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REPORTS OF CASES

DECIDED BETWEEN

JULY 10, 1992 and DECEMBER 10, 1992

IN THE

Supreme Court of Nebraska

VOLUME CCXLI

PEGGY POLACEK

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
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		George A. Thompson	Papillion
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		Donald E. Endacott	Lincoln
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman Robert E. Otte Darvid D. Quist	Fremont Dakota City Blair
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Ninth	Buffalo, Hall	John P. Icenogle James Livingston Joseph D. Martin	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Alfred J. Kortum Robert O. Hippe John D. Knapp Brian Silverman	Chadron Gering Gering Kimball Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
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Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
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		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
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		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

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Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
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Twelfth	Buffalo and Sherman	Gerald R. Jorgensen	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-86-158: **Patton v. Howard.** By order of the court, bankruptcy stay lifted; appeal dismissed.

No. S-89-733: **Cunningham v. State.** Stipulation allowed; appeal dismissed.

No. S-89-1454: **Staman v. Staman.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-90-299: **First Nat. Bank of Paullina v. Prosser.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-90-355: **Ritner v. Seaway Importing Co.** Stipulation allowed; appeal dismissed.

No. S-90-486: **In re Estate of Martin.** Appeal dismissed. See Rule 7A(2).

No. S-90-614: **Kean International v. Phipps.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-90-722: **Washington Cty. Bank v. Douglas.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-218: **Supervisory Employees Bargaining Assn. v. City of Bellevue.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-91-422: **Wiechman v. U.S. Slo-Pitch Softball Assn.** Stipulation allowed; appeal dismissed without prejudice; each party to pay own costs.

No. S-91-613: **Bakhit v. Oil Products Co.** Stipulation allowed; appeal dismissed.

No. S-91-654: **State v. Aviles.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-676: **Purbaugh v. Topp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-91-683: **Marshall v. Marshall.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-91-711: **In re Interest of Keeton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-915: **State ex rel. Brown v. County Superintendent.** Appeal dismissed as moot. See Rule 7A(2).

No. S-91-1039: **State ex rel. Brown v. County Superintendent.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-92-391: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-92-892: **State v. Miller.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. A-89-1459: **Whiteside v. FirsTier Bank**, 1 NCA 36 (1992). Petition of appellee for further review overruled.

No. A-89-1487: **Rigatuso v. Lowe**, 1 NCA 439 (1992). Petition of appellant for further review overruled.

No. A-90-005: **Cook v. Rector**, 1 NCA 213 (1992). Petition of appellant for further review overruled.

No. A-90-043: **Andrysik v. Kroupa**, 1 NCA 218 (1992). Petition of appellee for further review overruled.

No. A-90-060: **Cummings Enterprises v. City of Omaha**, 1 NCA 12 (1992). Petition of appellant for further review overruled.

No. A-90-081: **Hubbard v. Hubbard**, 1 NCA 266 (1992). Petition of appellee for further review overruled.

No. A-90-128: **Jones v. Harwager**, 1 NCA 277 (1992). Petition of appellant for further review overruled.

No. A-90-195: **Stodola v. Hartford Steam Boiler Insp. & Ins. Co.**, 1 NCA 238 (1992). Petition of appellee for further review overruled.

No. A-90-220: **Van Wey v. City of Grand Island**, 1 NCA 293 (1992). Petition of appellee for further review overruled.

No. A-90-237: **Walker v. Omaha Paper Co.**, 1 NCA 1383 (1992). Petition of appellant for further review overruled.

No. A-90-274: **Harz Mktg. v. MidAmerican Long Distance Co.**, 1 NCA 340 (1992). Petition of appellant for further review overruled.

No. A-90-274: **Harz Mktg. v. MidAmerican Long Distance Co.**, 1 NCA 340 (1992). Petition of appellee for further review overruled.

No. A-90-274: **Harz Mktg. v. MidAmerican Long Distance Co.**, 1 NCA 696 (1992). Petition of appellant for further review

overruled.

No. A-90-319: **State v. Dixon**, 1 NCA 746 (1992). Petition of appellant for further review overruled.

No. S-90-332: **Alder v. First Nat. Bank & Trust Co.**, 1 NCA 506 (1992). Petition of appellant for further review sustained.

No. A-90-361: **Benzel v. Gunter**, 1 NCA 510 (1992). Petition of appellant for further review overruled.

No. A-90-435: **Kaiman v. Mercy Midlands Medical & Dental Plan**, 1 NCA 453 (1992). Petition of appellee for further review overruled.

No. A-90-531: **Childs v. Godberson**, 1 NCA 521 (1992). Petition of appellant for further review overruled.

No. A-90-536: **Nelson v. Nemaha Cty. Hosp.**, 1 NCA 1009 (1992). Petition of appellee for further review overruled.

No. A-90-565: **McHenry v. Jones**, 1 NCA 850 (1992). Petition of appellant for further review overruled.

No. A-90-585: **Diers v. Van Diest Supply Co.**, 1 NCA 1099 (1992). Petition of appellee for further review overruled.

No. A-90-616: **Blaha Investments v. Kizzier Chevrolet Co.**, 1 NCA 1285 (1992). Petition of appellant for further review overruled.

No. A-90-621: **Ehlert v. Coppi**, 1 NCA 1018 (1992). Petition of appellant for further review overruled.

No. A-90-668: **Bain & Co. v. Blankenau**, 1 NCA 1031 (1992). Petition of appellant for further review overruled.

No. S-90-671: **First United Bank v. First Am. Title Ins. Co.**, 1 NCA 1158 (1992). Petition of appellant for further review sustained.

No. S-90-881: **Giese v. Giese**, 1 NCA 1485 (1992). Petition of appellee for further review sustained.

No. S-90-888: **State v. Ellington**, 1 NCA 668 (1992). Petition of appellant for further review sustained.

No. A-90-898: **State v. Brand**, 1 NCA 1172 (1992). Petition of appellant for further review overruled.

No. S-90-949: **Stratbucker Children's Trust v. Zoning Bd. of Appeals**, 1 NCA 1108 (1992). Petition of appellee for further review sustained.

No. A-90-1143: **State v. Zarasua**, 1 NCA 1187 (1992). Petition of appellant for further review overruled.

No. A-91-024: **Adams Bank & Trust v. Santero**, 1 NCA 1649 (1992). Petition of appellant for further review overruled.

No. A-91-037: **State v. Brock**, 1 NCA 615 (1992). Petition of appellant for further review overruled.

No. A-91-151: **State v. Love**, 1 NCA 866 (1992). Petition of appellant for further review overruled.

No. S-91-192: **State v. Childs**, 1 NCA 478 (1992). Petition of appellant for further review sustained.

No. A-91-262: **State v. Clark**,1 NCA 1652 (1992). Petition of appellant for further review overruled.

No. A-91-320: **State v. Kennedy**, 1 NCA 621 (1992). Petition of appellant for further review overruled.

No. A-91-344: **State v. Woodruff**, 1 NCA 813 (1992). Petition of appellant for further review overruled.

No. A-91-352: **State v. Shannon**, 1 NCA 817 (1992). Petition of appellant for further review overruled.

No. A-91-400: **State v. Neely**, 1 NCA 1123 (1992). Petition of appellant for further review overruled.

No. S-91-403: **State v. Reynolds**, 1 NCA 1429 (1992). Petition of appellee for further review sustained.

No. S-91-408: **State v. Filkin**, 1 NCA 1054 (1992). Petition of appellee for further review sustained.

No. S-91-408: **State v. Filkin**, 1 NCA 1054 (1992). Petition of appellant for further review overruled.

No. A-91-412: **State v. Greenhagen**, 1 NCA 820 (1992). Petition of appellant for further review overruled.

No. A-91-427: **State v. Britt**, 1 NCA 1308 (1992). Petition of appellant for further review overruled.

No. A-91-427: **State v. Britt**, 1 NCA 1308 (1992). Petition of appellee for further review overruled.

No. A-91-429: **State v. Max**, 1 NCA 1571 (1992). Petition of appellant for further review overruled.

No. A-91-505: **State v. Lampkin**, 1 NCA 821 (1992). Petition of appellant for further review overruled.

No. A-91-621: **State v. Harlan**, 1 NCA 575 (1992). Petition of appellant for further review overruled.

No. A-91-621: **State v. Harlan**, 1 NCA 575 (1992). Petition of appellee for further review overruled.

No. A-91-713: **State v. Murphy**, 1 NCA 1206 (1992). Petition

of appellee for further review overruled.

No. A-91-714: **State v. McGee**, 1 NCA 1440 (1992). Petition of appellant for further review overruled.

No. A-91-887: **State v. Gamblin.** Petition of appellant for further review dismissed as filed out of time.

No. S-91-899: **State v. Riley**, 1 NCA 629 (1992). Petition of appellee for further review sustained.

No. S-91-918: **Alexander & Alexander Inc. v. Coffey**, 1 NCA 871 (1992). Petition of appellant for further review sustained.

No. S-91-918: **Alexander & Alexander Inc. v. Coffey**, 1 NCA 871 (1992). Petition of appellee for further review sustained.

No. A-91-922: **Hogel v. Nugent.** Petition of appellant for further review overruled.

No. A-91-946: **Woehl v. IBP, inc.**, 1 NCA 938 (1992). Petition of appellant for further review overruled.

No. A-91-981: **State v. Denson.** Petition of appellant for further review overruled.

No. A-91-999: **State v. Kennedy.** Petition of appellant for further review overruled.

No. S-91-1016: **State v. Philipps**, 1 NCA 1251 (1992). Petition of appellee for further review sustained.

No. A-91-1017: **State v. Richter.** Petition of appellant for further review overruled.

No. A-91-1110: **Ditter v. State**, 1 NCA 708 (1992). Petition of appellant for further review overruled.

No. A-91-1117: **Cavanaugh v. deBaudiniere**, 1 NCA 713 (1992). Petition of appellee for further review overruled.

No. A-91-1169: **State v. Young.** Petition of appellant for further review overruled.

No. A-91-1204: **State v. Klawonn.** Petition of appellant for further review overruled.

No. A-92-026: **State v. Peters.** Petition of appellant for further review overruled.

No. A-92-030: **Hroch v. City of Omaha.** Petition of appellant for further review overruled.

No. A-92-035: **State v. Baker.** Petition of appellant for further review overruled.

No. A-92-064: **State v. Jakes.** Petition of appellant for further review overruled.

No. A-92-151: **State v. Hurtado.** Petition of appellant for further review overruled.

No. A-92-152: **State v. Hurtado.** Petition of appellant for further review overruled.

No. S-92-206: **State v. Reimers.** Petition of appellant for further review sustained.

No. A-92-308: **State v. Whited**, 1 NCA 1598 (1992). Petition of appellant for further review dismissed for lack of jurisdiction.

No. A-92-343: **State v. Wichman.** Petition of appellant for further review overruled.

No. A-92-369: **Farrell v. Shortridge.** Petition of appellant for further review overruled.

No. A-92-403: **State v. Kingsbury.** Petition of appellant for further review dismissed for lack of jurisdiction.

No. A-92-420: **State v. Cole.** Petition of appellant for further review overruled.

No. A-92-429: **Newell v. United Air Lines.** Petition of appellant for further review overruled.

No. A-92-445: **State v. Johnson.** Petition of appellant for further review overruled.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JAY T. BOYER, APPELLANT, V. EDVERT H. ADEN AND CALVIN H. GULLION, COUNTY CLERK OF GAGE COUNTY, NEBRASKA, AND ELECTION COMMISSIONER, APPELLEES.

486 N.W.2d 22

Filed July 10, 1992. No. S-89-1256.

1. **Voting: Proof.** A contestant has the burden of proving that the illegal votes were cast and that those votes altered the results of the election sufficiently to affect the outcome.
2. _____: _____. A contestant, in making his case on the controverted issue that illegal votes sufficient to change the result of the election were placed in the ballot box and counted, is required to prove both the illegal voting and the candidates for whom the illegal votes were cast.
3. **Statutes: Voting.** Statutory provisions regulating the conduct of an election are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself.

Appeal from the District Court for Gage County: ORVILLE L. COADY, Judge. Affirmed.

Lyle Joseph Koenig for appellant.

Roger L. Harris, of Dalke, Smith & Harris, for appellee Aden.

Randall L. Goyette, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Gullion.

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

WHITE, J.

Appellant, Jay T. Boyer, brings this action to set aside the results of an election held in Gage County on November 8, 1988. Appellee Edvert H. Aden was the successful candidate in

his bid for county supervisor of the sixth district of Gage County. Boyer, the only other declared candidate, alleges that illegal votes were received and counted in that election. The district court found no misconduct and ordered appellant to pay the costs of the action.

FACTS

Appellant's name was the only name on the ballot for county supervisor in the above-mentioned election. Appellee Aden was a declared write-in candidate, who campaigned extensively door-to-door in Wymore, Nebraska, and took out an advertisement in the Wymore newspaper. In the ad was an illustration of a ballot with Aden's name printed on the line under Boyer's name and with the oval next to the line filled in completely. Election Commissioner Calvin H. Gullion, the other appellee, posted voting instructions at two Wymore polling wards that provided, in pertinent part: "To write in a name—you must blacken the oval . . . and write the name on the line provided, where applicable." The words "[t]o write in" and "must" were printed in darker and larger type than the rest of the text, therefore specifically emphasizing those words. Aden won the election by a 69-vote margin.

Parties stipulated at trial that neither party had engaged in wrongdoing. Appellant contends that (1) no state law has been identified requiring that voters be informed about a write-in and that (2) Gullion did not contact the Secretary of State about the instructions and therefore did not have approval for their use.

ASSIGNMENTS OF ERROR

Appellant Boyer alleges that the district court erred in not finding that illegal votes were received or that there were illegal votes sufficient to influence the outcome of the election.

DISCUSSION

The case law surrounding this case, while not recent, is nevertheless solid—and more importantly, legally and logically sound. This court has adopted and adhered to a commonsense approach to election-result contests:

> We do not believe that courts should adopt and apply

> arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be.

State ex rel. Brogan v. Boehner, 174 Neb. 689, 698, 119 N.W.2d 147, 153 (1963).

Clearly, appellant has the burden of proving that the illegal votes were cast and that those votes altered the results of the election sufficiently to affect the outcome. We said in *Mehrens v. Election Canvassing Board*, 134 Neb. 151, 154, 278 N.W. 252, 253 (1938):

> Contestant, in making his case on the controverted issue that illegal votes sufficient to change the result of the election were placed in the ballot box and counted, was required to prove both the illegal voting and the candidates for whom the illegal votes were cast. *White v. Slama*, 89 Neb. 65, 130 N.W. 978 [1911]; *Mosiman v. Weber*, 107 Neb. 737, 187 N.W. 109 [1922]. There is no evidence to identify any candidate for whom illegal votes were cast.

Appellant contends that the instructions set forth in Neb. Rev. Stat. §§ 32-451 and 32-4,142 (Reissue 1988) are the only ones authorized to be displayed at a polling place. These statutes provide that the county clerk or election commissioner of each county shall cause the instructions to be printed in large type on cards.

We have previously held that statutory provisions regulating the conduct of an election are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself. It is not the policy of the law to disenfranchise voters who have complied with the mandatory provisions of the law because of mistakes, negligence, or misconduct of election officials. *Haggard v. Misko*, 164 Neb. 778, 83 N.W.2d 483 (1957). See *Greathouse v. School District*, 155 Neb. 883, 54 N.W.2d 58 (1952).

The record and case law simply do not support appellant's contentions. We find that no illegality or unfairness was committed by election officials in the function of providing

instructions on the voting procedure in regard to write-in candidates. No name was mentioned on the instruction posting, and absent evidence to the contrary, we cannot infer that the instruction was in any way suggestive. No fraud was committed in the conducting of this election. Due to our holding that no illegal votes were received, we do not address the issue of the sufficiency of illegal votes to alter the outcome.

Both of appellant's assignments of error must fail, and thus, we affirm the finding of the district court in its entirety.

