger is negligent or contributorily negligent." . . . "To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in the conduct and may vary depending on the circumstances."

*Rahmig v. Mosley Machinery Co., supra* at 452, 412 N.W.2d at 75. Accord, *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988).

In Sikyta's case, although the court instructed that Arrow had to prove Margaret Sikyta's contributory negligence, which, according to Arrow's specific allegations, included Sikyta's "standing while the bus was moving," the gist of the instruction is that, as a matter of law, Sikyta was negligent if she was merely standing in the moving bus. The question becomes: In and of itself, is a passenger's act of standing in a moving bus negligence?

As early as 1897, in *East Omaha Street R. Co. v. Godola*, 50 Neb. 906, 70 N.W. 491 (1897), this court affirmed a judgment for a plaintiff who was thrown from the platform of a streetcar owned by the defendant, which was "engaged in operating a suburban railway by means of electricity." 50 Neb. at 907, 70 N.W. at 491. Since a large number of people were in the car, the plaintiff was standing on the car's platform when the "train" sped into a curve at 12 miles an hour notwithstanding that 5 miles an hour was the maximum safe speed for negotiation of the curve. As one witness described the event: " 'They went around that curve at a pretty good hickory. There was several of them took a tumble; they rolled off like pumpkins.' " 50 Neb. at 908, 70 N.W. at 492. In *Godola*, the court held: "The plaintiff was not, as a matter of law, guilty of contributory negligence in riding upon the platform of the motor." 50 Neb. at 909, 70 N.W. at 492.

Next, in 1907, in *Coffey v. Omaha & C.B. Street R. Co.*, 79 Neb. 286, 112 N.W. 589 (1907), this court reviewed a wrongful death action in which a passenger, Nelson, was thrown from the defendant's streetcar and died as the result of striking the paved street. In affirming a verdict for the plaintiff, this court stated in *Coffey*:

> Defendant contends that, since Nelson chose to stand on the lower outside step of the platform . . . he was guilty of such contributory negligence as a matter of law . . . . [A] street railway company which permits the use of its platforms and steps for the carrying of passengers . . . is bound as a common carrier to use proper precaution for the protection of the passengers riding in such positions; and . . . we think it cannot be said to be negligence *per se* for a passenger to ride in such position.

79 Neb. at 289-91, 112 N.W. at 590.

In *Jacobs v. Milwaukee & Suburban Transp. Corp.*, 41 Wis. 2d 661, 165 N.W.2d 162 (1969), the Supreme Court of Wisconsin held that a passenger on a moving bus was required to use reasonable and ordinary care, such as utilization of available safety devices, for example, handles at the end of the bus' seats, and concluded that "an ordinary prudent person would not walk down a bus aisle without hanging on or being in a position to use devices provided to aid one in maintaining his [or her] balance on a moving bus." 41 Wis. 2d at 665, 165 N.W.2d at 164.

Similarly, in *Southeastern Greyhound Lines, Inc. v. Chumley*, 312 Ky. 154, 226 S.W.2d 777 (1950), the court considered the question of a plaintiff's contributory negligence when the plaintiff, standing in a bus aisle, was thrown about and injured when the bus came to a sudden stop. The *Chumley* court observed that the plaintiff, as a bus passenger, was required to "exercise the prudence and care for his own safety under the ordinary and usual exigencies attendant upon the circumstances." 312 Ky. at 160, 226 S.W.2d at 780. Cf. *Sanders v. New Orleans Public Service, Inc.*, 422 So. 2d 232 (La. App. 1982) (although a passenger stood up in the bus aisle preparatory to disembarking the bus, leaving the bus seat before the bus had stopped was not contributory negligence).

In Margaret Sikyta's case, the bus was equipped with a bathroom and, therefore, provided an implicit invitation for a passenger's use of the facility. Use of the bathroom required that a person walk to the facility at the rear of the bus; hence, one's walking to the bathroom was necessarily preceded by rising from a bus seat and standing preparatory to walking toward the bus bathroom. Whether there were safety devices available for Margaret Sikyta's use is undisclosed. Thus, we conclude that, in and of itself, a passenger's act of standing in a moving bus is not negligence. For that reason, the mere act of standing, without reference to attendant circumstances, cannot be classified as negligence on Margaret Sikyta's part. Yet, the trial court informed the jury that Margaret Sikyta's merely standing in a moving bus, if Arrow proved that act, constituted negligence on the part of Margaret Sikyta. Consequently, the court incorrectly instructed the jury that Margaret Sikyta was negligent as the result of her merely "standing while the bus was moving." That incorrect instruction was prejudicial to a fair disposition of Margaret Sikyta's negligence claim; hence, the instruction constituted reversible error.

## ASSUMPTION OF RISK

The court also instructed that Margaret Sikyta's "assumption of risk," if proved by Arrow, was a defense to Sikyta's negligence claim.

At the outset, we again point out that contributory negligence and assumption of risk are not Tweedledum and Tweedledee affirmative defenses. Not every negligence cause of action must necessarily produce a reflex action based on contributory negligence and assumption of risk as affirmative defenses. However, contributory negligence and assumption of risk, mutually asserted as defenses to a negligence action, seem to continue as problems in the trial of negligence actions, that is, if the number of recent appeals is any indication of an existing problem. Reviewing the nature of negligence and assumption of risk may alleviate that troublesome situation.

As Prosser points out:

> The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of

> situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. . . .
>
> The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea: the "reasonable man of ordinary prudence."
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> . . . .
>
> The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard.

Prosser and Keeton on the Law of Torts, *Negligence: Standard of Conduct* § 32 at 173-75 (5th ed. 1984).

In reference to assumption of risk, Prosser has stated:

> [T]he plaintiff is aware of a risk that has already been created by the negligence of the defendant, yet chooses voluntarily to proceed to encounter it—as where he has been supplied with a chattel which he knows to be unsafe, yet proceeds to use it anyway; or where he proceeds to walk over debris on the sidewalk carelessly strewn and left there by a construction contractor. If these are voluntary choices, the plaintiff may be found to have accepted the situation, and consented to relieve the defendant of his duty.
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> . . . .
>
> . . . Where [contributory negligence and assumption of risk] have been distinguished, the traditional basis has been that assumption of risk is a matter of knowledge of the danger and voluntary acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable person, however unaware, unwilling, or even protesting the plaintiff may be. Obviously the two may coexist when the plaintiff makes an unreasonable choice to incur the

risk; but either may exist without the other.

Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 481-82.

Nearly half a century ago, in *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943), this court recognized the distinction between contributory negligence and assumption of risk:

> [T]here is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, "*volenti non fit injuria*," whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care.

143 Neb. at 946, 12 N.W.2d at 89.

The distinction between contributory negligence and assumption of risk was reaffirmed in *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 450, 412 N.W.2d 56, 74 (1987), when we stated:

> " ' "One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it." ' " *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 670, 345 N.W.2d 12, 15 (1984). See Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984) (" 'Knowledge of the risk is the watchword of assumption of risk' ").
>
> In contrast with contributory negligence (fault or breach of a duty to exercise such care as an ordinary prudent person would have exercised under the same or similar circumstances), assumption of risk " 'involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may

have acted with due care . . . .' " *Sandberg v. Hoogensen*, 201 Neb. 190, 197, 266 N.W.2d 745, 750 (1978), quoting *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943).

More recently, in *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 398-400, 423 N.W.2d 115, 120 (1988), we observed:

> There is a definite demarcation between assumption of risk and contributory negligence as affirmative defenses, a delineation which may be obscured, if not totally obliterated, by incorrect application of these distinctly different defenses.
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> . . . .
>
> Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. [Citations omitted.] "[E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk." *Jensen v. Hawkins Constr. Co.*, [193 Neb. 220,] 226, 226 N.W.2d [346,] 350-51 [1975].
>
> As expressed in Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984): " 'Knowledge of the risk is the watchword of assumption of risk.' Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. 'A defect and the danger arising from it are not necessarily to be identified, and a person may know of one without appreciating the other.' Knowledge of the general danger may not be enough, and some courts require knowledge of the specific risk that caused the plaintiff's harm. The standard to be applied is,

in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence. If, because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence."

This court has recognized that, in determining the applicability of assumption of risk, " 'The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence.' " *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967) (quoting from Restatement (Second) of Torts § 496 D, comment *c.* (1965)).

Thus, while contributory negligence is predicated on an objective standard involving a hypothetical, fictitious, or mythical person, namely, the reasonably or ordinarily prudent person, assumption of risk is predicated on a standard involving a very real person, namely, a particular plaintiff, and the plaintiff's voluntary exposure to a known danger caused by the defendant's negligence, although the plaintiff actually recognizes and understands the danger which proximately causes damage to the plaintiff. Consequently, this court concluded that assumption of risk was inapplicable in the following: *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989) (plaintiff's decedent lacked knowledge that defendant's vehicle was approaching from behind the decedent, who was jogging along the right side of a county road, although decedent may have generally known that her presence on the right side of the road was more dangerous than her being on the road's left side, which would have afforded a frontal view of oncoming traffic); *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989) (length of time during which plaintiff's decedent had been a scuba diver did not establish that decedent

knew the risks of diving alone at the time when decedent drowned); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988) (plaintiff's walking on ice which covered the only access to her automobile was not a voluntary exposure to danger); *Mandery v. Chronicle Broadcasting Co., supra* (plaintiff, unaware that joists were missing beneath a floor, walked on the floor, which, on account of its weakened condition, collapsed and injured plaintiff); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987) (plaintiff lacked knowledge about a design defect in a guillotine scrap shear which malfunctioned on account of the defect and traumatically amputated plaintiff's fingers).

In *Mandery v. Chronicle Broadcasting Co., supra*, we recognized that a plaintiff's knowledge of danger, as an element in assumption of risk, may be proved by circumstantial evidence, since knowledge is a state of mind or a mental process.

However, in our review of the record in Margaret Sikyta's case, we find no direct evidence that she knew and understood that sudden application of the bus' brakes was imminent to avoid a collision between Arrow's bus and the preceding automobile. Although Margaret Sikyta was aware of general traffic conditions that morning, she made no specific observation concerning any particular automobile ahead of the bus immediately before sudden application of the bus' brakes and was unaware of the preceding automobile's movement in turning from the highway as she commenced her walk to the bus bathroom. Thus, there is no evidence from which an inference might be drawn that Margaret Sikyta knew of imminent danger involving the bus as it overtook the preceding automobile and, notwithstanding her knowledge of that imminent danger, placed herself in a position to suffer the consequences of attempted extrication from the dangerous situation, namely, sudden application of the bus' brakes in an effort to avoid a collision. Hence, we conclude that Arrow did not produce sufficient evidence to warrant submission of assumption of risk and permit the jury to conclude that Margaret Sikyta knew of the immediate and specific danger involved in the bus' operation in relation to the overtaken

automobile, but, nevertheless, exposed herself to that danger which proximately caused her fall and injury. Therefore, on the basis of the record presented, the defense of assumption of risk should not have been submitted to the jury.

As a result of the improper submission of assumption of risk and instruction on that defense, the jury may have found that Margaret Sikyta assumed the risk, as claimed by Arrow. Consequently, the trial court's submitting assumption of risk was prejudicial to Margaret Sikyta's substantial right to a fair trial on her negligence claim and constituted reversible error.

## ARROW'S CROSS-APPEAL

*Arrow's Motion for Directed Verdict.*

Although error was committed in the instruction on contributory negligence and by submitting assumption of risk, Arrow contends that its motion for directed verdict, made at the conclusion of Margaret Sikyta's case in chief, should have been sustained. However, after the court overruled Arrow's directed verdict motion, Arrow presented its case in chief. A defendant who moves for a directed verdict at the close of evidence in the plaintiff's case in chief and who, when the court overrules the directed verdict motion, proceeds with trial and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for directed verdict. See, *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984); *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983); *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983). Arrow's assigned error regarding the directed verdict motion is without merit.

Since we have concluded that reversible error occurred in Margaret Sikyta's trial, ordinarily, we would not consider Arrow's remaining assignments of error. However, Arrow's assigned errors beyond the directed verdict question refer to matters which may recur on retrial or which should be of some general interest to bench and bar in trials involving use of a deposition from a witness characterized as "unavailable."

*Discredit of Margaret Sikyta's Testimony.*

Arrow claims that Margaret Sikyta's testimony concerning

her injuries is discredited as a matter of law. To support its position, Arrow refers to *State v. Robertson*, 223 Neb. 825, 828, 394 N.W.2d 635, 637 (1986):

> Where it is clear that a party as a witness, to meet the exigencies in pending litigation and without reasonable explanation, changes such witness' testimony and then testifies to facts materially different concerning a vital issue, the subsequent and altered testimony from such witness is discredited as a matter of law and should be disregarded.

See, also, *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981).

During trial, Margaret Sikyta offered an explanation for her inconsistent deposition statement concerning existence of her back problem before the bus accident, namely, the possibility of cancer caused Margaret to focus on her medical examination and treatment for pain in her hip and overlook previous medical attention to her back. We are unable to conclude, as a matter of law, that her explanation is unreasonable and, therefore, a basis for mandatory discredit of her testimony. Whether Margaret Sikyta's explanation is reasonable and preserves her credibility is a matter for a jury's evaluation concerning witness credibility or weight to be given a witness' testimony.

*The Fulcher Deposition.*

Finally, Arrow claims that there was an insufficient showing that Dr. Fulcher could not or would not personally appear in court to testify in the trial. In particular, Arrow contends that Sikyta failed to provide the trial court with a sworn factual basis, for example, an affidavit or testimony, for a determination whether a deponent was unavailable as a witness at trial.

Sikyta's lawyer never requested a subpoena for Dr. Fulcher's attendance at Sikyta's trial. See *United States v. Bowen*, 411 F.2d 923 (5th Cir. 1969) (witness, who previously testified in a deposition, could not be located for service of a subpoena to compel attendance at trial; deposition testimony was allowed). Rather, regarding prospective use of the Fulcher videotape

deposition as substantive evidence at trial, Sikyta's lawyer alluded to the absence of a subpoena for Dr. Fulcher as a result of some agreement or stipulation that the deposition could be used in place of testimony adduced through Dr. Fulcher's personal appearance in court. However, stipulated use of the Fulcher deposition as a substitute for the physician's testimony adduced through courtroom interrogation does not appear in the deposition. Hence, we must conclude that there was no stipulation for use of Dr. Fulcher's videotape deposition pursuant to Neb. Ct. R. of Discovery 32(a)(3)(E) (rev. 1989), although the circumstances, especially obtaining the deposition during trial, strongly suggest arrangements for more than a "discovery" deposition.

The Nebraska Discovery Rules for All Civil Cases, which became effective on January 1, 1983, are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure.

The tenor of Rule 32 is to prefer "live" testimony, that is, oral testimony adduced in a courtroom within the presence and hearing of a jury. Referring to Fed. R. Civ. P. 32, the court observed in *Klepal v. Pennsylvania Railroad Company*, 229 F.2d 610, 612 (2d Cir. 1956): "[S]olicitude [is] disclosed in the rules generally for trials on oral testimony and the disposition to avoid trial on depositions alone where it can properly be avoided or where injustice or unfairness will not result." See, also, Rule 32(a)(3)(F) (due regard to the importance of presenting the testimony of witnesses orally in open court).

However, Rule 32(a)(3) does allow use of a witness' deposition in certain situations. A party seeking to admit or use a deposition on the basis that the witness is unavailable must establish that the requirements of Rule 32(a)(3) are satisfied. *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986). A showing of witness unavailability may be made through counsel's statements to the court. *Castilleja v. Southern Pacific Company*, 445 F.2d 183 (5th Cir. 1971). See, e.g., *Comeaux v. T. L. James & Co., Inc.*, 666 F.2d 294 (5th Cir. 1982); *Nanda v. Ford Motor Company*, 509 F.2d 213 (7th Cir. 1974); *United States v. Bowen, supra*; *Frederick v. Yellow Cab Co. of Philadelphia*, 200 F.2d 483 (3d Cir. 1952).

Determination that a witness is unavailable, thereby authorizing use of the witness' deposition pursuant to Rule 32(a)(3)(E), is within the discretion of a trial court, whose ruling will be upheld on appeal in the absence of an abuse of discretion. See *Castilleja v. Southern Pacific Company, supra.* See, also, *Pearl v. Keystone Consol. Industries, Inc.*, 884 F.2d 1047 (7th Cir. 1989); *Comeaux v. T. L. James & Co., Inc., supra*; *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980); *Nanda v. Ford Motor Company, supra*; *United States v. Bowen, supra.*

Also, we note that Sikyta's lawyer stated that Dr. Fulcher had "advised me several times" that the physician would be occupied in surgery during the week of Sikyta's trial. The statements by Margaret Sikyta's lawyer certainly dispel any notion that use of Dr. Fulcher's deposition became a necessity as the result of an emergency or something unexpected or unforeseeable, such as a sudden summons to surgery. Under the circumstances, a predeposition application for use of a deposition under Rule 32(a)(3)(F) might have avoided some of the procedural turmoil and headache. Rule 32(a)(3)(F) provides that a deposition may be used

> [u]pon application and notice prior to the taking of the deposition, that circumstances exist such as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Most curious is the fact that Dr. Fulcher was available for a late afternoon deposition, but no subpoena was issued for Dr. Fulcher's court appearance to give testimony in the jury's presence at the time when he was otherwise available for the deposition.

Consequently, we need not continue further into the propriety of using Dr. Fulcher's deposition in place of his testimony adduced through his personal appearance in the courtroom during Margaret Sikyta's trial. From our examination of the Fulcher deposition, we note that Arrow's lawyer extensively cross-examined Dr. Fulcher. Moreover, Arrow does not demonstrate that use of the Fulcher deposition deprived Arrow of a substantial right, prevented a just result, or

otherwise worked adversely or prejudicially to Arrow's case or defense. Arrow would be hard pressed to show deprivation of a substantial right or prejudice in light of the verdict favorable to Arrow. For that reason, we decline to delve further into the question about a proper procedure for showing that a witness is unavailable within the purview of Rule 32(a)(3)(E).

As a concluding comment about use of the Fulcher deposition, we recommend that trial courts abstain from involvement in the production or gathering of information pertinent to witness unavailability as a basis for use of a witness' deposition pursuant to Rule 32(a)(3). Such involvement not only complicates application of our standard of review, but presents unnecessary problems at the trial level in reference to a determination whether a witness is unavailable.

## CONCLUSION

As we have previously mentioned, there is reversible error in the trial of Margaret Sikyta's case. For that reason, we set aside the district court's judgment entered on the verdict and remand this cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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CLYDE E. SCHANEMAN AND BARBARA K. SCHANEMAN, APPELLEES AND CROSS-APPELLANTS, V. FLAVEL A. WRIGHT ET AL., APPELLANTS AND CROSS-APPELLEES.

470 N.W.2d 566

Filed June 7, 1991. No. 89-192.

1. **Pleadings.** Under the provisions of Neb. Rev. Stat. § 25-824 (Reissue 1989), the signature of a party or of an attorney on a pleading constitutes a certificate by him or her that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there is good ground for the filing of the pleading; and that it is not interposed for delay.
2. **Pleadings: Waiver.** The failure of a party to sign an answer is waived if not raised before trial.

3. **Quiet Title: Proof.** The plaintiff in an action to quiet title has the burden of proof and must recover on the strength of his or her own title and not the weakness of defendant's title.
4. **Trusts: Proof.** The burden of proof is upon one seeking to establish and enforce a trust to prove the same by clear and convincing evidence.
5. **Trusts: Parol Agreement: Statute of Frauds.** An express trust in real estate may not be created by parol agreement, for such agreement contravenes the statute of frauds.
6. **Trusts: Statute of Frauds.** Under the statute of frauds, an express trust in land (as opposed to a constructive or resulting trust) can only be created or declared by deed of conveyance in writing, subscribed by the party creating or declaring the same.
7. _____: _____. A memorandum properly signed is sufficient to satisfy the requirements of the statute of frauds if, but only if, it sets forth with reasonable definiteness the trust property, the beneficiaries, and the purposes of the trust.
8. **Trial: Evidence: Appeal and Error.** As a general rule, a litigant cannot introduce evidence and later complain that it was error to consider such evidence.
9. **Appeal and Error.** One who has invited error cannot be heard to complain of it.
10. **Trial: Evidence: Affidavits.** As a general rule, an affidavit cannot be used to establish facts material to the issue being tried.
11. **Evidence: Affidavits: Real Estate: Title.** Under Neb. Rev. Stat. § 76-271 (Reissue 1990), an affidavit explaining or correcting an apparent defect in the chain of title may be recorded as an instrument affecting real estate, and such record shall be prima facie evidence of the facts therein recited.
12. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
13. **Property: Contracts: Parol Evidence: Trusts.** If the owner of property makes an inter vivos transfer by a written instrument which declares that the transferee is to take the property for his or her own benefit, then absent proper grounds for rescission or reformation, the parol evidence rule will bar extrinsic evidence that the transferee was intended to hold the property in trust; but if the instrument does not declare that the transferee is to take the property either for his or her own benefit or in trust, then extrinsic evidence may be admitted to show how the transferee was intended to hold the property.
14. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the full 10-year statutory period.
15. _____. The sufficiency of the possession required to establish title by adverse possession is dependent upon the character of the land and the use which can reasonably be made of it.
16. **Adverse Possession: Oil and Gas: Mines and Minerals.** When there has been a severance of the mineral estate from the surface estate, mere occupancy of the surface is insufficient to establish title to the minerals by adverse possession; an actual, public, notorious, and uninterrupted working of the minerals under a

claim of ownership for the statutory period is generally required; the mere execution, delivery, or recording of oil and gas leases or mineral deeds does not constitute adverse possession.

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

Kathleen A. Jaudzemis, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

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

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

CAPORALE, J.

## I. INTRODUCTION

Defendants-appellants and cross-appellees, Flavel A. Wright and his spouse, Dorothy Wright Hughes and her spouse, Betty Wright Evers and her spouse, Fred Wright and his spouse, and Barbara Overholt and her spouse, assert the district court erred in quieting title to certain mineral rights in plaintiffs-appellees and cross-appellants, Clyde E. Schaneman and his spouse, Barbara K. Schaneman, by virtue of improvidently finding that (1) there existed no trust of those rights for the benefit of the defendants and (2) transference of the surface estate conveyed the mineral rights as well. By their cross-appeal, the plaintiffs challenge certain evidential rulings. We reverse.

## II. FACTS

On November 20, 1968, Elizabeth R. Wright, a widow, executed a deed conveying the mineral interests in her Scotts Bluff County land to one of her sons, Floyd E. Wright, subject to an existing lease of the oil and gas rights to Walter Ohmart, Jr. The mineral deed otherwise absolutely conveyed the mineral estate to Floyd E. Wright. This mineral deed was filed with the appropriate register of deeds on November 29, 1968. On January 13, 1969, "Floyd E. Wright Trustee" ratified the aforementioned Ohmart lease. On November 6, 1969, Floyd E. Wright and his wife, Elsie, as lessors executed a second oil and gas lease with Ohmart as lessee. This document made no

reference to a trust or trustee.

Elizabeth R. Wright died October 20, 1972, and Floyd E. Wright became executor of her estate. The subject land was then listed for sale. Plaintiffs sought to elicit testimony from real estate agent Victor Asmus that the listing included the mineral rights. Defendants objected on the ground that the testimony was barred by the parol evidence rule and was therefore irrelevant. The objection was sustained, and plaintiffs made an offer of proof, showing that if permitted, Asmus would testify that upon inquiry Floyd E. Wright said that all the mineral rights were going to be conveyed and, further, that he, Asmus, on behalf of Floyd E. Wright, represented to the Schanemans that if they purchased the land, they would receive all the mineral rights.

On March 10, 1973, plaintiff Clyde Schaneman, John L. Schaneman, and Clara B. Schaneman executed an offer to purchase the land at issue, "[t]ogether with all tenements, hereditaments, and appurtenances thereto pertaining. Subject to all easements, rights-of-way, and reservations of record. Further subject to Tenant's Lease in possession for crop year of 1973." The receipt for the earnest money the Schanemans tendered and the acceptance of offer were signed by "John F. Wright . . . for Floyd E. Wright Executor of the Estate of Elizabeth R. Wright."

During the title search, plaintiffs' attorney discovered the mineral deed, various oil and gas leases, and the ratification by Floyd E. Wright "Trustee," and through his title opinion brought these items to John Schaneman's attention.

Apparently in response to concerns raised by the title search, Floyd E. Wright, on July 20, 1973, executed an affidavit, which reads:

> FLOYD E. WRIGHT, being first duly sworn on his oath, deposes and states:
>
> 1. That he is a son of Elizabeth R. Wright, who died October 20, 1972, and a resident of Scotts Bluff County, Nebraska and that he looked after and managed the following:
>
> [Legal description of the subject land]
>
> for his mother during all of the times that she owned the

said land.

2. That on or about November 20, 1968, his mother, Elizabeth R. Wright, a widow, executed to him, a mineral Deed conveying to him all of the minerals in, on or under the said land, under an agreement whereby the affiant, Floyd E. Wright was to hold the said minerals in trust for himself, his brother and his sisters, one-fifth each and in trust for Fred Wright and Barbara Overholt, children of a deceased brother, William H. Wright, one-fifth each.

3. Affiant further states that during the time that Elizabeth R. Wright owned the said land, several oil and gas leases were granted to various lessees but that no drilling for oil and gas was ever done upon the said land and that there has never been any production of oil, gas or other minerals from the said land.

On August 8, 1973, Floyd E. Wright, both individually and as executor of the estate of his mother, together with his wife, executed a warranty deed in favor of plaintiffs, providing:

FLOYD E. WRIGHT, Executor of the Estate of Elizabeth R. Wright, Deceased; and, FLOYD E. WRIGHT and ELSIE WRIGHT, Husband and Wife, herein called the grantor whether one or more, in consideration of ONE HUNDRED AND FIFTEEN THOUSAND AND NO/100 ———————— ($115,000.00) ———— ———————— DOLLARS received from grantee, does grant, bargain, sell, convey and confirm unto CLARA B. SCHANEMAN, an undivided one-half (1/2); and, CLYDE E. SCHANEMAN and BARBARA K. SCHANEMAN, Husband and Wife, an undivided one-half (1/2), herein called the grantee whether one or more, the following described real property in Scotts Bluff County, Nebraska:

[Description of land at issue]

SUBJECT TO the surface lease to Larry Kilthau.

To have and to hold the above described premises together with all tenements, hereditaments and appurtenances thereto belonging unto the grantee and to grantee's heirs and assigns forever.

And the grantor does hereby covenant with the grantee

> and with grantee's heirs and assigns that grantor is lawfully seised of said premises; that they are free from encumbrance[;] that grantor has good right and lawful authority to convey the same; and that grantor warrants and will defend the title to said premises against the lawful claims of all persons whomsoever.

The affidavit of Floyd E. Wright was filed at 10:20 a.m., August 13, 1973; the warranty deed to the plaintiffs and Clara B. Schaneman was filed 1 minute later. The plaintiffs executed oil and gas leases for the property on June 15, 1975, December 18, 1978, November 6, 1980, and June 20, 1986.

## III. PRELIMINARY MATTERS

Before embarking on our analysis of defendants' appeal and plaintiffs' cross-appeal, we note that we are directed to no part of the record which deals with the grantee Clara B. Schaneman's interest in the subject land. Neither do we find any evidence concerning her interest. As a consequence, the district court's finding that the "[p]laintiffs are the record title owners to all ownership interests" in the land is erroneous. It is, however, an error which merges with the district court's erroneous adjudication, and we thus do not separately concern ourselves with the absence of any reference to that necessary party. For this reason, neither do we concern ourselves with the effect the deed executed by Floyd E. Wright and his spouse had on his own beneficial interest in the mineral estate.

Except for the fact that Floyd E. Wright's affidavit identifies Fred Wright and Barbara Overholt as children of affiant's deceased brother, neither does the record tell us Floyd E. Wright's relationship to the other defendants. However, this mystery, too, becomes unimportant, as the plaintiffs must recover on the strength of their own title, part IV, *infra*, and the record does identify the relationship of the two last-named defendants to Floyd E. Wright, thereby presenting the issue raised by defendants' appeal.

Lastly, we dispose of plaintiffs' assertion that defendants' failure to sign their answer deprives that pleading of all effect. "The signature of a party or of an attorney on a pleading constitutes a certificate by him or her that he or she has read the

pleading; that to the best of his or her knowledge, information, and belief there is good ground for the filing of the pleading; and that it is not interposed for delay." Neb. Rev. Stat. § 25-824 (Reissue 1989). Thus, the attorney's signature serves essentially the same function as the old verification requirement, and we have held that failure to verify an answer is waived if not raised before trial. *Northup v. Bathrick*, 80 Neb. 36, 113 N.W. 808 (1907). The same rule applies to the failure to sign an answer. The record failing to show that plaintiffs raised this defect before trial, when it could easily have been cured, the defect was waived.

## IV. ANALYSIS OF APPEAL

Although the plaintiff in an action to quiet title has the burden of proof and must recover on the strength of his or her own title and not the weakness of defendant's title, *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983), the burden of proof is upon one seeking to establish and enforce a trust to prove the same by clear and convincing evidence, see *Halsted v. Halsted*, 169 Neb. 325, 99 N.W.2d 384 (1959).

### 1. Existence of a Trust

Directing our attention to a portion of Restatement (Second) of Trusts § 24 (1959), the defendants first contend that "a valid trust was created by" Elizabeth R. Wright's "oral declaration." Brief for appellants at 8. The pertinent language reads: "(1) Except as otherwise provided by statute, the manifestation of intention to create a trust may be made by written or spoken words or by conduct. (2) No particular form of words or conduct is necessary for the manifestation of intention to create a trust." The Restatement, *supra* at 67. However, while this may be an accurate statement of how the settlor may manifest her intent, we have held that an express trust in real estate may not be created by parol agreement, for such agreement contravenes the statute of frauds. *Musil v. Beranek*, 160 Neb. 269, 69 N.W.2d 885 (1955).