AFFIRMED.

PERRY CROW, APPELLANT, V. RALPH L. GIEBELHAUS AND DONNA R. GIEBELHAUS, APPELLEES.

486 N.W.2d 207

Filed July 10, 1992. No. S-89-1324.

1. **Demurrer: Pleadings: Final Orders.** A court's dismissal of an action after a demurrer has been sustained to a petition and a plaintiff declines to replead is a final order.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
3. **Demurrer: Pleadings.** If a demurrer to a petition is sustained and the defective pleading can be remedied by amendment, the plaintiff may amend, with or without assessment of costs, as the court in its discretion may direct.
4. _____: _____. When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition.
5. _____: _____. After a demurrer has been sustained, but there is a reasonable possibility that a defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

Leonard Dunker for appellant.

James E. Gordon and David A. Hecker, of Erickson & Sederstrom, P.C., for appellees.

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

SHANAHAN, J.

Perry Crow commenced a negligence action against Ralph L. Giebelhaus and Donna R. Giebelhaus concerning Crow's bodily injuries. Giebelhauses jointly demurred and claimed that Crow's petition did not allege sufficient facts to state a cause of action. See Neb. Rev. Stat. § 25-806(6) (Reissue 1989) (insufficient factual allegations for a cause of action). The district court for Lancaster County sustained the Giebelhaus demurrer, failed to allow Crow an opportunity to amend his petition, and dismissed the action.

A court's dismissal of an action after a demurrer has been sustained to a petition and a plaintiff declines to replead is a final order. See, *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991); *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

STANDARD OF REVIEW

"In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader." *Balfany v. Balfany*, 239 Neb. at 392, 476 N.W.2d at 683. See, also, *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988).

> "When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial."

Security Inv. Co. v. State, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989) (quoting from *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988)). Accord *Balfany v. Balfany*,

supra.

"As used in § 25-806(6) concerning a demurrer, a statement of 'facts sufficient to constitute a cause of action' means 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " *Schuyler State Bank v. Cech*, 228 Neb. at 593, 423 N.W.2d at 468. Accord *Balfany v. Balfany, supra*.

CROW'S PETITION

In framing his petition, Crow apparently relied on *Rogers v. Navajo Freight Lines, Inc.*, 186 Neb. 502, 184 N.W.2d 623 (1971), wherein the plaintiff, who was not employed by the defendant, was, nevertheless, solicited by defendant's employees to assist in loading a truck and was injured in a loading accident as the result of negligence by one of the defendant's employees. In *Rogers*, this court affirmed the plaintiff's judgment in the negligence action. We note that, more recently, in *Trackwell v. Burlington Northern RR. Co.*, 235 Neb. 224, 454 N.W.2d 497 (1990), this court also recognized a negligence cause of action by a state trooper against a railroad, when the trooper was injured while assisting the railroad's employees in removal of a derailed track car which was blocking the railroad's main line.

According to Crow's petition, on October 21, 1985, the date of the accident, Crow was employed by Wyuka Cemetery, a public corporation, for which Ralph Giebelhaus was the general manager. Ralph Giebelhaus and another Wyuka employee, Donna Giebelhaus, were partners in Giebelhaus Memorials, which, independent of Wyuka Cemetery, sold, delivered, and installed cemetery monuments. As a result of his managerial capacity with Wyuka Cemetery, Ralph Giebelhaus, for the benefit of Giebelhaus Memorials, directed Crow, as a Wyuka employee, to install, apparently at a gravesite in the cemetery, a 1-ton monument which someone had purchased from Giebelhaus Memorials. In the course of that installation, the monument fell on Crow's foot, causing both foot and leg injuries. In his petition, Crow specified Giebelhauses' negligence; for example, failure to provide adequate equipment, instruction, and assistance to Crow for installation

of the monument.

DISMISSAL OF CROW'S ACTION

When Giebelhauses demurred to Crow's petition "because it [did] not state facts sufficient to constitute a cause of action," the court sustained the Giebelhaus demurrer and thereupon dismissed the action without affording Crow an opportunity to amend his petition.

In an attempt to justify the district court's sustaining their demurrer, the Giebelhauses, in substance, contend that Crow cannot maintain a negligence action against them because Crow was an employee of Wyuka Cemetery when the accident and injuries occurred. However, Giebelhauses' position and contention are inconsistent with Nebraska's longstanding recognition of an employee's right to maintain a negligence action for common-law liability of third parties outside and notwithstanding the Nebraska Workers' Compensation Act. See, *Turner v. Metro Area Transit*, 220 Neb. 189, 368 N.W.2d 809 (1985); *Danner v. Walters*, 154 Neb. 506, 48 N.W.2d 635 (1951); *Thomas v. Otis Elevator Co.*, 103 Neb. 401, 172 N.W. 53 (1919); *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379, 172 N.W. 52 (1919). Cf. Neb. Rev. Stat. § 48-111 (Reissue 1988) (employer's general exemption from liability in an employee's action outside the Nebraska Workers' Compensation Act).

In Crow's appeal, however, the important feature of the district court's ruling is not the question of correctness in sustaining the Giebelhaus demurrer, but, rather, the manner in which the court disposed of the proceedings by dismissing Crow's action.

Neb. Rev. Stat. § 25-854 (Reissue 1989) states, "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct." Hence, if a demurrer to a petition is sustained and the defective pleading can be remedied by amendment, the plaintiff may amend, with or without assessment of costs, as the court in its discretion may direct. See *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition unless it is clear that no reasonable

possibility exists that repleading will correct the defective petition. See, *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984); *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981). After a demurrer has been sustained, but there is a reasonable possibility that a defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion. See *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977).

In Crow's case, after the court sustained the Giebelhaus demurrer, the court immediately dismissed Crow's action without affording Crow the opportunity to amend his petition. Under the circumstances, and assuming that sustaining the demurrer was proper in the first instance, we are unable to conclude that Crow cannot allege a negligence cause of action against Giebelhauses if Crow has not already done so in his petition challenged by the Giebelhaus demurrer. In any event, the district court's dismissal of Crow's action without an opportunity to replead in an amended petition is an abuse of discretion by the trial court.

Accordingly, we reverse the judgment of the district court and remand this cause to the district court with direction to reinstate Crow's action for further proceedings.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., not participating.

LOIS PEGRAM, APPELLANT, V. STEVE EASTERLY, APPELLEE.

486 N.W.2d 206

Filed July 10, 1992. No. S-89-1373.

Damages: Verdicts: Juries. Where the amount of damages awarded by a jury is clearly inadequate, the verdict must be set aside.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Richard Douglas McClain for appellant.

No appearance for appellee.

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

HASTINGS, C.J.

Plaintiff, Lois Pegram, appeals from a jury verdict and judgment in her favor in the amount of $100 and the overruling of her motion for a new trial, assigning five specific errors, all of which conclude with a complaint as to the inadequacy of the verdict. We reverse and remand.

The defendant, Steve Easterly, resided in premises he had leased from the plaintiff. A fire destroyed the premises and a great deal of personal property belonging to the plaintiff. Plaintiff filed suit, alleging that the fire resulted from the negligence of the defendant in that he was in the act of boiling marijuana in alcohol and, by allowing the container of alcohol to remain open, permitted fumes from the alcohol to escape, which in turn were ignited by a spark when the refrigerator nearby turned on. The defendant admitted that the fire was caused when fumes from an open container of alcohol were ignited, but denied that he was boiling marijuana in alcohol and denied that he was negligent.

Although the proof of damages was somewhat flimsy, nevertheless, the plaintiff testified without objection as to values of many items of personal property, including antiques which totaled several thousand dollars. A verdict of $100 under the circumstances was obviously inadequate. Where the amount of damages awarded by a jury is clearly inadequate, the verdict must be set aside. *Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins.*, 220 Neb. 319, 370 N.W.2d 86 (1985).

The judgment of the district court is reversed and the cause remanded for a new trial on all issues.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEVEN L. HUSEN, APPELLEE, V. NANCY K. HUSEN, APPELLANT.

487 N.W.2d 269

Filed July 10, 1992. No. S-89-1429.

1. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
4. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
5. **Contracts: Intent.** If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties to the document must be determined from the contents of the document.
6. **Contracts.** The meaning of an unambiguous contract presents a question of law.
7. _____. A contract must be construed as a whole and, if possible, effect must be given to every part thereof.
8. **Contracts: Intent.** A contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties.
9. _____: _____. A court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. More specifically, a court is not free to rewrite a contract so as to provide terms contrary to those which are expressed.
10. **Trial: Evidence: Appeal and Error.** As a general rule, to constitute reversible error in a civil case the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John A. Wolf, of Shamberg & Wolf, for appellant.

John B. McDermott, of McDermott, Depue & Zitterkopf, for appellee.

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

HASTINGS, C.J.

This is an appeal by the respondent, Nancy K. Husen, from an order dismissing her application to hold her former husband, the petitioner, Steven L. Husen, in contempt of court because of his failure to make certain alimony payments. The court determined that the remarriage of the respondent caused a termination of the alimony payments which respondent was seeking to collect under the decree of dissolution. The respondent assigns as error generally that the court incorrectly determined that the obligation to make alimony payments was terminated. We affirm.

The decree of dissolution was entered by the trial court on June 14, 1983. The decree, which tracked the property settlement agreement of the parties, provided in part as follows:

> 5. The Petitioner is hereby ordered to pay alimony to the Respondent as follows:
>
> a. The sum of One Thousand Five Hundred and No/100 Dollars ($1,500.00) per month commencing July 1, 1983, for a term of seventy-two (72) consecutive months. These payments shall terminate only upon the death of the Respondent.
>
> b. Commencing July 1, 1989, for a period of seventy-two (72) months consecutively, the sum of One Thousand Five Hundred and No/100 Dollars ($1,500.00) per month. These payments shall terminate upon any of the following occurrences: the remarriage of the Respondent or the death of either the Petitioner or the Respondent.
>
> This award of alimony shall not be modified or revoked by either party but for the reasons set forth herein.

The parties stipulated at trial that the respondent remarried on July 28, 1984, and divorced in March 1986. In addition, the parties stipulated that the petitioner made alimony payments in accordance with the provisions of paragraph 5a set out above, but has not made any payments since July 1, 1989, as originally provided for in paragraph 5b.

In response to the petitioner's failure to provide alimony after July 1, 1989, the respondent filed an affidavit for contempt and a motion and order to show cause which was

disposed of as previously mentioned.

The petitioner testified in court that his understanding of the provision was that he would pay alimony for the first 6 years after the divorce (which he had done) and for an additional period of 6 years if his former wife did not remarry in the interim period. It was his contention that because the alimony provided for in paragraph 5b was to terminate upon the remarriage of the respondent, her remarriage terminated any obligation of his to commence making those payments.

Respondent argues that it was her understanding that the second schedule of alimony payments would stop only if she remarried during that second 6-year period. That is, because she remarried and divorced before the beginning of the second 6-year period, she was eligible to begin receiving those payments until she might remarry during that period.

The attorney who drew the property settlement testified that his interpretation of the agreement was that a remarriage at any time would terminate the second set of alimony payments.

An acquaintance of the respondent testified that less than a year before respondent's remarriage, the respondent told her that she realized that upon her remarriage she would receive alimony only during the first 6-year period.

The foregoing evidence would have been admissible only if the contract was ambiguous. It was received over the respondent's objection. Respondent contended that the contract was not ambiguous. We agree for different reasons.

In *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 71, 474 N.W.2d 238, 245 (1991), this court quoted the following language from *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989), concerning ambiguous documents:

> "Whether a document is ambiguous is a question of law initially determined by a trial court. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). 'Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.' *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

"Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). See, also, *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties). The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties to the document must be determined from the contents of the document. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988)."

The meaning of an unambiguous contract presents a question of law. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

"A contract must be construed as a whole and, if possible, effect must be given to every part thereof." *Crowley v. McCoy*, 234 Neb. 88, 91, 449 N.W.2d 221, 224 (1989).

"A contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties." *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 563-64, 446 N.W.2d 729, 731 (1989).

Read in this manner, the contract provides for two alimony payment periods of 6 years each. The first period ran from July 1, 1983, to July 1, 1989, and was terminable only upon the death of the respondent. The second period of alimony payments was to start on July 1, 1989, and would last until July 1, 1995, unless terminated by the death of either party or the remarriage of the respondent. We do not find support for respondent's argument that "[p]aragraph 5(b) also clearly and

unambiguously states that the terms and conditions of the second schedule would not commence until July 1, 1989." Brief for appellant at 8. We find that the language in paragraph 5b plainly and unambiguously states only that the second period of alimony payments was to start on July 1, 1989, not that the terms and conditions of the second payment schedule would start anew on July 1, 1989, as contended by the respondent.

Respondent's interpretation of the alimony provision would have the absurd result that if the husband had died during the first 6-year period, his estate would still be required to pay alimony during the second 6-year period, because his death did not occur after July 1, 1989. Under the same analysis, the respondent would still be entitled to alimony if she had remained married to her second husband, because the remarriage did not take place after July 1, 1989.

> A court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990). More specifically, a court is not free to rewrite a contract so as to provide terms contrary to those which are expressed. See *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983).

Kozlik v. Emelco, Inc., 240 Neb. 525, 536, 483 N.W.2d 114, 121 (1992). The subject language is a bargained-for contractual provision. Although the respondent may be dissatisfied with the bargain she made, it is not for this court to rewrite the contract she executed. See *Kozlik, supra.*

This case is similar to *Rumbaugh v. Rumbaugh*, 229 Neb. 652, 428 N.W.2d 500 (1988), which also dealt with a property settlement agreement. The parties in *Rumbaugh* disagreed about the following provision which provided for the college education of their child:

> "The respondent further agrees that when said child graduates from high school, he will pay the yearly cost of the college education for said child for a maximum of 4 years beyond high school, said yearly total costs not to

> exceed the normal cost then in effect for attendance at the University of Nebraska at Lincoln, or one of the state public schools in Nebraska; that this cost will include, but not be limited to, tuition, mandatory or other special fees, book costs, [sorority costs,] and the like, but will not cover clothing or food costs . . . ."

Id. at 652-53, 428 N.W.2d at 501. When the father refused to pay certain education expenses, the mother filed a motion for contempt. The court ordered a consolidated hearing for contempt and modification. During the hearing, the trial court excluded the father's testimony concerning his interpretation of the education expenses provision. This court agreed with the trial court that the provision was unambiguous and that therefore testimony concerning the parties' intentions should be excluded.

Parol evidence should not have been received in this case. However, as a general rule, to constitute reversible error in a civil case the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). The admission of the evidence did not unfairly prejudice the respondent, since we determine that the property settlement unambiguously provides that a remarriage at any time precludes the second period of alimony payments. In any event, we determine as a matter of law that the only disputed question in this case was a question of law which we decide independently of the decision reached by the trial court and without relying upon any of the erroneously admitted evidence. See, *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *Stecker v. Stecker*, 197 Neb. 164, 247 N.W.2d 622 (1976). The trial court reached the correct conclusion.

Respondent also argues that the trial court erred in applying Neb. Rev. Stat. § 42-365 (Reissue 1988) to the case at hand because the parties had "otherwise agreed," thus making the statute inapplicable. It is true that the trial court's journal entry provided in part, "Where a remarriage is terminated by divorce, a wife is not entitled to reinstatement of a former husband's obligation to support her unless otherwise agreed

upon as provided Neb. Rev. Stat. §42-365." Again, we agree with the respondent's conclusion, but it avails her nothing. We conclude from the property settlement agreement, which is the basis for the decree generally, and without reference to § 42-365, that the petitioner's obligation under paragraph 5b terminated and was never revived following her remarriage.

The judgment of the district court is affirmed.

AFFIRMED.

JOYCE BEAUFORD, APPELLANT, V. FATHER FLANAGAN'S BOYS' HOME, A NEBRASKA NONPROFIT CORPORATION, APPELLEE.

486 N.W.2d 854

Filed July 10, 1992. No. S-89-1462.

1. **Juries: Evidence: Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong. A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
2. **Verdicts: Appeal and Error.** A jury's verdict will not be reversed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Jury Instructions: Proof: Appeal and Error.** In order to establish that a trial court's refusal to give a requested instruction was reversible error, a plaintiff must show that she was prejudiced by the court's refusal to give the tendered instruction, that the tendered instruction is a correct statement of the law, and that the tendered instruction is warranted by the evidence.
4. **Jury Instructions: Appeal and Error.** Regarding a claim of prejudice from an instruction given or a trial court's refusal to give a tendered instruction, the instructions given must be read conjunctively rather than in isolation.
5. _____: _____. If the instructions given, when 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 the instructions necessitating a reversal.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Joyce Beauford, pro se.

Joseph C. Byam, of Byam & Byam, for appellee.

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

BOSLAUGH, J.

The plaintiff, Joyce Beauford, brought this action seeking payment of certain medical bills under the health plan of the defendant, Father Flanagan's Boys' Home (Boys Town). The plaintiff has appealed from the judgment in her favor in the amount of $3,616.13. The plaintiff's assignments of error are that the trial court erred by failing to give an instruction on future damages and that the jury's verdict is not supported by the evidence.

The record shows that the plaintiff was employed by the defendant as a teacher from 1974 until March 28, 1981, when she left Boys Town because of an illness. The plaintiff did not return to work after that date.

On April 21, 1981, the plaintiff was notified that she would be terminated as a teacher on June 5, 1981, the end of the 1980-81 school term. The plaintiff did not return to work at any time prior to the end of the school term on June 5.

Prior to her termination, the plaintiff had elected to receive her salary on a 12-month basis for the 1980-81 school year. From March 28 until June 5, 1981, the plaintiff was paid her regular salary, but it was entitled "salary continuance" because she was on sick leave. From June 5, 1981, until August 30, 1981, the plaintiff was paid the balance of her regular salary for the 1980-81 contract. In addition to her salary, all of the plaintiff's medical bills were paid through August 31, 1981.

The defendant's employee handbook states that "Salary continuance benefits will cease whenever an employee refuses to cooperate with the Home in securing necessary information to validate a claim or a continuing illness." In its medical plan,

the defendant also "reserves the right to have a physician it designates examine the individual whose loss is the basis of a claim when and so often as it may reasonably require."

The defendant terminated the plaintiff's salary continuance and health and dental plan because she would not submit to an examination by its physician on September 3, 1981.

The plaintiff challenged her termination through grievance procedures, and an arbitration hearing was held before Dean Kratz. On March 5, 1982, Kratz found that the plaintiff had violated the defendant's rules and should have been disciplined, but not discharged. Kratz ordered the plaintiff reinstated without backpay, effective April 12, 1982.

After the arbitration decision, the plaintiff did not return to work at Boys Town. The defendant notified her that she was not eligible for salary continuance or health insurance coverage until she submitted to an examination by the defendant's physician. The plaintiff was examined by the defendant's physician on June 24, 1982; however, no medical coverage was provided by the defendant.

In June 1982, the plaintiff was found eligible for long-term disability benefits from the defendant's disability insurance carrier, Union Mutual Insurance Company. The disability benefits were retroactive to September 1981. The plaintiff received disability payments from Union Mutual in the total sum of $25,399.04 for a 2-year period from September 28, 1981, through September 28, 1983.

On August 18, 1983, the plaintiff was offered a teaching position at Boys Town. The plaintiff refused to consider the offer and has never returned to active employment with the defendant.

On September 12, 1984, the Social Security Administration found that the plaintiff was entitled to receive disability payments commencing November 17, 1983. The plaintiff continues to receive Social Security disability payments and medicare coverage.

The jury returned a verdict in favor of the plaintiff in the amount of $3,616.13. The verdict represented the amount of medical bills the defendant's health plan would have paid between the effective date of the plaintiff's reinstatement after

arbitration and the period shortly after the defendant offered the plaintiff a teaching position.

At trial, the plaintiff requested an instruction on future damages for "medical and hospitalization" expenses; however, the plaintiff did not tender to the trial court a specific instruction for future medical and hospitalization expenses. The plaintiff objected to instruction No. 15 because it failed to include future medical, health, and dental expenses, but the trial court overruled the objection.

The plaintiff presented no evidence to warrant an instruction on future damages. The plaintiff has not worked at Boys Town since March 28, 1981. Under the express terms of the defendant's benefit contracts, the plaintiff is not entitled to any future benefits because she is not "actively working" at Boys Town.

The only evidence in the record relating to the plaintiff's medical treatment is the testimony of Dr. John F. Bookhardt, who examined the plaintiff just prior to testifying that the plaintiff "requires medical treatment now and will require it . . . for an indefinite period of time." Dr. Bookhardt does not specify what type of medical treatment the plaintiff requires, who would administer the treatment, where the treatment would take place, the cost of the treatment, whether the treatment requires hospitalization, or whether the treatment would be routine or out of the ordinary. Dr. Bookhardt even questioned his own examination of the plaintiff, because "it was very difficult to get a forthright answer" from her.

In order to establish that a trial court's refusal to give a requested instruction was reversible error, a plaintiff must show that she was prejudiced by the court's refusal to give the tendered instruction, that the tendered instruction is a correct statement of the law, and that the tendered instruction is warranted by the evidence. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

The plaintiff has not established that the trial court's refusal to instruct on future damages was reversible error. No instruction on future damages was tendered to the trial court by the plaintiff, and there is no evidence in the record to warrant an instruction on future damages.

Regarding a claim of prejudice from an instruction given or a trial court's refusal to give a tendered instruction, the instructions given must be read conjunctively rather than in isolation. If the instructions given, when 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 the instructions necessitating a reversal. *Rose v. City of Lincoln, supra.*

The plaintiff has failed to show that the instructions given to the jury, when taken as a whole, were misleading, contained incorrect statements of law, or failed to cover the issues of the case. The plaintiff was not prejudiced by the trial court's refusal to instruct on future damages.

As to the plaintiff's argument that the evidence is insufficient to support the jury's verdict, this court has stated:

> A civil jury verdict will not be disturbed on appeal unless clearly wrong. . . . A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. . . .
>
> . . . .
>
> . . . It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. . . .

Chadron Energy Corp. v. First Nat. Bank, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990).

Furthermore, a jury's verdict will not be reversed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987).

The evidence in this case justified the jury's award to the plaintiff because she had not complied with the requirements of the defendant's benefit contracts and later abandoned her employment. The plaintiff was not eligible for health insurance benefits until she was examined by the defendant's physician. When the defendant offered the plaintiff a teaching position on

August 18, 1983, she refused to consider the offer. The jury could reasonably conclude that the plaintiff had abandoned her employment with the defendant and was not entitled to any further benefits under her contract of employment.

The judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

TERRY R. RADKE, APPELLANT, V. H. C. DAVIS SONS' MANUFACTURING CO., INC., A KANSAS CORPORATION, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A PUBLIC BODY CORPORATE, APPELLEES.

486 N.W.2d 204

Filed July 10, 1992. No. S-89-1473.

Constitutional Law: Limitations of Actions: Products Liability: Due Process: Equal Protection. Nebraska's 10-year statute of repose for products liability actions found in Neb. Rev. Stat. § 25-224(2) (Reissue 1989) does not violate the Due Process Clause, the Equal Protection Clause, or the open courts provision of the Nebraska or U.S. Constitutions.

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

William A. Wieland, of The Healey Wieland Law Firm, and, on brief, Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Mark R. Scherer and Waldine H. Olson, of Schmid, Mooney & Frederick, P.C., for appellee H. C. Davis Sons' Manufacturing Co.

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

PER CURIAM.

This is a civil suit in which the plaintiff-appellant, Terry R. Radke, seeks damages for injuries allegedly sustained when he fell into a mixing machine designed and manufactured by the

defendant-appellee H. C. Davis Sons' Manufacturing Co., Inc. (H. C. Davis). The Board of Regents of the University of Nebraska is also a named defendant, though its only interest is in subrogation for workers' compensation benefits paid by the university to the plaintiff. See Neb. Rev. Stat. § 48-118 (Reissue 1988).

The plaintiff's negligence and strict liability theories of recovery are both premised upon H. C. Davis' failure to equip the mixer in question with certain safety features which would allegedly have prevented the accident. H. C. Davis filed a motion for summary judgment which the trial court sustained based upon Nebraska's 10-year statute of repose for products liability actions. See Neb. Rev. Stat. § 25-224(2) (Reissue 1989). This appeal followed.

FACTUAL BACKGROUND

On November 20, 1984, during the course of his employment in a work-study program at the University of Nebraska at Lincoln, the plaintiff fell into a "Davis Precision Mix Batch Mixer, Model No. S-20," designed and manufactured by H. C. Davis. The plaintiff became so entangled in the shaft and agitator paddles that use of an acetylene torch was required to extricate him.

The university purchased two model S-20 mixing machines from H. C. Davis in 1966, which machines were delivered on June 8 and 21, respectively. There is no record of H. C. Davis selling the university any other mixers than the two sold in 1966. From this evidence H. C. Davis concludes, and the plaintiff does not contest the conclusion, that the mixer involved in the November 20, 1984, accident is one of the two sold to the university in 1966.

CONSTITUTIONALITY OF § 25-224(2)

Section 25-224(2) provides:

> 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.

The plaintiff does not contest the fact that this case involves a "product liability action," see Neb. Rev. Stat. § 25-21,180 (Reissue 1989), nor that the period of repose began to run in June 1966, see *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985) (statute of repose applicable to an allegedly defective product begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is placed into the stream of commerce by the manufacturer). Instead, the plaintiff bases his appeal solely on the alleged unconstitutionality of § 25-224(2).

The plaintiff argues that § 25-224(2) violates the Due Process and Equal Protection Clauses of the Nebraska and U.S. Constitutions, Neb. Const. art. I, § 3, and art. III, § 18, and U.S. Const. amend. XIV, as well as the open courts provision of the Nebraska Constitution, Neb. Const. art. I, § 13. Recently, this court considered and rejected the same arguments.

In *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991), the court reasoned that

> "[t]he 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."

Id. at 191, 469 N.W.2d at 548, quoting *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991). Because "the Legislature is free to create and abolish rights so long as no vested right is disturbed," and the plaintiffs failed to show that the 10-year repose period is either unreasonable or arbitrary, we upheld the constitutionality of § 25-224(2) in that case. *Spilker*, 238 Neb. at 192, 469 N.W.2d at 548. Today, we adhere to our previous decision.

Summary judgment is proper when the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). Having resolved the legal issues adversely to

the plaintiff, and in the absence of any dispute as to the expiration of the 10-year period in 1976, we affirm the trial court's action sustaining H. C. Davis' motion for summary judgment.

AFFIRMED.

WHITE, J., dissenting.

Nebraska's statute of repose for products liability actions separately classifies persons injured by a defective product more than 10 years after its purchase or lease and persons injured by a defective product less than 10 years after its purchase or lease. In the absence of provisions somehow relating the period of repose to the useful life of the product or discovery of the defect, the Legislature's classification satisfies neither the special legislation provision of the Nebraska Constitution nor the Equal Protection Clause of the U.S. Constitution. See, Neb. Const. art. III, § 18; U.S. Const. amend. XIV.

STATE OF NEBRASKA, APPELLEE, V. WAYNE K. BREWER, APPELLANT.
486 N.W.2d 477

Filed July 10, 1992. No. S-91-204.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. **Confessions: Appeal and Error.** A determination by a trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
3. **Motions to Suppress: Appeal and Error.** In deciding whether a trial court's ruling on a motion to suppress is erroneous, an appellate 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 motion.
4. **Motions to Suppress: Confessions: Proof.** Although the burden of showing a confession to have been voluntary is upon the State, at a suppression hearing it need establish such only by a preponderance of the evidence.
5. **Confessions: Evidence: Proof.** In order to be ruled voluntary, it must be shown at a suppression hearing that a statement, admission, or confession was not the

product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Thomas P. McKenney and Deborah D. Cunningham for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CAPORALE, J.

Following a jury trial, the defendant-appellant, Wayne K. Brewer, was adjudged guilty of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989). He asserts that the trial court erred in (1) overruling his motion to suppress his statements to the interrogating officers and (2) admitting those statements into evidence. We affirm.

In view of the narrow scope of the inquiry presented by the summarized assignments of error, a detailed recitation of the facts surrounding the murder giving rise to this appeal is not required.

We thus turn immediately to Brewer's contentions in connection with the first assignment of error, that his various statements to the interrogating officers should have been suppressed because he was denied counsel and because the statements were in any event not given intelligently, knowingly, and voluntarily.

The murder had taken place in the early morning hours of March 21, 1990, and a search for Brewer had begun. Brewer arrived at an office of the Douglas County sheriff with his mother at approximately 11 o'clock that night. He was not then under arrest; in fact, as Officer Gary Kratina, Brewer's mother, and Brewer himself testified, Brewer was told he could leave at any time. Even though Brewer was not then in custody, he was,

nonetheless, at about 11:10 p.m., read a rights advisory form, which he initialed and signed. The form advised that the interrogator was a police officer; that Brewer had a right to remain silent and not make any statements or answer any questions, but that anything he said could and would be used in court; that he had a right to consult with a lawyer and have the lawyer present during questioning; and that if he could not afford a lawyer, one would be appointed for him by the court. The form included a statement that with the foregoing knowledge, Brewer was willing to talk with the interrogator.

According to Kratina, when Brewer signed the form he appeared to understand the questions, responded clearly, and did not seem to be under the influence of drugs or alcohol. Moreover, Kratina stated that no threats, force, promises, or coercion of any kind were used to obtain the confessions.

According to Kratina, Brewer did not confess to any involvement in the murder during the initial discussion he had with Kratina and Officer George Whitmore. Approximately an hour later, Brewer asked to speak with his mother and, according to Kratina, did so for 5 to 10 minutes. Kratina then reentered the room and asked Brewer whether he was ready to talk. Brewer hesitated, but the mother interjected and stated, " 'You know, Wayne, you know why we came out here. Tell the man what happened.' "

However, Brewer and his mother claim that when they were together, they requested that Brewer be given an attorney. The mother claims that Kratina told Brewer that "he couldn't get no lawyer appointed unless they went to court, and he couldn't do that unless he was arrested, and at that point he wasn't arrested." Brewer asserts that he asked for an attorney when he initially arrived at the sheriff's office and again before he made a statement. As did his mother, Brewer also stated that Kratina told him he could not have an attorney until he was charged.

Brewer's testimony and that of his mother were contradicted by several of the interrogating officers. Kratina testified that Brewer never requested an attorney, but he told Kratina that he and his mother, on the way to the sheriff's office, decided against getting an attorney—" 'we just decided we didn't need one, we would come out here and talk to you and tell you the

story; it wasn't going to make any difference if I talked to an attorney or not' . . . ." Officer Randall Brunckhorst testified that he never told Brewer he could not have an attorney or that he could not leave. Officer Mike Buglewicz also stated that he never told Brewer he could not have an attorney.

After Brewer had spoken with his mother, he proceeded to give an extensive confession to Kratina in his mother's presence. It was at this time that Brewer was first implicated in the crime. When Brewer was finished, Kratina testified that he left the room and returned with Brunckhorst, who had a tape recorder. At that point, Brunckhorst reviewed the previously signed rights advisory form with Brewer and then recorded his confession. At the beginning of this first taped statement, the voices of Brunckhorst and Brewer can be heard as Brewer acknowledged his rights and then waived those rights and gave a confession. At the end of the tape recording, Brewer confirmed that the confession was given freely and voluntarily, without any threats or promises. The confession concluded at 2:35 a.m. on Thursday, March 22, 1990.