#### (a) Statute of Frauds

The deed executed by Elizabeth R. Wright, granting the mineral estate to Floyd E. Wright, is absolute in its terms. There

is nothing in it which even suggests a trust. Under the statute of frauds, an express trust in land (as opposed to a constructive or resulting trust) can be created or declared only "by deed of conveyance in writing, subscribed by the party creating . . . or declaring the same." Neb. Rev. Stat. § 36-103 (Reissue 1988); *Halsted v. Halsted, supra*; *Musil v. Beranek, supra*.

Defendants assert that the writing requirement is met by Floyd E. Wright's affidavit. In support of this position, they cite us to Restatement (Second) of Trusts § 42 (1959), 1 A. Scott, The Law of Trusts § 42.3 (3d ed. 1967), and G. Bogert, The Law of Trusts and Trustees § 82 (rev. 2d ed. 1984), each and all to the effect that the statute may be satisfied by a writing signed by the trustee after the trust is created. These authorities state the general rule that a writing memorializing the oral trust and signed by the trustee while the trustee still holds title to the property may satisfy the statute of frauds.

This rule is followed even in jurisdictions whose statutes provide, as does ours, that the trust must be "created" or "declared" by a writing. See G. Bogert, *supra*, § 63. While *Musil* stated that an express trust in real estate could not be created by an oral agreement and other Nebraska cases have stated that such trusts are unenforceable, see, e.g., *Blohme v. Blohme*, 166 Neb. 369, 89 N.W.2d 127 (1958), *reh'g denied* 167 Neb. 1, 91 N.W.2d 30, this appears to be the first time this court has been asked to determine the validity of such trusts based upon a subsequent writing. In accordance with the great weight of authority, we hold that a subsequent writing, sufficiently memorializing an oral trust, signed by the trustee while the trustee holds title to the property, satisfies the statute of frauds.

"A memorandum properly signed is sufficient to satisfy the requirements of the Statute of Frauds if, but only if, it sets forth with reasonable definiteness the trust property, the beneficiaries and the purposes of the trust." Restatement (Second) of Trusts § 46 at 123 (1959). See, also, G. Bogert, *supra*, § 87. Floyd E. Wright's affidavit identifies the trust property and beneficiaries, but the only indication of the purposes of the trust is the words "to hold . . . in trust for." This, however, is a sufficient memorial of the trust purpose. See the Restatement, *supra*, § 46, comment *a*. at 123:

> If the owner of property declares himself trustee of the property or transfers it "in trust" for a named person without specifying further the purposes of the trust, the writing sufficiently designates the purpose of the trust since it is a declaration of a passive trust of the property for the intended beneficiary.

While the content of Floyd E. Wright's affidavit is sufficient to satisfy the statute of frauds, we must still determine whether it was executed while Floyd E. Wright had title to the mineral estate. The affidavit predates the warranty deed, for although it was filed on August 13, 1973, it was subscribed on July 20 of that year, while the deed is dated August 8, 1973.

Even though the earnest money and offer to purchase were accepted on March 10, 1973, the doctrine of equitable conversion did not vest plaintiffs with equitable title to the mineral estate on that date. This is because the acceptance was made by John F. Wright "for Floyd E. Wright Executor of the Estate of Elizabeth R. Wright." Since John F. Wright acted only as the agent of the executor of Elizabeth R. Wright's estate, the contract could only work an equitable conversion of the estate's interest. The mineral rights were not held by the estate but by Floyd E. Wright under the deed from his mother. Therefore, there could be no equitable conversion of the mineral estate unless and until Floyd E. Wright or his agent executed a contract of sale in his individual capacity or as trustee.

Since Floyd E. Wright's affidavit acknowledging the trust was executed while he still held the mineral estate, the writing, if admissible for that purpose, satisfies the statute of frauds.

(b) Admissibility of the Affidavit

Plaintiffs put forward two arguments against the use of the affidavit to satisfy the statute of frauds: (1) an affidavit is inadmissible to establish facts material to the issue being tried, and (2) use of the affidavit is barred by the parol evidence rule. Defendants counter by asserting that plaintiffs cannot complain of this use of the affidavit, since plaintiffs offered it into evidence in the first place.

We have held that as a general rule a litigant cannot introduce evidence and later complain that it was error to consider such

evidence. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). Plaintiffs, however, do not contend that it was error to admit the affidavit or that the district court used it improperly. Indeed, the affidavit clouds their title by failing to reveal whether the trustee had the power to sell the mineral estate; there is nothing inconsistent in plaintiffs' considering it relevant as a cloud on their title while simultaneously asserting that its use to change the meaning of the mineral deed is prohibited by the parol evidence rule.

While one who has invited error cannot be heard to complain of it, see, e.g., *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991), *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987), *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985), and *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985), that is not the case before us. Plaintiffs are not complaining of any error in the admission of the evidence; they are simply responding to an argument put forward by defendants on appeal.

Defendants' contention being without merit, we turn to the first of plaintiffs' arguments. They rely on statements by this court that the general rule in Nebraska is that an affidavit cannot be used to establish facts material to the issue being tried. *Doyle v. Union Ins. Co.*, 209 Neb. 385, 308 N.W.2d 322 (1981); *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 8 N.W.2d 185 (1943). While this may be the general rule, the Legislature has provided an exception. Under Neb. Rev. Stat. § 76-271 (Reissue 1990), an affidavit explaining or correcting an apparent defect in the chain of title may be recorded as an instrument affecting real estate, "and such record shall be prima facie evidence of the facts therein recited."

Floyd E. Wright's affidavit was recorded as an instrument affecting real estate; it explains the use of the word "trustee" in the January 13, 1969, oil and gas lease ratification and also states that no minerals were ever produced from the property, thus addressing concerns raised by plaintiffs' attorney in his abstract opinion. As an affidavit recorded under § 76-271, it is prima facie evidence that Floyd E. Wright took the mineral estate under an agreement whereby he was to hold the mineral rights in trust for the designated beneficiaries.

Plaintiffs' second challenge to the use of the affidavit is the parol evidence rule. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991). Plaintiffs contend that since the mineral deed is plain and unambiguous, the parol evidence rule bars use of the affidavit to prove a contemporaneous oral trust, since to prove such a trust would be to change the terms of the deed from an absolute grant of the mineral estate into a trust of that estate.

However, plaintiffs' application of the parol evidence rule is incompatible with the rule that a later writing signed by the trustee may satisfy the statute of frauds. Part IV(1)(a), *supra*. This is so because the only facts which could give rise to such a rule would include an earlier absolute deed to the purported trustee.

Restatement (Second) of Trusts § 38 (1959) states that if the owner of property makes an inter vivos transfer by a written instrument which declares that the transferee is to take the property for his or her own benefit, then absent proper grounds for rescission or reformation, the parol evidence rule will bar extrinsic evidence that the transferee was intended to hold the property in trust. But if the instrument does not declare that the transferee is to take the property either for his or her own benefit or in trust, then extrinsic evidence may be admitted to show how the transferee was intended to hold the property. Under this rule, the affidavit would be admissible, since the mineral deed is silent as to how Floyd E. Wright was to hold the property.

The reason the parol evidence rule is not applied in situations such as that now before us is simple, though rarely articulated. The parol evidence rule is applicable only where there is a completely integrated written agreement, and a deed is not, generally, intended to be a complete integration of the underlying agreement. Therefore, the rule is rarely applicable. See 3 A. Corbin, Corbin on Contracts § 587 (1960). Where the instrument states that the transferee is to take for his or her own benefit, then that much of the agreement is integrated and parol

evidence is barred. But as we have said, that is not the case here.

Plaintiffs also contend that the "statements" of Floyd E. Wright, as contained in the affidavit and the warranty deed, are inconsistent (the affidavit saying there was a trust and the warranties in the deed stating he had power to convey) and that we therefore should disregard both. Aside from the fact that the authority plaintiffs cite is clearly inapplicable to the facts before us, if we were to disregard the warranty deed, plaintiffs would be unable to claim it was meant to pass title to the minerals. The authority cited by plaintiffs is inapplicable because it deals with situations where a person changed his or her testimony, and the change was " 'clearly being made to meet the exigencies of the pending action . . . .' " *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 53, 313 N.W.2d 208, 213 (1981). As far as the record discloses, the "statements" of Floyd E. Wright were not made to the exigencies of any action, pending or otherwise. In addition, *Momsen* applies to the testimony of parties to an action, and Floyd E. Wright was not a party here. See *Palmer v. Forney*, 230 Neb. 1, 429 N.W.2d 712 (1988).

Thus, the parol evidence rule does not bar use of the affidavit. Moreover, as concluded in part IV(1)(a), *supra*, it is sufficient to satisfy the requirements of the statute of frauds, and, under § 76-271, it is prima facie evidence of the facts it recounts. All the other elements of a valid trust are present: (1) a competent settlor (Elizabeth R. Wright), (2) a trust property (the mineral estate), legal title to which has been transferred to (3) a competent trustee. Restatement (Second) of Trusts § 2, comment *h.* (1959). The district court thus erred in concluding that there existed no trust of the mineral rights.

### 2. Transference of Surface Estate

The next inquiry is whether the warranty deed executed by Floyd E. Wright and his wife nonetheless conveyed the mineral rights to plaintiffs, as the district court found, and, if not, whether plaintiffs acquired the mineral estate in some other way.

Neb. Rev. Stat. § 76-268 (Reissue 1990) provides as follows:

> If any conveyance of the title to, or any right or interest in real estate . . . shall be made after July 24, 1917, to any

> person . . . as trustee without naming any beneficiary and without any declaration of the terms of the trust having been executed and recorded in the manner prescribed by statute, in the office of the register of deeds of the county in which such real estate is located, it shall be conclusively presumed that such person . . . as trustee, has power and authority to convey the title, right and interest in such real estate which has been conveyed to him . . . and a purchaser from such trustee shall not be bound to inquire or ascertain the terms of the trust, unless before such conveyance . . . has been made by such trustee, the person claiming a beneficial interest therein shall have filed a notice as provided in section 76-267, in the office of the register of deeds of the county in which said real estate is located.

The "notice as provided in section 76-267" is a statement, supported by the affidavit of the person claiming a beneficial interest, identifying the affiant's residence and giving a description of the property and the affiant's interest therein. Neb. Rev. Stat. § 76-267 (Reissue 1990).

Floyd E. Wright was not only trustee of the mineral trust but was also a beneficiary. As such, he was a person claiming a beneficial interest in the minerals. His affidavit gives his residence, describes the property, and states the interest claimed. The affidavit was filed with the register of deeds. It therefore qualifies as notice under §§ 76-267 and 76-268. The question at this point is: Was the notice filed before such conveyance was made by such trustee?

> All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided*, that such deeds, mortgages and other

> instruments shall be valid between the parties.

Neb. Rev. Stat. § 76-238 (Reissue 1990).

Both the warranty deed and the affidavit are instruments within the meaning of this provision. The affidavit was recorded 1 minute before the deed was filed and therefore took effect before the deed. Thus, there is no conclusive presumption that Floyd E. Wright had the power and authority to convey title to the mineral estate. Because they had notice, plaintiffs had a duty under § 76-268 to inquire or ascertain the terms of the trust.

Moreover, since, as first established in part IV, *supra*, those seeking to quiet title must rely on the strength of their own title and not on the weakness of the title of others, plaintiffs had the burden of demonstrating that Floyd E. Wright had the power to sell the mineral estate. This they failed to do. While a trustee acting under the Nebraska Trustees' Powers Act, Neb. Rev. Stat. §§ 30-2819 et seq. (Reissue 1989), might have such authority, the sale in question predates that act by several years. The applicable rule, therefore, is that found in Restatement (Second) of Trusts § 190 at 418 (1959):

> The trustee can properly sell trust property if
>
> (a) a power of sale is conferred in specific words, or
>
> (b) such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that the property was to be retained in specie in the trust.

See, also, *Clark v. Fleischmann*, 81 Neb. 445, 116 N.W. 290 (1908) (trustee of testamentary trust could not sell trust corpus unless will provided express power of sale). We have no evidence that a power of sale was conferred in the agreement creating the trust, nor was any evidence adduced to indicate the sale was necessary or appropriate to carry out the purposes of the trust. We thus cannot conclude that Floyd E. Wright had the power to sell the mineral estate.

Plaintiffs nonetheless contend that Neb. Rev. Stat. § 76-269 (Reissue 1990) prevents defendants from attacking the warranty deed executed by Floyd E. Wright and his spouse, which by its terms purports to transfer the entire estate, both

surface and mineral. Section 76-269 provides, in relevant part, that

> no action shall be maintained whereby to set aside, cancel, annul, declare void or invalid any deed of conveyance . . . or other instrument affecting the title to any real estate, which has been recorded in the office of the register of deeds . . . for more than fifteen years prior to the commencement of such action, and purporting to be executed by any executor, administrator, guardian, receiver or trustee, notwithstanding any defect in, or absence of, any record of the court granting authority to such executor, administrator, guardian, receiver or trustee to execute the same.

Leaving aside the questions of whether the deed purports to be executed by Floyd E. Wright as trustee, whether the deed purports to convey the mineral estate, and whether this is an action to set aside or void the deed, § 76-269 is nevertheless inapplicable to the facts before us.

The action was commenced when plaintiffs filed their petition. Neb. Rev. Stat. § 25-501 (Reissue 1989). The petition was filed June 21, 1988. The deed was recorded August 13, 1973. This action was thus commenced less than 15 years after the deed was recorded and is therefore not within the ambit of § 76-269.

Finally, plaintiffs argue that, in any event, they acquired the mineral estate by adverse possession. One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the full 10-year statutory period. *Paasch v. Brown*, 217 Neb. 761, 351 N.W.2d 74 (1984). The sufficiency of the possession is dependent upon the character of the land and the use which can reasonably be made of it. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985). Plaintiffs' claim of adverse possession must therefore be judged in reference to the fact that the property claimed is a severed mineral estate.

When, as here, there has been a severance of the mineral estate from the surface estate, mere occupancy of the surface is insufficient to establish title to the minerals by adverse

possession. "An actual, public, notorious and uninterrupted working of the minerals for the statutory period is generally required. The mere execution, delivery, or recording of oil and gas leases or mineral deeds will not constitute adverse possession." H. Williams & C. Meyers, Oil and Gas Law § 224.4 at 54 (abridged ed. 1984). In order to bring this statement into line with Nebraska's law on adverse possession, we add that the working of the minerals must also be under claim of ownership. Since plaintiffs have offered no evidence that there has been any actual working of the minerals, their claim of adverse possession must also fail.

## V. ANALYSIS OF CROSS-APPEAL

Plaintiffs' cross-appeal challenges the district court's exclusion of testimony to the effect that the parties intended to transfer the minerals along with the surface estate, as detailed in part II, *supra*. This is a question we need not reach, for plaintiffs have failed to show that Floyd E. Wright had authority to convey the mineral estate. Absent such authority and in light of plaintiffs' knowledge of the trust, whether a transfer was intended is irrelevant.

## VI. DECISION

Accordingly, the decree of the district court quieting title to the mineral estate in and to the plaintiffs must be, and hereby is, reversed.

REVERSED.

HASTINGS, C.J., not participating.

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SUSAN K. ZARP, APPELLANT, V. WALLACE E. DUFF, APPELLEE.
470 N.W.2d 577

Filed June 7, 1991. No. 89-487.

1. **Pretrial Procedure: Expert Witnesses.** The duty is explicit to seasonably supplement a response to a discovery request seeking the identity of an expert witness expected to be called at trial and the subject matter and substance of the expected testimony from such expert.

2. **Pretrial Procedure: Trial: Expert Witnesses.** When a party has failed to respond or to respond properly to an interrogatory or has failed to make supplemental responses and then calls an expert witness to offer testimony within the scope of the interrogatory in question, the adverse party must object. If the court, over objection, allows such expert witness to testify, when appropriate the adverse party must move to strike the expert witness' testimony, request a continuance, or, under certain circumstances, move for a mistrial.
3. **Trial: Motions to Strike: Appeal and Error.** Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
4. **Trial: Expert Witnesses: Appeal and Error.** The trial court has discretionary power to admit or exclude the testimony of expert witnesses, and the trial court's ruling will be reversed only when there has been an abuse of that discretion.

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

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

Michael J. Mooney, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

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

WHITE, J.

In this professional negligence action the plaintiff, Susan K. Zarp, appeals from a jury verdict in favor of Dr. Wallace E. Duff, the defendant-appellee, based on the alleged error of the district court in admitting testimony by Duff's expert witness. We affirm.

Zarp filed this action in 1987 against Duff, an ear, nose, and throat physician, who performed nasal surgery on Zarp in 1984 after making a diagnosis of chronic sinusitis secondary to nasal trauma, nasal obstruction, and hypertrophy of the turbinates. Zarp alleges that the surgery was negligently performed and that as a result she continued to have facial pain and severe headaches.

Duff was served with interrogatories, including a request for the names and addresses of any expert witnesses to be called at trial, along with the substance of the facts and opinions to which each expert was expected to testify and a summary of the grounds for each expert's opinion. When Duff's answers were

served on Zarp's counsel on September 24, 1987, Duff stated that the names of such experts were "[u]nknown at this time."

Trial did not begin until April 3, 1989. The day of the trial Duff served amended answers to interrogatories, naming three experts who were to be called to testify for the defendant, including Dr. Ronald Pfeiffer of the University of Nebraska Medical Center's neurology department. Before jury selection began, Zarp's counsel objected to the amended answers, specifically objecting to the naming of Pfeiffer as an expert witness. Zarp's counsel admitted that a report by Pfeiffer was contained in the medical records which he planned to introduce at trial. Defense counsel asserted that Pfeiffer would be called merely to explain his report, which diagnosed the cause of Zarp's facial pain as classic migraine headache, unrelated to the facial surgery. Zarp's counsel argued that he could not request a continuance because he had already expended money to bring in other experts for the trial. After being assured by defense counsel that the experts would testify only to the facts in their medical reports, the court sustained the objection "as it is, but I'll allow him to call the witnesses to testify as to the facts which are evidenced by the medical records."

After the jury was impaneled, Pfeiffer was called as a witness on behalf of the defendant, and Zarp's counsel made no further objection. Pfeiffer testified that Zarp's facial pain was caused by classic migraine headache. At the conclusion of the trial, the jury returned a verdict for Duff. Zarp's motion for a new trial was overruled, and this appeal followed.

Zarp assigns as error the trial court's admission of Pfeiffer's testimony, based on the failure to list him as an expert witness prior to trial, and the trial court's overruling of the motion for new trial based on the admission of Pfeiffer's testimony.

The Nebraska discovery rules have been formulated to assist in pretrial preparation and "to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact." *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 537, 407 N.W.2d 146, 153 (1987). Under Neb. Ct. R. of Discovery 26(e)(1)(B) (rev. 1989),

> there is an explicit duty seasonably to supplement a response to a request for discovery [such as a response to

> an interrogatory] directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony.

*Norquay, supra* at 537, 407 N.W.2d at 154.

However, in *Norquay* we also held:

> When a party has failed to respond, or respond properly, to an interrogatory authorized by Rule 26(b)(4)(A)(1), or has failed to make supplemental responses required under Rule 26(e)(1)(B) . . . and such noncomplying party calls an expert witness to offer testimony within the scope of the interrogatory in question, the adverse party *must object* to a previously unidentified expert witness' testifying in general or object to testimony of an expert witness testifying about a previously undisclosed but discoverable matter sought to be disclosed by the interrogatory in question. If the court, over objection, allows such expert witness to testify, notwithstanding nondisclosure before trial, when appropriate the adverse party *must move to strike* the expert witness' testimony, request a continuance to give the surprised adversary an opportunity to investigate further and secure rebuttal evidence, or, under certain circumstances, move for a mistrial.

(Emphasis supplied.) *Norquay, supra* at 541-42, 407 N.W.2d at 156.

In the present case, Zarp's counsel made no objection at trial to the admission of Pfeiffer's testimony. Counsel now argues that the objection and ruling earlier in the day would have made any objection during Pfeiffer's testimony at trial "superfluous and of no effect." Brief for appellant at 19. That is not the case. As we reiterated in *Norquay*, " 'Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.' " *Norquay, supra* at 542, 407 N.W.2d at 156, quoting *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Zarp also failed to move for a continuance or to seek a mistrial. She cannot now complain about the admission of Pfeiffer's testimony.

We also note that it is within the trial court's discretion to

admit or exclude the testimony of an expert witness, and "[a] trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion." *Fuglsang v. Blue Cross*, 235 Neb. 552, 554, 456 N.W.2d 281, 283 (1990).

We cannot say that the trial court abused its discretion in allowing Pfeiffer to testify in order to explain his report, already a part of the medical records which had been received into evidence. Zarp failed to object at trial, and we cannot correct the error now on appeal. The decision of the district court is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. PATRICK J. GREEN, APPELLANT.

470 N.W.2d 736

Filed June 7, 1991. No. 90-454.

1. **Right to Counsel.** If an indigent defendant is to be imprisoned upon conviction, he or she has a right to be represented by counsel at trial, regardless of whether the offense for which he or she may be imprisoned is classified as petty, misdemeanor, or felony.
2. **Right to Counsel: Waiver.** An accused may waive his or her right to counsel when such waiver is made intelligently and understandingly, with knowledge of the right to counsel.
3. **Right to Counsel: Waiver: Proof.** The State has the burden of establishing a valid waiver of a defendant's sixth amendment right to counsel.
4. **Right to Counsel.** A trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but the warning is not required.
5. _____. Once a defendant is informed of the right to retained or appointed counsel, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right.
6. **Right to Counsel: Waiver.** A knowing and intelligent waiver of the right to counsel can be inferred from conduct.
7. _____: _____. A defendant's familiarity with the criminal justice system is an important factor in determining whether waiver of counsel was knowingly and intelligently made.

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8. **Right to Counsel.** A defendant may not utilize his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
9. **Right to Counsel: Waiver.** A waiver of counsel need not be prudent, just knowing and intelligent.
10. **Right to Counsel: Effectiveness of Counsel.** A defendant who elects to represent himself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel.
11. _____: _____. A defendant who chooses to represent himself or herself must accept the consequences of that election.
12. **Right to Counsel.** A trial court may—even over a defendant's objection—appoint standby counsel to aid the defendant if and when the accused requests help, and to be available to represent the defendant if termination of the defendant's self-representation is necessary.
13. _____. The appointment of standby counsel is left to the discretion of the trial court.
14. **Constitutional Law: Right to Counsel.** A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.
15. **Criminal Law: Right to Counsel: Effectiveness of Counsel.** A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel. A defendant may insist on representing himself or herself no matter how foolhardy that decision is, if made knowingly and intelligently, and once that decision is made, the defendant making that choice must accept the consequences of his or her election.
16. **Right to Counsel.** It is not up to the trial court to conduct the defense of a pro se defendant.
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, pass on the credibility of witnesses, 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. **Drunk Driving: Words and Phrases.** It is unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor. "Under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
20. **Drunk Driving: Evidence: Proof.** Either a law enforcement officer's

observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic liquor.

21. **Drunk Driving: Implied Consent: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Any law enforcement officer may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine when the officer has reasonable grounds to believe that such person was driving a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.
22. **Implied Consent: Blood, Breath, and Urine Tests.** Any person who refuses to submit to a chemical blood, breath, or urine test shall be guilty of a crime and, upon conviction thereof, shall be punished.
23. _____: _____. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.
24. _____: _____. The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of a refusal or is not able to make a reasoned judgment as to what course of action to take.
25. **Drunk Driving: Prior Convictions: Right to Counsel: Waiver: Proof.** In order to prove a prior driving while under the influence of alcohol conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had counsel or knowingly, voluntarily, and intelligently waived the right to counsel.
26. **Prior Convictions: Right to Counsel: Waiver: Proof.** The State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled.
27. **Trial: Evidence: Prior Convictions: Appeal and Error.** If a defendant fails to object to the admission in evidence of records of his or her prior convictions, error claimed with respect to the admission of that evidence is not preserved for appellate review.
28. **Trial: Appeal and Error.** Absent plain error, when an issue is raised for the first time in the Supreme Court, it will be disregarded, as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
29. **Appeal and Error.** The Supreme Court 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 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.

30. **Prior Convictions: Right to Counsel: Waiver.** A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel as to prior convictions for enhancement purposes.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, LYLE WINKLE, Judge. Judgment of District Court affirmed in part, and in part reversed and cause remanded with directions.

James C. Stecker for appellant.

Robert M. Spire, Attorney General, and Barry Waid for appellee.

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

FAHRNBRUCH, J.

Patrick J. Green appeals his convictions for what is commonly called third-offense drunk driving and for third-offense refusing to submit to a test to determine his alcohol content. The violations were alleged to have occurred on March 19, 1989. We affirm in part and in part reverse and remand with directions.

Green was also charged in the county court for Platte County with refusal to submit to a preliminary breath test and with two counts of criminal mischief. However, the State dismissed one of the criminal mischief charges and the count for refusal to submit to a preliminary breath test. The jury found Green not guilty of the remaining criminal mischief charge.

Green's seven assignments of error consolidate to allege that the trial court erred in (1) finding that he had voluntarily, knowingly, and intelligently waived his right to counsel; (2) failing to appoint an attorney to serve him as standby counsel; (3) permitting him to introduce evidence of his prior misconduct; (4) finding that the evidence was sufficient to support his convictions; (5) finding that his prior convictions were valid for enhancement purposes; and (6) that his sentences were excessive.

Green represented himself at all stages of the proceedings. Following presentation of the case to the jury on June 29 and 30, 1989, Green was convicted of operating a motor vehicle while under the influence of alcoholic liquor and of refusal to submit to a chemical test of his blood, breath, or urine to determine alcohol content.

After an enhancement hearing held on July 10, 1989, the trial court determined that Green had been convicted on at least two prior occasions of each of the offenses of which he was found guilty. Sentences were imposed on July 25, 1989. On each conviction, Green was sentenced to a 6-month term of imprisonment, the sentences to run consecutively, and fined $500, and he was ordered not to drive any motor vehicle for any purpose for 15 years and his driver's license was revoked for the same period. The sentencing order was filed on July 27, 1989.

Green timely appealed to the district court for Platte County, which affirmed the county court's judgment. Green timely appealed to this court from the district court. Green was represented by counsel in both his appeal to the district court and his appeal to this court.

## I. WAIVER OF COUNSEL

At a group arraignment on April 4, 1989, the county court for Platte County informed Green that he had the right to have an attorney represent him at all critical stages of the proceedings and that if his offense carried the possibility of imprisonment, he had the right to have a court-appointed attorney represent him at no expense if he could not afford an attorney. Green was further advised of certain other statutory and constitutional rights. The court individually informed Green of the nature of the charges and the possible penalties, including the enhanced penalties for third-offense operating a motor vehicle while under the influence of alcohol and for third-offense refusal to submit to a chemical test to determine the alcohol content in his blood, breath, or urine. Green advised the court that he understood the nature of the charges and the possible penalties. He told the court that he had sufficient funds to hire an attorney and requested a 2-week continuance so that he could determine whether to hire counsel or proceed on his

own. The court granted a continuance until April 18, at which time Green was to enter his pleas.

When Green appeared before the county court on April 18, the court asked him if he had had an opportunity to speak with an attorney. Green said that he had spoken with a few attorneys in Platte County, but that "they were so wrapped up in this mysterious web that has been weaved in this local area, that I could not honestly with full faith, go in and give one of those people some of my lucre." He requested another continuance so that he could drive to Lincoln or Omaha to hire an attorney. After the court remarked that 2 weeks seemed a sufficient period of time in which to hire a lawyer from Lincoln or Omaha, Green responded, "I have more in my life to do than worry about my court cases." The court refused the continuance and entered pleas of not guilty for Green. At that point, Green stated, "I'm sure the Supreme Court will enjoy that." At the conclusion of the hearing, the court told Green that if he had counsel, his attorney could attend a pretrial conference, or if he did not have counsel, he personally could attend the conference.

On May 22, Green appeared pro se at the pretrial conference. Since Green had earlier requested a jury trial, the court scheduled Green's trial for June 29. As stated, Green thereafter represented himself at all stages of the proceedings.

In his first assignment of error, Green claims that at a minimum, a trial court must advise a defendant of the dangers and disadvantages of self-representation. Without this warning, Green contends, there can be no voluntary, intelligent, and knowing waiver of a right to counsel.

The sixth amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." If an indigent defendant is to be imprisoned upon conviction, he or she has a right to be represented by counsel at trial, regardless of whether the offense for which he or she may be imprisoned is classified as petty, misdemeanor, or felony. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). See, also, Neb. Rev. Stat. § 29-3902 (Cum. Supp. 1990) (statutory right to counsel for felony defendants and

misdemeanants who may be punished by imprisonment). A criminal defendant may proceed pro se and forgo his or her right to counsel, but the waiver of that right must be made knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Accord *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974) (an accused may waive his or her right to counsel when such waiver is made intelligently and understandingly, with knowledge of the right to counsel). The State has the burden of establishing a valid waiver of a defendant's sixth amendment right to counsel. *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). In *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), the Supreme Court cautioned that every reasonable presumption against waiver must be indulged.

In *Faretta, supra* at 422 U.S. at 835, the Court explained:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with his eyes open." [Citation omitted.]

While the Supreme Court has not laid down a hard-and-fast rule requiring a ritualized warning, a fair reading of *Faretta, supra*, leads to the conclusion that the Court strongly suggests that a defendant be warned of the pitfalls of self-representation. This conclusion is supported by the Court's declaration in *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), that the constitutional minimum for determining whether a waiver is knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel.

Not only does a warning protect a defendant's constitutional rights, but it also serves a practical function. First, such a warning facilitates resolution of the conundrum with which trial courts are faced. An overprotective trial court which refuses to allow a defendant to jeopardize his or her own

defense by proceeding pro se risks violating the defendant's right to self-representation as guaranteed by *Faretta, supra*. Conversely, a trial court that does not warn a defendant of the dangers of self-representation may be subject to an appeal on the ground that the waiver of counsel was not knowingly and intelligently made. A warning lessens the risk of reversible error on either of those grounds. Furthermore, a warning on the record would relieve an appellate court from searching through the entire record to determine whether the waiver was knowingly and intelligently made when the question could be answered by reference to a relatively short and simple colloquy on the record. See *Meyer v. Sargent*, 854 F.2d 1110 (8th Cir. 1988).

That said, we disagree with Green that a formalistic litany is required to show a knowing and intelligent waiver of the right to counsel. Instead, we adopt a more flexible approach and hold that a trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that the warning is not required. See, e.g., *Meyer, supra*. As the following discussion demonstrates, it is nonsensical to reverse Green's convictions because of the absence of an on-the-record warning when the record viewed as a whole demonstrates a knowing and intelligent waiver of his right to counsel.

Green was apprised of his right to counsel and the right to court-appointed counsel in the case of indigency. The fact that Green was not later informed of his right at each proceeding is inconsequential. Once a defendant is informed of the right to retained or appointed counsel, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right. *State v. Dyke*, 231 Neb. 621, 437 N.W.2d 164 (1989); *State v. Tharp*, 224 Neb. 126, 395 N.W.2d 762 (1986). It is further noted that a knowing and intelligent waiver of the right to counsel can be inferred from conduct. See *State v. Tharp, supra* (after a defendant has been advised of his right to counsel, his conduct in appearing without counsel may result in a waiver of counsel). Accord *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

Green was no stranger to the judicial system, he having been

charged with and convicted of a number of offenses as reflected in the record and in *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988) (where Green, before both a jury and this court, represented himself on charges basically identical to those presented in this appeal), and *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990) (where Green, having been charged with driving on a suspended license and having voluntarily, understandingly, and intelligently waived his right to counsel after a full explanation of the consequences of pro se representation, represented himself not only at pretrial conference, but also at the jury trial itself). It has been held that a defendant's familiarity with the criminal justice system is an important factor in determining whether waiver of counsel was knowingly and intelligently made. See, e.g., *Meyer, supra*; *State v. Dungan*, 149 Ariz. 357, 718 P.2d 1010 (1985); *Burton v. State*, 260 Ark. 688, 543 S.W.2d 760 (1976); *People v. Morissette*, 150 Ill. App. 3d 431, 501 N.E.2d 781 (1986), *appeal denied* 114 Ill. 2d 554, 508 N.E.2d 733 (1987). In view of Green's experience, a warning of the dangers and disadvantages of self-representation would have been a useless exercise.

One other major factor leads to the conclusion that Green's waiver of counsel was knowingly and intelligently made. A defendant may not utilize his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice. *State v. Denbeck*, 219 Neb. 672, 365 N.W.2d 469 (1985). After the county court permitted Green 2 weeks to retain his own counsel, he appeared and made the unsupported claim that attorneys in Platte County were biased. As an explanation for not seeking an attorney from another area, Green said that he had better things to do with his time than worry about his court cases. When the county court refused yet another continuance so Green could seek counsel, Green suggested that this court might predicate error upon that refusal. From the described events, it can be inferred that Green was manipulating the system and obstructing the orderly progression of his case. He was afforded ample time to retain counsel, yet he freely chose to proceed on his own.

Although Green may have made an unwise decision in

representing himself, that does not render his waiver of counsel invalid. A waiver of counsel need not be prudent, just knowing and intelligent. A defendant who elects to represent himself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Accord *State v. Rogers*, 208 Neb. 464, 303 N.W.2d 788 (1981) (a defendant who chooses to represent himself or herself must accept the consequences of that election).

The county court was not clearly erroneous in finding Green's waiver of counsel to be voluntary, knowing, and intelligent. See *State v. Strickland*, 209 Neb. 133, 306 N.W.2d 600 (1981) (issue of whether waiver of counsel after defendant was "Mirandized" was made voluntarily, knowingly, and intelligently is reviewed under "clearly erroneous" standard). This assignment of error is meritless.

## II. STANDBY COUNSEL

Green next contends that even if the court finds that he voluntarily, knowingly, and intelligently waived his right to counsel, the trial court should have appointed standby counsel to ensure a fair trial.

A trial court may—even over a defendant's objection—appoint standby counsel to aid the defendant if and when the accused requests help, and to be available to represent the defendant if termination of the defendant's self-representation is necessary. *Faretta, supra*. However, *Faretta* does not require a trial court to permit "hybrid representation." *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Green's argument necessitates a determination of the proper review by this court of a trial court's failure or refusal to appoint standby counsel. Permitting a pro se defendant standby counsel could well interfere with the orderly progression of the case. See, *United States v. Kimmel*, 672 F.2d 720 (9th Cir. 1982) (inconvenience); *Bowen v. State*, 606 P.2d 589 (Okla. Crim. App. 1980) (disorderly procedure). Furthermore, by appointing standby counsel, the trial court runs the risk of infringing on the defendant's right to

self-representation. See, e.g., *McKaskle, supra*. The trial court is in the best position to gauge these considerations. For those reasons, the appointment of standby counsel is left to the discretion of the trial court. See *People v. Mirenda*, 57 N.Y.2d 261, 442 N.E.2d 49, 455 N.Y.S.2d 752 (1982) (appointment of standby counsel is a subject for discretion of the trial judge, whose decision will not be disturbed absent an abuse of discretion).

In this case, Green never requested standby counsel. See *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990) (request for appointment of standby counsel is an important factor in deciding whether court should have done so). In light of Green's antagonism toward and his unsubstantiated distrust of the local bar and in light of his manipulative tactics, this appeal might well be based on interference with Green's right to self-representation if the court had appointed standby counsel. Under the circumstances, the trial court did not abuse its discretion in failing to appoint standby counsel.

## III. INTRODUCTION OF EVIDENCE OF PRIOR MISCONDUCT

During cross-examination of one of the witnesses during the State's case in chief, and during his own case in chief, Green elicited testimony regarding a number of his prior arrests and contacts with Columbus police officers. Green contends that the trial court committed reversible error by not immediately conducting a hearing outside the presence of the jury pursuant to Neb. Rev. Stat. § 27-104(3) (Reissue 1989) to determine the admissibility of the evidence.

Section 27-104(3) provides in relevant part, "Hearings on . . . preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests." In this case, Green maintains that the interests of justice required the hearing. The record is devoid of any request by Green for such a hearing.

Green claims in effect that the trial court had an obligation to save him from himself. In this regard, the U.S. Supreme Court has declared: "A defendant does not have a constitutional right to receive personal instruction from the trial judge on

courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course." *McKaskle v. Wiggins, supra* at 465 U.S. at 183-84. This court has held that a criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). We have further declared that a defendant may insist on representing himself or herself no matter how foolhardy that decision is, if made knowingly and intelligently, and once that decision is made, the defendant making that choice must accept the consequences of his or her election. *State v. Rogers*, 208 Neb. 464, 303 N.W.2d 788 (1981).

Green must accept the consequences of his election to proceed pro se. It is not up to the trial court to conduct the defense of a pro se defendant. A defendant's rights guaranteed under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), must be honored, even if in doing so, a court allows a defendant to do harm to himself or herself. The trial court did not abuse its discretion in failing sua sponte to hold a hearing pursuant to § 27-104(3). See *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984) (trial court's action under federal counterpart reviewed for abuse of discretion). This assignment of error is without merit.

## IV. SUFFICIENCY OF THE EVIDENCE

In his next assignment of error, Green argues that the evidence was insufficient to sustain his convictions for operating a motor vehicle while under the influence of alcoholic liquor and for his refusal to submit to a chemical test to determine the alcohol content of his blood, breath, or urine.

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, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991). 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. *Id.*

> " ' "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." ' [Citation omitted.]"

*State v. Cogswell*, 237 Neb. 769, 771, 467 N.W.2d 680, 681-82 (1991).

Viewed in the light most favorable to the State, the record reflects the following: Officer Todd Thalken, who at all relevant times was a Columbus, Nebraska, police officer, testified that on March 19, 1989, at approximately 6:16 p.m., he saw a yellow Thunderbird automobile traveling eastward on 13th Street in Columbus at an estimated rate of speed of 60 m.p.h. Thalken followed the vehicle with the intention of giving the driver a verbal warning for speeding. After Thalken pulled behind the Thunderbird at a stoplight, the driver of the Thunderbird began power braking the car and squealing its tires for approximately 5 seconds. At that time, Thalken saw the driver's face in the rearview mirror of the Thunderbird and recognized him to be Green.

After Thalken signaled Green to stop, Green exited the Thunderbird "at a very fast rate" and refused Thalken's request to return to his own car. By the time Thalken got out of his vehicle, Green was at the side of the officer's vehicle, yelling at him. Thalken testified that Green appeared to have been drinking alcohol, swayed as he walked, smelled of alcohol, and had a flushed face. At the time, Thalken had been a Columbus police officer for 18 months, had received training at the Law Enforcement Training Center at Grand Island, and had made several arrests of persons suspected to be under the influence of alcohol. An eyewitness who observed Thalken and Green from across the street testified that Green appeared to be drunk and was loudly babbling. When Thalken asked Green if he had been drinking, the defendant said that he would not give any incriminating information. Green would not provide his driver's license, registration, proof of insurance, birth date, or name when the officer requested them.

Thalken asked Green to recite the alphabet, that being one of the field sobriety tests which the officer had been trained to administer. Thalken testified that Green "said, A B C and then he said — he started babbling — he said, is D before X or is R before Z and then he went on and just said a whole bunch of letters of the alphabet totally out of order with no direction to it." When Thalken asked Green to again recite the alphabet, the defendant recited it to *p* without error, stopped, and refused to go further. Green failed a second field sobriety test which Thalken referred to as the "finger touching test." It was the officer's opinion that Green was under the influence of alcohol to the point where his driving skills were impaired. When Thalken asked Green to put his hands behind his back so he could be handcuffed for his arrest, Green refused, started walking away, and called the officer names. Thalken and another police officer, who had arrived to render assistance, were required to forcefully place Green under arrest.

As Green was being taken to the police station, he continued to berate Thalken. When Thalken attempted to take a picture of Green at the police station, Green unzipped his pants, pulled out his penis, and said, "[I]f you [want to] take a picture, take a picture of this." Thalken testified that the odor of alcohol was present in the room in which Green was placed. A preliminary breath test advisement form was read to Green at the police station. During the entire time that the form was read to Green, he repeatedly yelled, "I don't understand!" Green refused to take the preliminary breath test.

Thalken read a chemical test implied consent form to Green. The form was offered and received in evidence and provides in substance that the person to whom it is read is under arrest for operating a motor vehicle while under the influence of alcoholic liquor; that he or she is being required to submit to a chemical test of his or her blood, breath, or urine to determine the person's alcohol content; that he or she is subject to certain penalties for a refusal to submit to the test; and that if the advising officer directs that the test will be of the subject's blood or urine, the arrestee may choose whether to have his or her blood or urine tested. While Thalken was reading the form to Green, the defendant again repeatedly shouted, "I don't

understand!" When Thalken asked Green what parts he did not understand, Green kept stating, "I don't understand!" After the officer requested Green to sign the form, he replied, "I'm not going to sign anything I don't understand and I wouldn't even admit that I do understand it." Green never submitted to a chemical test of his blood or urine and refused to sign the form. Green was then placed in a holding cell, whereupon he pulled down his pants and urinated on the floor in front of Officer Thalken.

1. Driving While Under the Influence

It is unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor. Neb. Rev. Stat. § 39-669.07(1) (Reissue 1988). " 'As used in § 39-669.07, the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.' [Citation omitted.]" *State v. Tanner*, 233 Neb. 893, 895, 448 N.W.2d 586, 588 (1989). It is not necessary for a conviction for driving under the influence of alcoholic liquor that a sample of blood, breath, or urine show a certain concentration of alcohol in a defendant's blood, breath, or urine, as those are alternate offenses under § 39-669.07. See, *State v. Tatara*, 230 Neb. 279, 430 N.W.2d 692 (1988); *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988). "Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages. [Citations omitted.]" *State v. Lichti*, 219 Neb. 894, 897, 367 N.W.2d 138, 141 (1985).

Thalken, a trained and experienced police officer, observed Green driving at an excessive rate of speed and squealing his tires. The officer testified that Green smelled of alcohol, swayed as he walked, had a flushed face, exhibited extremely belligerent conduct, and failed two field sobriety tests. He further testified that in his opinion, Green was under the influence of alcohol to the point that his driving skills were

impaired.

Green raises a number of points which go to the weight of the evidence. As we have said, this court does not reweigh the evidence. Those factual questions were for the jury, which resolved them adversely to Green. The evidence was sufficient for a jury to find beyond a reasonable doubt that Green was guilty of driving while under the influence of alcohol.

2. REFUSAL TO SUBMIT TO A CHEMICAL TEST

> Any law enforcement officer . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving . . . a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine . . . when the officer has reasonable grounds to believe that such person was driving . . . a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

Neb. Rev. Stat. § 39-669.08(2) (Reissue 1988). Subsection (4) of § 39-669.08 provides in substance that any person who refuses to submit to a chemical blood, breath, or urine test shall be guilty of a crime and, upon conviction thereof, shall be punished in the same manner as under § 39-669.07.

Green contends that the evidence shows that because he claimed he did not understand that he was being requested to submit to a chemical test, Officer Thalken never requested that he submit to the test. Therefore, Green concludes, the evidence against him was insufficient to show that he refused to submit to a chemical test.

> A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it. [Citations omitted.]

*State v. Beerbohm*, 229 Neb. 439, 445, 427 N.W.2d 75, 79 (1988). As this court explained in *Clontz v. Jensen*, 227 Neb. 191, 196, 416 N.W.2d 577, 580 (1987): "The only understanding

required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of a refusal or is not able to make a reasoned judgment as to what course of action to take."

As a matter of fact, Green is incorrect. Officer Thalken's testimony shows that he read the implied consent form to Green and that Green was informed that he was required to submit to a chemical test of his blood, breath, or urine to determine the alcoholic content. Even assuming that Green did not hear the officer's request to submit to the test, acceptance of Green's argument would require this court to ignore common sense and permit absurdity to rule the day. One cannot evade the effect of the law simply by repeatedly screaming that he or she does not understand. In fact, Green's efforts during the reading of the form lead to just the opposite conclusion. The jury could reasonably have inferred that by attempting to drown out the reading of the implied consent form, Green hoped to escape taking the test and avoid the reach of §§ 39-669.07 and 39-669.08. This inference presupposes that Green knew exactly what he was doing and understood what was being asked of him. The evidence was sufficient to show that Green conducted himself in such a manner as to justify a reasonable person in Officer Thalken's position in believing that Green understood that he was being asked to submit to a chemical test and manifested an unwillingness to take it. There was sufficient evidence for the jury to find beyond a reasonable doubt that Green refused to submit to a chemical test for alcohol content.

## V. USE OF PRIOR OFFENSES FOR ENHANCEMENT

If one has been convicted in the previous 10 years of operating or being in actual physical control of any motor vehicle while under the influence of alcoholic liquor or drugs or of refusal to submit to a chemical test of his blood, breath, or urine for a determination of alcohol content, the convictions may be used to enhance the penalty for a current conviction for either of those offenses. §§ 39-669.07 and 39-669.08.

Relying on 1980, 1984, and 1987 convictions, the State sought to enhance each of Green's current convictions to third

offense. At an enhancement hearing held on July 10, 1989, the State offered the Platte County Court files from case No. 84-261 and case No. 86-640. The county court required the State to make copies of the files and to substitute them for the originals. The copies of the files were received in evidence.

In case No. 84-261, a jury in the county court for Platte County, on September 27, 1984, found Green guilty of driving while under the influence of alcoholic liquor and refusal to submit to a chemical test of blood, breath, or urine to determine alcohol content. A journal entry from that case discloses that at his arraignment, Green was informed of his right to counsel and right to court-appointed counsel if a possible penalty was imprisonment and if he was indigent. That entry further reflects that Green would secure his own counsel. Green stated at the enhancement hearing in the present case that he became dissatisfied with his attorney and decided to represent himself in case No. 84-261.

Included in the file in case No. 84-261 was the file from case No. 79-3526. The file reveals that on January 22, 1980, Green pled, and the county court for Saunders County found him, guilty of driving while intoxicated. A journal entry from that file reflects that Green was informed of his rights and that Green stated that he did not wish to be represented by an attorney. The journal entry does specify the rights of which Green was informed.

In case No. 86-640, a Platte County Court jury found Green guilty on January 28, 1987, of refusal to submit to a chemical test. A journal entry discloses that at his arraignment, Green appeared pro se and was advised of his right to an attorney and his right to have one appointed if he was indigent. The journal entry provided spaces wherein the court could indicate whether a defendant was asked if he or she wanted an attorney, had an attorney, had funds to hire an attorney, and was requesting court-appointed counsel. The spaces were left blank. Green requested a jury trial and chose to represent himself in that case. See *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988).

"[I]n order to prove a prior driving while under the influence of alcohol conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant

had counsel or knowingly, voluntarily, and intelligently waived the right to counsel. [Citations omitted.]" *State v. Vanderkuur*, 235 Neb. 566, 567, 456 N.W.2d 473, 474 (1990).

> "[T]he State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled." [Citation omitted.]

*State v. Dyke*, 231 Neb. 621, 623, 437 N.W.2d 164, 166 (1989).

Green contends that because there was not a valid waiver of counsel in any of the proceedings in which he was previously convicted, the prior convictions cannot be used for enhancement purposes.

As a threshold matter, we first must determine whether we can reach the merits of Green's argument. If a defendant fails to object to the admission in evidence of records of his or her prior convictions, error claimed with respect to the admission of that evidence is not preserved for appellate review. *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984); *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978). Absent plain error, when an issue is raised for the first time in the Supreme Court, it will be disregarded, as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). However, the Supreme Court 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 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. *In re Interest of G.G.*, 237 Neb. 306, 465 N.W.2d 752 (1991).

Only with respect to the 1984 conviction can it be said that Green raised the issue of waiver of counsel before the trial court. Nonetheless, it would constitute a miscarriage of justice

to allow Green's penalty to be enhanced on the basis of prior, unconstitutional convictions. We find that the trial court committed plain error when it relied upon Green's 1980 and 1987 convictions to enhance the penalties in this case.

With respect to the 1980 conviction in Saunders County Court, it cannot be said that Green's waiver of counsel was knowing and intelligent. The record from that conviction fails to show that Green was even advised of his right to counsel or that an attorney would be appointed if he could not afford one. If one is unaware of his or her right to counsel, it follows that one cannot knowingly and intelligently waive that right.

The 1987 conviction suffers from a similar infirmity. Although Green was advised in that case of his right to counsel, including court-appointed counsel, there is nothing to show that his waiver of counsel was knowingly and intelligently made. The State's position seems to be that if one is informed of his or her right to counsel, a knowing and intelligent waiver may be inferred if he or she then appears pro se at trial. We reject that contention and reiterate that at a minimum, a sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel as to prior convictions for enhancement purposes. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987) (a checklist signed by a trial judge, which reflected that the defendant was advised of his right to counsel and waived that right, satisfied the State's burden of proving conviction in question was a valid one for enhancement purposes). Accord *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986). The spaces provided for on the docket entry for waiver of counsel were left blank. Thus, the docket entry fails to show that there was any waiver of counsel.

The 1984 convictions of driving while under the influence of alcoholic liquor and refusal to submit to a chemical test to determine alcoholic content present a different case. After being informed of his right to counsel, Green advised the court that he would secure his own counsel. At his enhancement hearing in this case, Green testified:

> [W]hen [name] was my attorney in 84-261, I . . . approached the Court and declared that [he] was incompetent. Judge Gerald Rouse said that my findings

> had no merit and he on his own considered [the lawyer] a very competent attorney. I had no recourse but to — Because of my financial status at the time, I was not going to be allowed another court appointed attorney, so I had no choice but to go pro se.

From this, it is clear that Green was aware that he had the right to a court-appointed attorney, that another lawyer would not be appointed to represent him, and that he made a conscious decision to forgo the aid of court-appointed counsel. The record sufficiently demonstrates a knowing and intelligent waiver of counsel in the 1984 proceeding. Accordingly, only the 1984 conviction may be used for enhancement purposes.

## VI. EXCESSIVE SENTENCES

In his final assignment of error, Green contends that the court imposed excessive sentences and should have sentenced him to probation. In view of our conclusion in part V of this opinion that Green's 1980 and 1987 convictions may not be used for enhancement purposes, the matter must be remanded for resentencing. Thus, there is no need to reach this assignment of error.

The district court's affirmance of the sentences is reversed. The cause is remanded to the district court with the directions that it vacate and set aside the county court's sentences and remand the matter to that court for further proceedings pursuant to law.

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

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## STATE OF NEBRASKA, APPELLEE, V. LARRY A. BRIGHT, APPELLANT.

470 N.W.2d 181

Filed June 7, 1991. No. 90-573

1. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential

element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

2. **Convictions: Appeal and Error.** When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. These are all matters for the jury, and a conviction must be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support the conviction.
3. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute such as Neb. Rev. Stat. § 28-706 (Cum. Supp. 1988), "intentionally" means willfully or purposely, and not accidentally or involuntarily.
4. **Criminal Law: Intent.** Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.
5. **Criminal Law: Child Support: Intent: Juries.** The determination of whether a defendant has the ability to pay child support in order to determine whether the failure to do so was intentional is a question of fact left to the jury.
6. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss the charges against him or her for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
7. **Criminal Law: Confessions: Words and Phrases.** In a confession an accused admits guilt of every material element of the crime charged, whereas in an admission an accused acknowledges some fact or circumstance in itself insufficient to constitute an acknowledgement of guilt, but tending to prove the ultimate fact of guilt.
8. **Sentences: Appeal and Error.** A sentence that is within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
9. **Sentences.** In imposing a sentence, a sentencing judge should consider, among other things, the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.

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

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee.

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

HASTINGS, C.J.

Defendant, Larry A. Bright, appeals from guilty verdicts on two counts of criminal nonsupport of his minor children, pursuant to Neb. Rev. Stat. § 28-706(1) (Cum. Supp. 1988), and the concurrent sentences of 1 year's imprisonment on each count. Defendant appeals, assigning as error the failure of the trial court to direct a verdict of not guilty at the close of the State's case in chief and the excessiveness of the sentences. We affirm.

Section 28-706(1) provides as follows: "Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport."

The defendant and Christine (Bright) Peterson were married from 1971 to 1983. Two children were born of this marriage on August 7, 1971, and July 17, 1974. Pursuant to a decree of dissolution entered on May 11, 1983, defendant was ordered to pay child support in the amount of $125 per month per child until each child reached the age of 19 years.

The information in this case was filed on November 9, 1989, alleging that from January 1 to June 23, 1989, the defendant intentionally failed, refused, or neglected to provide proper support to each of his children.

The decree of dissolution noted that at the time of its entry, defendant was unable to be employed due to an asthmatic condition. From January 1 through March 16, 1989, the defendant paid $200 in child support. As of February 28, 1990, the defendant was in arrears on his child support obligation in the sum of $16,934.09.

According to the testimony of Peterson, she had a telephone conversation with the defendant on about January 21, 1989. She was told by the defendant that he was working for Quick Courier Company out of Pennsylvania and he did not want to have to pay child support. He told her that he had supported the children for 12 years and that now it was her turn.

During phone calls in February of that same year, as testified to by Peterson, defendant acknowledged that he made about

$2,000 per month, but said that his living expenses were very high.

Peterson also testified that there were additional telephone conversations, one in March, two in April, two in May, one in June, and two in July. Each time the issue of child support was discussed. Peterson asked that he at least pay something. Defendant's reply was that Peterson should quit bothering him because he did not want to have to give up any of his income. He said he was not about to work just so she could get his money.

Peterson's husband, Robert, testified as to two or three phone conversations he had with the defendant in January 1989, and one in March. The substance of those conversations was that defendant claimed he was not going to pay Peterson any money because he did not think he owed it. However, Peterson's husband testified to another conversation in which he claimed that defendant said he was going to be able to get some money when a "buddy" of his sold some land in Arizona and that he, the defendant, would pay $3,000 on back child support so he could stay out of jail.

In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Valdez*, 236 Neb. 627, 463 N.W.2d 326 (1990).

When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. These are all matters for the jury, and a conviction must be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support the conviction. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991).

In the context of a criminal statute such as § 28-706, "intentionally" means willfully or purposely, and not accidentally or involuntarily. *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988). Intent may be inferred from the words or acts of the defendant and from the circumstances

surrounding the incident. *State v. Eichelberger, supra.* The determination of whether a defendant has the ability to pay child support in order to determine whether the failure to do so was intentional is a question of fact left to the jury. See *State v. Eichelberger, supra.*

The evidence is unequivocal that the court had ordered the payment of child support and that defendant had failed to make the payments as required. Proof of defendant's ability to work despite his asthmatic condition is evidenced by his work history from January through June 1989. The record discloses sufficient facts and circumstances from which a jury could infer that the defendant was capable of working during this period of time and that his refusal to pay child support was willful.

On a criminal defendant's motion to dismiss the charges against him or her for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990).

The defendant argues that a confession, standing alone, is insufficient to prove that a crime has been committed. See *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990). In a confession an accused admits guilt of every material element of the crime charged, whereas in an admission an accused acknowledges some fact or circumstance in itself insufficient to constitute an acknowledgement of guilt, but tending to prove the ultimate fact of guilt. *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). While the telephone conversations could be considered an admission of the defendant's intent not to meet his child support obligations, it does not appear that the defendant admitted every material element of felony nonsupport and therefore that he made a confession. However, he did make certain admissions which could properly be considered by the jury along with all other facts and circumstances in the case.

There is no merit to the defendant's first assignment of error.

A sentence that is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991). Each count of

which defendant was convicted is a Class IV felony, with a possible maximum sentence of 5 years' imprisonment.

In imposing a sentence, a sentencing judge should consider, among other things, the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

There is no evidence that the sentencing judge failed to take the specified factors into account in imposing the sentences. There was no abuse of discretion, and the judgment of the district court is affirmed.

AFFIRMED.

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THOMAS REYNOLDS PORTER, JR., APPELLEE, V. TERESA MELINDA HUCKINS PERKINS, APPELLANT.

470 N.W.2d 580

Filed June 7, 1991. No. 90-666.

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

Phillip G. Wright and Bonnie P. Harty for appellant.

Michael F. Pistillo and Mark A. Steele, of Steier, Rogers & Pistillo, P.C., for appellee.

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

HASTINGS, C.J.

The original decree determining custody awarded the parties joint custody of the parties' minor child, Thomas, with possession of the child placed with the mother, Teresa Melinda Huckins Perkins. On application of the father, Thomas Reynolds Porter, Jr., the decree was modified to provide the

care, custody, and control of the minor child be awarded to the father, subject to reasonable rights of visitation by the mother, and the court further ordered the mother to pay child support and the father to pay to the mother the amount of child support in arrears.

When the custody of minor children is involved in a proceeding, the custody is determined by the fitness of each parent and the best interests of the children. See *Applegate v. Applegate*, 236 Neb. 418, 461 N.W.2d 419 (1990). We review the judgment of the trial court de novo on the record, see *Codr v. Codr, ante* p. 48, 469 N.W.2d 124 (1991), and, finding no abuse of discretion, affirm the judgment.

AFFIRMED.

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## WILLIAM O. WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF KARI L. WILLIAMS, DECEASED, APPELLEE, V. MONARCH TRANSPORTATION, INC., APPELLANT.

470 N.W.2d 751

Filed June 14, 1991. No. 88-1074.

1. **Verdicts: Appeal and Error.** A verdict in a civil case will be upheld on appeal unless a jury's finding, necessary for the verdict, is clearly erroneous.
2. _____: _____. A verdict in a civil case must be sustained if the evidence, viewed and construed most favorably to the prevailing party, is sufficient to support that verdict.
3. _____: _____. A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.
4. **Wrongful Death: Damages: Words and Phrases.** A wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value.
5. **Wrongful Death: Damages.** In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship.
6. **Wrongful Death: Damages: Juries.** The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss which must be determined upon a consideration of the circumstances in each case.
7. **Wrongful Death: Damages: Words and Phrases.** In an action for wrongful death

of a child, "money value" of parental loss is not limited to, always equated with, or necessarily dependent on deprivation of the child's monetary contribution toward parental well-being.

8. **Wrongful Death: Damages.** In a wrongful death action, damages are not recoverable for mental suffering or anguish, bereavement, or solace.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

William J. Dunn and John W. Iliff, of Gross & Welch, P.C., for appellant.

J. Michael Coffey, of Stave & Coffey, P.C., and, on brief, Donald W. Kleine, of Kleine Law Office, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In the district court for Sarpy County, William O. Williams, personal representative of the estate of Kari L. Williams, brought a wrongful death action against Monarch Transportation, Inc., regarding a collision between an automobile driven by Kari L. Williams and a truck owned and operated by Monarch. The collision resulted in Kari's hospitalization and eventual death on October 14, 1987. After Monarch admitted liability for the collision and Kari's death, only the question of damages was submitted to the jury, which awarded $15,804.46 for Kari's hospital and funeral expenses and $250,000 for pecuniary loss sustained by Kari's next of kin.

Monarch appeals and contends that the $250,000 verdict is contrary to law, unsustainable under the evidence, and the product of passion, prejudice, speculation, and sympathy.

Kari, who died at age 24, was survived by her parents, Shirley Ann and William "Bill" Williams, who were near 50 years of age at the time of Kari's death. Shirley Ann and Bill Williams have been married for 31 years, throughout which they have lived in Springfield, Nebraska. Both Shirley Ann and Bill Williams are employed. Kari had an older sister, two younger sisters, and an older brother.

Until a year before her death, Kari had lived with her parents in their home, where the Williams children had grown up. As

the middle child in the family, Kari was the "mediator," one who would always "smooth things over" when childhood quarrels developed.