Upon completion of the recorded statement, Brewer was told that he was going to be charged with criminal homicide and booked. Thereafter, Brewer led Buglewicz and Officer Neil Paulison to where the victim's automobile had been dumped into the Missouri River. Kratina testified that at 11 a.m. on March 22, he went to the correctional center where he again met with Brewer. Brewer was again read his rights and again signed a rights advisory form. Kratina did not threaten, force, or coerce Brewer into talking, nor did he make any promises in order to persuade Brewer to talk. During the interview, Brewer told Kratina where specific pieces of evidence could be found. At 3:30 p.m. on the same day, Kratina received a radio message from his office that Brewer wanted to speak to him. For the third time Brewer signed a rights advisory form, and for the fourth time he waived his rights. On this occasion Brewer told Kratina where additional items of evidence had been abandoned. Brewer then led Kratina to the location.

Brewer next asked to speak to the prosecutor familiar with the case. Brewer was thereupon returned to the sheriff's office, where he met Deputy County Attorney Samuel Cooper. For the

fourth time Brewer signed a rights advisory form, and for the fifth time he waived his rights. For the second time Brewer gave a tape-recorded statement. Recorded at the beginning of the tape are Brewer's affirmative responses to the questions on the advisory form. In fact, Cooper specifically reviewed Brewer's right to have an attorney present at that time and told Brewer directly that there were no promises and that in all likelihood Brewer would be charged with first degree murder the following day. Nevertheless, Brewer agreed to speak.

Resolution of the first assignment of error is controlled by the rule that in determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. See, *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992); *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992). Specifically, a determination by a trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). Moreover, in deciding whether a trial court's ruling is erroneous, an appellate 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 motion. *State v. Utterback, supra*; *State v. Melton, supra*.

Implicit in the trial court's ruling on the suppression motion is the finding that Brewer did not ask for the services of an attorney. Given the conflict in the evidence in that regard, it cannot be said the finding is clearly wrong.

That brings us to the second aspect of the first assignment of error, the voluntariness of Brewer's statements. Although the burden of showing a confession to have been voluntary is upon the State, at a suppression hearing it need establish such only by a preponderance of the evidence. *State v. Cody*, 236 Neb. 69, 459 N.W.2d 195 (1990); *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989); *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988).

In order to be ruled voluntary, it must be shown at a suppression hearing that a

> statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.

State v. Melton, 239 Neb. at 796, 478 N.W.2d at 347. Accord, *State v. Haynie, supra.*

In order to find a statement, admission, or confession involuntary and therefore in violation of due process rights, such as Brewer claims to have been the case here, "coercive police conduct is a necessary predicate." *State v. Hankins*, 232 Neb. 608, 623, 441 N.W.2d 854, 868 (1989). This court has identified examples of such conduct.

> A nonexhaustive list of potentially material considerations in determining the voluntariness of statements in the context of inducements by prosecuting authorities includes whether (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf, (4) defendant is aware of his constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent.

State v. Haynie, 239 Neb. at 487, 476 N.W.2d at 912.

The record is devoid of any instances where the conduct of the interrogating officers was coercive. Outside of Brewer's averment that he was denied his right to counsel, which has been discussed and dismissed previously, Brewer presents no instances where the interrogating officers coerced him into giving a statement. Brewer's conduct overwhelmingly supports the State's assertion that he fully and completely cooperated

with the sheriff's officers.

The record establishes that Brewer was read his rights on five separate occasions; signed four separate rights advisory forms; voluntarily appeared at the sheriff's office during the initial investigation; voluntarily showed the sheriff's officers where the victim's automobile had been abandoned; voluntarily telephoned Kratina, telling him where the items of evidence could be found and directing him to the location; and voluntarily asked to speak, and gave a taped confession, to the deputy county attorney. Moreover, both tape-recorded confessions demonstrate that Brewer was fully informed of his rights and the implications of talking. During the recordings, Brewer stated that he was giving the confessions voluntarily and that no threats had been made or promises given to him.

Brewer's assertion in the second assignment of error, that the trial court erred in permitting his confessions to be admitted into evidence, is subsumed in his claim that they were obtained unconstitutionally. Once it was properly determined at the suppression hearing that the statements were voluntary and not otherwise the product of an impermissible interrogation, the statements became admissible. See, *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991); *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990); *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Because the record does not sustain the assignments of error, we, as stated earlier, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRADLEY S. ROENFELDT, APPELLANT.

486 N.W.2d 197

Filed July 10, 1992. No. S-91-340.

1. **Trial: Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling.

2. **Trial: Minors: Witnesses.** While no certain age has been deemed to be the age at which a child becomes competent to testify in a court of law, the court generally takes into consideration whether she is able to receive correct impressions by the senses, to recollect accurately, and to appreciate the moral duty to tell the truth.
3. **Trial: Minors: Witnesses: Appeal and Error.** The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion.
4. **Trial: Expert Witnesses: Sexual Misconduct: Minors: Jurors.** An expert may testify about sexual abuse in generalities, without being familiar with the alleged victim, because few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Mark A. Johnson, of The Law Offices of Mark A. Johnson, for appellant.

Don Stenberg, Attorney General, William L. Howland, and, on brief, Mark L. Ells for appellee.

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

WHITE, J.

STATEMENT OF THE CASE

Bradley S. Roenfeldt appeals his jury conviction of one count of first degree sexual assault, a Class II felony in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), and the resulting sentence of 10 to 25 years' imprisonment. First degree sexual assault is punishable by 1 to 50 years' imprisonment.

FACTS

B.W., a 10-year-old female, made complaint of inappropriate sexual contact to a police officer on July 31, 1990, and to her family physician on August 2. The person alleged to have committed the improper acts was the appellant, Roenfeldt. Roenfeldt was questioned by the police officer and, while admitting a number of inappropriate sexual experiences with B.W., claimed that he did not remember the claimed incidents of first degree sexual assault.

B.W. told the physician and Detective Steven Hecker of a

number of incidents of fellatio (oral stimulation of the penis), at least one of which was of recent origin. On November 3, 1990, B.W. was deposed by Roenfeldt's counsel. A number of statements were made by her relating to the approximate time of the last incident, and a number of collateral matters were not consistent with her testimony at trial or her conversation with Hecker and her physician, Dr. Richard Votta.

At trial, B.W. testified that the last assault came after she was released from the University of Nebraska Hospital about a week prior to Detective Hecker's interview. She testified that this occurred after completing her fourth grade education. At the deposition, B.W. testified that the last incident occurred in her third grade year. In the physical exam, redness of the labia and vagina were noted, indicating sexual touching but not indicating sexual penetration of the vagina or anus.

In an attempt to rehabilitate B.W.'s testimony, Hecker was asked to recite the substance of the entire conversation with B.W. Over objection, Hecker testified that B.W. told him that while she was performing fellatio on Roenfeldt he told her "not to use her teeth too much," and that "there were times that he would have his penis in my mouth" so far she would gag.

Appellant questions, but presented no evidence on, B.W.'s ability to accurately testify, because one doctor had labeled her as having borderline intellectual function and because the child had seen adult videotapes and had seen her mother and appellant engage in sexual activity. The trial court overruled appellant's motion for a court-compelled psychiatric examination of B.W.

Appellant also sought to depose a school principal regarding an incident surrounding a missing watch; however, the court held it to be a collateral issue and improper to attack a witness' credibility with specific instances of dishonesty.

Finally, appellant filed an amended motion in limine, seeking to prohibit several witnesses from testifying as to B.W.'s comments to them regarding "a particular matter." The court found that at least some of the proposed testimony was corroborative and that the statements by B.W. had been for the purpose of a medical history and, accordingly, overruled the motion in its entirety.

ASSIGNMENTS OF ERROR

Summarily, Roenfeldt alleges that the district court erred in (1) denying appellant's motion to have the alleged victim examined by a court-appointed psychiatrist in order to determine her mental competency, in violation of his right to due process under the state and federal Constitutions; (2) determining that the alleged victim was a competent witness to testify at trial in this matter; (3) overruling appellant's hearsay objection and allowing a detective to testify on direct examination as to what the alleged victim had said to him in his interview with her; (4) allowing the alleged victim's examining doctor to testify as to what she may have told him during the examination, as not falling within the hearsay exception; (5) allowing evidence of the alleged victim's discharge summary date from the University of Nebraska Hospital as a Neb. Rev. Stat. § 27-803(3) (Reissue 1989) exception; (6) overruling appellant's hearsay objection and allowing testimony of a third party as to what the alleged victim had related to her regarding appellant's assaults on her; (7) failing to allow appellant to depose the principal of the alleged victim's grade school and failing to allow discovery of documents of an exculpatory nature regarding the alleged victim; (8) allowing an expert witness' testimony regarding exhibited symptoms of children who have been sexually abused; and (9) imposing an excessive sentence.

DISCUSSION

In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within the 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 the verdict. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *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 the evidence beyond a reasonable doubt. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *State v. Zitterkopf, supra*; *State v. Reynolds, supra.*

FAILURE TO COMPEL VICTIM'S PSYCHIATRIC EXAMINATION

A defendant in a criminal proceeding has no general due process right to discovery. *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling. See, *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Blair, supra*; *State v. Tuttle, supra.*

The granting of a request for a psychiatric evaluation of the victim falls within the discretionary power of the trial court. *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990). The purpose of a psychiatric examination in a case involving a sexual offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness. *Id.* If the victim in this case were of a more mature age, compelling a psychiatric examination, though still discretionary, would have been appropriate. The tender years and limitations of B.W., in conjunction with her previous examinations by medical and psychological professionals, and her courtroom testimony all were deemed sufficient by the trial judge for the jury to assess the child's credibility as a witness. We agree. The assignment is without merit.

DETERMINATION OF VICTIM'S COMPETENCY TO TESTIFY

While no certain age has been deemed to be the age at which a child becomes competent to testify in a court of law, the court

generally takes into consideration whether she is able to receive correct impressions by the senses, to recollect accurately, and to appreciate the moral duty to tell the truth. See, *In re Interest of M.L.S.*, 234 Neb. 570, 452 N.W.2d 39 (1990); *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988). The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion. *In re Interest of M.L.S., supra*; *State v. Guy, supra*; *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984).

We find no abuse of discretion in the court's determination that the child was a competent witness. The record is clear that B.W. was able to receive correct sensory impressions, recollect accurately, and appreciate the moral duty to tell the truth.

While the effect of the alleged assault on her mental and emotional difficulties may have compromised her judgment of both the timing of the sequence of events and certain anatomical references, no evidence suggested that these difficulties rendered B.W. incompetent to testify to the crimes committed against her.

The assignment is without merit.

DETECTIVE'S AND COUNSELOR'S HEARSAY TESTIMONY

Detective Hecker and counselor Monica McCarthy were permitted to testify, on direct examination, to statements B.W. had made to them during the course of interviews. Appellant contends that these comments were hearsay and went beyond the scope of B.W.'s previous testimony.

Appellant, however, on B.W.'s cross-examination, had sought to impeach B.W.'s credibility with inconsistent statements and suggestions of fabrication and improper influence. The record is clear that both Hecker and McCarthy were called to establish prior consistent statements. The fact that Hecker, in particular, had mentioned several details that B.W. had not mentioned (e.g., that during an incident of fellatio, appellant had asked B.W. not to use her teeth too much; that sometimes appellant would insert his penis into her mouth so far she would gag; and that appellant had stuck his

penis where she goes to the bathroom and that that had hurt) is of no consequence. Appellant had opened the door to this testimony to rebut his allegation of fabrication, and while new details surrounding the abusive activities were revealed, those details were consistent with, and not contradictory or collateral to, B.W.'s own testimony.

The assignment is without merit.

PHYSICIAN TESTIMONY REGARDING B.W.'S COMMENTS DURING MEDICAL EXAMINATION

Dr. Votta, B.W.'s treating physician, testified that during a medical interview B.W. told him that her mother's boyfriend had tried to put "his thing" where she goes to the bathroom.

Appellant asserts that Dr. Votta's testimony about B.W.'s comments about the source of her condition in a medical interview should have been excluded under the hearsay rule. Contrary to appellant's contentions, the record is clear that the comments were offered by B.W. in the context of a medical examination and diagnosis, and hence were admissible under § 27-803(3). That provision, as an exception to the hearsay rule exclusions, permits admission of statements by a declarant patient for the purposes of medical diagnosis or treatment, and description of medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, as is reasonably pertinent to diagnosis.

We find that Dr. Votta's testimony was admissible under the § 27-803(3) exception to the hearsay rule. The assignment is without merit.

EVIDENCE OF VICTIM'S DISCHARGE SUMMARY DATE

Dr. Votta testified, over objection on hearsay grounds, to the dates of B.W.'s hospital stay from records provided to him by the University of Nebraska Hospital, where other doctors had attended to B.W.'s exacerbated cystic fibrosis condition. The significance of the dates pinpointing B.W.'s hospital stay revolved around B.W.'s statements that the sexual abuse had occurred after that hospital stay.

An objection based on the best evidence or original writing

rule would have been a proper objection. The best evidence rule is most appropriately described as the original writing rule: In proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent.

It is suggested in McCormick on Evidence § 233 (John W. Strong 4th ed. 1992) that courts abandon the distinction between transactions essentially written and nonwritten and allow the application of the rule to turn upon the trial judge's determination of such factors as the centrality of the writing to the litigation, the importance of bringing the precise words of the writing before the trier, and the danger of mistransmission or imposition in the absence of the original. The result is a collateral documents exemption from the basic rule which has followed as a necessary concession to the expedition of trials.

Even if he had had the document with him, Dr. Votta's testimony was hearsay, an out-of-court statement offered to prove the truth of the matter asserted and inadmissible in accordance with Neb. Rev. Stat. § 27-802 (Reissue 1989). Dr. Votta could not have provided the necessary foundation for the document, as he was not a party to the making of the hospital summary discharge record and could not attest to the accuracy of the document. He was only able to testify that the hospital normally sends such copies of the summaries of discharge records of Dr. Votta's patients' hospital stays for his records and continuing treatment of the patients.

While Dr. Votta did recommend that B.W. be admitted into the hospital for her cystic fibrosis condition, he had no personal knowledge whether or when B.W. had actually been admitted, except for the copies of summary discharge documents that the hospital forwards to treating physicians as a matter of normal operating procedure.

Although the admitted testimony, absent supporting testimony by hospital records personnel, is hearsay without a corresponding exemption, we find the error in admitting the unsupported testimony is harmless beyond a reasonable doubt for three reasons: (1) B.W.'s previously discussed courtroom testimony and July 31, 1990, statements to her friend and

subsequently to authorities indicated the recentness of the occurrence of the alleged assault; (2) Dr. Votta testified from his personal knowledge that he had examined B.W. on August 2, 1990, for possible sexual abuse and that his findings (recent manipulation) were "not inconsistent" with the allegation of sexual assault; and (3) in this context, the writing in question is not central to the litigation, and the evidence supporting B.W.'s contentions regarding the approximate timing of the alleged assault was cumulative and established by first-person testimony. The court's error in admitting Dr. Votta's hearsay testimony from the hospital discharge summary is thus harmless beyond a reasonable doubt. See, *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990); *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

COLLATERAL TESTIMONY OF SPECIFIC ACTS

Appellant next contends that he should have been allowed to depose the principal of B.W.'s grade school and should have been allowed discovery of "an exculpatory nature" regarding an incident surrounding a missing watch and B.W.'s alleged untruthfulness regarding the watch's whereabouts. The court denied the request, finding that the material sought was related to a collateral issue, a specific incident of alleged dishonesty, and improper for impeachment purposes.

The court has the discretion to order depositions in criminal cases if the information may affect the outcome of the trial. Neb. Rev. Stat. § 29-1917 (Reissue 1989). See, also, *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Brown*, 214 Neb. 665, 675, 335 N.W.2d 542 (1983).

This line of discovery not only is clearly collateral to the criminal behavior at hand, but does nothing to exculpate the appellant. The request was correctly denied.

We find no abuse of discretion, and thus the assignment is without merit.