According to one of Kari's junior high school teachers, Kari was "[v]ery positive. She was a very bright, very upbeat, cheerful type of young lady, kind of a spark plug with a group, I guess. Always kind of kept the group happy and cheerful and doing positive and constructive things."

When Kari attended Platteview High School near Springfield, she also participated in volleyball, basketball, and track. Describing Kari's involvement in those extracurricular activities, Robert Icenogle, a Platteview teacher, characterized Kari: "She gave her best. She would make any sacrifice that was needed or called for . . . ." Also, Icenogle noted that Kari was family oriented and frequently talked about her family's activities. Icenogle observed that there was a "[v]ery close relationship" between Kari and her parents, with whom she was "always very close, very supportive."

The day after she was graduated from high school, Kari began employment in the office of Timmerman Feedyards near Springfield, where she earned $19,000 annually. Gerald Timmerman, owner of the feedyard, described Kari as an "extraordinary" employee who displayed "[u]nlimited" potential and a combination of "a business manner and a very personal manner . . . a talent, you know, that God gives somebody, you don't develop that." According to Timmerman, "the only thing that ever meant more to [Kari] than her work and her friends was her family." In Timmerman's view, the Williams family was the "upmost first" priority in Kari's life.

About a year before her death, Kari arranged to rent a house from her brother, Mike. That house was located 1 mile from the home of Shirley Ann and Bill Williams. According to Mike, Kari felt it was time to leave the family home, but she wanted to live near her parents "so she could always stop in." After Kari moved, she visited her parents almost daily, sometimes stopping by and saying "just checking on you," but many times staying for dinner and late into the evening, or even overnight. In the words of Bill Williams, Kari was "[a]lways . . . in contact with you no matter what." As Mike Williams recounted, "There

[were] a lot of times it still looked like [Kari] lived there." According to Kari's mother and father, they "saw her just as much after she was gone as [they] did while she lived there."

As far as family events were concerned, Kari was the "great organizer." She cooked, set up tables, decorated, and cleaned her parents' home for large holiday gatherings. When a family birthday was approaching, Kari always contacted each family member to remind them, or to tell them about a family celebration which had been planned. Kari "went a lot of places" with Shirley Ann and Bill Williams, including a vacation trip to Minnesota in the summer preceding Kari's death. On weekends, according to Bill Williams: "It was a Sunday ritual . . . we [Kari and her parents] went to church every Sunday morning. After church, we go out and have breakfast together and that was just the way it was on Sunday mornings." Kari and her mother shopped together almost every weekend and often had lunch together during the week. As Shirley Ann Williams expressed: "Kari lived at home as an adult probably more than the other girls . . . . I got to know her more on the basis of a friend. She became a friend as well as a daughter. She was probably my best friend." Although Kari moved from the family home, she continued to help her parents with various tasks, such as gardening and preparation of family gatherings. Kari's relationship with her parents never changed before her death. As Shirley Ann Williams expressed Kari's relationship with her parents: "If you ever needed help with anything at all, all you had to do was call Kari."

Monarch did not cross-examine any witness who testified about Kari's relationship with Shirley Ann and Bill Williams and her activities involving her parents. Monarch did not present any case in chief.

The court correctly instructed the jury on the elements of damages recoverable in a Nebraska wrongful death action. The jury returned its verdict for $265,804.46, including $250,000 for pecuniary loss sustained by Kari's next of kin.

## STANDARD OF REVIEW

A verdict in a civil case will be upheld on appeal unless a jury's finding, necessary for the verdict, is clearly erroneous.

See, *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990); *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

"A verdict in a civil case must be sustained if the evidence, viewed and construed most favorably to the prevailing party, is sufficient to support that verdict." *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 443, 412 N.W.2d 56, 70 (1987). As expressed in *Rahmig*: "A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law." 226 Neb. at 457, 412 N.W.2d at 78.

> [A] verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record.

*Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 643, 452 N.W.2d 270, 280 (1990). Accord, *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985); *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979); *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978). See, also, Neb. Rev. Stat. § 25-1142 (Reissue 1989) (vacation of verdict for award of excessive damages given under the influence of passion or prejudice).

## WRONGFUL DEATH DAMAGES

Concerning the amount of recovery in a wrongful death action, Neb. Rev. Stat. § 30-810 (Reissue 1989) in pertinent part provides: "The verdict or judgment should be for the amount of damages which the persons [widow, widower, or next of kin] in whose behalf the action is brought have sustained."

In *Maloney v. Kaminski*, 220 Neb. 55, 69, 368 N.W.2d 447, 458 (1985), this court stated: "We have held that a wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value."

In relation to "pecuniary loss" and "money value," this court has consistently recognized that in an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship. See, *Crewdson, supra*; *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979); *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973). See, also, *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 120, 499 N.E.2d 1373, 1379 (1986): "When children are wrongfully killed, the parents' investment of money and in affection, guidance, security and love is destroyed. Society recognizes the destruction of that value, whether the child is a minor or an adult."

"The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974) (wrongful death action). Accord, *Singh v. Air Illinois, Inc.*, 165 Ill. App. 3d 923, 520 N.E.2d 852 (1988); 1 S. Speiser, Recovery for Wrongful Death § 3:49 (2d ed. 1975). "[T]here is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance . . . ." *Fussner v. Andert*, 261 Minn. 347, 353, 113 N.W.2d 355, 359 (1961).

> Quite obviously it is impossible to generalize on the extent to which persons . . . enjoy each other's companionship and society. This is a highly personal relationship which must of necessity be decided on a case-by-case basis. When it relates to a parent and child, it depends on all the circumstances important in the lives of a *particular* parent and a *particular* child.

(Emphasis in original.) *Pagitt v. City of Keokuk*, 206 N.W.2d 700, 703 (Iowa 1973).

In *Wycko v. Gnodtke*, 361 Mich. 331, 338-40, 105 N.W.2d 118, 122-23 (1960), the Supreme Court of Michigan observed:

> What, then, is the pecuniary loss suffered because of the taking of the child's life? It is the pecuniary value of the

> life. . . .
>
> . . . [A]n individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain.

Cf., *Smith v City of Detroit*, 388 Mich. 637, 202 N.W.2d 300 (1972); *Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970).

Regarding the pecuniary loss requirement for wrongful death damages, this court noted that

> the word "pecuniary" is not to be construed in a strict sense, that it is difficult to determine its exact measure, and that the task of determining such must be left to the good judgment and ordinary common sense of the jurors. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case. [Citations omitted.] There is no requirement that there be evidence of the dollar value of companionship, counseling, or advice. It is a matter left to the sound discretion of the jury.

*Maloney v. Kaminski*, 220 Neb. 55, 69-70, 368 N.W.2d 447, 458 (1985). See, also, *Garvin, supra* (wrongful death damages are incapable of computation and are largely a matter for the jury); *Selders v. Armentrout*, 192 Neb. 291, 293, 220 N.W.2d 222, 224 (1974) (damages in wrongful death cases are peculiarly for the jury to determine because of the numerous contingencies involved, and "[a]t best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness"). Thus, in an action for wrongful death of a child, "money value" of parental loss is not limited to, always equated with, or necessarily dependent on deprivation of the child's monetary contribution toward parental well-being.

According to one commentator, a wrongful death action is

"sui generis" and involves placing a monetary value on a human life; hence, determination of wrongful death damages, which may elude a precise mathematical calculation, is left to a jury, which "possesses discretion, and [which] is given wide latitude to exercise its sound judgment and good sense, aided by proper instructions from the court." 2 S. Speiser, Recovery for Wrongful Death § 9:2 at 4 (2d ed. 1975).

In a wrongful death action, damages are not recoverable for mental suffering or anguish, bereavement, or solace. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979). Speiser reminds us of the difference between compensation for mental anguish, bereavement, or solace and compensation for loss of society, comfort, and companionship:

> When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. . . . The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have *contributed* in terms of support, assistance, training, comfort, consortium, etc.

(Emphasis in original.) 1 S. Speiser, Recovery for Wrongful Death § 3:52 at 327 (2d ed. 1975).

## THE VERDICT

Throughout its brief, Monarch emphasizes that nothing established Kari's past monetary contribution to Shirley Ann and Bill Williams or indicated Kari's prospective monetary contributions to her parents. Therefore, Monarch argues, the $250,000 verdict is excessive in this wrongful death action.

However, there is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or

prospective. Rather, "the society, care and attention of a deceased [family member] are 'services' having financial value which may be both measured and compensated." 1 S. Speiser, *supra*, § 3:49 at 321.

There is nothing to contradict or undermine the evidence of Kari's relationship with her parents, Shirley Ann and Bill Williams, or Kari's activities which were a source of society, comfort, and companionship for her parents. Given the history of an extraordinary young woman's very remarkable relationship with her parents, the jury in this case obviously evaluated the future by the past and, accordingly, returned its verdict to compensate for the loss caused by Kari's death. We conclude that the Williams verdict is supported by relevant evidence and cannot conclude that the verdict resulted from passion, prejudice, or mistake. Thus, we are unable to state that the Williams verdict is excessive under the circumstances.

AFFIRMED.

COLWELL, D.J., Retired, dissenting.

I disagree with the majority on the issue of the amount of damages allowed by the jury for pecuniary loss; from the record the verdict for $250,000 was clearly wrong, being excessive, as it shocks the conscience. See *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 643, 452 N.W.2d 270, 280 (1990):

> [A] verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record.

Concerning the $250,000 verdict, the court's instruction No. 8 told the jury to reduce any damages allowed for loss of society, comfort, and companionship to their present cash value. There is nothing in the record showing how the jury followed that instruction.

The issue presented here is whether or not the $250,000 jury verdict was excessive as it relates to the pecuniary loss of Kari's society, comfort, and companionship, or, simply, how much

was that loss worth in money to the next of kin (parents). Such elements of loss are recoverable under Neb. Rev. Stat. § 30-810 (Reissue 1989), which provides in part, "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." That statute does not require pecuniary loss; however, that element has been included by judicial interpretation. The statutory and judicial interpretation history of § 30-810 has been reviewed in such cases as *Ensor v. Compton*, 110 Neb. 522, 194 N.W. 458 (1923), *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989), and other cases, including the provision in Gen. Stat. ch. 15, § 2 (1873), that recovery shall be limited to $5,000.

There are some definite limitations to the recovery for pecuniary loss in wrongful death cases.

> Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death. . . . [R]ecovery for loss of services and companionship by a surviving husband or wife can only be sustained where the evidence shows a reasonable probability that such services and companionship afforded the survivor was [sic] of such a character that it would be of advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her.

*Ensor v. Compton, supra* at 524, 194 N.W. at 459. "This change . . . does not provide a wide open door to all sorts of claims for damages." *Id.* "[A] wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value." *Maloney v. Kaminski*, 220 Neb. 55, 69, 368 N.W.2d 447, 458 (1985); *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979). Neb. Rev. Stat. § 25-1142(4) (Reissue 1989) provides that a new trial shall be granted if there are "excessive damages, appearing to have been given under the influence of passion or prejudice." (See the "shock the conscience" rule above-quoted in *Crewdson*.)

With the rule allowing recovery in wrongful death cases for pecuniary loss of society, comfort, and companionship for both minors (*Selders*) and adults (*Garvin*), the court has struggled in

a search for some basis or guideline to consider and evaluate verdicts and judgments on the issue of whether they are excessive or inadequate. The court has said:

> It is virtually impossible to "color match" cases in attempting to decide a given issue. . . .
>
> . . . [O]ne common thread runs throughout all of those cases, namely, that damages in any wrongful death case are incapable of computation and are largely a matter for the jury. . . . ". . . 'The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness.' . . ."

*Garvin v. Coover, supra* at 586-87, 276 N.W.2d at 227. Later, in *Maloney, supra* at 69, 368 N.W.2d at 458, the court stated that

> the word "pecuniary" is not to be construed in a strict sense, that it is difficult to determine its exact measure, and that the task of determining such must be left to the good judgment and ordinary common sense of the jurors. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case.

From the foregoing, the conclusion is inescapable that in wrongful death cases such as the case at bar there are few clear rules or guidelines for the fact finder in arriving at a verdict/judgment which can be examined along with the record when challenged as either excessive or inadequate.

Likewise in such cases, there are few clear guidelines or rules for the appellate court to follow in order to carry out its duty to provide justice to all parties, including (1), unless the jury is clearly wrong, the reviewing court will not interfere with the jury verdict, *Garvin v. Coover, supra*; (2) a new trial shall be granted "for excessive or inadequate damages as to be the result of passion or prejudice," see *Crewdson* and § 25-1142 (this seldom factually appears in the record); (3) damages for mental suffering, bereavement, or solace are not recoverable (here again, there is seldom clear evidence in the record supporting these items); and (4) a verdict or judgment shall not be sustained if it shocks the conscience (again, there is no uniformity or color-matching process to equate the record with conscience).

From a review of the cases, it is apparent no attempt has been made in Nebraska to achieve uniform assessment of pecuniary loss in wrongful death cases. In *Garvin, supra*, the court reviewed awards made in several prior cases and then affirmed a damages award of "none," finding it was not inadequate. In *Garvin* the facts surrounding the life and death of the 20-year-old single decedent were similar to those in the case at bar. Later, in *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990), the court reversed and set aside a $510,000 verdict (as reduced to its present cash worth) as being excessive and shocking the conscience; the facts surrounding the life and death of the 21-year-old single male decedent were similar to those in the case at bar. From the foregoing, the most that can be deduced as to the issue of pecuniary loss is that "none" is acceptable and $510,000 is too much.

The dilemma presented to the court in these wrongful death cases, absent a clear showing in the record that the damages award is excessive or inadequate as the result of passion, prejudice, mistake, or other means, is either for the court to approve the jury verdict on the theory that the assessment of pecuniary loss is for the jury to determine or, after examining the record, for the court to decide whether the verdict is excessive, as it shocks the conscience, for which decision there are no guidelines.

It is undisputed in the case at bar that the decedent, Kari L.

Williams, age 24 years, prior to her death was a bright, considerate, dependable, and loving adult child who was devoted to her parents, William and Shirley Williams, and to her siblings; that her family regularly enjoyed Kari's companionship; and that her family was rightfully proud of Kari's industry and accomplishments. Kari had lived outside of the family home for about 1 year, and she intended to be married in the near future, when she would establish her own marital home and future. Her family had hoped and expected that their family relationships would continue.

From this record, the majority apparently relied upon the sound discretion of the jury to compensate for the loss caused by Kari's death by evaluating the future with the past, and the award of $250,000 was not found to be excessive, on the conclusion that the verdict was not a result of passion, prejudice, or mistake.

The majority's conclusion on this issue is a further erosion of the element of pecuniary loss in wrongful death cases and the rule, "A wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value." See *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). It brings into focus the dissent of Chief Justice White in *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), challenging the rule in that case extending the recovery in the wrongful death of a child to include loss of society, comfort, and companionship of the child. Chief Justice White argued that the rule permitted recovery for emotional reasons:

> In the hands of an imaginative lawyer, marshaling family albums and the testimony of sympathetic friends, and demonstratively organized and staged by a histrionic-minded lawyer, this court will undoubtedly be faced in the future with the almost impossible job of attempting to apply the generalized principles of excessiveness of a verdict to these judgments, which by their nature are an attempt to award money for a purely emotional loss conjectural, speculative in nature, and incapable of measurement or proof by any objective standard or related criteria.

*Id.* at 282, 207 N.W.2d at 690.

From my review of the record, the jury verdict of $250,000 for pecuniary loss was clearly wrong, being excessive, as it shocks the conscience, and, accordingly, it was the result of either passion, prejudice, mistake, or some other means not apparent from the record. The verdict should be reversed and the cause remanded for a new trial on plaintiff's second cause of action on the issue of damages for pecuniary loss suffered by decedent's next of kin. See *Crewdson v. Burlington Northern RR. Co., supra.*

Lastly, I object to these majority citations as being contrary to existing Nebraska law: (1) "When children are wrongfully killed, the parents' investment of money and in affection, guidance, security and love is destroyed. Society recognizes the destruction of that value, whether the child is a minor or an adult." *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 120, 499 N.E.2d 1373, 1379 (1986). That language in the Illinois case was in support of the rule that under its wrongful death act, "there is a presumption of loss of society for an adult child." *Id.* Nebraska has no such presumption; rather, pecuniary loss is a fact question for the jury. (2) Although Nebraska recognizes the loss of society, comfort, and companionship of a deceased adult child as an element of damage, see *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979), the majority attempts to extend and define this element by quoting from 1 S. Speiser, Recovery for Wrongful Death § 3:49 at 321 (2d ed. 1975): "[T]he society, care and attention of a deceased [family member] are '*services*' having financial value which may be both measured and compensated." (Emphasis supplied.) That rule is not in accord with Nebraska law.

# JEANINE K. STUCZYNSKI, APPELLEE, V. JAMES E. STUCZYNSKI, APPELLANT.

471 N.W.2d 122

Filed June 14, 1991. No. 89-081.

1. **Divorce: Appeal and Error.** In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. When the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Support: Rules of the Supreme Court: Presumptions.** Child support shall be established in accordance with the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
3. **Property Division: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
4. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1988) make it appropriate.
5. _____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. The court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future and should consider the earning capacity of the supporting spouse.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed as modified.

John W. Kocourek, of Peterson Law Offices, for appellant.

Paul R. Elofson, of Abrahams, Kaslow & Cassman, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an action for dissolution of marriage. The parties agreed on a property settlement regarding the disposition of most of their marital assets and the debts accumulated during the marriage. They further agreed that custody of their two minor sons should be awarded to petitioner-appellee wife subject to reasonable rights of visitation in respondent-appellant husband. The district court found that this agreement was fair and reasonable and incorporated the terms of the agreement into the decree.

Pursuant to the property settlement agreement, the wife was awarded the marital home subject to the debt thereon. The house is to be sold upon the wife's remarriage or when the youngest child reaches majority. After the residence is sold, the husband will receive $11,250, which was agreed to be his equity interest in the real estate and personal property. The parties allocated their personal property, divided the husband's pension, and awarded each party a vehicle subject to the debt thereon. The husband agreed to liquidate certain cash value life insurance policies to provide a fund to discharge several thousand dollars of outstanding debt of the parties. The remainder was divided one-half to each.

The only issue not settled by the agreement of the parties was with regard to the amounts of alimony and child support. The district court ordered the husband to pay alimony of $350 per month for a period of 7 years and child support of $350 per month per child. The husband has appealed and assigns 12 errors, which may be summarized as contentions that the trial court erred in (1) "[t]aking into consideration Respondent's second job in making its award of alimony and child support" and (2) "[f]ailing to take into consideration the earning *capacity* of the petitioner which should be based upon a 40 hour work week, and not the 32 hours she was actually employed."

In connection with the first summarized assignment, two issues must be decided in our review. The first is the issue of considering the earnings of the second job the husband works. The second issue is implicit in the presentations of both parties. The husband, in his evidence on the issue of support, assumes that only his basic salary, not including overtime wages, should

be considered his total earnings. The wife, on the same issue, wants to include in the husband's total earnings the entire amount of overtime earned by the husband in 1987, which was the last full year of earnings before the trial in September 1988. We determine those two issues herein and modify the judgment of the trial court with regard to the husband's first summarized assignment of error. We affirm the judgment of the trial court on the second assignment. The remainder of the specific assignments of error need not be specifically addressed, with the exception that we note appellant is in error when he states that he "timely" filed his "Motion to Reconsider and Motion for Specific Findings of Fact and Conclusions of Law . . . ." Brief for appellant at 4. We have considered the motion to reconsider as a motion for new trial. In a case tried to the court without a jury, a motion for specific findings of fact pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1989) must be made before the final submission of the case to the court. *State, ex rel. Sorensen, v. Mitchell Irrigation District*, 129 Neb. 586, 262 N.W. 543 (1935). Appellant's assignment of error in this regard has no merit.

In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. 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. *LaBenz v. LaBenz*, 237 Neb. 231, 465 N.W.2d 726 (1991); *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990).

The record shows that the parties were married on February 24, 1973. At the time of trial, the wife was 34 years old and the husband was 36 years old. Throughout the marriage, the husband was employed as a maintenance mechanic at ConAgra, Inc., and the wife worked as a homemaker. The couple's sons were born on November 30, 1973, and November 24, 1976.

The husband left the home in the summer of 1987, but continued to support his family, contributing approximately

$1,600 per month to the wife for her and the children's household expenses during the time between the filing of the petition herein and the trial. The petition for dissolution was filed on July 8, 1987, and the decree was entered on November 28, 1988. The record before us does not set out any temporary support order.

In the fall of 1987, the wife borrowed approximately $5,000 in student loans, enrolled in a 9-month program at the Omaha College of Health Careers, and completed her medical assistant training in May 1988. In June 1988, she began working 32 hours per week at a doctor's office, earning $5 per hour with no employment benefits.

In November 1987, the husband secured a part-time position at Omaha Processors, Inc., in addition to his regular job at ConAgra. He testified that he generally worked 40 hours per week at ConAgra, plus 8 hours per month overtime at ConAgra, and worked 30 hours per week at Omaha Processors. The husband testified that he got the second job "[t]o take care of the responsibilities from the house that I just left and to enable Jeanine [petitioner] to acquire employment or schooling to get employment." The husband further testified that he did not want to continue working 70 hours per week. In 1987, the husband earned net wages of $27,796 (including a federal tax refund of $4,513) from ConAgra, and net wages of $1,774 from Omaha Processors. The court also considered evidence of the husband's projected earnings for 1988 and the parties' income tax returns for 1985, 1986, and 1987.

Based on the foregoing, the district court found that

> the petitioner has the approximate take home pay of $515 per month based upon her current employment of approximately 32 hours per week, with expenses of $1,500, including a student loan [payment] of approximately $100. The Court finds that the respondent has current net income of approximately $2,100, *based upon employment from two positions*, and that he has reasonable monthly expenses of approximately $880.

(Emphasis supplied.)

On appeal, the husband contends that the award of alimony and child support constituted an abuse of discretion because it

equals 75 percent of his income from ConAgra and the court based the award on his working 70 hours per week. Thus, he claims, he will be forced to work 70 hours per week for the next 7 years and is "in effect reduced to a form of bondage or involuntary servitude to his former wife from which he cannot escape." Brief for appellant at 13.

We first consider appellant's first summarized error, concerning his second job, and determine there is merit in the husband's contention that the court should not have considered income from his second job in setting child support and alimony payments. In this connection, we agree with the holding in *Naquin v. Naquin*, 405 So. 2d 1171, 1172 (La. App. 1981), where the court stated:

> The wife contends that the husband was obligated to work at a second job during his seven days off. We know of no jurisprudence requiring the party obligated to furnish child support to undertake two separate employments. We note that offshore work with seven days on and seven days off is considered a full time job.

We hold a party obligated to furnish child support is not required to undertake two separate employments when the party has one full-time job. A spouse with a full-time job, which job also furnishes substantial overtime, may not be required to work at a second job to furnish child support. If the earnings in such a second job are included in the calculation of the amount of child support due from the worker, the next result is a court requirement that the worker continue indefinitely at these two jobs to satisfy the court order.

It is true that the Nebraska Child Support Guidelines, effective October 1, 1987, and thus in effect at the time of the trial in this case, provided as a definition of "Total Monthly Income," "This is income of both parties derived from *all* sources . . . ." (Emphasis in original.) Those guidelines were promulgated by this court, pursuant to the direction of Neb. Rev. Stat. § 42-364.16 (Reissue 1988). That statute provides:

> The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines unless the

court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

The child support guidelines thus set out a rebuttable presumption. We find that the strict application of the then-effective guidelines in this case did not result "in a fair and equitable child support order."

A problem sometimes before the trial courts and this court is the parent who will not work to capacity to properly provide for the parent's children. That is not this case. The husband in this case apparently recognized his obligations and voluntarily took steps to meet those obligations. Apparently, he contributed $1,600 per month to the support of the wife he had left and their children during the most stressful time following his departure from the family. To satisfy the requirements of his family, he took a second job. He now says he is tired of working 70 hours a week. No worker should be required to work at such a rate for long periods of time, and it is not fair and equitable to require him to do so. Accordingly, we hold, in the case at issue, that the trial court abused its discretion in determining the husband's net income "based upon employment from two positions."

We turn then to a de novo calculation of the proper amount of respondent's income for the purpose of child support. The record shows that respondent typically worked more than 8 hours per month overtime at ConAgra over the course of his employment, as indicated by his testimony and income tax records. The husband's regular salary at ConAgra was $11.87 per hour for 40 hours per week. Thus his annual basic salary was $24,689. In 1985, he earned $7,545 in overtime wages; in 1986, $8,457; and in 1987, $10,743 in such overtime. At the trial herein, the husband offered his pay stub showing that by September 13, 1988, he had gross earnings of $21,251. That amount shows weekly earnings of $574, and therefore his estimated gross earnings in 1988 would be $29,848. This would mean that in 1988, the husband could reasonably be expected to earn $5,159 in overtime pay at ConAgra.

In presenting her figures as to the husband's earnings, the wife assumes both the earnings from two jobs and that the

earnings from the husband's ConAgra job would be equal to the husband's 1987 earnings. That figure, as set out above, included $10,743 in overtime salary. In contrast, in calculating his 1988 ConAgra earnings the husband submitted evidence based only on his basic ConAgra wage of $24,689.

Both parties choose to ignore the actual figures before them. Those figures, when extrapolated, show that in 1988 the husband could be expected to earn his basic salary plus $5,159 in overtime wages. As a result, the figures presented to the court on this issue were too high as presented by the wife and too low as presented by the husband. This difference may be the obvious result of the adversary system, but it might be noted that where numbers are concerned, a fair, impartial presentation may well be more effective than an adversarial approach.

This leads us to consideration of the second issue before us: How is overtime to be treated in the calculation of income for the purposes of child support calculations? We believe it is appropriate to consider overtime wages in setting child support and alimony payments if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime. See, *Lenz v. Wergin*, 408 N.W.2d 873 (Minn. App. 1987); *Strauch v. Strauch*, 401 N.W.2d 444 (Minn. App. 1987); *In re Marriage of Heinemann*, 309 N.W.2d 151 (Iowa App. 1981). A court's findings regarding the employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control. In this case, the record shows that in 1988, the husband can reasonably expect to earn $5,159 annual overtime at ConAgra. Where the facts show that overtime in 1 year (1987 in this case) is much higher than in a current year, the high earnings may not be used. Since respondent husband's income may not include speculative income that the husband employee has no control over, it was an abuse of discretion for the trial court to consider the inapplicable high overtime income of 1987.

In our de novo review, we must reassess the husband's contribution under the child support guidelines. We first note

that the wife's projected income is understated in that the wife had had employment for only 13 weeks before the trial. During that brief time, she netted $1,674 as salary. The wife's evidence showed that sum divided by 7 to determine her biweekly pay, which was then used to determine her net monthly salary of $514. This figure is not correct. To determine biweekly wages over a 13-week period, the total should be divided by 6.5. The correct amount is $554 per month.

In calculating the husband's amount due, we have followed the husband's approach in exhibit 9, with the exception that we have used a total gross monthly income figure of $2,487 (one-twelfth of husband's projected income of $29,848, which amount includes $5,191 of overtime pay) rather than the $2,057 (one-twelfth of husband's basic annual salary, not counting overtime) used by the husband. We also used the tax deductions shown in the husband's exhibit 9, since no other figures are presented to us. These calculations result in a net monthly income to the husband, from ConAgra only, of $1,905. Using the child support guideline formula, the husband's share should be less than $600.

The husband testified he was willing to pay child support of $300 per month per child, but contends $350 per month per child is excessive.

Since the husband volunteered to pay $600 per month total child support, and the child support guidelines, on the figures presented to us, indicate that his child support payments should be somewhat less than $600 per month, we modify the child support to $300 per month per child. The Nebraska Child Support Guidelines in effect at the time the decree herein was entered did not specifically provide for the situation in which more than one child was involved. In our de novo review, we apply paragraph H of the current guidelines and further modify the support order to provide that respondent shall pay $600 per month total support through November 30, 1992. Beginning December 1, 1992, or on whatever earlier date it is shown to the trial court that the older child has become emancipated, marries, or dies, the husband is ordered to pay $390 per month for support for the younger child until that child becomes emancipated, becomes self-supporting, marries, or dies, or

until further order of the court.

Regarding the payment of alimony, Neb. Rev. Stat. § 42-365 (Reissue 1988) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

See, also, *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988); *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988).

In *Murrell v. Murrell*, 232 Neb. 247, 252, 440 N.W.2d 237, 241 (1989), we said that "[a] division of property and the awarding of alimony are not subject to a precise mathematical formula. Rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in light of the factors set forth in § 42-365." In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.* The court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future and should consider the earning capacity of the supporting spouse.

In this case, the wife had graduated from high school and was 19 years old when the parties were married in 1973. At that

time, the parties agreed that the wife would remain at home and take care of the children, and she did so for 15 years. After the separation, petitioner borrowed $5,625, completed an educational program, and now works 32 hours a week as a medical assistant. She earns $5 per hour, receives no employment benefits, and is responsible for the day-to-day care of two children.

The record shows that before the trial, the husband had worked hard, at two jobs, while his wife was attending school to help her obtain employment after she had been out of the job market a long time. It appears that the trial court considered the income from the husband's two jobs in setting the alimony at $350 per month. Under the circumstances, the district court abused its discretion in awarding alimony of $350 per month for a period of 7 years. We modify the alimony award to $300 per month for 7 years. That amount satisfies the husband's obligation in this regard.

With regard to the husband's contention that the trial court erred in determining the wife's monthly contribution on the basis of 32 hours per week, rather than 40, we determine the trial court did not err in its order in this connection. As stated above, the wife had just returned to the job market after a long absence. She testified that the 32-hour job was all she could find at that time in the area she had trained for. She had only worked 13 weeks at the time of trial, and she could hardly be expected to be more aggressive in searching for a better job in that length of time. The trial court did not err in this regard.

We do not award attorney fees in this appeal.

The judgment of the trial court, as modified herein, is affirmed.

AFFIRMED AS MODIFIED.

# CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. ABC BOOKS, INC., A NEBRASKA CORPORATION, APPELLANT.

470 N.W.2d 760

Filed June 14, 1991. No. 89-216.

1. **Equity: Appeal and Error.** In an action in equity, this court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
3. _____: _____: _____. Due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it.
4. **Constitutional Law.** The criteria employed in evaluating language for vagueness embrace flexibility and reasonable breadth, rather than meticulous specificity or mathematical certainty.
5. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
6. **Constitutional Law.** Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated.
7. _____. Protected first amendment speech may be subject to time, place, and manner restrictions if sufficiently justified and narrowly enough drawn.
8. _____. The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided (1) the restrictions are justified without reference to the content of the regulated speech, (2) they are narrowly tailored to serve a significant governmental interest, and (3) they leave open ample alternative channels for communication of the information.
9. **Constitutional Law: Ordinances.** The inquiry for first amendment purposes is not concerned with economic impact; rather, it looks only to the effect of the ordinance upon freedom of expression.
10. **Ordinances: Nuisances.** Where an ordinance is openly, publicly, repeatedly, continuously, persistently, and intentionally violated, a public nuisance is created.
11. **Equity: Injunction.** A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.
12. **Injunction: Statutes: Public Health and Welfare: Nuisances.** Although acts punishable by fine will not ordinarily be enjoined, this rule does not deny such a remedy in the prevention of public wrongs arising out of repeated violations of a

penalty statute which harmfully affects the interests of the public. This rule does not require that such acts create a nuisance, and injunction is properly used for the protection of public rights, property, or welfare, whether or not such acts violate a penalty statute and whether or not they constitute a nuisance.

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

Douglas L. Kluender and K. Kristen Witter, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

William F. Austin, Lincoln City Attorney, for appellee.

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

BOSLAUGH, J.

This appeal involves the constitutionality of a provision of the Lincoln Municipal Code, § 5.12.175 (created by ordinance No. 14335), governing the interior visibility of viewing booths in picture arcades. The defendant, ABC Books, Inc., appeals from the judgment granting a permanent injunction to the plaintiff, City of Lincoln, enjoining ABC Books from operating picture arcades in violation of the Lincoln Municipal Code.

ABC Books is a Nebraska corporation which operates the Adult Book Store and Cinema X Theatre at 921 O Street in Lincoln, Nebraska. The premises include 33 coin-operated booths in which members of the public pay to view sexually explicit films or videos. All of the booths are "single person" booths, with a floor area approximately 3 by 3 feet. Each booth is enclosed, that is, each booth has a full-length door which closes and locks so that patrons can watch the sexually explicit movies behind closed doors. Patrons may view the movies in two types of booths. There are 20 coin-operated 8-millimeter film booths. In these, the movie is projected onto the inside of the booth door after the customer enters the booth and shuts the door. There are also 13 coin-operated video booths in which customers can view preprogrammed selections on television monitors. The television monitors are positioned on one side of the booth.

On March 10, 1986, the Lincoln City Council enacted

ordinance No. 14335, amending chapter 5.12 of the Lincoln Municipal Code to define picture arcades and to regulate the operation of such picture arcades in the city. The relevant sections as amended by the ordinance read:

> **5.12.010 Definitions. . . .**
>
> . . . .
>
> The term "picture arcade" shall mean any place to which the public is admitted wherein one or more coin- or slug-operated or electrically, electronically, or mechanically controlled still or motion picture machines, projectors, or video cassettes are maintained for the purpose of showing still or motion pictures to five (5) or fewer persons per machine at any one time.
>
> . . . .
>
> **5.12.175 Operation of picture arcade. . . .**
>
> . . . .
>
> (b) No person shall maintain any picture arcade unless the entire interior of such premises wherein the pictures are viewed is visible upon entrance to such premises. No partially or fully enclosed booths or partially or fully concealed booths shall be maintained.
>
> (c) No permittee, his or her employee, agent, partner, director, officer, stockholder, or manager of any picture arcade shall knowingly allow or permit any act of sexual intercourse, sodomy, oral copulation, or masturbation to be committed in the subject picture arcade, or knowingly permit or allow the subject picture arcade to be used as a place in which solicitations for sexual intercourse, sodomy, oral copulation, or masturbation openly occur.

Lincoln Mun. Code §§ 5.12.010 and 5.12.175 (1986).

Lincoln Mun. Code § 5.12.220 (1986) sets out the penalty for violations of the provisions of chapter 5.12:

> Any person upon whom a duty is placed by the provisions of this chapter who shall fail, neglect, or refuse to perform such duty, or who shall violate any of the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not to exceed one hundred dollars ($100.00) and shall stand committed to the city jail until such fine and costs of

prosecution are paid.

The city alleges that the ordinance was passed as a response to complaints that sexual activity was occurring on the defendant's premises. At a public hearing regarding the ordinance, the city's chief of police, Dean Leitner, testified that sexual solicitations were occurring in and around the picture arcades of the premises. He explained that the booths have apertures which allow participants on either side of the wall to engage in sexual activity with one another. The booths, in effect, facilitate anonymous sexual activity.

In spite of the ordinance's promulgation on March 10, 1986, the defendant continues to operate its picture arcades in the same manner. The record reveals that the defendant has been convicted on three separate occasions for violating the ordinance, and yet the arcades continue to be operated with enclosed booths. At trial, police officers testified that the viewing booths located in the picture arcades remain fully enclosed and concealed with doors. Undercover officers testified that illicit sexual activities continue to occur on the defendant's premises. Officers personally observed instances of masturbation, fondling, and solicitation of prostitution by patrons on the premises of the store. In addition, officers observed semen, dirty Kleenex, and condoms on the floors of the booths. In sum, the evidence indicates that sexual solicitations, assaults, and indecent exposures occur on a continual basis in and around the picture arcades.

On appeal, the defendant contends that (1) § 5.12.175 (ordinance No. 14335) is unconstitutional because it is (a) vague, (b) overbroad, or (c) a prior restraint upon freedom of expression; (2) the trial court erred in finding that the defendant's fully enclosed booths constituted a nuisance and as such justified the issuance of an injunction; and (3) the trial court erred in failing to grant an injunction prohibiting the city clerk from refusing to issue mechanical amusement device permits to the defendant.

This is an action in equity, and as such, in addressing the issues presented, this court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider the fact that the trial court

observed the witnesses and accepted one version of the facts over another. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984); *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

## I. CONSTITUTIONALITY OF ORDINANCE NO. 14335

In passing upon the constitutionality of an ordinance, this court begins with a presumption that the ordinance is valid; consequently, the burden is on the challenger to demonstrate the constitutional defect. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *State v. Davison*, 213 Neb. 173, 328 N.W.2d 206 (1982).

### 1. WHETHER THE ORDINANCE IS VAGUE

ABC Books argues that the ordinance is impermissibly vague in violation of the 1st and 14th amendments to the U.S. Constitution. The portion of the ordinance of which ABC Books complains is found in § 5.12.175(b) of the code, which provides in part: "No person shall maintain any picture arcade unless the entire interior of such premises wherein the pictures are viewed is visible upon entrance to such premises. No partially or fully enclosed booths or partially or fully concealed booths shall be maintained."

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). See, also, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988). In other words, due process requires that an enactment supply (1) a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and (2) "explicit standards for those who apply [it]." *Grayned v. City of Rockford, supra* at 408 U.S. at 108. The criteria employed in evaluating language for vagueness embrace " 'flexibility and reasonable breadth, rather than meticulous specificity' " or "mathematical certainty." *Grayned*

*v. City of Rockford, supra* at 408 U.S. at 110.

Here, although the ordinance might have been drafted with greater precision, there is nothing vague about the prohibition against fully enclosed booths like those maintained by ABC Books. We find the ordinance meets both due process requirements. The ordinance provides adequate notice to persons of ordinary intelligence regarding the conduct prohibited and provides adequate standards to law enforcement officials. See, *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Connally v. General Const. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

2. WHETHER THE ORDINANCE IS OVERBROAD

ABC Books also challenges the constitutionality of the ordinance on overbreadth grounds; however, it fails to address that issue in its brief. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989). Therefore, we do not consider the overbreadth error assigned by ABC Books.

3. WHETHER THE ORDINANCE CREATES A SYSTEM OF PRIOR RESTRAINT

ABC Books next contends that ordinance No. 14335 constitutes an impermissible prior restraint on free speech. ABC Books argues that the ordinance constitutes a prior restraint because "without the physical separation . . . of a booth," it is "in effect, prevented from showing video movies." Brief for appellant at 10.

" 'Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated.' " *U.S. v. Kaun*, 827 F.2d 1144, 1150 (7th Cir. 1987) (quoting *In re G. & A. Books, Inc.*, 770 F.2d 288 (2d Cir. 1985), *cert. denied, M. J. M. Exhibitors, Inc. v. Stern*, 475 U.S. 1015, 106 S. Ct. 1195, 89 L. Ed. 2d 310 (1986)). In the present case, the Lincoln city ordinance does not restrict the viewing of any forms of entertainment or grant officials the discretion to suppress any speech based upon its content.

In *Berg v. Health and Hosp. Corp. of Marion County, Ind.*, 865 F.2d 797 (7th Cir. 1989), The Health and Hospital Corporation of Marion County, Indiana, enacted an "open booth" ordinance designed to eliminate closed structures at picture arcades. Plaintiffs alleged the ordinance was an unconstitutional prior restraint on free speech. The U.S.Court of Appeals for the Seventh Circuit disagreed, holding that " '[t]he ordinance does not ban the viewing of films or other entertainment, but merely regulates the environment in which the viewing occurs.' " *Id.* at 801. Here, the ordinance does not restrain ABC Books from selling to its patrons whatever books, films, videotapes, or other forms of entertainment it may wish, provided ABC Books complies with the ordinance. Consequently, as in *Berg*, there is simply no prior restraint of free speech. See, also, *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990) (open booth ordinance is not an unconstitutional prior restraint on free speech); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986) (open booth requirement does not constitute prior restraint); *Martinez v. State*, 744 S.W.2d 224 (Tex. App. 1987) (municipal open booth ordinance does not operate as prior restraint on free speech).

4. TIME, PLACE, AND MANNER RESTRICTION

ABC Books also contends that the ordinance is unconstitutional as a time, place, and manner restriction because it is not tailored narrowly enough and does not further a significant governmental interest.

The city's ordinance does not limit its applicability to picture arcades where obscene movies are shown, nor does the city contend that the films or videos viewed therein are obscene. Therefore, this court assumes that the materials viewed in the booths are protected by the first amendment. The U.S. Supreme Court has long held that protected first amendment speech may be subject to time, place, and manner restrictions if sufficiently justified and narrowly enough drawn. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984); *Young v.*

*American Mini Theatres*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

In *Ward v. Rock Against Racism, supra*, the Supreme Court set out the appropriate standard for reviewing governmental regulations on the time, place, or manner of protected speech:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] the restrictions "are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information."

491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence, supra*).

Under the time, place, and manner analysis, other courts have consistently upheld "viewing booth" ordinances as valid exercises of state police power. See, *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990); *Berg v. Health and Hosp. Corp. of Marion County, Ind., supra*; *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982); *Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585 (E.D. Wis. 1988); *Broadway Books, Inc. v. Roberts, supra*; *EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179, 158 Cal. Rptr. 579 (1979); *Deluxe Theater v. City of San Diego*, 175 Cal. App. 3d 980, 221 Cal. Rptr. 100 (1985). Similarly, we find no constitutional infirmity in ordinance No. 14335.

The first requirement of the *Ward* time, place, and manner test is easily met. The ordinance is indisputably content-neutral; it draws no distinction between the types of films or videos which might be viewed in the booths. Thus, the ordinance is unrelated to the content of the movies shown in the booths.

The second element of the *Ward* test requires that the ordinance be narrowly tailored to serve a significant governmental interest. The narrow tailoring requirement is satisfied " 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward v. Rock Against Racism, supra*

at 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)). The city has a significant interest in preventing the kind of unlawful conduct, as well as the health and safety problems, which regularly occurs in the enclosed booths on ABC Books' premises. The evidence at trial showed that incidents of masturbation, fondling, and indecent exposure occur in the enclosed booths. Further, semen, dirty Kleenex, and condoms can be observed on the floors of the booths. The prohibition of such booths furthers the city's interest in deterring and detecting the use of the premises for such unlawful activity. The city's interest in deterring not only unlawful conduct, but conduct inimical to public health, decency, and order, would not be achieved as effectively without the ordinance, and thus the ordinance is narrowly tailored to serve a significant governmental interest.

The third *Ward* requirement necessitates that the city show that the ordinance leaves "open ample alternative channels of communication" of sexually explicit material. This requirement is also easily met. The ordinance in no way prohibits or regulates the time or place for viewing the sexually explicit films or videos. It simply requires that no partially or fully enclosed or concealed booths can be maintained. ABC Books can provide and its patrons can watch, except in partially or fully enclosed or concealed booths, films or videos whenever and wherever they desire. The viewing public is in no way "denied access to the market or . . . unable to satisfy its appetite for sexually explicit fare." *Young v. American Mini Theatres*, 427 U.S. 50, 62, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). Thus, ample alternative channels for communicating sexually explicit films and videos are left open by the ordinance.

Finally, ABC Books argues that the ordinance suppresses free speech because it would lose money by complying with the ordinance, and as a result, its film and video operation could close. In *Young v. American Mini Theatres, supra*, the Supreme Court upheld a zoning ordinance which forbade the owners of two adult theaters to exhibit adult movies at their current locations. Justice Powell noted that "[t]he constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business." *Id.* at 427 U.S.

at 78 (Powell, J., concurring). Justice Powell went on to state, "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Id.* Thus, the governmental interest in this ordinance does not relate to the suppression of free expression.

In conclusion, under the *Ward* analysis, the city's picture arcade ordinance is a valid manner restriction of speech under the first amendment.

## II. EVIDENCE WAS INSUFFICIENT TO SUPPORT ISSUANCE OF INJUNCTION

Defendant ABC Books asserts the trial court erred (1) in finding defendant's maintenance of fully enclosed booths constitutes a nuisance and (2) in granting the injunction.

The City of Lincoln, a city of the primary class, possesses statutory authority to sue and suppress nuisances. See Neb. Rev. Stat. § 18-1720 (Reissue 1987). It may make ordinances, bylaws, rules, and regulations not inconsistent with state law for promoting public safety, morals, and welfare of its inhabitants. See Neb. Rev. Stat. § 15-263 (Reissue 1987).

Lincoln Mun. Code § 9.48.010 (1979) provides in part:

> Any room, house, building, structure, or place, and any property kept and used in maintaining the same, where in violation of the ordinances of the City of Lincoln unlawful or illegal acts are committed is hereby declared to be a disorderly house and a public or common nuisance; such unlawful or illegal acts so committed in such disorderly house are hereby declared to be disorderly practices and a public or common nuisance . . . .

In the present case, the evidence established that contrary to § 5.12.175, defendant ABC Books continues to operate its picture arcades with fully enclosed booths. The City of Lincoln successfully prosecuted ABC Books on three separate occasions for violations of the ordinance; however, the convictions have not resulted in the removal of the fully enclosed booths. Furthermore, the evidence at trial established that illicit sexual activity regularly occurs in and around the enclosed booths. Undercover police officers personally

observed instances of sexual solicitations, assaults, and indecent exposures on the premises of the defendant's store.

The city has an interest in seeing that the law is not continually violated. Where an ordinance is openly, publicly, repeatedly, continuously, persistently, and intentionally violated, a public nuisance is created. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n*, 133 Neb. 89, 274 N.W. 397 (1937); *State, ex rel. Hunter, v. The Araho*, 137 Neb. 389, 289 N.W. 545 (1940).

" ' "[A] court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the . . . law even though these acts may be subject to criminal prosecution." ' " *State ex rel. Douglas v. Wiener*, 220 Neb. 502, 503, 370 N.W.2d 720, 722 (1985). See, also, *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981); *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973); *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947). Furthermore, this court has previously stated:

> "We recognize the general rule that acts punishable by fine will not ordinarily be enjoined. But this rule does not have the force of denying such a remedy in the prevention of public wrongs arising out of repeated violations of a penalty statute which harmfully affects the interests of the public. And this rule does not require that such acts should create a nuisance. Injunction is properly used for the protection of public rights, property, or welfare, whether or not such acts violate a penalty statute and whether or not they constitute a nuisance."

*State ex rel. Meyer v. Weiner, supra* at 33, 205 N.W.2d at 651 (quoting *State v. Chicago & N. W. Ry. Co., supra*).

We find that ABC Books openly, publicly, repeatedly, continuously, persistently, and intentionally violated the city's ordinance and that, therefore, its actions constituted a public nuisance. Consequently, the trial court properly enjoined ABC Books from continuing such violation.

## III. CITY'S REFUSAL TO ISSUE MECHANICAL AMUSEMENT DEVICE PERMITS

Under the Lincoln Municipal Code's chapter 5.12, ABC Books is required to secure an annual permit from the city clerk in order to operate its mechanical amusement devices, i.e., picture arcades. The relevant sections of the chapter provide:

> **5.12.020 Permit required.** No person shall display for use or permit to be used any [mechanical amusement device, e.g., picture arcade] without first securing a permit therefor and paying an occupation tax thereon . . . .
>
> . . . .
>
> **5.12.160 Revocation of permit.** If at any time any permittee, or a managing officer thereof, if the permittee is a corporation, firm, partnership, or association, or the person in charge of or managing the operation of such machines is not of good moral character, or is convicted of violating any of the provisions of this chapter or any laws against gambling, the city council may forthwith revoke such permit.
>
> . . . .
>
> **5.12.190 Expiration of permit.** Each permit shall expire on, and shall be renewed by, the thirty-first (31st) day of May following the date of issuance.

Lincoln Mun. Code §§ 5.12.020, 5.12.160, and 5.12.190 (1986).

The record shows that in 1986 and the preceding years, ABC Books annually applied for and received permits to operate its picture arcades, that is, its fully enclosed video and 8-millimeter film booths. In 1987 and 1988, however, the city clerk refused to issue permits to ABC Books on grounds that ABC Books had been convicted of violating chapter 5.12 and remained in continuous violation thereof. When the city brought this action to have ABC Books permanently enjoined from operating its picture arcades in violation of chapter 5.12, ABC Books counterclaimed by requesting that the city clerk be enjoined from refusing to issue permits to ABC Books. The trial court denied ABC Books' counterclaim. On appeal, ABC Books contends that the trial court erred in failing to issue an injunction against the city clerk.

The record shows that ABC Books was convicted three times in 1986 of violating the provisions of chapter 5.12. Further, the record shows that subsequent to its three convictions in 1986, ABC Books continued to operate its picture arcades in violation of chapter 5.12. Consequently, when ABC Books requested permits in 1987 and 1988, the city clerk refused to issue the permits. Under § 5.12.160, a single violation of chapter 5.12 constitutes a ground for revoking a mechanical amusement device permit. The continuous violation of chapter 5.12 constitutes a proper ground for refusing to issue an annual permit. Thus, the trial court properly denied injunctive relief to ABC Books.

The judgment of the district court is in all respects affirmed.

AFFIRMED.

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MAE E. MCCLYMONT, APPELLANT, V. LLOYD A. MORGAN, APPELLEE.

470 N.W.2d 768

Filed June 14, 1991. No. 89-352.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party.
3. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.
4. **Negligence: Jury Instructions.** In the past it has been said that the sudden emergency doctrine may be invoked where (1) there exists a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose are present, and (3) there is a need for instant decision. However, an instruction on such doctrine is nothing more than a specific statement of the general rule that the standard of care is that care a reasonably careful person would exercise *under similar circumstances*. The giving of a sudden emergency instruction singles out one aspect of the general standard of care and may give it, the doctrine of sudden emergency, undue emphasis and may unduly emphasize

one party's argument regarding a certain part of the standard of care.

5. **Negligence: Jury Instructions: Case Overruled.** As a general rule, the giving of an independent sudden emergency instruction is not warranted in a negligence action, and to the extent that *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978), holds otherwise, it is overruled.

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

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Harder, P.C., for appellant.

Graten D. Beavers, of Knapp, Mues, Beavers & Luther, for appellee.

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

HASTINGS, C.J.

Mae E. McClymont appeals from a jury verdict in the amount of $75,000 rendered in favor of Lloyd A. Morgan, the defendant, on his counterclaim. Plaintiff McClymont assigns as error generally the judgment in favor of defendant, the failure of the trial court to direct a verdict in favor of the plaintiff, and the failure to give plaintiff's proposed instruction on the sudden emergency doctrine. We affirm.

This lawsuit arose out of an automobile accident which occurred on March 1, 1987, on Highway 44 at its intersection with River Road one-half mile south of Kearney, in Kearney County. Highway 44 runs north and south. River Road comes from the west and makes a T-intersection with the highway. On the east side of the highway is a driveway.

The plaintiff was driving her automobile north on the highway. The defendant was driving his vehicle south. According to the plaintiff, she observed the vehicle driven by Morgan suddenly swerve into her lane of travel with his left turn signal on. In an attempt to avoid an accident with Morgan, McClymont swerved her vehicle to the left, but was unable to avoid a collision. The vehicles collided near the center of the roadway, with the point of impact being approximately 6 inches west of the centerline in Morgan's lane of travel.

Also present at this intersection, heading south and in the

process of making a right-hand turn onto River Road, was a pickup truck towing a boat and driven by Dick Skiles. Morgan, who testified by way of deposition because of his illness, said that as he approached the Skiles truck, which was partially on the shoulder, he pulled his vehicle into the lane occupied by McClymont in order to pass the truck. He said that as he started to pass the truck and boat, the boat was sticking out from the shoulder onto the roadway approximately 2 feet. He admitted that he did not see the McClymont vehicle until he began crossing back into the southbound lane and that there was no reason why he could not have seen it earlier, and also acknowledged that he gave a left-hand turn signal as he passed the pickup and boat.

Skiles, the driver of the pickup that was turning west onto River Road, testified that immediately prior to the accident he was approximately 150 yards from the intersection and he pulled onto the shoulder of the road. He said when the Morgan vehicle passed his pickup, his pickup and boat were completely on the shoulder of the road and the Morgan vehicle remained completely in the southbound lane.

The passenger in the Skiles pickup, Larry Trompke, testified that he heard a car horn honk as they were on the shoulder of the road. Trompke saw the Morgan vehicle pass the pickup and saw the McClymont vehicle, which he thought to be making a left turn onto River Road before the collision. Trompke, like Skiles, testified that no portion of the Morgan vehicle went into the northbound lane as it was passing the pickup.

The officer who investigated the accident testified that the point of impact was approximately 6 inches west of the centerline of the highway.

Richard Large, a consulting engineer and accident reconstructionist, opined that the Morgan vehicle was totally in the northbound lane just prior to the time of impact for approximately six-tenths of a second.

Generally, the plaintiff's first three assignments of error can be summarized as claiming that the court erred in failing to grant her motions for directed verdict on her operative petition and on the counterclaim of the defendant, which motions were made at the close of all the evidence.

A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed. *Youngs v. Potter*, 237 Neb. 583, 467 N.W.2d 49 (1991).

Suffice it to say, the evidence supported a conclusion that the accident occurred completely on the defendant's side of the highway and that defendant never did cross the centerline. There was sufficient evidence to support the jury's verdict.

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party. *Youngs v. Potter, supra*.

We consider next the plaintiff's claim that the court erred in refusing to give her requested instruction on sudden emergency. In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

In the past, this court has held that where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. See *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978).

The sudden emergency doctrine may be invoked where (1) there exists a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose are present, and (3) there is a need for instant decision. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

The trial court found in this instance that it was not clear from the evidence presented that there was a sudden emergency.

However, we need not pursue that point. NJI2d 3.09 recommends no instruction on sudden emergency should be given. The comments to NJI2d 3.09 suggest that such an instruction is nothing more than a specific statement of the general rule that the standard of care is that care a reasonably

careful person would exercise under similar circumstances. Those comments go on to explain that under such a general instruction relating to the standard of care, the circumstance of an emergency may be argued to the jury regardless of whether a specific instruction on sudden emergency is given.

The problem with giving the sudden emergency instruction is that it singles out one aspect of the general standard of care and may give it, the doctrine of sudden emergency, undue emphasis and may unduly emphasize one party's argument regarding a certain part of the standard of care.

The jury was instructed that negligence is doing something which an ordinary, prudent person would not have done *under similar circumstances*, or failing to do something which an ordinary, prudent person would have done *under similar circumstances*, and that drivers are negligent if they do something a reasonably careful driver *in the same situation* would not have done or fail to do something a reasonably careful driver *in the same situation* would have done. All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991).

The jury instructions as a whole discussed the standard of care and were not misleading. The plaintiff was free to argue to the jury that an emergency situation existed which allowed the jury to assess plaintiff's actions according to what the reasonably prudent person would have done under similar circumstances.

The giving of an independent sudden emergency instruction is not warranted in a negligence action, and to the extent that *Bedke v. Kucera, supra*, holds to the contrary, it is overruled.

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

AFFIRMED.

# NU-DWARF FARMS, INC., A NEBRASKA CORPORATION, APPELLANT, V. STRATBUCKER FARMS, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLEES.

470 N.W.2d 772

Filed June 14, 1991. No. 89-369.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that the movant is, as a matter of law, entitled to judgment.
2. **Summary Judgment: Appeal and Error.** When reviewing a motion for summary judgment, the Nebraska Supreme Court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions, making an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just.
4. **Waters.** A lower proprietor may defend his or her land against diffused surface waters, so long as that defense does not negligently or unnecessarily injure another, while an upper proprietor has a right to drain surface waters through a natural drainageway, and the flow of that drainageway cannot be arrested or interfered with to the injury of neighboring proprietors.
5. **Waters: Words and Phrases.** Diffused surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.
6. _____: _____. A natural drainageway is formed when diffused surface waters are channeled into a well-defined natural course, whether the course be ditch, swale, or draw in its primitive condition.
7. **Waters.** Unlike a statutory watercourse, a natural drainageway need not be at least 2 feet below the surrounding land.
8. _____. A landowner is the owner of surface waters which fall, rise, or flow upon the land, and the landowner may retain them for his or her own use without liability. The landowner may also change their course on his or her own land by ditch or embankment, but may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
9. **Real Estate: Vendor and Vendee: Easements: Notice.** One who purchases land burdened by an open and visible easement is ordinarily charged with notice that he or she is purchasing a servient estate.
10. _____: _____: _____: _____. A person takes land subject to an easement

where that person purchases the land with knowledge or with actual, constructive, or implied notice that the land is burdened with an easement.

11. **Waters: Easements.** When a landowner substitutes a permanent artificial drainageway crossing his or her own land for a natural one obstructed by that landowner, the landowner impresses the artificial drainageway with a servitude in favor of the land drained thereby, and the upper proprietor (that is, the owner of the land drained) may enforce this servitude against the substituting landowner and its successors in interest; the mere fact that the land through which the easement runs is later subdivided does not destroy the easement.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded for further proceedings.

Thomas C. Huston and Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Michael S. Mostek, of McGill, Parsonage & Lanphier, P.C., for appellees.

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

CAPORALE, J.

Appellant, Nu-Dwarf Farms, Inc., commenced this action seeking a mandatory permanent injunction requiring appellees, Stratbucker Farms, Ltd., Herman Stratbucker, and Stratbucker Farms of Nebraska, Inc. (hereinafter collectively referred to as Stratbuckers), to unblock an artificial drainage ditch which transversed a portion of Stratbuckers' land. Nu-Dwarf claims it is entitled to relief under the theory that by blocking the drainage ditch, Stratbuckers unlawfully obstructed a watercourse, and under the additional theory that Stratbuckers' conduct unreasonably interfered with Nu-Dwarf's use and enjoyment of its property. The district court granted the Stratbuckers' motion for summary judgment and overruled Nu-Dwarf's motion for such judgment. Nu-Dwarf asserts, in summary, that the district court (1) erred in concluding that the law affords the drainage ditch no protection from obstruction and that there could thus be no question of fact as to Nu-Dwarf's enjoyable use of its own property and (2) erred in overruling Nu-Dwarf's motion. We reverse and remand with direction.

Before proceeding to a recitation of the relevant facts and analysis of the applicable substantive law, we recall that our review is controlled by the rule that summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that the movant is, as a matter of law, entitled to judgment. *Flynn v. Bausch, ante* p. 61, 469 N.W.2d 125 (1991); *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991). Moreover, when reviewing a motion for summary judgment, the Supreme Court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence. *Millard v. Hyplains Dressed Beef, supra.* Additionally, although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions, making an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just. *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990).

With those rules in mind, we turn our attention to the facts. The parties own adjacent farmland in Washington County, Nebraska, just south of the DeSoto National Wildlife Refuge. Nu-Dwarf owns the west half of the northwest quarter and Tax Lots 15 and 18 of Section 35, Township 18 North, Range 12 East of the 6th P.M. Tax Lot 18 comprises all but the extreme southwest corner of the northwest quarter of the southwest quarter of Section 35, and Tax Lot 15 is essentially the northern half of the southeast quarter of the northwest quarter of Section 35. Nu-Dwarf's petition alleges that Stratbucker Farms, Ltd., is the record owner of Tax Lot 23, property abutting that of Nu-Dwarf on the south and east, and that the true owner is Stratbucker Farms of Nebraska, Inc., by virtue of unrecorded deeds.

U.S. Highway 75 crosses the southwest quarter of Section 35, running from the northwest to the southeast. There is a railroad right-of-way along the northeastern edge of the highway. That portion of the right-of-way which is within Section 35 is referred to as Tax Lot 25. Nu-Dwarf's petition asserts that Herman Stratbucker claims an interest in Tax Lot 25 but that, by virtue of another unrecorded deed, the true owner is Stratbucker Farms of Nebraska, Inc. George Stratbucker, one of the shareholders of Stratbucker Farms of Nebraska, Inc., and a limited partner in Stratbucker Farms, Ltd., stated that Stratbucker Truck Farms, Ltd., is the owner of Tax Lot 25. It appears that Stratbucker Truck Farms, Ltd., and Stratbucker Farms, Ltd., may be the same entity, which is also referred to in the depositions as "Stratbucker Truck" and perhaps "Stratbucker Farms" as well. In their answer, Stratbuckers allege that Herman Stratbucker is the record owner of Tax Lot 25 and that an unrecorded deed exists naming Stratbucker Farms of Nebraska, Inc., as grantee of Tax Lot 25.