EXPERT WITNESS

Appellant asserts that testimony of Dr. Barbara Sturgis, who testified to the symptoms, behavior, and feelings generally

exhibited by children who have been sexually abused, was irrelevant, lacked foundation, and was speculative, since she had never examined B.W.

The expert testimony, though not premised upon an examination of B.W., was relevant in assisting the trier of fact in understanding and determining the issue in B.W.'s case (whether appellant had sexually assaulted her) and therefore came within the requirements of Neb. Rev. Stat. § 27-702 (Reissue 1989). See, also, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that "[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship," and "the behavior exhibited by sexually abused children is often contrary to what most adults would expect." *People v. Nelson*, 203 Ill. App. 3d 1038, 1042, 561 N.E.2d 439, 442 (1990).

Dr. Sturgis did not testify to an opinion on whether B.W. had indeed been sexually abused, nor did she attest to the likelihood of B.W.'s veracity or truthfulness. The testimony was correctly admitted and the assignment is without merit.

EXCESSIVE SENTENCE

A sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990); *State v. Von Busch*, 234 Neb. 119, 449 N.W.2d 237 (1989). Appellant's sentence of 10 to 25 years' imprisonment is well within the statutory guidelines of 1 to 50 years' imprisonment. Appellant's eighth summarized assignment, alleging the imposition of an excessive sentence, is, like the previous seven assignments, without merit. We therefore affirm the matter in its entirety.

AFFIRMED.

IN RE ESTATE OF MILDRED MORSE, DECEASED. DANIEL V. MORSE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MILDRED MORSE, DECEASED, APPELLEE, V. DAKOTA COUNTY, APPELLANT.

486 N.W.2d 195

Filed July 10, 1992. No. S-91-809.

1. **Appeal and Error.** On questions of law, an appellate court has an independent obligation to reach a correct conclusion.
2. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.

Appeal from the District Court for Dakota County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Dakota County, RODNEY R. SMITH, Judge. Judgment of District Court affirmed.

Kurt A. Hohenstein, Dakota County Attorney, for appellant.

Maxine M. Buckmeier, of Corbett, Anderson, Corbett, Poulson, Flom & Vellinga, for appellee.

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

CAPORALE, J.

The county court determined that the petitioner-appellee, Daniel V. Morse, personal representative of the estate of Mildred Morse, deceased, had a $2,208.34 inheritance tax liability to the respondent-appellant, Dakota County, Nebraska. Claiming the actual liability to be $45,868.45, the county appealed to the district court, which affirmed the county court's determination. In this court the county asserts, in summary, that the district court erred by mischaracterizing the familial relationship of the decedent to the distributees hereinafter described. We affirm.

The decedent married Rex Morse on October 29, 1947, when she was 46 years old; the record does not reflect the husband's age. The decedent had no children of her own, and the marriage produced none. However, the husband had four adult children from an earlier marriage.

At the time of the husband's intestate death on March 14, 1984, all of his assets were owned jointly with the decedent, who died testate on January 26, 1989. The decedent bequeathed the bulk of her estate in equal shares to her husband's four children. She had also owned certain property jointly with her husband's five grandchildren. Her holdings, including the jointly held property, totaled $295,061.95.

On October 27, 1989, the personal representative petitioned the county court for a determination of the inheritance tax and on the same day, on the assumption that the decedent had no legally recognized familial relationship to the distributees, paid the anticipated tax of $45,868.45 to the county. A hearing on the determination of said tax was set for November 20, 1989.

So far as the record reflects, no action was taken on November 20, 1989. However, on December 20, 1990, the personal representative, now claiming the distributees were to be treated as the children and grandchildren of the decedent, filed a motion under the authority contained in Neb. Rev. Stat. § 77-2018 (Reissue 1990) for a $43,660.11 refund on the taxes paid.

Neb. Rev. Stat. § 77-2004 (Reissue 1990) provides in pertinent part:

> In the case of a . . . son, daughter [and] any lineal descendant . . . the rate of tax shall be one percent of the clear market value of the property in excess of ten thousand dollars received by each person. Any interest in property . . . which may be valued at a sum less than ten thousand dollars shall not be subject to tax.

Neb. Rev. Stat. § 77-2005 (Reissue 1990) declares:

> In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, or the spouse or surviving spouse of any of such persons, the rate of tax shall be six percent of the clear market value of the property received by each person in excess of two thousand dollars and not exceeding sixty thousand dollars; and on all the excess over sixty thousand dollars, the rate of tax shall be nine percent.

Neb. Rev. Stat. § 77-2005.01 (Reissue 1990) reads, in

relevant part:

> For the purposes of sections 77-2004 and 77-2005, relatives of the decedent shall include relatives of a former spouse to whom the decedent was married at the time of the death of the former spouse and relatives of a spouse to whom the decedent was married at the time of his or her death.

The county contends that §§ 77-2004 and 77-2005.01 are in conflict and must be construed such that, contrary to the ruling of the district court, stepchildren and stepgrandchildren are not entitled "to a status equal to natural blood children and grandchildren of the deceased." More specifically, the county urges that as § 77-2005.01 "relates to both Section 77-2004 and 77-2005" and "[t]here is nothing in Section 77-2005.01 which specifically states that step-children or step-grandchildren shall be taxed at the rates only in Section 77-2004," brief for appellant at 8, the distributees must be taxed at the higher rate set out in § 77-2005. As the question presented is one of law, this court has an independent obligation to reach a correct conclusion. *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992).

Contrary to the county's position, § 77-2005 is not implicated, and there is no conflict between §§ 77-2004 and 77-2005.01. So far as the question presented is concerned, §§ 77-2004 and 77-2005 define the tax treatment to be accorded the relatives of a deceased person. Section 77-2005.01 extends the same treatment to the relatives of a former spouse to whom the deceased person was married at the time of the spouse's death. Thus, § 77-2005.01 expands the operation of §§ 77-2004 and 77-2005, but § 77-2005.01 in no sense conflicts with either of the other two statutes.

The applicable rule is that a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. See, *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992); *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992).

AFFIRMED.

REBEKAH B. SNODGRASS, APPELLEE, V. KELLY R. SNODGRASS, APPELLANT.
486 N.W.2d 215

Filed July 17, 1992. No. S-89-1174.

1. **Modification of Decree: Appeal and Error.** Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning modification.
2. **Equity: Courts: Parties: Estoppel.** Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy has violated conscience, or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Affirmed.

Paul W. Deck, of Deck & Deck, for appellant.

No appearance for appellee.

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

GRANT, J.

Respondent, Kelly R. Snodgrass, appeals an order of the district court for Dixon County. The order dismissed appellant's application to modify the divorce decree entered in this case, in which application he sought custody of one of the two children named in the decree, and he also sought to determine that one of the two children named in the decree was not his child.

In his brief, appellant assigns two errors: (1) "That the trial court erred in finding that the Respondent's conduct was so willful and contumacious as to deny him access to the Court under the Unclean Hands doctrine embraced in *Voichoskie v. Voichoskie*," 215 Neb. 775, 340 N.W.2d 442 (1983), and (2) "The Court erred in holding that the Respondent cannot now ask the Court to determine paternity . . . four years after the dissolution proceeding." We affirm.

The record shows the following facts: A decree dissolving the marriage of Rebekah B. Snodgrass and appellant was filed by

the Dixon County District Court on May 23, 1984. The decree, dated January 25, 1984, ordered the custody and control of the two minor children of the marriage to be continued in the court, with physical possession in appellee. Appellant was granted visitation rights "at reasonable times and reasonable places." The decree of the court ordered that appellant pay $125 per month per child for support of the minor children of the parties. No appeal of the decree was ever taken on any issue. On May 9, 1984, the court reduced the child support obligation to $100 per child, commencing June 1, 1984.

Appellant was later served an order to show cause why he should not be found in contempt of court for failure to pay child support. After a hearing on April 11, 1988, the court found that appellant had the ability to pay child support "either in whole, or in part," and that appellant had willfully failed to make child support payments. The court further ordered that appellant could purge himself of contempt "by paying $3,000 on the delinquencies on or before the 9th day of May and continue [sic] to make regular payments." The hearing was continued to May 9, 1988.

The record does not show any further hearings on the contempt issue except the judge's minutes, which show that on May 9, 1988, sentencing was continued to August 8, and then continued to September 12. On September 12, the minutes show the following: "Payments of $200.00 month having been made, sentencing deferred till further Order of Ct."

On December 19, 1988, appellant, through a different attorney, filed the application to modify the decree described above. The application alleged that the older of the two children was not fathered by appellant; that appellant had had "considerable difficulty in obtaining specific and definite rights of visitation"; that appellee had not discharged her debts as ordered in the decree, forcing appellant into bankruptcy; and that

> [b]ecause of [appellant's] lack of obtaining steady employment and because of the [appellee's] failure to discharge her debts (placing this responsibility upon him), he has become arrears [sic] in his child support payments; that the [appellee], by contrast, has had steady income and

> earnings; that the [appellant] has incurred a sizeable amount of past due child support and cannot possibly reduce that unless he is given some opportunity to apply a portion of the sum of future child support payments on the arrearage until that is paid.

Appellant then prayed for a paternity determination as to one of the children and for custody of the other child.

Appellee filed a motion to dismiss appellant's application. Appellee referred to the court's order of contempt of April 11, 1988, and noted that appellant was in arrears on child support in the sum of $8,005. Appellee contended that appellant's motion should be dismissed because appellant failed to come to equity court with clean hands.

Appellant's response to this motion asserted that "the exact amount of arrearage in child support is in dispute" and that the finding of contempt "does not seem to bear support in accordance with the very limited record," in that there was no basis for the court's ruling that appellant willfully failed to pay his support obligations. Finally, he alleged that he "was making honest effort[s] to render steady payments."

On March 23, 1989, the court conducted a hearing on appellant's application. By an entry in the trial docket on March 23, the court ordered that the application be dismissed "as the [appellant] is seeking equity from the [appellee] when he is not in equity himself."

On April 13, 1989, appellant filed a "Motion to Vacate Decision and Grant Hearing." The motion, as its contents are liberally construed, shows that this pleading should be construed as a motion for new trial and that it operates to extend the time for the filing of a notice of appeal. The motion was overruled on August 14, 1989. Appellant timely appealed the decision to this court.

Appellant's first assignment of error asserts that "the trial court erred in finding that the Respondent's conduct was so willful and contumacious as to deny him access to the Court . . . ."

Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning modification. *Huffman v. Huffman*, 236 Neb. 101,

459 N.W.2d 215 (1990).

Appellant urges that the application of the doctrine followed in *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983) (*Voichoskie I*), would be "untenable and amount to denial of justice depriving a party of a substantial right." Brief for appellant at 31. In *Voichoskie I*, this court reversed and remanded a decision by the trial court to dismiss an application to modify a decree. The trial court found that the petitioner's failure to pay over $3,000 in delinquent support before seeking a modification of his support payments was a failure to do equity. We held that the application alleged a change in circumstances and an inability to make the payments, and it was therefore reversible error for the trial court, without a hearing, to fail to determine whether the petitioner was able to pay the arrearages or unable to pay due to some intentional conduct on his own part.

After remand, Voichoskie's application was again denied, and he again appealed to this court.

In *Voichoskie v. Voichoskie*, 219 Neb. 670, 365 N.W.2d 467 (1985) (*Voichoskie II*), the record showed that appellant earned $370 per week at the time of his divorce, but since that time the court found that "the respondent has often been content to live on unemployment and has not made a substantial effort to obtain employment at a salary equal to the one he received at the time of his divorce." *Id.* at 672, 365 N.W.2d at 469.

We then affirmed the trial court's denial of modification, applying the principle set out in *Voichoskie I*, 215 Neb. at 779, 340 N.W.2d at 445: "If the evidence shows that the petitioner is able to pay the arrearage or is unable to pay through some intentional conduct on his part, the doctrine of clean hands may be invoked to bar his claim for relief." Regarding the doctrine of clean hands, we have stated:

> " ' "Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." ' . . ."

Brown v. Alron, Inc., 223 Neb. 1, 7, 388 N.W.2d 67, 72 (1986).

The record in this case is clear. In 1984, appellant received an average of approximately $739 per month gross pay (including 3 months of unemployment compensation) and made total payments of $1,000. In 1985, he received a gross average of approximately $692 per month (including another 3 months of unemployment compensation) and paid no child support.

In 1986, appellant earned approximately $720 per month gross pay at a steady job. In 1987, his gross earnings were approximately $1,000 per month. He made no payments at all during these 2 years.

Appellant testified, on direct examination, at his contempt hearing:

> Q. . . . Looking at Exhibit No. 1 [the child support payment record], I'll ask you to state whether or not it's a correct record of all payments you have been [sic] paid to the clerk's office?
>
> A. Yes, it is.
>
> Q. . . . [W]hy was it that you did not make any payments for child support from October of 1985 to the present time [April 11, 1988] since you have been employed?
>
> A. There was [sic] a lot of times I never even knew where the children were at.
>
> Q. I see.
>
> A. I know that isn't a good enough excuse, but that's the reason why.
>
> . . . .
>
> A. . . . I know it's my fault that I'm behind. . . .
>
> Q. Mr. Snodgrass, what attempt, if any, have you made on any support since the divorce decree to the present time?
>
> A. Well, I really haven't made any attempt.

On cross-examination, appellant confirmed that the only two payments of any kind into the court for child support in 1985 and 1986 were applied by the IRS from his tax refunds. As of April 11, 1988, appellant was in arrears for $7,729.

As stated above, on April 11, 1988, the court found appellant in contempt for willfully failing to pay child support, and the

court stated appellant could purge himself of contempt by paying $3,000 on or before May 9, 1988, and by resuming his regular child support payments. Between April 11 and May 9, appellant paid $275. The court, in two successive journal entries, continued appellant's sentencing until September 12, 1988. By this time, he had paid $980 (not including a tax refund offset of $394 paid by the IRS) to the court clerk. On September 12, the court continued sentencing until further order of the court. On September 27, appellant made a payment of $150 to the court. This was the last payment made in 1988.

On December 19, 1988, appellant filed an application to modify the decree. At the time, he was in arrears for $8,005, having paid only $1,524 of his obligation for the year (all but $150 of which was paid while contempt sentencing was pending).

The record shows only one payment, of $50, made in January 1989, before appellant's application was dismissed. In a memo on its ruling, the court stated that it would "certainly reconsider this matter when the respondent has made some showing of good faith."

We note that an invocation of the doctrine of unclean hands in this case does not link the payment of child support to the rights of a parent to exercise visitation. The two are independent. It is strictly appellant's flagrant and continuing contempt of court which precludes him from obtaining relief.

Appellant's conduct since the dissolution of the marriage has been to pay no child support unless compelled by the court, in spite of a work record which, although not steady, has been consistent, except for a 6-month period of unemployment. Appellant seems to justify this withholding of child support by repeatedly stating that he was having difficulties exercising his visitation rights. This is not an acceptable excuse.

Our de novo review of the record, including appellant's own testimony, shows adequate support for the trial court's ruling. Appellant's first assignment of error is without merit.

Appellant, in his second assignment of error, asserts, "The Court erred in holding that the Respondent cannot now ask the Court to determine paternity . . . ."

In a motion seeking blood testing filed on January 31, 1989,

(18 days after his last payment of $50), appellant alleged that at the time of the dissolution proceedings, "I had suspicion that [appellee's older son] was not my son." He went on to allege that the issue of paternity was raised in the pleadings by denial of paternity in appellant's answer to appellee's petition, but that "the matter was never addressed by the court." Appellant stated that, at the time, his attorney stated there was not sufficient evidence to pursue a paternity dispute.

Now, based on alleged recent assertions by appellee and the child, appellant states, "I am convinced I am not the boy's father."

In *State ex rel. Storz v. Storz*, 235 Neb. 368, 371, 455 N.W.2d 182, 184 (1990), this court stated: "Because the father and mother were married when the child was conceived, the child is their legitimate son, and he is a product of their marriage."