The Nu-Dwarf property originally drained in a south-southwesterly direction into a swamp; it is not clear whether this drainage flowed along a well-defined natural course. It appears that the Chicago and North Western Transportation Company laid a rail line adjacent to the Nu-Dwarf property in the 1870's, obstructing the natural drainage. A ditch was dug along the railroad right-of-way, and this ditch carried the drainage from Nu-Dwarf in a southeasterly direction, the drainage eventually making its way into the nearby Missouri River. This railway ditch is parallel to the railroad and highway and extends to the northwest beyond Section 34. The ditch was extant in 1933 and may date to the building of the railroad.

In the early 1940's, the ditch was deepened by the then owner of the Nu-Dwarf property, apparently with the railroad paying the costs. At that same time, two ditches were constructed on the Nu-Dwarf property, emptying into the railway ditch. Nu-Dwarf's president stated that he performs maintenance on the railway ditch once each year.

The railroad was abandoned in the early 1980's, and the portion of the right-of-way referred to as Tax Lot 25 made its

way into the hands of Stratbuckers. In June 1987, Stratbuckers filled a large section of the ditch within this lot, and water no longer passes through. The unfilled portion of the ditch is several feet deep, and the filled portion is alleged to be as much as 6 feet in depth. George Stratbucker stated that he had the ditch filled "[b]ecause we had purchased the property and it was a mess with trees and a fence, and we wanted to incorporate the property that we purchased with the rest of the land." At the time of suit, the filled area was not planted but was in "government idle acres." Stratbuckers did not inform Nu-Dwarf about the filling of the ditch, and George Stratbucker stated that he had not really given any thought to Nu-Dwarf's drainage.

On the cadastral maps contained in the record, there is a narrow finger of land separating Tax Lot 25 and the Nu-Dwarf property. There appears to be a separate dispute between Nu-Dwarf and Stratbuckers over ownership of this land. Nu-Dwarf's president also claims ownership of a portion of Tax Lot 25; however, since Nu-Dwarf's petition asserts that the true owner of Tax Lot 25 is Stratbucker Farms of Nebraska, Inc., we need not concern ourselves with this claim.

The district court, in sustaining Stratbuckers' motion for summary judgment, held: "Nebraska law does not provide the right of protected drainage through an artificial drainway. The drainage of [Nu-Dwarf] not being protected, [Stratbuckers are] not required to restore the ditch to its former condition; nor [are Stratbuckers] liable for damages, if any . . . ."

In connection with its first theory of recovery, Nu-Dwarf alleges that the railway ditch is a statutory watercourse within the meaning of Neb. Rev. Stat. § 31-202 (Reissue 1988); claims that the ditch received and drained Nu-Dwarf's land from at least March 5, 1973, the date it acquired the property; and asserts that by filling in a portion of the ditch, Stratbuckers obstructed the flow of surface waters, to Nu-Dwarf's detriment.

The Nebraska rule regarding interference with surface waters was announced in *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). Under *Nichol*, a lower proprietor may defend his or her land against diffused surface waters, so long as that defense

does not negligently or unnecessarily injure another, while an upper proprietor has a right to drain surface waters through a natural drainageway, and the flow of that drainageway cannot be arrested or interfered with to the injury of neighboring proprietors.

Diffused surface waters are "waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow." *Nichol v. Yocum, supra* at 303, 113 N.W.2d at 198; *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). A natural drainageway is formed when diffused surface waters are channeled into a well-defined natural course, whether the course be ditch, swale, or draw in its primitive condition. *Id.*; *Romshek v. Osantowski, supra.* Unlike a statutory watercourse, a natural drainageway need not be at least 2 feet below the surrounding land. *Romshek v. Osantowski, supra.* Cf. § 31-202 ("[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse").

The rule that water flowing in a natural drainageway may not be dammed, repelled, or diverted without liability for damages caused thereby arises from the theory that the lower estate, through which the natural drainageway runs, is under a natural servitude to receive the water flowing along the drainageway from the higher estate. *Nichol v. Yocum, supra*; 3 H. Farnham, The Law of Waters and Water Rights § 889d (1904). The lower estate is not, however, under a natural servitude to receive diffused surface waters which have not found their way into a natural drainageway, since the physical attributes of the land do not make the servitude apparent to a prospective purchaser. *Nichol v. Yocum, supra*, quoting 3 H. Farnham, *supra*.

In essence, diffused surface waters are treated as a common enemy (subject to the rule requiring necessity and absence of negligence) until they are channeled into a natural drainageway, at which point the notion of a natural servitude comes into play, prohibiting obstruction of the drainageway to the detriment of others.

Under *Nichol*, the key to the upper proprietor's right is the existence of the servitude, impressed by nature on the lower estate in the form of a natural drainageway. In the case before us, the railway ditch is not a natural ditch, swale, or draw, but an artificial creation. It is not, therefore, a *natural* drainageway. The natural drainage from the Nu-Dwarf property was toward the southwest, while Tax Lot 25 is south of Nu-Dwarf. The record indicates that in a state of nature Tax Lot 25 did not receive surface waters from Nu-Dwarf's land. Therefore, no natural servitude was impressed upon Tax Lot 25 in favor of Nu-Dwarf's land.

There is evidence, however, that the natural drainage of the Nu-Dwarf property crossed the railroad right-of-way at a point somewhat to the northwest of Tax Lot 25 and that this natural drainage was obstructed by the railway bed. If this drainage occurred via natural drainageways, the right-of-way was subject to a natural servitude, and the railroad had a continuing duty to provide for the passage of those surface waters. See, *Lee v. Chicago, B. & Q. R. R. Co.*, 151 Neb. 797, 39 N.W.2d 574 (1949); *Arnold v. Huenefeld*, 176 Neb. 683, 127 N.W.2d 196 (1964).

Apparently, the railroad chose to fulfill this duty by channeling the water into its ditch rather than providing for its passage beneath the railway bed. Because Nu-Dwarf's predecessors suffered no injury, they could not complain of this choice, although if there were a lower proprietor injured by the diversion, that proprietor could have sought redress. See *Nickerson Township v. Adams*, 185 Neb. 31, 173 N.W.2d 387 (1970). In any event, the railroad substituted the natural drainageway crossing its right-of-way with an artificial one paralleling its tracks. By making this substitution, the railroad impressed a drainage servitude upon its right-of-way, replacing the existing natural servitude. Its ditch is simply a substitute for the natural drainageways off the Nu-Dwarf property.

Stratbuckers make much of the fact that the substituted drainageway does not follow the general course of drainage as it existed in a state of nature and that in such state Nu-Dwarf's property did not drain across Tax Lot 25. Stratbuckers overlook that this change from the natural scheme is the result

of positive acts by their predecessor in interest, which chose to burden its own property. Had there been no railway bed blocking Nu-Dwarf's natural drainageways, or had Tax Lot 25 not been part of the railroad's right-of-way, then Stratbuckers' position might have merit; however, the record, when read in the light most favorable to Nu-Dwarf, establishes that such was not the case.

We have stated that a landowner

> is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature.

*Jameson v. Nelson*, 211 Neb. 259, 263-64, 318 N.W.2d 259, 262-63 (1982), citing *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). It is also essential that one seeking to prohibit such a diversion show some damage or injury resulting from it. *Nickerson Township v. Adams, supra*. The railroad changed the course of the surface waters flowing upon its own land by means of the ditch. Absent some injury to another, it was permitted to do this.

Nu-Dwarf could not unilaterally divert its water onto Stratbuckers' land except via a natural drainageway. Nu-Dwarf, however, is not the party which diverted the drainage; rather, it was Stratbuckers' predecessor in interest who diverted the drainage across its own land. The mere fact that Tax Lot 25 was later severed from the portion of the right-of-way originally burdened with the natural servitude does not free it of the alternative servitude impressed upon it by Stratbuckers' grantor. The record indicates that the ditch's existence (and consequently the existence of the servitude) would be apparent to any purchaser of the property who cared to inspect it. One who purchases land burdened by an open and visible easement is ordinarily charged with notice that he or she is purchasing a servient estate. *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989); *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984); *Magnuson v.*

*Coburn*, 154 Neb. 24, 46 N.W.2d 775 (1951). Generally, a person takes land subject to an easement where that person purchases the land with knowledge or with actual, constructive, or implied notice that the land is burdened with an easement. *Johnson v. Mays, supra.*

The present situation is to be distinguished from that in *Jameson v. Nelson, supra*, cited by Stratbuckers. In *Jameson*, we held that an artificial channel draining surface waters from plaintiffs' property into a natural drainageway on defendant's property was not to be treated as a natural drainageway, despite the fact that the artificial channel had been in use for over 30 years. Unlike in the situation now before us, the artificial channel in *Jameson* was not created by the lower proprietor as a substitute or replacement for a natural drainageway which that proprietor had blocked.

Stratbuckers also cite *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985), in which we affirmed the denial of an injunction based on the claim that the county, in the course of building a bridge, obstructed a natural drainageway across a road. Although *Belsky* refers to the road as "an integral but artificial component of the drainway, [which] prevents characterizing any traversing drainway as one existing in a state of nature," *id.* at 83, 369 N.W.2d at 52, it is not the mere fact that there was an artificial component to the drainageway which prevented recovery, but the fact that no drainageway ever existed on the land in a state of nature. The facts disclosed that the land in question was level, and the surface waters flowed across a roadway simply because the absence of vegetation made that the path of least resistance. There was no evidence of a natural depression, draw, swale, or other drainageway existing as the result of natural forces. "Drainage of Belsky's farm resulted from the road's surface and was not attributable to characteristics of land in a natural state." *Id.* In other words, the county's right-of-way was not impressed with a natural servitude. Therefore, *Belsky*, like *Jameson*, is inapposite. This is clear from a review of subsequent cases in which we have held that an entirely manmade channel which replaces a natural drainageway is still considered a natural drainageway. See *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446

(1989).

Stratbuckers also claim that Neb. Rev. Stat. § 31-201 (Reissue 1988), which speaks in terms of "natural watercourses," defines the limits of drainage rights in Nebraska. This position, however, is untenable. See, *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905) (right to drain exists independent of the drainage statute); R. Harnsberger & N. Thorson, Nebraska Water Law & Administration § 4.11 (1984); 5 R. Clark, Waters and Water Rights §§ 455 et seq. (1972).

We thus hold that when a landowner substitutes a permanent artificial drainageway crossing his or her own land for a natural one obstructed by that landowner, the landowner impresses the artificial drainageway with a servitude in favor of the land drained thereby, and the upper proprietor (that is, the owner of the land drained) may enforce this servitude against the substituting landowner and its successors in interest. The mere fact that the land through which the easement runs is later subdivided does not destroy the easement.

It is therefore clear, without our reaching the issues presented by Nu-Dwarf's second theory of recovery, that the district court erred in sustaining Stratbuckers' motion for summary judgment. However, that does not mean the district court should have granted Nu-Dwarf's motion. In order for a court to find an easement by substitution, Nu-Dwarf must prove that the railroad blocked a natural drainageway which drained the Nu-Dwarf property and that at least part of the purpose of the railway ditch was to replace that natural drainageway. Since the depositions only speak in terms of natural or original drainage and not drainageways, a question of fact exists as to whether this drainage occurred via natural drainageways.

Finally, there is a question of fact as to precisely which Stratbucker owns the property in question and, thus, who should be enjoined, if anyone.

Accordingly, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., not participating.

# IN RE INTEREST OF R.G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.G.P., APPELLANT.

470 N.W.2d 780

Filed June 14, 1991. No. 90-942.

1. **Rules of the Supreme Court: Records: Appeal and Error.** A document entitled "bill of exceptions," but which is not prepared in accordance with the rules of the Nebraska Supreme Court, is not such a bill; the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case being treated as if no bill had been filed.
2. **Trial: Records: Liability.** A court reporter's breach of duty may give rise to civil liability.
3. **Supreme Court: Jurisdiction: Appeal and Error.** The Nebraska Supreme Court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders.** Neb. Rev. Stat. § 25-1902 (Reissue 1989) describes three types of order as final: (1) one affecting a substantial right in an action and which in effect determines the action and prevents a judgment; (2) one affecting a substantial right made in a special proceeding; and (3) one affecting a substantial right made upon a summary application in an action after judgment.
5. **Constitutional Law: Parental Rights.** Parents have a recognized liberty interest in raising their children.
6. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** An ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time pending a hearing as to whether the detention should be continued is not final; however, a detention order entered after a hearing continuing to keep a juvenile's custody from his or her parent pending an adjudication hearing to determine whether the juvenile is neglected, and thus within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), is final and thus appealable.
7. **Appeal and Error.** Errors assigned but not discussed will not be considered on appeal.
8. **Constitutional Law: Due Process.** When examining a claim that one is being deprived of a liberty interest without due process of law, a three-stage analysis is employed: The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
9. **Juvenile Courts: Parental Rights: Affidavits: Records: Notice.** The information upon which the State seeks an ex parte temporary detention order under the provisions of Neb. Rev. Stat. § 43-250 (Reissue 1988) shall be contained in the affidavit of one who has knowledge of the relevant facts; such affidavit shall be presented to the juvenile court and made a part of the record of the proceedings, and the affected juvenile's parent shall be given prompt notice of the order.
10. **Juvenile Courts: Jurisdiction.** The State's failure to comply with the statutory requirements relating to the entry of an ex parte temporary detention order

under the provisions of Neb. Rev. Stat. § 43-250 (Reissue 1988) does not deprive the juvenile court of jurisdiction.

11. **Juvenile Courts: Parental Rights: Rules of Evidence.** At a hearing to determine who shall have custody of a juvenile pending an adjudication, Neb. Rev. Stat. § 43-283 (Reissue 1988) applies, and relaxed rules of evidence may be followed.
12. **Rules of Evidence: Due Process.** In circumstances whereunder relaxed rules of evidence may be employed, due process requires that the proceedings be fundamentally fair.
13. **Juvenile Courts: Appeal and Error.** The Nebraska Supreme Court reviews appeals from juvenile proceedings de novo on the record and is required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, this court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of facts over another.
14. **Guardians Ad Litem.** A guardian ad litem has the authority to present evidence and witnesses, to cross-examine witnesses at all evidentiary hearings, and to argue.
15. **Juvenile Courts: Parental Rights: Proof.** The State must prove by a preponderance of the evidence that the custody of an alleged dependent or neglected juvenile should be in the Department of Social Services pending adjudication.

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

Connie Kearney for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

Regina T. Makaitis, Assistant Douglas County Public Defender, guardian ad litem.

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

CAPORALE, J.

## I. INTRODUCTION

Finding that pending investigation the temporary placement of the infant girl, R.G., was a matter of immediate and urgent necessity, the juvenile court, on August 10, 1990, ordered, ex parte, that the Nebraska Department of Social Services take custody of the infant but that custody be returned to her parents unless, within "eight judicial days," a petition was filed requesting continued detention. Seven calendar days

(presumably five judicial days) later, on August 17, 1990, the State of Nebraska filed a petition seeking further orders concerning the infant's custody. Following a hearing on August 24, 1990, at which the appellant mother, L.G.P., appeared, the juvenile court, on August 27, 1990, ordered that the infant's custody be continued in the department. The mother, and she only, has undertaken an appeal of both orders, claiming, in summary, that the juvenile court (1) erred in asserting jurisdiction because of myriad alleged federal and state constitutional violations in connection with both orders, as well as violations of state statutes in the entry of the ex parte order, (2) erred in its evidential rulings, (3) erred in permitting the participation of the infant's guardian ad litem in prosecuting the State's petition, and (4) erred in ordering that, pending an adjudication hearing, temporary custody of the infant remain in the department. The State claims we lack jurisdiction to consider this appeal, as the orders involved are not final. We conclude this court has jurisdiction as a result of the detention order of August 27, and affirm.

## II. PRACTICE CAUTION

Before proceeding further, we call attention to the fact that all bills of exceptions filed in this court, from whatever tribunal, are to conform to the requirements of the rules hereinafter cited. These rules dictate, among other things, that the full name of each witness and the nature of the examination undergone be stated at the top of each page of the witness' testimony. Neb. Ct. R. of Prac. 5F(3) and I (rev. 1989) and Neb. Ct. R. of Official Ct. Rptrs. 19f(3) and i (rev. 1989). The tops of the pages of the document filed as the bill of exceptions in this case reflect neither the name of the witness nor the type of examination involved.

We once again caution that a document entitled "bill of exceptions," but which is not prepared in accordance with our rules, is not such a bill and that the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case being treated as if no bill had been filed. *Langness v. "O" Street Carpet Shop*, 217 Neb. 569, 353 N.W.2d 709 (1984). The fact that in order to properly review this case we

have taken the time to continually flip back and forth through the relatively short record of the August 24 hearing is not to be taken as an indication that we shall undertake the same task in future cases.

It also may be worth recalling that a court reporter's breach of duty may give rise to civil liability. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

## III. FACTS

The record does not reflect what information, if any, the juvenile court had before it when it entered the ex parte temporary detention order of August 10. The August 17 petition leading to the August 24 hearing and subsequent August 27 detention order alleges that pursuant to the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the juvenile court has jurisdiction over the infant because she lacked proper parental care by reason of the faults or habits of the mother. More specifically, it alleges that on three occasions since May 1990, the infant had been observed to have black eyes, which occurred while she was under the mother's care and custody, and that the mother continued to use alcohol and drugs to the extent that her parenting abilities were impaired.

Although the record does not reflect when the mother first received summons in these proceedings, which involve only the infant, the evidence adduced at the August 24 hearing establishes that the infant is the youngest of four children born to the mother and that she visited her children, all of whom appear to be in the department's custody, between August 10 and 24. The evidence further reflects that on the morning of the day on which the ex parte temporary detention order was issued, the mother, who is single, took her then 1-year-10-month-old daughter and the then 9-month-old infant to a day-care facility. In her absence she left her son, then 8 years 9 months old, to watch her third daughter, then 3 years 6½ months old.

The mother testified that she returned home for a short time after taking her two daughters to the day-care facility, only to leave again upon finding that her son was watching a movie and that her remaining daughter was asleep. Prior to leaving the

second time, the mother instructed her son to keep the doors locked and to escort the remaining daughter to the day-care facility when she awoke.

According to the mother, she was gone for approximately 2 1/2 hours, returning home at about 11:10 a.m. Upon her return, she found attached to her door a handwritten note on the back of a sheet of paper denoted "OMAHA POLICE DIVISION STREET RELEASE," which note read: "Attention: [mother's name] Your children have been taken into protective care. Please call Gary DIETRICH . . . ." The mother thereafter called Dietrich, who told her to call one James Willis, the Deputy Douglas County Attorney who later filed the petition described in part I, *supra*. Willis was unable to give the mother much information, as he was waiting for someone else to gather additional information.

The mother also telephoned the day-care facility, inquiring about her two younger daughters. She was told she could not retrieve the children because they had been placed on "hold." Apparently, the county attorney's office, after being notified by the day-care provider that the infant had a not-unprecedented black eye, asked the provider not to return the infant to the mother.

The department contacted the mother that afternoon, and a caseworker was then sent to the mother's residence. At the meeting which followed, the mother told the caseworker the infant's eye was bruised when, while the mother was home, one of the other children opened a cupboard door into the infant while the two were playing. Although it was denied by the mother, the caseworker testified that the mother admitted permitting her 3 1/2-year-old daughter to play unattended in a park across the street from the mother's residence. The mother also told the caseworker she saw nothing wrong with leaving her 8 1/2-year-old son to take care of the 3 1/2-year-old for as long as 2 1/2 hours.

The caseworker asked the mother to submit to a drug test that afternoon, to which the mother initially agreed. The caseworker thereupon took the mother to a hospital for administration of the test. Upon arrival, the mother entered the hospital quickly and thereafter eluded the caseworker. As a

consequence, no test was administered that day.

The mother testified that she called her attorney upon arrival at the hospital and that she delayed the test pending a meeting with the attorney, which could not be arranged until the following week. The mother did undergo a drug urinalysis on August 14, 1990, the results of which were negative. However, the infant's father, who was then living with the mother, testified that as recently as June he had seen the mother use drugs.

## IV. FINALITY OF ORDERS

Before undertaking an analysis of the mother's summarized assignments of error, we address the State's claim that we lack jurisdiction to consider these appeals. The State correctly points out that we are without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991). Thus, the issue is whether the orders from which this appeal was taken were final within the meaning of Neb. Rev. Stat. § 25-1911 (Reissue 1989), which provides that a "judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record." The proceedings of a separate juvenile court are reviewed in accordance with § 25-1911. See Neb. Rev. Stat. § 43-2,126 (Cum. Supp. 1990).

Neb. Rev. Stat. § 25-1902 (Reissue 1989), a statute which has remained virtually unchanged throughout the course of Nebraska's statehood (see, Rev. Stat. § 581 (1867); Rev. Stat. § 8176 (1913); Comp. Stat. § 9128 (1922); Comp. Stat. § 20-1902 (1929)) provides:

> An order affecting a substantial right in *an action*, when such order in effect determines the action and prevents a judgment, and *an order affecting a substantial right made in a special proceeding*, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

(Emphasis supplied.)

Thus, § 25-1902 describes three types of order as final: (1) one affecting a substantial right in an action and which in effect

determines the action and prevents a judgment; (2) one affecting a substantial right made in a special proceeding; and (3) one affecting a substantial right made upon a summary application in an action after judgment. This classification has been specifically recognized on numerous occasions. See, e.g., *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972); *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960); *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 69 N.W. 104 (1896) (statute is composed of two categories, the second of which consists of two subcategories). All three types share the requirement that a substantial right be affected. In addition, the first category requires that the order arise in an "action" and that it "in effect determines the action and prevents a judgment." The second type requires only that the order affect a substantial right in a "special proceeding"; unlike the first type, there is no corresponding requirement that the order effectually determine the action and prevent a judgment. The third type requires that the order be made "upon a summary application in an action *after* judgment." (Emphasis supplied.)

We have not always, in considering whether an order is appealable, focused on the nature of the proceeding in which the order was rendered and thus have not always articulated with which of the three possible types of final order we were concerned.

For example, in *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953), a proceeding for adjustment of a claim against a decedent's estate, this court, without specifying whether the challenged order arose in an action or a special proceeding, ruled that an order denying a motion for summary judgment was not final, observing that "an order is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect. [Citations omitted.]" 157 Neb. at 472, 59 N.W.2d at 617-18. Judge Paul E. Boslaugh, in a concurring opinion, objected to the majority's failure to consider the type of proceeding in which the order was rendered:

> The basis of the decision . . . should have been that the

order sought to be reviewed by this appeal was one made in a special proceeding but it was not "an order affecting a substantial right." The majority opinion states that the denial of a motion for a summary judgment did not determine the *action*, did not prevent a judgment, or affect a substantial right. This is followed by the assertion that an order is final for purposes of appeal when it determines the rights of the parties and no further questions can arise before the court rendering it except those incident to the enforcement of the adjudication. This is all immaterial and foreign to this proceeding except the conclusion that the denial of the motion did not affect a substantial right.

. . . .

Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute. A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are [sic] made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the "main case." The distinction between an action and a special proceeding has been clearly recognized by this court. In Turpin v. Coates, 12 Neb. 321, 11 N.W. 300, it is said: "A special proceeding

> may be said to include every special statutory remedy which is not in itself an action."

(Emphasis in original.) 157 Neb. at 473, 479, 59 N.W.2d at 618, 620-21.

Agreeing that the method of analysis suggested in the foregoing concurrence is more helpful than some we have employed, we move on to a consideration of the types of the orders involved in this appeal.

It is clear beyond dispute that the subject orders were not entered after judgment; thus, the third type of order described by § 25-1902 is not involved. "Action," as that term is used in the Nebraska statutes, has, since Nebraska attained statehood, meant a civil action. See, Rev. Stat. § 2 (1867); 1867 Neb. Laws, § 1, p. 71; Rev. Stat. § 7560 (1913); Comp. Stat. § 8503 (1922); Comp. Stat. § 20-101 (1929); Neb. Rev. Stat. § 25-101 (Reissue 1989). Civil actions are governed by Neb. Rev. Stat. ch. 25 (Reissue 1989). Although "special proceeding" has no statutory definition, this court has, for nearly 110 years, construed the phrase to mean every civil statutory remedy which is not encompassed in what is now chapter 25.

In *Turpin v. Coates*, 12 Neb. 321, 323, 11 N.W. 300, 301 (1882), the first case to construe the meaning of special proceeding in determining whether an order was final, this court held: "A special proceeding may be said to include every special statutory remedy which is not in itself an action." The court went on to hold that an order discharging garnishees affected a substantial right and, since rendered in a special proceeding, was a final order. For further examples of special proceedings, see, e.g., *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (effort to remove a personal representative); *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972) (summary judgment); *Ropken v. Ropken*, 169 Neb. 352, 99 N.W.2d 480 (1959) (divorce action); *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952) (suit for breach of promise of marriage and seduction); and *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952) (accounting by personal representative).

More directly in point, this court has held that litigation under the juvenile court act declaring a juvenile to be dependent

and neglected was a special proceeding and that the order placing the juvenile's custody with the State was final within the meaning of § 25-1902. See, *Krell v. Sanders*, 168 Neb. 458, 96 N.W.2d 218 (1959); *State v. Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976).

As the orders in question arose in a special proceeding, the only thing which remains to be decided on the issue of their appealability is whether they affect a substantial right of the mother.

It has long been established that parents have a recognized liberty interest in raising their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

There is no question that both the ex parte temporary detention order and the later detention order interfered with the mother's rights in her infant daughter. The issue is whether that interference was substantial.

In *In re Interest of Roman*, 212 Neb. 919, 327 N.W.2d 36 (1982), this court held that an order of the district court which reversed and remanded the order of the county court sitting as a juvenile court terminating parental rights was a final order.

*In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983), held that an adjudication order finding a juvenile to have violated state law was an appealable order, but that a predisposition order placing the juvenile in a correctional facility for evaluation preliminary to a dispositional hearing was not. *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985), a dependency and neglect case, reaffirmed the *Aufenkamp* court's holding regarding the finality of an adjudication order. *In re Interest of J.M.S.*, 218 Neb. 72, 352 N.W.2d 186 (1984), another delinquency case, reaffirmed the nonfinality of a predisposition order which placed each juvenile in a correctional facility for evaluation for a period of not more than 30 days.

However, *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989), another dependency and neglect case, ruled that an order by the separate juvenile court requiring a parent to participate in psychological therapy and also requiring the

department to pay for such therapy was a final order.

*In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989), held that an order refusing to permit the withdrawal of an answer of no contest entered at an adjudication hearing was not a final order. The decision rested not on a finding that no substantial right in a special proceeding had been affected but, instead, on findings that the ruling on the motion to withdraw the no contest answer did not affect the parent's relationship with his child and was therefore interlocutory rather than final.

Thus, the question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

For the reasons detailed in the analysis of the mother's constitutional concerns in part V(1), *infra*, we conclude the ex parte temporary detention order is nonfinal and thus not appealable, but that the later detention order is a final, appealable order.

## V. ANALYSIS OF SUMMARIZED ASSIGNMENTS OF ERROR

The foregoing matters having been addressed, we turn our attention to the summarized assignments of error.

### 1. Juvenile Court's Assertion of Jurisdiction

The mother first asserts that the ex parte temporary detention order and subsequent detention order failed to confer jurisdiction on the juvenile court because the sections of the Nebraska Juvenile Code under which they were entered deprive her of a recognized liberty interest, in violation of her right to due process of law under the state and federal Constitutions. More specifically, she claims that the ex parte order violated her right to be free from unreasonable seizures as guaranteed by Neb. Const. art. I, § 7, and that the alleged code violations violated various rights guaranteed by Neb. Const. art. I, § 1, and the first, fourth, fifth, and ninth amendments to the U.S. Constitution. In addition, she claims the ex parte order was entered in violation of various statutory provisions, as described in part V(1)(a)(ii), *infra*.

With respect to the constitutional claims, we note that the mother, while invoking the constitutional provisions last mentioned, has not articulated independent arguments regarding each provision claimed to have been violated, choosing instead to treat all of them as components of the alleged denial of due process. Therefore, pursuant to the rule that errors assigned but not discussed will not be considered, see, *City of Lincoln v. ABC Books, Inc., ante* p. 378, 470 N.W.2d 760 (1991), and Neb. Ct. R. of Prac. 9D(1)d (rev. 1989), we limit our analysis to the due process claim.

(a) Ex Parte Temporary Detention Order

To state the obvious, inasmuch as we have concluded that the ex parte order is not appealable, the mother's claims of error in connection with its entry are not properly before us. We discuss the issues raised thereby only to document the reasoning which leads to the conclusion that the ex parte order is not final.

*(i) Claimed Constitutional Deficiency*

As this court recently stated in *State v. Cook*, 236 Neb. 636, 645, 463 N.W.2d 573, 579 (1990), citing *Washington v. Harper*, ____ U.S. ____, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), when examining a claim that one is being deprived of a liberty interest without due process of law, a three-stage analysis is employed:

> The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.

As to the first stage, there is no question that, as established in part IV, *supra*, a parent has a liberty interest in raising her or his child, a concept which encompasses the child's custody, care, and control. We thus move on to the second stage of the due process analysis, which, as noted in *Cook, supra* at 645, 463 N.W.2d at 579, involves a consideration of three elements:

> In embarking on the second stage of the analysis, we

> recall that "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Washington v. Harper, supra* at 110 S. Ct. at 1040-41. As noted in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): "[R]esolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted.] More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation omitted.]"

As to the first element involved in determining the procedural protections required, there can be no question that the mother's interest is significant. However, the effect of the ex parte temporary detention order on that interest is tempered by its short duration. It hinges continued custody in the department on further action by the State. The effect of the ex parte order on the mother's liberty interest is further tempered by the fact that the order plays no part in determining the propriety of continuing further temporary custody in the department until adjudication.

The next element relates to the risk of an erroneous deprivation of the mother's interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.

Neb. Rev. Stat. § 43-248 (Reissue 1988) authorizes the warrantless seizure of a juvenile "when such juvenile is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection . .

. ." Neb. Rev. Stat. § 43-250 (Reissue 1988) contemplates that a juvenile so removed and placed in the custody of the department must be released if a court order authorizing the placement is not issued within 48 hours of the seizure. While requiring an adversarial hearing before any order is entered, as the mother suggests, would undoubtedly reduce the likelihood of erroneous seizures, it would at the same time impose an unreasonable hindrance on taking emergency action to save an endangered juvenile. This is particularly so when, as developed in part V(1)(b), *infra*, an adversarial hearing must be held within a reasonable period of time after the seizure in order that a prolonged temporary period of separation of the juvenile from the parent may be ordered.

Indeed, the hindrance the mother's suggestion would impose on the State brings us to the third and final element to be considered when determining what process is due in a given situation: the governmental interest. This determination includes weighing "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Under the doctrine of parens patriae, the State is vested with power to set standards for the care and protection of children within its borders. See *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). One would be hard pressed to cite a governmental interest of greater import. It is pursuant to this interest that the State has enacted the Nebraska Juvenile Code. The sheer magnitude of this interest renders acceptable a certain degree of risk that the State will, on rare occasion, make erroneous short-term seizures and placements of juveniles.

From the foregoing, it becomes clear that the process which is due in order that the State may temporarily seize and place an endangered juvenile outside the parent's home pending the filing of a petition requesting continued placement of the juvenile until adjudication must be responsive to the parent's liberty interest while not eviscerating the State's parens patriae interest.

We thus move to the third and final stage of our due process

analysis, in which the facts of this case are examined to ascertain whether there was a denial of that process which was due.

Under such facts the ex parte temporary detention order was akin to a temporary restraining order in that it was, by its terms, of limited duration and designed to preserve the status quo until an adversarial hearing could be held. See, e.g., *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955). Allowance of such ex parte temporary action is a reasonable reaction to a perceived emergency situation involving a matter of utmost State interest and thus a legitimate exercise of the State's power under the parens patriae doctrine.

The State suggests in its brief that, in any event, in certain emergency circumstances it may act "without regard to the requirements of due process." Brief for appellee at 10. This may be true for those who live in some societies, but it is not true for those who live under the flag of the United States of America. What the foregoing due process analysis does demonstrate, however, is that different situations call for differing degrees of due process.

Therefore, the State may not, in exercising its parens patriae interest, unreasonably delay in notifying a parent that the State has taken emergency action regarding that parent's child nor unreasonably delay in providing the parent a meaningful hearing.

Indeed, the procedures used in this case, although marginally meeting the requirements of due process under the facts, were shoddy.

The apparent failure of the State to document the facts on which the juvenile court relied in entering its ex parte temporary detention order on August 10 is more than a little bothersome. What saves the juvenile court's jurisdiction in that regard is that the evidence adduced at the August 24 hearing supports what was done 14 days earlier. However, as the mother argues, the better practice, and the practice which shall henceforth be followed, is that the information upon which the State seeks an ex parte temporary detention order be contained in the affidavit of one who has knowledge of the relevant facts and that such affidavit be presented to the juvenile court and be

made a part of the record of the proceedings. In addition, the affected juvenile's parent shall be given prompt notice of the order.

*(ii) Claimed Statutory Violations*

In addition to the foregoing meritless constitutional claims, the mother asserts the ex parte order is unenforceable because the State failed to establish that at the time of the seizure the infant was "seriously endangered in . . . her surroundings and immediate removal appear[ed] to be necessary for [her] protection," as required by § 43-248(3); failed to place the infant "in the least restrictive environment consistent with" her best interests, as required by § 43-250(4); and failed to make "reasonable efforts" prior to the infant's placement "to prevent or eliminate the need for removal and to make it possible for the [infant] to return to . . . her home," as required by Neb. Rev. Stat. § 43-254 (Reissue 1988).

However, whatever may be the remedy for the State's alleged failure to comply with the statutory requirements relating to the entry of an ex parte temporary detention order, the failure does not deprive the juvenile court of jurisdiction, for, as noted previously in part V(1)(a)(i), *supra*, the temporary detention order forms no basis for the order which followed. See *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985).

(b) Detention Order

The mother also claims that as several procedural safeguards which protect the rights of juveniles alleged to be delinquent are not extended to juveniles claimed to be dependent or neglected, the detention order of August 27 denied her due process of law and thus did not vest the juvenile court with jurisdiction over the infant.

This allegedly differing treatment purportedly arises from the use of the word "deliver" in § 43-250(4) and Neb. Rev. Stat. § 43-253 (Reissue 1988), the relevant portions of which read:

> When a juvenile is taken into temporary custody pursuant to subsection (3) of section 43-248 [the warrantless seizure provision employed in this case], the officer may *deliver* the custody of such juvenile to [the department] . . . .

(Emphasis supplied.) § 43-250(4).

> *Upon delivery* to the juvenile court or probation officer of a juvenile who has been taken into temporary custody under sections 43-248 and 43-250, the court or probation officer shall immediately investigate the situation of the juvenile and the nature and circumstances of the events surrounding his or her being taken into custody.

(Emphasis supplied.) § 43-253.

The mother argues that since, under the provisions of § 43-250(4), juveniles claimed to be dependent or neglected are taken into custody pursuant to the warrantless seizure provision and delivered directly to the department, they are not, as are juveniles claimed to be delinquent, delivered to the juvenile court. She therefore contends that § 43-253 does not apply to juveniles who are not claimed to be delinquent. The mother then postulates that as § 43-253 does not apply, Neb. Rev. Stat. § 43-275 (Reissue 1988), which purports to require that when "a juvenile is detained or placed in custody under the provisions of section 43-253 a petition or complaint . . . be filed within forty-eight hours excluding nonjudicial days," likewise does not apply. Therefore, under the mother's reading of the statutes, §§ 43-253 and 43-275 only provide procedural protection to juveniles who are alleged to be delinquent. The mother also points out that Neb. Rev. Stat. §§ 43-255 and 43-256 (Reissue 1988), both of which outline additional procedural protections, by their terms apply only to juveniles claimed to be delinquent. Her argument culminates in the conclusion that it is a denial of her right to due process to have a statutorily mandated procedure for juveniles alleged to be delinquent but not for juveniles asserted to be dependent or neglected.

However, the mother's reading of §§ 43-250(4) and 43-253 is overly narrow and thus wrong. By providing that the "department shall have no other authority with regard to such temporary custody until or unless there is an order by the court placing the juvenile in the custody of the department," § 43-250(4) clearly contemplates that upon seizure, the placement of the juvenile's temporary custody becomes a question for the juvenile court. An application for such an order constitutes a delivery of the seized juvenile to that court.

This necessarily means, as held in *In re Interest of S.S.L., supra*, that the filing time limit imposed by § 43-275 also applies. It is unfortunately true that the petition in this case was not filed within 48 hours, but whatever else the State's failure to comply with that statutory directive may do, it does not, in and of itself, create a jurisdictional defect. See *In re Interest of S.S.L., supra*. The failure does, however, raise due process concerns.

Thus, we return to the traditional due process analysis employed in concluding that the ex parte temporary detention order of August 10 is not appealable. See part V(1)(a), *supra*. Obviously, the consideration involved in the first stage of that analysis, the mother's interest, is the same under the August 27 detention order as under the ex parte order.

However, for purposes of the second stage of the analysis, in which the procedural protections required are determined, the detention order of August 27 differs from the ex parte order. This is so, for an adjudication hearing may be delayed for months. (Neb. Rev. Stat. § 43-271 (Reissue 1988) contemplates a delay of as long as 6 months from the date of filing the petition giving rise to the detention order.) Consequently, the mother's interest may be affected for a longer period of time under the detention order than it can be under the ex parte temporary detention order. Due process principles therefore require that the mother have been given a meaningful opportunity to be heard on the issue of whether a detention order should have been issued.

Having reached the third stage of the due process analysis, in which we determine whether the process due was given, we recall that the mother appeared at the August 24 hearing. Although she urges that "two weeks to wait for a hearing is not reasonable," brief for appellant at 20, she makes no claim that the timespan between whatever notification she received and the hearing was so short as to deprive her of a meaningful opportunity to be heard.

These circumstances, coupled with the fact that the mother was permitted to visit with the infant during the 14-day delay between the ex parte order and the August 24 hearing, lead us to conclude that the statutory procedures as applied to her

adequately protected against the risk of an erroneous deprivation of her interest and that the probable value of additional or substitute procedural safeguards is slight. Accordingly, the August 27 detention order did not violate the mother's due process rights. See *State ex rel. Miller v. Locke*, 162 W. Va. 946, 253 S.E.2d 540 (1979) (statute allowing child to be taken for no more than 10 days unless parents given 5 days' actual notice and a reasonable opportunity to be heard held to provide adequate due process, if properly applied).

We caution, however, that the 14 days elapsing between the entry of the ex parte order and the hearing poise the procedures employed in this case on the brink of unreasonableness. Even if for computing some 48-hour periods the concept of "judicial days" has valid meaning, it can have no validity when measuring longer interferences with the relationship between parent and child. Time is time, by whatever name it might be called. See *County of Riverside v. McLaughlin*, ____ U.S. ____, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (delay of not more than 48 hours, including intervening weekend, between warrantless arrest and probable cause hearing presumptively comports with fourth amendment).

### 2. Evidential Rulings

In the second summarized assignment of error, the mother complains that in conducting the August 24 hearing, the juvenile court did not employ strict rules of evidence, admitted hearsay, and placed the burden of proving nonneglect on her.

#### (a) Applicable Evidential Rules

As to the appropriate rules of evidence, Neb. Rev. Stat. § 43-283 (Reissue 1988) authorizes the use of relaxed rules of evidence at "any dispositional hearing." Proceedings to terminate parental rights fall within the purview of § 43-283, and, thus, relaxed rules of evidence may be used in such proceedings. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). See, also, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991).

It would be anomalous indeed to permit the use of relaxed rules in determining whether a parent's rights in and to her or his child should be forever terminated but to insist on the use of

strict rules of evidence in determining whether a parent's rights should be interfered with temporarily while awaiting adjudication. While a dispositional proceeding has generally been thought of as a judicial determination concerning a juvenile's relationship to her or his parents made following an adjudication under § 43-247, *In re Interest of J.S., A.C., and C.S., supra*, a proceeding concerning the temporary placement of a juvenile pending adjudication is likewise dispositional in that, by its nature, the ruling involves a nonpermanent placement of a juvenile pending further judicial action. Thus, a hearing to determine who shall have custody of a juvenile pending an adjudication is in that sense dispositional; therefore, § 43-283 applies to such a proceeding, and relaxed rules of evidence may be followed.

(b) Hearsay

The mother complains that hearsay was admitted. Even where relaxed rules of evidence may be employed, due process requires that the proceedings be fundamentally fair. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). Thus, certain hearsay may be inadmissible irrespective of whether strict rules of evidence apply.

However, in considering the mother's claim in this regard, it must be remembered that this court reviews appeals from juvenile proceedings de novo on the record and is thus required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, this court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of facts over another. *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988); *In re Interest of Biesecker*, 214 Neb. 425, 333 N.W.2d 923 (1983).

Therefore, the improper admission of evidence in a juvenile proceeding does not, in and of itself, constitute reversible error, for as long as proper objection was made at trial, this court, in its review, ignores information which was improperly received. *In re Interest of D.S. and T.S., supra.*

(c) Burden of Proof

The mother's claim that the juvenile court improperly placed

the burden of proof on her and that the State failed to establish that the infant's preadjudication placement with the department should be continued in the department arises from the following colloquy during opening statements:

> THE COURT: . . . Now, I think you first started out by saying that two of the children were in foster care that day; right?
>
> [MOTHER'S COUNSEL]: Your Honor, they were in — not foster care. They were in a licensed day-care home. They were in day-care.
>
> THE COURT: And the eight-year old was left home alone.
>
> [GUARDIAN AD LITEM]: With the — in charge of a three-year old.
>
> THE COURT: Not just alone, but in the care of a three-year old. That right there is totally inappropriate, in my mind. You don't leave an eight-year old alone. And you don't leave an eight-year old alone in the care of a little one. That's neglect right there. That's an emergency, and the children have to be taken out of the home because the mother is not around.
>
> . . . .
>
> . . . Okay. She was going down to the county jail; right?
>
> [MOTHER'S COUNSEL]: Yes.
>
> THE COURT: She lived clear in South Omaha. She would be gone, I'll bet, for two hours.
>
> [GUARDIAN AD LITEM]: I believe, Your Honor, the testimony was two and a half hours.
>
> THE COURT: I would like to know anyone here who is — who has had kids would leave their eight-year old alone for three hours in the care of a three-year old. Raise your hands who would do that.

Clearly, the juvenile court's implied suggestion that the propriety of the mother's conduct was to be judged in accordance with the outcome of a poll is unfortunate, inappropriate, and not to be condoned. However, we need not address whether the juvenile court's comments were such as to constitute the imposition of a presumption of neglect on the mother because this court certainly indulges in no such

presumption.

3. Role of Guardian Ad Litem

Overlooking that the petition was filed by the county attorney and not the guardian ad litem, the mother, in the third summarized assignment of error, complains that the guardian ad litem was unlawfully permitted to prosecute the case. In doing so, she cites to Neb. Rev. Stat. § 43-272.01 (Cum. Supp. 1990), the relevant portions of which read:

> (1) A guardian ad litem as provided for in subsections (2) and (3) of section 43-272 shall be appointed at the commencement of all cases brought under subdivision (3)(a) . . . of section 43-247 . . . .
>
> (2) In the course of discharging duties as guardian ad litem, the person so appointed shall consider, but not be limited to, the criteria provided in this subsection. The guardian ad litem . . . (b) is not appointed to prosecute or defend the parents or other custodian of the protected juvenile but shall defend the legal and social interests of such juvenile. Social interests shall be defined generally as the usual and reasonable expectations of society for the appropriate parental custody and protection and quality of life for juveniles without regard to the socioeconomic status of the parents or other custodians of the juvenile . . . (e) may present evidence and witnesses and cross-examine witnesses at all evidentiary hearings, (f) shall be responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile . . . .

It is true that the guardian ad litem conducted much of the evidential presentation and argument against the mother. However, a guardian ad litem clearly has the authority to "present evidence and witnesses and cross-examine witnesses at all evidentiary hearings." § 43-272.01(2)(e); *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988); *In re Interest of R.W.*, 236 Neb. 420, 461 N.W.2d 545 (1990). It necessarily follows that a guardian ad litem will adduce such evidence as he or she concludes will serve the interests of the juvenile and argue in favor of such disposition as the guardian concludes is best for

the juvenile. The question is not who adduced the evidence and persuaded the juvenile court, but what does the evidence prove and was the juvenile court's ruling correct?

4. PROPRIETY OF DETENTION ORDER

The foregoing question brings us to the fourth and last summarized assignment of error, the mother's claim that the juvenile court erred in continuing the infant's temporary care after seizure in the department.

The circumstances required to be established for continuing to withhold a juvenile's custody from her or his parent pending adjudication are found in § 43-254:

> If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

Although Neb. Rev. Stat. § 43-279.01(3) (Cum. Supp. 1990) provides that when adjudicating whether a juvenile is dependent or neglected within the purview of § 43-247(3)(a) the State must establish its allegations by a preponderance of the evidence and that when seeking to terminate parental rights the proof must be clear and convincing, it is silent as to the quantum of proof required to satisfy the State's burden of proving that the custody of an alleged dependent or neglected juvenile should be in the department pending adjudication.

However, as the temporary placement is no more onerous than an adjudication that a juvenile is dependent or neglected such as to subject the juvenile to the jurisdiction of the juvenile court, we hold that proof by a preponderance of the evidence that such placement needs to be continued is sufficient. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986) (preponderance of evidence sufficient to support adjudication that juvenile was within purview of § 43-247(3)(a)).

The evidence of the mother's demonstrated unabashed

proclivity to leave her other children in their own care under the supervision of a not-quite-9-year-old, coupled with the evidence of her recent drug use, preponderates in favor of a conclusion that the infant is neglected such as to come within the purview of § 43-247(3)(a). The State need not wait to intervene until the infant suffers injury because she was left in the immature care of her oldest sibling.

## VI. JUDGMENT

The record failing to sustain any of the summarized assignments of error, we affirm the detention order of August 27, 1990.

AFFIRMED.

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## KURT A. KNIPPELMIER, APPELLANT, V. KIMBERLY ANN KNIPPELMIER, APPELLEE.

470 N.W.2d 798

Filed June 21, 1991. No. 89-135.

1. **Divorce: Appeal and Error.** In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. When the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Support: Rules of the Supreme Court: Presumptions.** Child support shall be established in accordance with the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
3. **Child Support: Rules of the Supreme Court.** The court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
4. **Child Support.** In determining the amount of a child support award, the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.

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

Louie M. Ligouri for appellant.

Steven J. Mercure, of Nestor & Mercure, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an action for dissolution of marriage. Petitioner-appellant husband, Kurt A. Knippelmier, and respondent-appellee wife, Kimberly Ann Knippelmier, were married on August 27, 1983. Two children were born to the marriage: Stanley Kyle, born June 24, 1986, and Kristin Ann, born January 23, 1988. The marriage was dissolved by a decree entered by the district court for Nemaha County, Nebraska, on February 8, 1989.

Pursuant to a property settlement agreement approved by the district court, the husband was awarded a 1982 Ford Bronco; the assets of his automotive repair business, which he and his father operate as a partnership; certain real estate, including the family home; and household personalty. The Bronco, the real estate, and the husband's interest in the automotive repair business have a combined total value of $33,800. The husband assumed payment for all the parties' debts, totaling $32,031.33, which were incurred prior to their separation on September 9, 1988. The wife received a 1979 Oldsmobile station wagon worth $2,000, a life insurance policy, her 401K retirement plan, and household goods. The parties agreed that no alimony would be paid. The parties also agreed that the wife would have custody of the children, subject to specific visitation in the husband.

After trial, the court ordered the husband to pay child support of $113.75 per child plus $150 per month toward the child-care expenses. The husband timely appealed, contending that the trial court erred in (1) setting child support in an amount above that established by the Nebraska Child Support Guidelines, (2) fixing day-care expenses in an excessive amount, and (3) ordering an automatic increase in child support to be

payable beginning September 1, 1995. We determine appellant husband is correct only in his third assignment of error and affirm the judgment of the trial court, as modified herein.

In appeals involving actions for dissolution of marriage, the Supreme Court's review 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. 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. *LaBenz v. LaBenz*, 237 Neb. 231, 465 N.W.2d 726 (1991).

The record shows the following: The parties were married on August 27, 1983, and are the parents of two children, ages 4 and 3. They agreed that the wife would receive custody of the children and that neither party would pay alimony to the other.

Both parties have high school educations. During the marriage, the wife was the primary wage earner and was employed by a Hinky Dinky supermarket in Auburn. Shortly before trial, the wife moved to Lincoln, and she began employment with Hinky Dinky in Lincoln 5 days before the trial. At the time of trial, she earned $5.25 per hour, had a monthly gross income of $910, and estimated her child-care costs in Lincoln would be $448 per month. While employed in Auburn, the wife earned $700 per month, with child-care expenses of either $380 or $288 per month. The difference in those amounts is not explained, but may be connected with the fact that while in Auburn, the wife had assistance from relatives.

The husband testified that he is an able-bodied man and is capable of gainful employment. He had no taxable income in 1985, earned approximately $5,000 in 1986, and earned $3,276 in 1987. At the time of trial, the husband was self-employed in an automotive repair business with his father. The business had been in operation for 2 years. At the time of trial, the husband's affidavit showed estimated gross earnings from the automotive repair business were $615 per month, and his estimated monthly net income was $465.

Based on the foregoing, the district court found that "the

Petitioner has the same earning capacity and ability as the Respondent and the net income of the Respondent is presently approximately $750.00 per month." The husband was ordered to pay child support of $113.75 per month per child

> until the youngest child . . . born January 23, 1988, is enrolled and attending school, at which time the [husband] shall pay . . . the sum of $150.00 per child per month for a total sum of $300.00 per month for the support of the above-named minor children of the parties, payable on the 1st day of September, 1995, and continuing thereafter . . . .

The court also ordered the husband to pay $150 per month for child-care expenses "until both of the minor children of the parties hereto are regularly enrolled in and attending school." The court also specified certain visitation adjustments in the support order.

In general, child support payments should be set according to the guidelines established by the Nebraska Supreme Court.

Neb. Rev. Stat. § 42-364(4) (Reissue 1988) provides:

> In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court pursuant to section 42-364.16 for the establishment of child support obligations. . . .

Neb. Rev. Stat. § 42-364.16 (Reissue 1988) provides:

> The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

Thus, the court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.

The child support guidelines of the Nebraska Supreme Court apply to any child support award made from and after October 1, 1987. *Stuczynski v. Stuczynski, ante* p. 368, 471 N.W.2d

122 (1991); *Formanack v. Formanack*, 234 Neb. 325, 451 N.W.2d 250 (1990).

This case presents a contrast with *Stuczynski v. Stuczynski, supra*, where the husband worked two jobs to support his wife and children. In the instant case, for reasons not shown, the husband works, if at all, at jobs paying less than minimum wage, thus leaving the support of his children primarily to his wife.

Reviewing the record de novo, we find that there is sufficient evidence in the record to rebut the presumption that the child support guidelines should be applied in this case. Although there is no specific evidence in the record to support the trial court's conclusions that "in this country there still is no [parity] in opportunities for jobs between men and women" and that "there are ten times the opportunities out there for [petitioner] to make twice as much as [respondent is] making, with less opportunities," the court properly considered the fact that the husband admitted he is able-bodied and is capable of gainful employment, with some skills in the automobile repair business.

In *Burhoop v. Burhoop*, 221 Neb. 657, 661, 380 N.W.2d 254, 257 (1986), a case concerning an award of alimony, we said that "the earning capacity of both parties in a dissolution of marriage should be considered" and that "[t]he actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award of alimony." *Id.* at 662, 380 N.W.2d at 258. Accord *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988). The same is true of child support. See, e.g., *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989). Under the circumstances presented in this case, a strict application of the guidelines would have discounted the husband's earning capacity and placed an unfair burden on the wife.

Having determined that a strict application of the child support guidelines would be inequitable in this case, we consider the husband's contention that the child support award is excessive. Both parents have the duty to support their minor children. *Druba v. Druba, ante* p. 279, 470 N.W.2d 176 (1991); *Coffey v. Coffey*, 205 Neb. 191, 286 N.W.2d 753 (1980).

Although not identical, the situation is similar to that presented in *State v. Smith, supra* at 743-44, 437 N.W.2d at 806, a paternity action:

> Smith testified that before 1986, he worked as a state brand inspector, making approximately $18,000 per year. At the beginning of 1986, after he knew he was accused of being [the child's] father, he quit his job to work on his parents' ranch. He receives no compensation for working on the ranch other than room and board. He occasionally works day labor jobs as a ranch hand for approximately $50 per day. This work varies depending on the season. He also raises a few cattle on his own. His tax returns indicate he has continually lost money on this venture. The court found, although Smith had made a business decision to cease being a brand inspector, it was not a factor to be considered in determining the amount of child support he should pay. *Based upon his earning capacity*, as evidenced by his earnings as a brand inspector, the court ordered Smith to pay $200 per month in child support.

(Emphasis supplied.) We held in *State v. Smith* that the trial court did not abuse its discretion in ordering the father to pay $200 per month child support.

In the present case, the wife earns gross income of approximately $910 per month. She began to receive those higher earnings 5 days before the trial. The husband has a high school education, is self-employed as an auto mechanic, and testified that there was no reason he could not obtain other employment. The record shows that the husband estimated in 1988 he would make gross income of approximately $615 per month. This amount, in itself, would result in substantially higher income than the husband's self-employment income of $3,276 in 1987. In setting child support payments at $113.75 per month per child (rather than at the $78.65 amount suggested by the husband), the district court assumed that the husband had the capacity to earn at least as much money as the wife. Although there is no specific testimony in the record on this point, we reiterate that both parents have the duty to support their minor children and conclude that, under the circumstances, the trial court did not abuse its discretion in

setting child support at $113.75 per month per child. The amounts are almost minimal, and the husband, as a father, should be expected to help support his children.

The husband further contends that the district court erred in ordering him to pay day-care expenses in an excessive amount. The child support guidelines effective on the date of trial provided that "[d]ay-care expenses are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines." See *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987). The wife testified that since moving to Lincoln she could no longer receive help from relatives with day care. She estimated she would now be required to pay approximately $448 per month in child-care expenses. Under the circumstances, the trial court did not abuse its discretion in ordering the husband to contribute $150 per month toward child-care expenses.

The husband contends finally that the district court erred in ordering an automatic increase in child support, to be payable beginning September 1, 1995. In making the contention that his child support payments will be increased in 1995, the husband overlooks the fact that at the same time, the court's order provides that his contribution toward the child-care expenses incurred by the wife will be terminated when the younger child begins attending school. The net effect of the decree in this regard is to terminate the husband's obligation to contribute to the child-care expenses in the amount of $150 per month at the time the younger child begins attending school, and to increase his child support at the same time to $300 per month from $227.50 per month. This amounts to a net decrease in overall child support and child-care payments to the wife of $77.50 per month as of September 1, 1995.

In determining the amount of a child support award, the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children. *Formanack v. Formanack*, 234 Neb. 325, 451 N.W.2d 250 (1990). While the record supports the trial court's child support award and award of child-care expenses as of the date

of the dissolution hearing, there was no evidence presented showing what the financial condition of the parties, the estimated cost of supporting the children, or the child-care expenses will be in September 1995. While the child-care expenses may or may not decrease when the younger child begins to attend school, it does not appear to us that such expenses will vanish. The wife may need more assistance from the husband at that time if she is to continue to be the primary support of the children. Accordingly, in view of the particular circumstances of this case, we find that an automatic decrease on September 1, 1995, in total payments made by the husband should not be ordered at this time. The district court erred in ordering an automatic change in total payments, effective that date. Should the circumstances materially change in the future, either party may petition the district court to modify the decree at that time.

We note that the current requirements of the Nebraska Child Support Guidelines in paragraph H specifically provide for the situation in which more than one child is involved. See *Stuczynski v. Stuczynski, ante* p. 368, 471 N.W.2d 122 (1991). In view of the young ages of the children herein and the fact we are not applying the guidelines herein, we do not provide for the situation in which one child becomes emancipated.

The decree is modified to delete the requirement that the husband pay increased child support beginning September 1, 1995, and to delete the requirement that the husband's payments for child-care expenses be terminated on the same day. In all other respects, the judgment of the district court is affirmed.

The wife is awarded the sum of $100 to be applied toward her attorney fees in this court.

AFFIRMED AS MODIFIED.

MICHAEL KANE, APPELLANT, V. STEVE VODICKA, NEBRASKA STATE PENITENTIARY SAFETY OFFICER, ET AL., APPELLEES.

471 N.W.2d 136

Filed June 21, 1991. No. 89-175.

1. **Moot Question.** A case becomes moot when the issues presented are no longer alive.
2. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the 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.
3. **Demurrer: Pleadings.** If a demurrer is sustained, the plaintiff must be given an opportunity to amend, if the defect is such that it can be remedied.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Michael Kane, pro se.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellees.

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

CAPORALE, J.

Appellant, Michael Kane, while an inmate at the Nebraska State Penitentiary, filed a petition against the appellees, prison officials and employees, seeking various orders, injunctive relief, and compensatory and punitive damages stemming from alleged unsanitary conditions at the penitentiary's "big kitchen." Following a telephonic hearing, the district court sustained the defendants' demurrer and dismissed the petition. Kane's assignment of error takes issue with the district court's finding that his petition failed "to state a claim for which [it] has jurisdiction." We reverse and remand for further proceedings.

Chief among the allegations against the defendants "individually and in their official capacities" are claims that the penitentiary's "big kitchen" is dirty, understaffed, undersized, mismanaged, and insect-infested; that Kane has found foreign objects, such as wire, metal fragments, and a pastry brush

bristle, in his food; and that he no longer eats many foods, avoiding those in which foreign objects could be concealed, because "[t]he big kitchen scares the hell out of" him.

It appears defendants were served only through the Attorney General and not individually. They therefore demurred in their official capacity only, claiming that the district court had no jurisdiction of the subject of the action and that the petition did not state facts sufficient to constitute a cause of action. The suit against them as individuals is therefore not before us.

We begin our analysis by noting that Kane has been discharged from the penitentiary. His first five prayers for relief combine, in effect, to request that the district court order defendants to discontinue alleged unsanitary practices and begin performing their duties in a sanitary manner. These remedies are injunctive, albeit containing both prohibitory and mandatory elements, in that they aim to prevent future harm. See, e.g., *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *County of Knox v. City of Creighton*, 214 Neb. 196, 333 N.W.2d 395 (1983).

This court has consistently held that a case becomes moot when the issues presented are no longer alive. See, e.g., *Department of Health v. Manor Care, Inc.*, 237 Neb. 269, 465 N.W.2d 764 (1991); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). Kane's release from imprisonment means that he can no longer be harmed by defendants' official conduct. Thus, the claims for injunctive relief to prevent future harm are no longer alive, and, accordingly, they are moot. We thus need not, and do not, concern ourselves further with those matters.

The remaining portions of Kane's prayer seek compensatory and punitive damages, attorney fees, and costs. Although the prayer of a petition is not a part of the factual allegations and is not considered in determining whether a cause of action has been stated, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990), the petition does contain factual allegations which sound in tort. As to these allegations, we must determine whether the district court correctly concluded it lacked subject matter jurisdiction.