Appellant chose not to assert that the older child was not his at any time until after appellant had been determined to be in contempt. Paternity was determined by the court in the original decree herein. That determination was not appealed and is, therefore, final. Appellant raises no new facts or circumstances which require the district court to reopen the decree. Appellant's second assignment is without merit.

Having found no merit in either of appellant's assignments of error, we affirm the decision of the district court.

AFFIRMED.

PRAWL ENGINEERING CORPORATION, APPELLANT, V. CHARLES VRANA AND SON CONSTRUCTION COMPANY, APPELLEE.

486 N.W.2d 24

Filed July 17, 1992. No. S-89-1182.

1. **Contracts.** A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction.
2. _____. Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Michael F. Coyle, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

GRANT, J.

Plaintiff, Prawl Engineering Corporation (Prawl), appeals the August 31, 1989, ruling of the district court for Douglas County, affirming the March 8, 1988, ruling of the county court for Douglas County which, after trial, had found in favor of defendant-appellee, Charles Vrana and Son Construction Company (Vrana), and had dismissed Prawl's petition. Prawl timely appealed to this court.

In its appeal, Prawl asserts that the county and district courts erred (1) in finding that plaintiff, as a subcontractor, was bound by a contract entered into between the owner of a project and the general contractor; (2) in their construction of the plain meaning of the subcontract agreement as a matter of law; and (3) in failing to award any damages to plaintiff for partial performance of work performed on the job plus lost profits. We note that the errors complained of were not committed jointly by the county court and the district court. The case was tried by the county court and affirmed by the district court in its appellate capacity. We shall so review the case.

No specific assignments of error were made in the notice of appeal from county court to district court, but our decision of *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), was handed down after the trial decision, and that case was not applicable at the time of the appeal to the district court.

The record before the trial court shows the following: On May 7, 1987, Vrana entered into a subcontract agreement with Prawl for sheet metal work to be done on a new construction

project at One Pacific Place in Omaha. Vrana had entered into a contract with One Pacific Place Venture, hereinafter referred to as Owner, to act as general contractor to construct a retail center designed by Owner's architectural firm, Gensler & Associates. The project was originally designed to be a two-story retail strip shopping center.

In preparation for the subcontract work, Prawl began drafting shop drawings. These documents cost Prawl $407 in labor and materials. This work was not directed by Vrana to begin. In June 1987, Owner contacted Vrana and ordered it to cease all work because the land and the project were going to be sold. Vrana then contacted its subcontractors, including Prawl, which as yet had not performed any work on the job site, and relayed the message.

The project and site were sold by Owner to PTM Specialty Centers (PTM), and new plans were drafted by a different architectural firm. The new plans called for a much larger, one-story complex and an additional building. In September 1987, Vrana successfully bid for the general contract on the new PTM project.

Vrana received sketches prepared by the new architects and forwarded them to Vrana's subcontractors under the previous contract. Prawl agrees that it had copies of the new plans by late November 1987. Vrana requested that the subcontractors submit new proposals for the new project.

Prawl's drafting department found the sketches to be incomplete for Prawl's purposes and attempted to make more detailed drawings of its portion of the work.

Vrana, for its part, was under a deadline to have the PTM project substantially completed by May 1, 1988. This substantial performance on the part of Vrana would have required completion of the sheet metal work. During December 1987, January 1988, and early February 1988, Vrana received no complete or precise estimate of costs from Prawl. On February 26, 1988, Vrana entered a subcontract agreement with Sol Lewis Engineering for sheet metal work on the new project.

A letter from Prawl to Vrana, dated March 23, 1988, listed a breakdown of the outside sheet metal costs for the two buildings, but contained no costs for signage, which was also a

necessary part of the sheet metal project. The letter was dated almost a month after Sol Lewis signed a contract with Vrana. The Vrana-Sol Lewis contract was based on Sol Lewis' bid submitted pursuant to the new architect's sketches.

On March 24, 1988, an employee of Prawl drove by the site and saw sheet metal work being done by Sol Lewis. Prawl immediately contacted Vrana and learned that Vrana had contracted with Sol Lewis 4 weeks previously.

Prawl instituted this action, alleging that Vrana breached the May 7, 1987, contract with Prawl by contracting with Sol Lewis. Vrana responds that the original work contracted for was never done because ownership changed and that the May 7 agreement was not relevant to Vrana's contract with PTM. Therefore, if Prawl had wanted a subcontract with Vrana for the PTM project, a new and complete bid would have to have been submitted. Prawl did not timely submit a bid under the PTM contract, and Vrana ultimately awarded a new subcontract to Sol Lewis.

Prawl's first two assignments of error allege that the trial court erred in interpreting the plain meaning of the May 7, 1987, contract between Vrana and Prawl to mean that "plaintiff [Prawl] is bound by a contract entered into between the owner [Owner] of a project and the general contractor [Vrana]."

The findings of the trial court were based on language in the subcontract agreement between Vrana and Prawl. Prawl contends there is error in the county court's conclusion that "plaintiff's sub-contract work is subject to the plans and specifications submitted by the Owner . . . and as those plans and specifications may change during the course of the project."

We have stated that a written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989). Also, words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them. *Id.*

The language of the Vrana-Prawl contract is clear. Article III

provides: Prawl agrees "[t]o begin the work herewith contracted for as soon as the project . . . is ready for such work . . . All work to be done when and as directed by the project superintendent."

Article X provides that Prawl was

> [t]o be bound to [Vrana] by the terms of the general conditions of the specifications and addenda, and to conform to and comply with the drawings and specifications and addenda, and to assume toward [Vrana] all the obligations and responsibilities that [Vrana] assumes in and by the aforesaid documents toward [Owner.]

Finally, article XII provides that "[Vrana] shall have the right to order in writing the omission of the parts of the work, or materials as omitted from the general contract . . . by the architect and/or Owners . . . ."

Without question, no construction work ever began as contemplated by the original contract between Vrana and Owner under the original plans. When Owner ordered Vrana to stop all work on the site, and then sold the project and site to PTM, the essence of the order, as far as Prawl was concerned, was a complete omission or cancellation of the sheet metal work for which Prawl had subcontracted. Vrana was entitled under the subcontract agreement to order this omission.

When the project was resold to PTM, no matter what the project design, Vrana had to rebid, and, therefore, it needed new bids from its subcontractors for the new and different project.

The Prawl-Vrana contract clearly provides for the omission of work and an accompanying reduction in payment. The contract also provides that Prawl was bound to Vrana for job specifications, as Vrana was bound to the Owner. The Owner ordered omission of all work not yet begun, and since no order had been given to Prawl to begin work, this meant complete omission of Prawl's duties under the subcontract. No work was ordered, none was done on the site, and Prawl is entitled to nothing.

Prawl's final assignment asserts that it was error for the lower courts to fail to award appellant damages and lost

profits. As we have found that Prawl has no cause of action against Vrana, we also find that Prawl is entitled to no damages from Vrana. Appellant's final assignment is without merit.

Having found no merit to any of Prawl's assignments of error, we affirm the order of the district court, affirming the county court's judgment.

AFFIRMED.

DENNIS KAPPENMAN, APPELLANT, V. GENE HEULE, APPELLEE.

486 N.W.2d 27

Filed July 17, 1992. No. S-89-1359.

1. **Actions: Appeal and Error.** In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. **Negligence: Words and Phrases.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. Negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
3. **Expert Witnesses.** An expert's opinion must be based upon reasonable certainty or reasonable probability in the field in which the witness claims to be an expert.
4. **Pleadings: Negligence: Jury Instructions: Appeal and Error.** When the affirmative defense of contributory negligence is pleaded, but there is no relevant or competent evidence to support the defense, it is prejudicial error to submit the issue of contributory negligence.
5. **Jury Instructions: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Mark M. Sipple, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

FAHRNBRUCH, J.

In this appeal of a no-contact truck-motorcycle accident, Dennis Kappenman, a dentist, claims the trial court erred in (1) failing to direct a verdict in his favor on the issue of liability, (2) submitting the issue of his alleged contributory negligence to the jury, and (3) failing to grant him a new trial on the issue of damages.

We hold that Kappenman was prejudiced when the district court for Platte County erroneously submitted to the jury the issue of Kappenman's alleged contributory negligence and when it failed to grant the appellant a new trial on the issue of damages.

Kappenman was injured at approximately 1:30 p.m. on September 10, 1986, at the intersection of 17th Street and 26th Avenue in Columbus, Nebraska. Seventeenth is an east-west street and 26th Avenue is a north-south street. Before Kappenman was injured, the defendant, Gene Heule, was traveling eastbound in his pickup truck on 17th Street as he approached 26th Avenue, and Kappenman was operating a motorcycle northbound on 26th Avenue. Kappenman's travel on 26th Avenue was protected against eastbound traffic on 17th Street by a stop sign. An employee riding in the front seat of Heule's truck testified that his employer "came very near to a stop, possibly what I refer to as a rolling stop. He braked and just before coming to a complete stop, started into the intersection." Kappenman testified that Heule stopped and then pulled into the intersection. Regardless of which version is accepted regarding whether Heule came to a full stop before entering the intersection, the evidence is undisputed that Heule entered the intersection without observing Kappenman. Heule testified he did not see Kappenman on his motorcycle until Heule's truck had entered the intersection. At that time, Kappenman was approximately 50 feet from the south line of 17th Street. Not only was Kappenman's travel on 26th Avenue

protected by a stop sign, but he also had the directional right-of-way. It is also undisputed that Kappenman was operating his motorcycle well within the 30-mile-per-hour speed limit on 26th Avenue. The evidence on Kappenman's speed varied from 20 to 25 miles per hour.

A second employee passenger in Heule's truck testified that he saw Kappenman traveling well within the speed limit and that Kappenman was operating his motorcycle in a normal fashion. This passenger warned Heule of Kappenman's approaching motorcycle, and the defendant stopped his truck. Heule testified that when he stopped, the front bumper of his truck was "four to five feet short of the centerline" of 26th Avenue. Kappenman's motorcycle was traveling north in the eastern half of 26th Avenue. Both Heule and this passenger watched as Kappenman's motorcycle went out of control and Kappenman "dump[ed] the bike over."

Kappenman testified that when he saw the truck enter the intersection, he knew that the driver had not seen him. In order to avoid being hit by the truck, Kappenman decided to "lay down" his motorcycle. Optimally, this would involve applying the rear brake, then applying the front brake, leaning to the right with the front brake, then locking. This in turn would put pressure on the front end of the bike and allow the bike's back end to slide around. When Kappenman applied his brakes, the bike behaved as he expected it to, except it did not slide around. When the bike came to a stop, Kappenman was unable to promptly release his foot from the bike. He testified that the situation required a much quicker response than normal. Kappenman said he lost control just before the motorcycle he was riding tipped over while he was still on it. The motorcycle fell across his right hip, and his buttocks hit the pavement. It is undisputed that Kappenman sustained injuries.

There was evidence that Kappenman incurred special damages, that he had pain and suffering, and that his activities were impaired as a proximate result of the accident.

Kappenman's motion at the close of all the evidence for a directed verdict in his favor on the issue of negligence and liability on the part of the defendant was overruled. The jury was instructed on Kappenman's alleged contributory

negligence and returned a verdict in favor of Kappenman in the amount of his proven special damages. In his motion for a new trial, Kappenman, in substance, asked the trial court to grant him an additur to the jury's verdict, and to thereafter allow Heule the option of consenting to the jury's verdict as enhanced by the additur or the further option of a new trial on the matter of damages alone. The motion was overruled. At oral argument before this court, Kappenman abandoned his request for an additur. See *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. See *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990).

Kappenman first complains that the trial court did not direct a verdict in his favor on the issue of the defendant's negligence and liability. Inherent in the jury's verdict is a finding of negligence and liability on the part of the defendant in this case. In view of those findings and our holding in this case, it is not necessary for us to discuss this assignment of error further.

Kappenman next argues (1) that there was no competent evidence to support the trial court's instruction to the jury on the issue of Kappenman's alleged contributory negligence and (2) that he should have been awarded a new trial on the issue of damages. We agree that as a matter of law the trial court should not have submitted to the jury an instruction on Kappenman's alleged contributory negligence.

Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). Negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. See, *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953); NJI2d 3.02.

To prove negligence on the part of Kappenman, Heule attempted to qualify a passenger in Heule's truck as an expert on whether Kappenman could have stopped his motorcycle normally. The passenger testified that he was familiar with the operation of motorcycles because he had owned one for 6 years, but that it had been inoperable for the past 2 years because he wrecked it when "I locked up on the brakes" while riding on a dike near a lake at night. He testified he had operated both drum brake and disc brake motorcycles. The passenger further testified that he had never been "motorcycle-qualified," i.e., he had never obtained a license to operate a motorcycle. The record fails to reflect any evidence that the passenger had examined the motorcycle Kappenman was operating. The record further fails to reveal that the passenger was familiar with the operation or capability of the motorcycle Kappenman was operating, particularly under the circumstances confronting Kappenman at the time he took evasive action to escape injury.

The passenger was asked, "[B]ased upon your observations and your experience with motorcycles, what you saw and know, do you have an opinion about whether Dr. Kappenman could have come to a normal stop before he entered the intersection from the time he first started to brake?" After stating he had an opinion, the passenger was permitted to give his opinion, over Kappenman's objection: "I *think* he could have stopped [upright, normally] if he wouldn't have locked up on the front brake." (Emphasis supplied.) The passenger testified that Kappenman tipped his motorcycle over. "[H]e was coming down and he locked up on the front tire, the back tire came off the ground, and the handlebars spun sideways and he just rolled to the side."

An expert's opinion must be based upon reasonable certainty or reasonable probability in the field in which the witness claims to be an expert. See *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992). Here, neither the question propounded to the passenger nor his answer included the proper standard of definiteness, i.e., reasonable certainty or reasonable probability in the relevant field of expertise, for the admissibility of an expert opinion. "I *think* he could have

stopped if he wouldn't have locked up on the front brake" falls within the realm of speculation and conjecture. The trial court abused its discretion in permitting the truck's passenger to give his opinion as to whether Kappenman could have come to a normal stop before entering the intersection.

Kappenman testified that when he was faced with the potentially dangerous situation, he acted in the manner most likely to spare himself injury. Kappenman related that when he observed Heule's truck enter the intersection that he had less than a second and a half to make his decision and get stopped. "I made a decision to try to stop and get down so if he hit me, it would be in the back end of the bike instead of in the side and across my legs," Kappenman testified. As a matter of law, there was insufficient evidence that Kappenman did not act as a reasonably careful person would under similar circumstances. Nor is there any competent evidence that the plaintiff acted in breach of his duty to protect himself from injury.

Without the passenger's "expert opinion," there was no relevant or competent evidence to support Heule's plea of contributory negligence on the part of Kappenman.

When the affirmative defense of contributory negligence is pleaded, but there is no relevant or competent evidence to support the defense, it is prejudicial error to submit the issue of contributory negligence to a jury. See, *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990); *Gehre v. Coleman*, 233 Neb. 32, 443 N.W.2d 606 (1989). Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial. *Jensen v. Archbishop Bergan Mercy Hosp., supra.*

It is evident that Kappenman suffered prejudice by the court's instructing the jury on Kappenman's alleged contributory negligence. Instruction No. 6, of which Kappenman complains, required the jury to deduct from Kappenman's damages that portion which the jury would find attributable to his alleged contributory negligence. The jury verdict equaled only the special damages Kappenman proved. Obviously, the jury awarded nothing for Kappenman's pain and suffering, upon which he offered undisputed evidence.

By instructing the jury on the issue of Kappenman's alleged contributory negligence, the trial court committed prejudicial error. Heule's negligence has already been established by a jury, and that issue need not be retried. Since we hold that the trial court should not have submitted to the jury Kappenman's alleged contributory negligence, the only issue left to be tried upon remand for a new trial is the issue of Kappenman's damages.

This cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, v. ERNIE W. CHAMBERS, APPELLANT.

486 N.W.2d 219

Filed July 17, 1992. No. S-90-975.

1. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the machine was accurate and functioning properly.
2. **Trial: Evidence: Proof.** Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise.
3. _____: _____: _____. To present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.
4. **Trial: Evidence: Records: Appeal and Error.** Where the record shows that the trial court in a trial to the court relied upon inadmissible and prejudicial evidence in finding the defendant guilty, the judgment must be reversed.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS,

Judge. Judgment of District Court reversed, and cause remanded with directions.

Ernie W. Chambers, pro se.

Don Stenberg, Attorney General, Kenneth W. Payne, and, on brief, Susan M. Ugai for appellee.

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

BOSLAUGH, J.

The defendant, Ernie W. Chambers, was convicted of driving 75 miles per hour in a 65-mile-per-hour zone, in violation of Neb. Rev. Stat. § 39-662 (Reissue 1988). Upon appeal to the district court, the judgment was affirmed. He has now appealed to this court.

The defendant's three assignments of error, when summarized, allege that the district court erred in failing to find that the county court erred in (1) receiving, over defendant's objection, the speed reading taken from a "VASCAR Plus" speed-measuring device, and (2) "engaging in conduct so prejudicial as to deny the defendant a fair and impartial trial."

The record shows that on February 1, 1989, Nebraska State Patrol Trooper Mark Van Horn observed the defendant driving a blue Honda Civic and preparing to pass other vehicles on Interstate 80 near the Highway 77 interchange north of Lincoln, Nebraska. Van Horn estimated the defendant's speed to be 75 to 78 miles per hour and, using a VASCAR Plus speed-measuring device (VASCAR), clocked the defendant traveling at 75.3 miles per hour.

VASCAR is an acronym for Visual Average Speed Computer and Recorder. Unlike a radar unit, a VASCAR unit does not emit a signal; instead, VASCAR calculates the speed of a vehicle by employing the formula: speed equals distance divided by time. One component of the VASCAR unit is connected to the odometer cable of the patrol car and can be used to measure distances. A properly calibrated VASCAR unit is capable of accurately measuring a distance, even though the vehicle's odometer may not accurately measure the same distance. Another component of VASCAR is a timing or clocking device

which measures the elapsed time between the time an officer manually activates and then deactivates the VASCAR clock. This clocking component employs a quartz crystal in measuring the elapsed time.

David Johnson, a Nebraska State Patrol trooper, testified that there are several methods by which VASCAR can be used to measure a vehicle's speed. In one method, an officer enters a known, predetermined distance into the VASCAR unit, then activates the VASCAR's timing component when the vehicle reaches the beginning point of the predetermined distance and deactivates the timing component when the vehicle reaches the ending point of the predetermined distance. Using the predetermined distance and the elapsed time, the VASCAR unit calculates the speed of the vehicle. On the day the defendant was cited for speeding, Trooper Van Horn clocked the defendant traveling a predetermined distance of .1892 mile.

Law enforcement personnel can test the accuracy of the VASCAR's distance-measuring component against a pre-measured distance. The accuracy of the VASCAR's clocking and calculating components can be tested by first entering a predetermined distance into the VASCAR unit and then using an accurate stopwatch to time the activation and deactivation of the timing component of the VASCAR unit. For example, if an officer enters .2500 mile as the predetermined distance, he can then use a stopwatch to time a 15-second interval between the activation and deactivation of the VASCAR's timing component. The VASCAR unit, if operating properly, will register a speed of 60 miles per hour. Johnson testified that he normally uses this method to test the accuracy of the timing and calculating components of VASCAR.

On the day he cited the defendant for speeding, Van Horn did not use a stopwatch to test the accuracy of his VASCAR unit, but instead tested the VASCAR for accuracy against his B36 radar unit. Van Horn testified that he used the B36 radar unit to determine the speed of his own vehicle and that he verified the accuracy of his VASCAR unit "by driving an average speed of 60 miles per hour for approximately a quarter mile." On redirect examination, the State attempted to show that Van Horn's test of the VASCAR's accuracy was more than just an

approximation. However, Van Horn only testified that he verified his VASCAR unit's accuracy by traveling a "certain" distance at a "certain" rate of speed, and that he then "used the radar to compare it to the speed displayed on the VASCAR unit." On the basis of that test, he testified that the VASCAR unit was shown to be working accurately "[w]ithin the tolerances [of] one quarter of one percent."

Van Horn further testified that he tested the accuracy of his B36 radar unit in the manner in which he was trained, but the record does not show how Van Horn tested his radar unit, nor does it show how Van Horn was trained to test his radar unit.

The defendant first contends that the district court erred in failing to find that the county court erred in receiving, over his objection, the speed reading taken from the VASCAR unit, and he premises his argument upon Neb. Rev. Stat. § 39-664 (Reissue 1988). That section provides that before the State may offer the results of a speed-measuring device, it must first prove, among other things, that "[t]he operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order."

There is no question in this case but that Van Horn properly tested the distance-measuring component of his VASCAR unit and found it to be operating accurately. However, the patrol car was stationary at the time Van Horn observed the defendant, and Van Horn did not use the distance-measuring component of the VASCAR unit in determining the defendant's speed. Thus, verifying the accuracy of the distance-measuring component of the VASCAR unit did nothing to verify the accuracy of its timing, or clocking, mechanism.

The defendant contends that the State failed to prove that the required external tests of accuracy were conducted with respect to the clocking component of Van Horn's VASCAR unit. The State, on the other hand, argues that Trooper Johnson's testimony shows that because the timing mechanism in Van Horn's VASCAR unit employs a quartz crystal, the accuracy of the mechanism is, in essence, self-proving. However, this contention cannot be sustained in light of the requirements of

§ 39-664(d). Consequently, the State must rely solely upon Van Horn's test of his VASCAR unit by his B36 radar unit in order to prove that Van Horn conducted an "external" test of accuracy upon the timing component of the VASCAR unit.

Citing cases from other jurisdictions, the defendant contends that all reported cases dealing with VASCAR accuracy tests have required the use of a certified stopwatch to test the accuracy of a VASCAR unit, and he argues that Van Horn's method of testing the accuracy of his VASCAR unit against his radar unit is not sufficient to prove the "external tests of accuracy" required by § 39-664(d). We assume for purposes of this opinion that it is appropriate to use radar to conduct an external test of the accuracy of a VASCAR unit.

In *State v. Chambers*, 233 Neb. 235, 240-41, 444 N.W.2d 667, 670-71 (1989), we stated:

> *To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be "[r]easonable proof that the . . . machine was accurate and functioning properly." State v. Kudlacek*, 229 Neb. 297, 301, 426 N.W.2d 289, 292 (1988) (foundation relating to accuracy of radar unit and Intoxilyzer machine). See, also, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969). In *Snyder* and *Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an appropriate testing device which itself has been tested for accuracy, lest such evidence of testing and the testing itself "might have to proceed ad infinitum" to verify the accuracy of all instruments used. *State v. Snyder, supra* at 466, 168 N.W.2d at 531. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957) (an officer's testimony that he drove his patrol car at 60 miles per hour, indicated by the car's speedometer, through the testing range for the radar device used to prove the speed of the defendant's vehicle was sufficient foundation for admissibility of the radar-determined speed without proof of the speedometer's accuracy). Thus, although we have rejected a requirement that any testing device used to

> establish the accuracy of a primary measurement device must itself be independently tested, we have recognized such a procedure to thwart a foundational challenge to the primary device's accuracy. See *State v. Chambers*, 207 Neb. 611, 299 N.W.2d 780 (1980) (mechanical stopwatch tested with a Vibrograph, which was in turn itself tested against another Vibrograph).
>
> *Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise.* . . . In any event, we hold that *to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.*

(Emphasis supplied.)

In the present case, Van Horn used his B36 radar to test the accuracy of his VASCAR unit, and he testified that he tested his radar in the manner in which he was trained. However, as noted previously, the record contains no indication of how Van Horn tested his radar unit, nor does it show how Van Horn was trained to test the radar unit. Van Horn's mere recital that he tested the B36 radar is insufficient to show that the radar unit's accuracy had been "verified through an independent test for accuracy." See *State v. Chambers*, 233 Neb. at 241, 444 N.W.2d at 671. Based upon the record before us, for all we know, Van Horn tested the accuracy of his B36 radar against his VASCAR unit, and vice versa.

Furthermore, absent proof of the radar unit's accuracy, such a unit is not a testing device of the type recognized and normally used to verify the accuracy of VASCAR.

Although the State failed to prove compliance with § 39-664, which was a foundational prerequisite to admissibility of the VASCAR speed reading, the State argues that the judgment should nevertheless be affirmed because Van Horn is trained to

estimate a vehicle's speed based upon visual observation and because Van Horn observed the defendant's vehicle and estimated it to be traveling 75 to 78 miles per hour. However, this contention ignores the specific findings of the trial court with respect to the defendant's guilt. The county court stated: "I do find that the Vascar reading, that the foundation and the testimony concerning the Vascar reading was — I do find that there is foundation and the testimony concerning the Vascar reading is persuasive and I do find that the defendant is guilty of speeding." Thus, it is clear from the record in this case that the county court specifically relied upon the improperly admitted VASCAR reading in finding the defendant guilty of speeding. Consequently, the judgment must be reversed.

Because the county court's error in admitting the reading from Van Horn's VASCAR unit was "trial error" and does not bar a retrial, the cause must be remanded for a new trial. See *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989).

As a result of our disposition of the defendant's first summarized assignment of error, it is unnecessary to consider his second summarized assignment of error.

The judgment is reversed and the cause remanded with directions to remand the cause to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. ERNIE W. CHAMBERS, APPELLANT.

486 N.W.2d 481

Filed July 17, 1992. No. S-90-983.

1. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; in such a case, a reversal is warranted if the record

shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

2. **Trial: Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) Whether the witness qualifies as an expert pursuant to Neb. Rev. Stat. § 27-702 (Reissue 1989); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Rev. Stat. § 27-403 (Reissue 1989).

3. _____: _____: _____. A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.

Appeal from the District Court for Hall County, WILLIAM H. RILEY, Judge, on appeal thereto from the County Court for Hall County, RICHARD E. WEAVER, Judge. Judgment of District Court affirmed.

Ernie W. Chambers, pro se.

Don Stenberg, Attorney General, Wynn Clemmer, Kenneth W. Payne, and, on brief, Susan M. Ugai for appellee.

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

CAPORALE, J.

The defendant-appellant, Ernie W. Chambers, challenges the district court's affirmance of the county court's judgment that he violated Neb. Rev. Stat. § 39-662 (Reissue 1988) by operating a motor vehicle in excess of the posted speed limit of 65 miles per hour. We affirm.

The only trial witness, Michael Robinson, is a 16-year veteran of the Nebraska State Patrol, who has enforced speed limits his whole career and has worked as a speed enforcement officer for 2 years. He testified that at 2:10 p.m. on July 29, 1989, he was parked at the extreme south edge of the Alda interchange in Hall County, Nebraska, approximately 600 feet from Interstate 80, when, through the use of a machine known as the VASCAR Plus, he clocked the defendant's vehicle traveling at 76.6 miles per hour. Robinson also testified that independent of the machine reading, he, on the basis of his

visual observation of the vehicle, determined that it was traveling at "about 77" miles per hour.

Neb. Rev. Stat. § 39-664 (Reissue 1988) provides in part:

> (1) Determinations made regarding the speed of any motor vehicle based upon the visual observation of any law enforcement officer may be corroborated by the use of radio microwaves or other electronic device. The results of such radio microwave or other electronic speed measurement may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The measuring device was in proper working order at the time of conducting the measurement;
>
> (b) The measuring device was being operated in such a manner and under such conditions so as to allow a minimum possibility of distortion or outside interference;
>
> (c) The person operating such device and interpreting such measurement was qualified by training and experience to properly test and operate the device; and
>
> (d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

Based on that statute, the defendant asserts that the district court erred in not finding that the county court erred on the record in:

> concluding without sufficient evidence that the VASCAR Plus speed measuring device was accurate on the day of the arrest.
>
> . . . receiving into evidence, over objection, the purported speed reading derived from a device not proved to have been tested properly.
>
> . . . concluding that officer was properly trained to operate the VASCAR, solely on the basis of hearsay

evidence received over objection.

. . . finding that the VASCAR Plus was operated properly.

Robinson described the machine used to measure the speed of the defendant's vehicle as a "speed measuring device which . . . uses the computations of distance and time to determine speed." The machine has two manually operated toggle switches, "[o]ne for feeding distance in the moving mode and the other is for feeding in the time." The timing switch on the machine is engaged when the vehicle enters the premeasured zone and is disengaged when the vehicle reaches the end of the zone.

Thus, the record suggests that the machine is but a stopwatch combined with a calculator. It appears that by dividing the traveltime into a premeasured distance set into the machine, the machine computes the rate of travel in miles per hour. In this instance, the machine was set for a distance of .1992 miles, the premeasured distance through which the defendant's vehicle was clocked. That is all that can be determined with reasonable certainty about the machine from this record. For example, although Robinson testified that he had received training in the use of the machine from its manufacturer, he, in attempting to explain how he tested the machine for accuracy on the day in question, said:

> I drive through this distance using the time and distance and recall the distance and it checks against what I have. And I must — The distance measured over is .2500 miles. And then I can recall and check after I drive through and measure it. . . . [I]t . . . has to be plus or minus. . . . .0006 and then if it is within that plus or minus of 20 — it would be .2500, then it is deemed to be accurate.

If that description has meaning, it is not discernible to us. The quality of the record concerning the operation and testing of the machine is such that the plaintiff-appellee, the State, failed to prove compliance with § 39-664. The county court, therefore, erred in receiving in evidence the machine reading of the defendant's rate of travel.

However, whether the district court erred in affirming the judgment of the county court is another matter, for, as noted

earlier, Robinson testified that in his opinion, independent of the machine's reading, the defendant was traveling in excess of the posted speed limit. The applicable rule is that the erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. See, *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992); *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). In such a case, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. See *State v. Chambers, ante* p. 60, 486 N.W.2d 219 (1992).

Not only has the defendant not assigned any error to the county court's admission of Robinson's opinion testimony, although he objected to its receipt at trial, but the testimony was properly received.

Notwithstanding the patrol's policy not to issue citations solely on the basis of a trooper's opinion of a driver's rate of travel, § 39-664 provides that determinations of speed based on a law enforcement officer's visual observation "*may* be corroborated" by the use of other devices. (Emphasis supplied.) Thus, the use of corroborative devices is not mandatory, and an officer's observation of speed alone, if otherwise admissible, is sufficient to sustain a conviction.

The defendant objected to the receipt of Robinson's opinion on the ground that an inadequate factual basis had been laid. However, Neb. Rev. Stat. § 27-705 (Reissue 1989) provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

We have stated that in order to determine whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, four preliminary questions must be answered:

(1) Does the witness qualify as an expert pursuant to Neb.

> Evid. R. 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403?

State v. Reynolds, 235 Neb. 662, 679-80, 457 N.W.2d 405, 417 (1990).

A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). See Neb. Rev. Stat. § 27-702 (Reissue 1989). In *Stahl*, an officer qualified as an expert in drug identification based on his 120 hours in training and extensive practical experience. Similarly, in citing *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984), we wrote: "Though the officer had no experience in botany and knew little about the scientific tests used to identify marijuana, he did have 9 years' experience in law enforcement, during which time he learned ' "what it looks like and what the seeds look like." ' " *Stahl*, 240 Neb. at 506, 482 N.W.2d at 835. See, *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990); *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989). The focus in determining whether someone qualifies as an expert is on the individual's knowledge on a topic, irrespective of whether that knowledge was derived from formal education or practical experience.

With respect to measuring speed, in *Herman v. Lee*, 210 Neb. 563, 571, 316 N.W.2d 56, 61 (1982), an accident case involving a reconstructionist's calculation of speed from the evidence, we observed that "an opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue."