Neb. Const. art. I, § 13, declares: "All courts shall be open,

and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Neb. Rev. Stat. § 24-302 (Reissue 1989) provides: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

We have neither been directed to, nor have we found, anything which purports to divest the courts of jurisdiction to determine a case in which a prisoner seeks monetary damages from his keepers. On the contrary, Neb. Rev. Stat. § 81-8,214 (Cum. Supp. 1990) specifically vests in the district court jurisdiction to hear tort claims filed against the state. Indeed, prisoner actions seeking damages from jailers have been entertained in this state. Thus, the district court had subject matter jurisdiction, which is defined as the 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. *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991). For prisoner cases decided under such power, see, e.g., *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975) (prisoner successfully brought negligence action against city, under Political Subdivisions Tort Claims Act, for injuries suffered while incarcerated in city "drunk tank"); *Webber v. Andersen*, 187 Neb. 9, 187 N.W.2d 290 (1971), *appeal after remand*, *Webber v. City of Omaha*, 190 Neb. 678, 211 N.W.2d 911 (1973) (action by prisoner seeking damages for injuries suffered when assaulted by other inmates); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N.W.2d 906 (1948), *appeal after remand* 152 Neb. 290, 41 N.W.2d 123 (1950) (action against sheriff for wrongful death of decedent while incarcerated).

We do not at this time consider whether Kane succeeded in stating a cause of action, for even if he did not, he must be given an opportunity to amend his petition in an effort to remedy any such defect as may exist. Neb. Rev. Stat. § 25-854 (Reissue 1989); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, *supra* (failing to grant leave to amend after sustaining demurrer constituted abuse of discretion).

Accordingly, we reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., concurs in the result.

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STATE OF NEBRASKA, APPELLANT, V. DODGE CITY ET AL., APPELLEES.

470 N.W.2d 795

Filed June 21, 1991. No. 89-339.

1. **Penalties and Forfeitures: Equity: Appeal and Error.** An action for forfeiture is considered to sound in equity, and we review an equity action de novo on the record and reach our own conclusion independent of the findings of the trial court.
2. **Actions: Statutes.** Under the general saving clause, a pending action is not affected by the repeal or amendment of a statute, and the laws in effect at the time of the commencement of the action are controlling.
3. **Statutes.** The saving clause applies to both civil and criminal statutes.
4. **Gaming: Penalties and Forfeitures.** Neb. Rev. Stat. § 28-1111 (Reissue 1989) requires that any gambling device possessed in violation of article 11 of chapter 28 shall be forfeited to the state. In addition, Neb. Rev. Stat. § 29-820(1)(d) (Reissue 1989) requires that seized contraband shall be destroyed.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

Robert M. Spire, Attorney General, and William L. Howland for appellant.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., and Andrew J. McMullen for appellees.

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

WHITE, J.

The State appeals from an order of the district court which

held that five electronic and video machines were prohibited gambling devices on the date of their seizure, but which held that the machines could not be forfeited to the state. The trial court ruled that the machines could be returned to their owners because the applicable statute had been amended prior to the hearing on the petition for forfeiture. We reverse.

Sgt. Larry Williams, an investigator for the Nebraska State Patrol, testified that in January 1987, he took part in the seizure of five electronic and video gambling machines from clubs in Kearney, Nebraska. On May 19, 1987, the State filed a petition seeking an order directing forfeiture of the machines as illegal gambling devices. A hearing on the petition was held on January 17, 1989, and the court issued its order on March 14, 1989. The trial court found that the seizure was proper, but that the devices were no longer unlawful under current statutes, and that the devices and money found in them should be returned to their owners. The State's motion for new trial was overruled, and this appeal followed.

The State assigns as error the trial court's determination that the 1987 amendment to Neb. Rev. Stat. § 28-1107 (Reissue 1989) made only possession of certain mechanical gambling devices illegal, and its determination that in order for forfeiture to be legal, possession of the gambling devices had to be in violation of article 11 of chapter 28 of the Nebraska Revised Statutes.

As we noted recently in *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991), an action for forfeiture is considered to sound in equity, and we review an equity action de novo on the record and reach our own conclusion independent of the findings of the trial court.

The State's petition seeking the forfeiture was filed prior to the amendment of § 28-1107, and under the general saving clause, a pending action is not affected by the repeal or amendment of a statute, and the laws in effect at the time of the commencement of the action are controlling. See, *United Mineral Products Co. v. Nebraska Railroads*, 177 Neb. 802, 131 N.W.2d 388 (1964); Neb. Rev. Stat. § 49-301 (Reissue 1988). We have held that the saving clause applies to both civil and criminal statutes. See *State v. Randolph*, 186 Neb. 297, 183

N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686.

Although we must apply the statute which was in effect at the time of the petition for forfeiture, and in so doing we find that the machines in question were gambling devices and were properly seized, we also find that the devices were illegal under either version of the statute.

In *Two IGT Video Poker Games, supra*, we analyzed whether two video poker devices similar to the ones at issue here met the statutory definition of gambling device as found in Neb. Rev. Stat. § 28-1101(5) (Reissue 1989), which has not been amended since 1986. We held:

> 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 . . . .

*State v. Two IGT Video Poker Games, supra* at 151, 465 N.W.2d at 459.

The version of § 28-1107 which was in effect in early 1987 provided that possession of a gambling device is illegal, and provided exceptions for certain types of devices, including for

> any coin-operated mechanical game designed and manufactured to be played for amusement only and which may allow the player the right to replay such mechanical game at no additional cost, which right to replay shall not be considered money or property, except that such mechanical game (a) can accumulate no more than fifteen free replays at one time, (b) can be discharged of accumulated free replays only by reactivating the game for one additional play for each accumulated free replay, and (c) makes no permanent record directly or indirectly of free replays so awarded.

§ 28-1107 (Reissue 1985).

In the later 1987 version, exceptions were added for "computer gaming device[s], electronic gaming device[s], or

video gaming device[s]." Also eliminated was the 15-replay limit. See § 28-1107 (Reissue 1989). The revision in the law makes no difference to the facts of this case, since the machines are illegal gambling devices under either version of the statute.

Dodge City and the other games in the present case, like those in *Two IGT Video Poker Games*, are activated by players using coins and provide free replay credits, which involve extension of a service or entertainment. Thus, the devices are used to bet something of value on the outcome of a future event, and "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." *State v. Two IGT Video Poker Games, supra* at 152, 465 N.W.2d at 459. None of the exceptions in § 28-1101(4)—entering into a lawful business transaction, playing an amusement device with an unrecorded right of replay, conducting or participating in a prize contest, and conducting or participating in any bingo, lottery, or raffle—apply to this case.

As with the devices in *Two IGT Video Poker Games*, we find that these machines are equipped both with reset switches and with meters to make a permanent record of the replays awarded, which violates the statute and makes the machines illegal gambling devices. Under Neb. Rev. Stat. § 28-1111 (Reissue 1989), which has remained in effect throughout the history of this case, any gambling device possessed in violation of article 11 of chapter 28 "shall be forfeited to the state." In addition, Neb. Rev. Stat. § 29-820(1)(d) (Reissue 1989) requires that seized contraband, such as these illegal gambling devices, shall be destroyed.

The district court was correct in finding that the machines were illegal at the time of the seizure; however, the trial court erred in holding that the machines were no longer illegal 2 years later and that they should be returned to the owners.

We reverse the decision of the district court and remand the cause with directions to grant the plaintiff's petition for forfeiture.

REVERSED AND REMANDED WITH DIRECTIONS.

LAURA J. NEAL, APPELLEE AND CROSS-APPELLANT, V. SCOTT A. NEAL, APPELLANT AND CROSS-APPELLEE.

470 N.W.2d 803

Filed June 21, 1991. No. 89-391.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

James R. Place, of Place and Rasmussen, on brief, for appellant.

Scott A. Neal, pro se.

Ronald E. Frank and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellee.

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

PER CURIAM.

This is an appeal from a dissolution of marriage decree dated March 31, 1989, entered by the district court for Douglas County. The sole issue raised by the parties on appeal and cross-appeal is the amount of alimony awarded the appellee spouse. Awards of alimony are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. *Dinovo v. Dinovo, ante* p. 285, 470 N.W.2d 174 (1991). Reviewing the judgment of the trial court de novo on the record and finding no abuse of discretion, we affirm the judgment. See *Schulze v. Schulze, ante* p. 81, 469 N.W.2d 139 (1991).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY W. KIECKHAFER, APPELLANT.

471 N.W.2d 135

Filed June 21, 1991. No. 90-317.

**Trial: Evidence: Stipulations: Appeal and Error.** One who, without raising any objection, stipulates to the admission of evidence cannot on appeal complain about its receipt.

Appeal from the District Court for Antelope County, MERRITT C. WARREN, Judge, on appeal thereto from the County Court for Antelope County, STEPHEN P. FINN, Judge. Judgment of District Court affirmed.

Rodney W. Smith for appellant.

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

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

CAPORALE, J.

Following a bench trial on stipulated facts, the county court adjudged defendant-appellant, Stanley W. Kieckhafer, guilty of driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). The district court affirmed the conviction, and Kieckhafer now asserts that court erred in failing to find that the county court erred in refusing to suppress certain evidence. We affirm.

Kieckhafer argues that his arrest was illegal because the arresting officer did not have probable cause to stop and subsequently seize him. At the hearing on Kieckhafer's motion to suppress the evidence leading to and developed after his arrest, the arresting officer testified that at 2:30 on the morning in question he saw Kieckhafer leave a bar and fall while opening the door of his automobile. A while after Kieckhafer succeeded in crawling into his automobile, the officer approached the vehicle and discovered that Kieckhafer, clouded in an effluvium of alcohol, was so sound asleep that calling his name did not rouse him.

The officer maintained intermittent surveillance of

Kieckhafer between the hours of 2:30 and 4:30 a.m., when he again checked Kieckhafer at the surveillance scene and observed that he was still "passed out." The officer then returned to his home for a cup of coffee.

At approximately 7 a.m., the officer, being a firefighter as well as the assistant chief of police, responded to a fire call. Upon arriving at the fire, he discovered the house which was burning belonged to Kieckhafer. The officer was sent to the surveillance scene in order to determine from Kieckhafer whether anyone was in the building. Kieckhafer appeared to be just awakening, perhaps in response to the fire whistle and sirens, and he, still redolent of alcohol, told the officer that no one was in the house. The officer thereupon returned to the fire to pass on that information. Within about 5 minutes, the officer again returned to the surveillance scene and discovered that Kieckhafer had departed.

Upon making inquiries, the officer learned that Kieckhafer "had stopped at PDQ and got gas . . . ." The officer once again returned to the surveillance scene and later, at about 10 that same morning, saw Kieckhafer drive by, pull up to a stop sign, and, without stopping, execute a wide turn "into the other lane." The officer then approached Kieckhafer, again noticed the odor of alcohol about him, and, after Kieckhafer unsuccessfully performed some field sobriety tests, arrested him.

To postulate that an officer who has observed a person who emits the odor of alcohol leave a bar, fall getting into his automobile, spend hours in a deep sleep, and later drive his automobile improperly does not have grounds to form the reasonable suspicion needed to stop the person and arrest him after he failed to satisfactorily perform field sobriety tests appears untenable. E.g., *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990). However, we do not reach the question, for at trial Kieckhafer, without in any way preserving his earlier objection, stipulated to the admission of the very evidence he had earlier argued should have been suppressed. The applicable rule is that one who, without raising any objection, stipulates to the admission of evidence cannot on appeal complain about its receipt. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682

(1987).

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT G. FLECK, APPELLANT.

471 N.W.2d 132

Filed June 21, 1991. No. 90-339.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate 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 an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Convictions: Circumstantial Evidence: Proof.** 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.
4. **Circumstantial Evidence: Words and Phrases.** "Circumstantial evidence" means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process.

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

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

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

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

SHANAHAN, J.

In the district court for Douglas County, a jury convicted Robert G. Fleck of felonious first degree false imprisonment, a violation of Neb. Rev. Stat. § 28-314(1) (Reissue 1989), and use of a knife to commit a felony, a violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). Section 28-314(1) states: "A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury . . . ." Sentenced to imprisonment for each conviction, Fleck appeals and, in his sole assignment of error, asserts that the evidence is insufficient to sustain his convictions. Specifically, Fleck claims that the evidence failed to establish that he committed the crimes.

## STANDARD OF REVIEW

In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). Accord, *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

On a claim of insufficiency of evidence, an appellate 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 an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *State v. Lonnecker, supra*; *State v. Reynolds, supra*.

## FACTUAL BACKGROUND

While the female victim was walking from a grocery store to her parked car at approximately 1 a.m., she saw an occupant in a cream-colored or beige automobile parked next to her car in

the lighted parking lot. As the victim approached her car, the male occupant of the beige vehicle opened that car's door. When the victim neared the front of her car, the man, wearing a ski mask and brandishing a hunting knife, pointed the knife at the victim; forced her inside her car; and directed her to drive to the back of the grocery store while the abductor sat in the rear seat of the victim's car. After the victim drove to the back of the store and parked near a "dumpster," the abductor ordered the victim to get out of the car, said that he "had a gun," threatened to shoot her if she ran, handcuffed her, and led her to a nearby area, where he talked with the victim for about 5 minutes. Throughout her contact with the abductor, the victim observed that he was wearing a ski mask with a red border or trim around the mouth and eye holes in the mask, a red checkered flannel shirt with a black T-shirt underneath, baggy jeans, "earth shoes," and white surgical gloves. The victim also noted that her abductor was a Caucasian male who was approximately 5 feet 7 inches tall, was slight in build, and had facial blemishes around his eyes, visible through the ski mask, and that he carried some duct tape with him. After talking to the victim, the man said he "couldn't do it"; released the victim from the handcuffs; walked her back to her car, where he told the victim to remain; and fled on foot.

The victim then immediately drove to a convenience store across the street, from which store the police were contacted. When the police arrived, the victim described her assailant and pointed out the beige car, which was still sitting in the grocery store parking lot. From the convenience store, officers observed an individual approach and enter the beige car across the street in the grocery store parking lot. Two officers drove to the beige car and encountered the male individual, who identified himself as "Robert Fleck." Thereupon, police brought the victim to the parking lot, where she observed that the detained Caucasian had the same blemishes around his eyes as her abductor had, was the same height and build, and was wearing the same jeans, T-shirt, and earth shoes previously noted by the victim in the course of the abduction. Police found handcuffs in Fleck's rear pocket and later located two pairs of surgical gloves and a hunting knife in the car registered to Fleck.

In a search at the dumpster site behind the grocery store, police discovered a BB gun which was a facsimile of a "large-caliber weapon." Also, under the dumpster, police found a pair of surgical gloves, a dark ski mask with red trim, duct tape, and a red checkered flannel shirt, which matched the victim's description of those articles.

## SUFFICIENCY OF THE EVIDENCE

" ' "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. Zitterkopf*, 236 Neb. 743, 747, 463 N.W.2d 616, 620 (1990) (quoting *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990)). " 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). See, also, *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

Viewing and construing the evidence most favorably to the State, we conclude that the evidence was sufficient for the jury to find, beyond a reasonable doubt, that Fleck was the perpetrator of the crimes charged. Because the evidence is sufficient to sustain each of Fleck's convictions, his convictions are affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. WILLIAM BECK, APPELLANT.
471 N.W.2d 128

Filed June 21, 1991. No. 90-408.

1. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute, an act is done intentionally if it is done willfully or purposefully rather than accidentally or involuntarily. The intent operative at the time of an action, as a

state of mind, may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.

2. **Child Support: Visitation: Appeal and Error.** This court has never stated that visitation rights and child support payments may be linked such that the failure to provide one shall lead to an excuse not to provide the other. The right of visitation is not a quid pro quo for the payment of child support.
3. **Sentences: Appeal and Error.** A sentence that is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. It is also within the trial court's discretion to direct that sentences imposed for separate crimes may be served consecutively.
4. **Convictions: Restitution.** A sentencing court may order the defendant to make restitution for the actual loss sustained as a direct result of the offense for which the defendant had been convicted. The court may not order an offender to make restitution on a charge for which the offender is not convicted.
5. **Child Support: Appeal and Error.** This court cannot and will not serve as a civil collection agency for child support arrearage.

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

James H. Truell for appellant.

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

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

WHITE, J.

William Beck appeals his York County District Court convictions for criminal nonsupport, in violation of Neb. Rev. Stat. § 28-706(1) (Reissue 1989). He was sentenced to a total of 40 to 120 months in prison and was ordered to pay restitution of $11,008. We affirm the convictions, but modify the order of restitution.

The defendant-appellant is the father of Billi Jo Beck, who was born on February 18, 1975. The decree of dissolution of marriage, entered on November 4, 1976, placed legal custody of the child in the court and awarded physical custody to Beck's former wife, now Connie Tyrrell. Beck was ordered to pay $75 each month in child support. Since 1976, only two support payments, both unemployment intercepts in 1984, were received by the clerk of the district court.

The information charging Beck with seven counts of

criminal nonsupport for the months of May through November 1989 was filed on January 5, 1990. At arraignment Beck stood mute, and not guilty pleas were entered for him. After waiving his right to a jury trial, Beck was found guilty of all seven counts following a bench trial. The trial court sentenced him to 20 to 60 months' imprisonment on each count, with six sentences to run concurrently and one to run consecutively. He was ordered to pay $11,008 in restitution, which was apparently the full amount of back child support owed by him. His motion for new trial was overruled, and this appeal followed.

Beck's assignments of error combine to assert that the trial court abused its discretion in failing to allow the taking of depositions and the admission of certain evidence which would support his defense, in sentencing the defendant to incarceration, and in ordering restitution beyond that charged in the information. Beck's asserted defense is that he did not violate the statute because he believed that he was not required to pay child support when his rights to visitation had been limited by his ex-wife.

The criminal nonsupport statute provides:

> (1) Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport.
>
> . . . .
>
> (7) Criminal nonsupport is a Class IV felony if it is in violation of any order of any court.

§ 28-706.

Beck attempted to show at trial that he did not violate the statute because he lacked the necessary intent. Instead, he asserted that he failed to pay support because he believed the decree of dissolution linked the child support payments with his visitation rights and that when visitation was denied, he believed he was no longer required to pay child support. At no time does Beck deny that he failed to make any payment toward child support in more than 14 years. On appeal, he argues that he should have been allowed to present evidence of his state of mind as an explanation for that failure. We disagree.

The nonsupport statute requires that the person charged must have intentionally failed to provide support which he knows or reasonably should know he is legally obliged to provide. Through an offer of proof, Beck stated that he would testify to his belief that the wording of the divorce decree allowed him to stop payments if he was not allowed visitation. However, this argument fails when the decree itself is examined. In it, the court ordered reasonable visitation on the first and third weekends of each month, and provided that "[s]aid visitation is to continue on the first and third weekend of each month only so long as Respondent pays the Court ordered child support." The decree further ordered that "[i]f said [child support] payments shall not be made to the Clerk of the District Court as herein ordered then the reasonable rights of visitations shall cease." Nowhere in the decree is it stated or implied that the child support obligation would be void if visitation was not provided.

As we recently held in another criminal nonsupport case,

> In the context of a criminal statute, that which is done willfully or purposefully rather than accidentally or involuntarily is done intentionally; being a state of mind, the intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.

*State v. Meyer*, 236 Neb. 253, 255, 460 N.W.2d 656, 658 (1990). In that case, the father had attempted to introduce evidence that he stopped paying child support because the mother was no longer making mortgage payments and because the child had been placed in foster care. We noted:

> Meyer does not claim that he accidentally or involuntarily neglected to make the payments; rather, he professes to have had good reasons for willfully and purposefully refraining from so doing. Thus . . . he is concerned not with his intent, but with his motives for knowingly refraining from doing that which he was ordered to do. The evidence with which he is concerned may, in Meyer's own mind, explain why he chose to act as he did, but it does not negate his intent to so act.

*Id.*

We could repeat this statement and simply substitute Beck's name because, like Meyer, Beck does not claim that he simply neglected to make the payments, but suggests that he had a good reason for doing so.

We have never stated that visitation rights and child support payments may be linked such that the failure to provide one shall lead to an excuse not to provide the other. In a civil contempt proceeding, we held:

> The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support to exercise his rights of visitation does not justify the father's withholding the payment of child support. The father is not without remedy and may make application to the court for further orders requiring the mother to permit the father to exercise his right of visitation. The right of visitation, however, is not a quid pro quo for the payment of child support and the mother's action does not justify the father's failure to pay.
>
> . . . .
>
> . . . Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made. The disposition of minor children and provision for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances as disclosed to it. When a court orders the payment of child support, it means to have such order followed.

*Eliker v. Eliker*, 206 Neb. 764, 773-74, 295 N.W.2d 268, 273 (1980).

Beck provided no evidence that he made any attempt to have the decree modified or to have its visitation provisions enforced. We make no finding as to whether his ex-wife did interfere with his visitation. We do find that the evidence and depositions which Beck sought to provide were irrelevant to the issue of his intentional failure to pay child support and therefore were not admissible. We affirm Beck's convictions for criminal nonsupport.

As to the appellant's assignments of error relating to

sentencing, we reach a slightly different result. Each of Beck's convictions was for a Class IV felony, which provides for a maximum of 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105(1) (Reissue 1989). He was sentenced to 20 to 60 months' imprisonment on each count, with only two sentences to run consecutively. We repeat once again our rule that a sentence that is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Andersen, ante* p. 32, 468 N.W.2d 617 (1991). It is also within the trial court's discretion to direct that sentences imposed for separate crimes may be served consecutively. *Andersen, supra*. We do not find that the trial court abused its discretion in sentencing.

However, we disagree with the trial court's order concerning restitution. The ledger sheets of the clerk of the district court, which sheets were received in evidence, indicate that as of November 30, 1989, Beck's total delinquency stood at $11,463. Garnishment proceedings had been started in late November 1989, so apparently some additional payments had been credited to the account by the time of the sentencing in May 1990. The record does not indicate how the trial court determined that the amount of restitution should be $11,008. In fact, the bill of exceptions indicates that the court ordered restitution in the amount of $10,008, while the judgment indicates $11,008. Whatever the actual figure of Beck's child support arrearage, he cannot be ordered to pay this amount through a criminal prosecution.

Nebraska law provides that "[a] sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense *for which the defendant has been convicted*." (Emphasis supplied.) Neb. Rev. Stat. § 29-2280 (Reissue 1989).

As we recently held in *State v. Escamilla*, 237 Neb. 647, 652, 467 N.W.2d 59, 63 (1991), "[Section] 29-2280 does not permit a court to order an offender to make restitution on a charge of which the offender is not convicted . . . ." Beck was convicted only of failure to pay child support for the months of May, June, July, August, September, October, and November 1989.

Pursuant to the decree of dissolution, he was to pay $75 per month. His restitution should have been based on only the 7 months for which he was convicted, a total of $525. This court cannot and will not serve as a civil collection agency for child support arrearage. We find that Beck should have been ordered to pay $525 as restitution, and we affirm Beck's conviction in all other respects.

AFFIRMED AS MODIFIED.

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## STATE OF NEBRASKA, ON BEHALF OF THE MINOR CHILD ANGELA GARCIA, APPELLANT, V. ROBERT GARCIA, APPELLEE.

471 N.W.2d 388

Filed June 28, 1991. No. 89-032.

1. **Actions: Child Support: Prosecuting Attorneys: Paternity: Garnishment.** It is the duty of the county attorney to take action against a nonsupporting parent of a dependent child and to initiate either a criminal or a civil child support enforcement action against this parent. The county attorney's duties include establishing paternity and obtaining support for children born out of wedlock, enforcing child support orders through income withholding, and petitioning for a support order when no such order exists.
2. **Actions: Child Support: Prosecuting Attorneys.** The county attorney's obligation is to proceed on behalf of dependent children due child support from a nonsupporting parent.
3. **Actions: Child Custody: Prosecuting Attorneys: Conflict of Interest.** The county attorney may not represent both the interests of the child and the interests of a parent when the issue of custody of the child is raised.
4. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right 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, and fairness of the judicial process.
5. **Constitutional Law: Actions: Legislature.** Neb. Const. art. V, § 22, permits the state to consent to suit against itself on such terms and conditions as the Legislature may prescribe. This provision of the Constitution is not self-executing. The Legislature must act to make the provisions of § 22 available.

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

Robert M. Spire, Attorney General, and Royce N. Harper for appellant.

Charles W. Campbell, Special Prosecutor.

No appearance for appellee.

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

WHITE, J.

The State of Nebraska appeals from the decision of the Seward County District Court permitting appointment of a special prosecutor to replace the Seward County Attorney in a civil child support action and assessing against the Department of Social Services (DSS) fees and expenses incurred by the special prosecutor.

At the request of DSS, the Seward County Attorney filed a civil petition on April 5, 1988, seeking child support from Robert Garcia on behalf of Angela Garcia. Angela is the minor child of Robert Garcia and Candice D. Garcia, who were divorced in 1983. The original divorce decree did not provide for the support of Angela, but granted custody to Candice Garcia. Robert Garcia filed an answer and counterclaim to the child support petition requesting that he now be given custody of Angela.

Because the custody issue was raised by Robert Garcia in his counterclaim, the Seward County Attorney felt he had a conflict of interest and filed a motion for appointment of a special prosecutor. The district court appointed the prosecutor, and a settlement was later reached by the parties. The special prosecutor then filed an application for fees, and a hearing in the Seward County District Court was scheduled.

The district court found that implicit in every application to determine paternity and obtain support for a minor child is a preliminary determination of custody. The court stated that DSS should have known of this implicit finding and ruled that in this case, because the issue of custody was raised prior to the determination of support, fees incurred by a special prosecutor should be assessed against DSS because it initiated the action. The court then entered a judgment against DSS in the amount

of $300 for fees incurred by the special prosecutor in this case.

Although the State contested the assessment of fees against DSS at oral argument and in its brief requests this court to reverse the district court's decision allowing the fees, the State has failed to assign this point as error. Rather, the State assigns as error the Seward County prosecutor's decision to withdraw from the case and the district court's decision to permit the appointment of the special prosecutor.

We reverse the decision of the district court and hold that the district court's decision to appoint a special prosecutor in this case was in error, as was its decision to assess fees for the prosecutor against DSS.

Neb. Rev. Stat. § 43-512.01 (Reissue 1988) mandates that it is the duty of the county attorney to take action against a nonsupporting parent of a dependent child and to initiate either a criminal or a civil child support enforcement action against this parent. Neb. Rev. Stat. § 43-512.03 (Reissue 1988) makes more explicit the duties of the county attorney in obtaining and enforcing orders for child support, including establishing paternity and obtaining support for children born out of wedlock, enforcing child support orders through income withholding, and petitioning for a support order when no such order exists. In this case Robert and Candice Garcia were married at the time of Angela's birth, and Robert Garcia readily acknowledges his paternity. In his counterclaim he asked only for custody of his daughter.

The county attorney's obligation is to proceed on behalf of dependent children due child support from a nonsupporting parent. We agree with the Nebraska State Bar Association's advisory opinion that the county attorney may not represent both the interests of the child and the interests of a parent when the issue of custody of the child is raised. The county attorney's duties are clearly set forth in the statutes above. These duties do not include involvement in the determination of custody of a dependent child. Therefore, no conflict existed.

In this case Robert Garcia raised the issue of custody of his minor daughter as a part of the civil child support proceedings, and the county attorney determined that he was under a conflict of interest. A special prosecutor was appointed by the

court to replace the county attorney. We fail to see how appointment of the special prosecutor solved any conflict of interest problem in this case. When the county attorney declined to proceed with the civil support proceeding against Robert Garcia, the special prosecutor simply stepped into the shoes of the county attorney. It would have been equally unethical for the special prosecutor to proceed with the civil support action against Robert Garcia and at the same time become involved in the custody battle between Robert and Candice Garcia. Therefore, appointment of the special prosecutor did nothing to eliminate the supposed conflict of interest. We find the district court's appointment of the special prosecutor to be in error. However, since the parties have settled the matter, the only remaining issue is who should pay the expenses for the special prosecutor. We find the district court's decision to assess fees for the special prosecutor against DSS in derogation of the State's sovereign immunity. We note plain error by the district court and raise the issue on our own motion.

> " 'Plain error' is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right 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, and fairness of the judicial process."

*In re Interest of A.M.H.*, 233 Neb. 610, 618, 447 N.W.2d 40, 46 (1989) (quoting *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989)).

Neb. Const. art. V, § 22, states that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." In *Gentry v. State,* 174 Neb. 515, 118 N.W.2d 643 (1962), we stated that this provision of the Constitution permits the state to consent to suit against itself on such terms and conditions as the Legislature may prescribe. This provision of the Constitution is not self-executing. The Legislature must act to make the provisions of § 22 available. *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985). The Nebraska Legislature has previously

enacted many statutes which allow the state to be sued in its own courts. See, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990) (State Tort Claims Act); Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987 & Cum. Supp. 1990) (Administrative Procedure Act).

In this case the district court entered judgment for the special prosecutor's fees against DSS. The judgment was entered as a result of the State's prosecution of Robert Garcia for child support payments and is the equivalent of a suit against the State. We do not find any statute in which the Legislature has permitted a judgment for attorney fees to be entered against the State in an action for child support payments. In our review of articles 1, 2, 5, 7, 9, and 14 of chapter 43 of the Nebraska statutes, we note that DSS bears the cost of various services performed for the protection of juveniles in this state. See, Neb. Rev. Stat. §§ 43-258(4) and 43-284.02 (Reissue 1988).

The various costs borne by DSS do not include payment of fees incurred by a special prosecutor appointed by the court in a child support action. The Legislature has made no provision for payment of attorney fees by DSS in child support actions, and thus any judgment against the State for these fees violates state sovereignty. We do not determine at this time who is responsible for payment of fees for a special prosecutor. We do hold, however, that the district court cannot simply enter a judgment for fees against the State without specific legislative authorization. The decision of the district court is reversed.

REVERSED.