At the time Robinson was permitted to state his opinion of the defendant's rate of travel, he had established that he had been trained in visually estimating the speed of vehicles and certified as capable of making such estimates, that he had enforced speed limits for 16 years, and that enforcing speed limits had been his specialty for the preceding 2 years. Thus, the

county court could properly consider Robinson an expert, by virtue of both training and experience.

In addition, Robinson had, by implication, established that he had observed the defendant travel a distance of approximately one-fifth of a mile, the distance between the point at which the defendant entered the premeasured distance used in connection with the machine's measurement of the defendant's rate of travel (when the timing switch needed to be engaged) and the point at which he exited that area (when the timing switch had to be disengaged). Thus, there was, when Robinson's opinion was received, a sufficient showing that he had specific knowledge of the underlying facts to enable him to form and express his opinion. Beyond that, on cross-examination Robinson was questioned extensively about his training and the facts revolving around his observation of the defendant. Robinson stated that in the left-hand lane which the defendant's vehicle occupied, there were no vehicles either behind or in front of the defendant's for a distance of a quarter of a mile when Robinson first observed that the defendant was speeding. In fact, when asked why he focused on the defendant's vehicle, Robinson responded: "Because of my visual observation before the vehicle got there that it was an excessive speed limit [sic] and it was also passing the other traffic in the passing lane." It was Robinson's opinion that the vehicles in the right-hand lane were traveling at 67 miles per hour. Thus, the opinion as to the defendant's excessive speed has two independent levels of competence. First, Robinson visually estimated the defendant's rate of travel at 77 miles per hour. Second, the defendant was seen overtaking vehicles in the right-hand lane which were observed to be moving at a speed 2 miles over the limit.

On the matter of the driver's identity, the record shows that the vehicle in question traveled approximately 2 1/2 miles between the point at which Robinson first saw it and the point at which Robinson pulled the vehicle over. Robinson remarked that although he could not identify the driver when he first saw the vehicle and although he did not have the vehicle in sight at all times while it traveled that distance—because the vehicle was being operated in the left-hand lane and had traveled only 2

miles and because the probability of someone stopping on I-80 and changing drivers was so small—the defendant, the person he stopped, had to have been the person driving the vehicle.

The rule is that although in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused, such evidence is sufficient to support a conviction if it and the reasonable inferences which may be drawn therefrom establish guilt beyond a reasonable doubt. *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992). There was, as to the speeder's identity, no fact or circumstance reasonably susceptible of two interpretations; the question was only whether, under the conditions described by Robinson, his identification of the defendant as the driver was reliable and, thus, credible. As we repeatedly point out, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. See, *State v. Brewer, ante* p. 24, 486 N.W.2d 477 (1992); *State v. Johnson*, 240 Neb. 924, 485 N.W.2d 195 (1992); *State v. Waltrip*, 240 Neb. 888, 484 N.W.2d 831 (1992).

While the defendant finds the relationship between Robinson's opinion of his speed and the machine's measurement of it suspiciously close, it is within the province of the trier of fact to determine the weight the opinion should be given. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). Moreover, as noted in *Melanson v. State*, 188 Neb. 446, 197 N.W.2d 401 (1972), the precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show the limit was exceeded. See, also, *Milwaukee v. Berry*, 44 Wis. 2d 321, 171 N.W.2d 305 (1969) (testimony of experienced officer, who observed vehicle travel a distance of one block, that speed exceeded speed limit sufficiently probative to satisfy burden of proof, notwithstanding that officer did not state rate of travel).

The distinction between this case and *State v. Chambers, ante* p. 60, 486 N.W.2d 219 (1992), also decided today, is that whereas the record in the case first decided establishes that the trial court, acting as the trier of fact therein, specifically relied on inadmissible evidence in finding that the speed limit had been exceeded, the record in this case does not so demonstrate. Here, the trial court merely found that the State had met its burden of proof.

One other matter remains for comment. In his reply brief, the defendant attempts to question the amount of the appeal bond. However, the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief. *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991). Because the appellee would have no opportunity to respond, a reply brief cannot be used to raise new matters.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. ROBERT W. RYLAND, APPELLANT.

486 N.W.2d 210

Filed July 17, 1992. No. S-91-554.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Constitutional Law: Search and Seizure.** A person is seized within the meaning of the Fourth Amendment to the U.S. Constitution only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
3. **Police Officers and Sheriffs: Motor Vehicles.** Any person who knowingly fails or refuses to obey any lawful order of any law enforcement officer who is controlling or directing traffic shall be guilty of a traffic infraction.
4. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** 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 to the U.S. Constitution.

Appeal from the District Court for Garden County, JOHN D. KNAPP, Judge, on appeal thereto from the County Court for Garden County, JAMES L. MACKEN, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Richard H. Jensen for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

PER CURIAM.

The deputy sheriff who arrested Robert W. Ryland had no probable cause to stop Ryland while he was driving his motor vehicle, and therefore, Ryland's Garden County Court jury conviction of driving while under the influence of alcoholic liquor, or while driving with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of his or her breath, must be reversed.

In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

Taking the view most favorable to the State, the evidence reflects that on June 19, 1989, a Garden County deputy sheriff twice attempted, unsuccessfully, to contact Ryland by telephone. The deputy wanted to obtain a statement from Ryland concerning an auto accident witnessed by him the previous week. There was a question as to whether a driver in that accident was driving while under the influence of alcohol. The deputy testified that during the evening of June 19, he noticed a man resembling Ryland getting into an automobile. The deputy said he parked his patrol car at the intersection of

two highways, where he believed Ryland would be passing through on his way home. After verifying through the sheriff's office that the car was registered in Ryland's name, the deputy pulled his patrol car behind Ryland's automobile when it entered the intersection. The deputy activated his red lights and flashed his headlights. He followed Ryland in this manner for over a mile. The deputy said that at no time while he was driving behind Ryland did he observe Ryland violate any rule of the road and that the deputy's sole purpose in stopping Ryland was to obtain his statement about the previous accident.

The deputy testified that after Ryland stopped his automobile, the deputy parked his vehicle a few feet behind it. The deputy approached the car he had followed and identified the driver as Ryland. Ryland testified that the deputy said, " 'Mr. Ryland, I am not stopping you for a moving violation. I would like to have a statement from you. Would you give me one?' And I said, 'Be happy to, certainly.' " The deputy testified that Ryland was "wobbly" as he walked back to the patrol car and that after Ryland got into the patrol car the deputy noticed that Ryland's eyes were watery and bloodshot and his speech was slurred. Ryland attempted to write a statement about the accident of the previous week, but was unable to complete the task. The deputy stated that he asked Ryland if he had been drinking, to which Ryland replied, "Of course. Probably too much."

After Ryland was unable to recite the alphabet, the officer arrested him. Ryland then told the deputy that "I'm guilty, no sense of arguing about that." Ryland was transported in the patrol car to the sheriff's office, where he consented to a breath test, which showed that his breath contained sixteen-hundredths of 1 gram of alcohol per 210 liters of breath.

At a July 19, 1989, hearing, Ryland moved to suppress any evidence against him obtained on June 19. The State acknowledged that Ryland had not violated any law when he was stopped by the deputy. Before trial and out of the presence of the jury, the court indicated that it had ruled adversely to Ryland on his suppression motion. The court told the defendant's counsel that he would be permitted to object to the introduction of the evidence the court refused to suppress, but

that defendant's counsel must refrain from giving the reasons for his objection. The trial court ruled that "the constitutional issue [legality of stopping Ryland] must be resolved in favor of the State because this defendant was not the target of any investigation; therefore, the 4th Amendment is not involved." The court allowed Ryland a continuing objection to the evidence obtained after Ryland was stopped.

Following a jury trial, Ryland was found guilty of driving while under the influence of alcoholic liquor, or while driving with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of his or her breath. He timely appealed to the district court, which affirmed the judgment of the county court. The district court found that "the officer's stopping of defendant's vehicle and subsequent arrest of defendant was a reasonable exercise of his duties as a police officer and was justified under the circumstance; was not an arbitrary stop; was not a pretext for other reasons; and was not violative of defendant's constitutional rights."

On appeal, Ryland's first three assignments of error combine to assert that the trial court erred (1) in finding that the deputy's stop of Ryland's vehicle was constitutionally permissible and (2) in receiving into evidence at Ryland's trial evidence and statements obtained by the deputy after Ryland was stopped. We disagree with the trial court's statement that the Fourth Amendment to the U.S. Constitution is not involved in this case.

A person is seized within the meaning of the Fourth Amendment to the U.S. Constitution only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Under the circumstances of being pursued by a patrol car which had its red lights activated and its headlights flashing, a reasonable person in Ryland's position would believe he or she was not free to leave the officer's presence. Furthermore, had he not obeyed these signals from the deputy, Ryland could have been in violation of Neb. Rev. Stat. § 39-604(1) (Reissue 1988), which provides that "[a]ny person who knowingly fails or refuses to obey any lawful order of any law enforcement officer who is

controlling or directing traffic shall be guilty of a traffic infraction." It is universally understood that when a law enforcement patrol car is following an automobile and the red lights of the patrol car are activated, such activity by the driver of the patrol car constitutes an order for the driver of the automobile being followed to stop.

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. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). See, also, *State v. Colgrove*, 198 Neb. 319, 253 N.W.2d 20 (1977). In *Colgrove*, we reversed the defendant's convictions of possession of marijuana and possession of a concealed weapon. Police officers had stopped the defendant's car in an attempt to locate persons for whom the officers had arrest warrants. A subsequent search of the defendant's person revealed drugs and a weapon. In holding that the investigatory stop was in violation of the Fourth Amendment to the Constitution of the United States and article I, § 7, of the Constitution of Nebraska, we stated that

> [t]he undisputed facts in this case show that the actions of the defendant and his companions gave no reasonable ground to suspect, nor did the officers have information of any kind which could reasonably lead them to any conclusion that the occupants of the Colgrove car were committing, or were about to commit, or had committed any crime. Neither were the officers in the process of any criminal investigation which might have made it reasonable to make inquiry of the car's occupants. In short, there was nothing in the circumstances or within the officers' knowledge, as demonstrated by the record, which gave any ground whatever for an investigatory stop
>
> . . . .

Id. at 324, 253 N.W.2d at 23.

Similarly, the facts in this case, also undisputed, show that the deputy was not aware that Ryland had violated any rule of the road at the time he was stopped and that the deputy's sole

purpose in stopping Ryland was to obtain his statement about a previous accident that Ryland had witnessed. The deputy acknowledged that obtaining the statement from Ryland was not an emergency matter.

Because the deputy had no probable cause to stop Ryland and because the deputy had no reasonable suspicion of the existence of criminal activity, his actions were constitutionally impermissible under the Fourth Amendment to the Constitution of the United States and article I, § 7, of the Constitution of Nebraska. The trial court should have sustained Ryland's motion to suppress and should have disallowed at trial any evidence obtained by the deputy after the stop.

We reverse Ryland's conviction for driving while under the influence of alcoholic liquor or while driving with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of his or her breath. Because all of the evidence obtained by the deputy sheriff was inadmissible over objection, we remand the cause to the district court with directions to remand the cause to the county court with directions to dismiss the charge against Ryland. In view of our holding, we need not address Ryland's remaining assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting.

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable seizures. The issue is whether the seizure of the defendant was unreasonable. It seems to me that the issue must be resolved by consideration of all of the facts and circumstances in the case.

In *State v. Colgrove*, 198 Neb. 319, 324, 253 N.W.2d 20, 23 (1977), we noted that the officers who had stopped the defendant were not "in the process of any criminal investigation which might have made it reasonable to make inquiry of the car's occupants."

In *State v. Joao, Jr.*, 56 Haw. 216, 533 P.2d 270 (1975), the defendant was stopped by a police officer who had been assigned to investigate a traffic accident in which the defendant

was believed to have been involved. After the defendant was stopped, the officer asked the defendant and a passenger to leave the automobile, after which a firearm was discovered in plain sight. The court held that the stop was lawful, but that the request that the defendant and the passenger leave the automobile was not justified. In holding that the initial stop was lawful, the court said:

> The initial stop in this case was proper. *Cf. State v. Tsukiyama*, 56 Haw. 8, 525 P.2d 1099 (1974). *Compare, United States v. Ward*, 488 F.2d 162 (9th Cir. 1973); *People v. Parisi*, 393 Mich. 31, 222 N.W.2d 757 (1974). Officer DeCaires had a perfectly legitimate reason for stopping the defendant in the first instance. He had been assigned to question him relative to a traffic accident which had occurred previously. However, the officer had been unable to carry out his assignment because of his inability to locate the defendant earlier. Had the stop been limited simply to afford the officer the opportunity to arrange for an interview with the defendant at a more reasonable hour and location, there could have been no legal flaw in the police procedure.

Joao, Jr., 56 Haw. at 218, 533 P.2d at 272. See, also, *Michigan State Police Dept. v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); *Williamson v. U.S.*, 607 A.2d 471 (D.C. App. 1992).

If the opinion in the *Ryland* case is understood to mean that any stop where the officer does not have a reasonable suspicion, supported by articulable facts, that criminal activity exists, then it goes too far.

An interesting hypothetical situation to consider would be to determine what the officer should do if Ryland, after stating that he would " '[b]e happy' " to give a statement, had added: "Just as soon as I dispose of the dead body in the trunk."

HASTINGS, C.J., joins in this dissent.

RICHARD HANSON, APPELLANT, V. GENERAL MOTORS CORPORATION, APPELLEE.

486 N.W.2d 223

Filed July 24, 1992. No. S-89-1492.

1. **Appeal and Error.** On questions of law, an appellate court has an independent obligation to reach a correct conclusion.
2. **Motor Vehicles: Sales: Certificate of Title.** As between the buyer and seller of a motor vehicle, the certificate of title is prima facie evidence, but is not conclusive proof of ownership.
3. **Motor Vehicles: Certificate of Title.** As between the buyer and manufacturer of an allegedly defective motor vehicle, the certificate of title is not conclusive proof of ownership.
4. **Summary Judgment.** Summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, HANNON, and IRWIN, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Gordon Peterson, of Orton, Brown, Thomas & Peterson, for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

CAPORALE, J.

The plaintiff-appellant, Richard Hanson, and his wife, Beverly Hanson, both contributed to the purchase price of a vehicle claimed to have been manufactured by the defendant-appellee, General Motors Corporation, which vehicle they caused to be titled solely in the wife's name. The husband and wife later joined in filing this action, alleging that the vehicle was defective, in breach of the warranties made by General Motors. General Motors successfully moved the district court for summary judgment against the husband, on

the ground that as he was not named as an owner on the certificate of title, he could have no legally cognizable interest in the vehicle, and then effected a settlement with the wife. The husband appealed, asserting that the district court erred in concluding that he lacked standing to sue. The Court of Appeals affirmed the judgment of the district court, and we thereafter granted the husband's petition for further review. We now reverse the judgment of the Court of Appeals and remand the cause to that court with direction to remand to the district court for further proceedings consistent with this opinion.

General Motors relies on the certificate of title act, Neb. Rev. Stat. §§ 60-101 through 60-117 (Reissue 1988), and more specifically on § 60-105(1), which reads, in relevant part:

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

The husband, however, argues that under the circumstances of this case, the foregoing statute is not conclusive on the question of ownership.

Since the issue as to whether § 60-105(1) renders a certificate of title conclusive on the issue of the husband's ownership interest under the circumstances of this case is one of law, we have an independent obligation to reach a correct conclusion. See, *In re Estate of Morse, ante* p. 40, 486 N.W.2d 195 (1992); *Husen v. Husen, ante* p. 10, 487 N.W.2d 269 (1992).

We recently reviewed the import of § 60-105(1) in *Alford v. Neal*, 229 Neb. 67, 425 N.W.2d 325 (1988), a replevin action in which the highest bidder at a public auction was held to be the owner of certain motor vehicles against the claim of the named titleholders that the bidder had merely extended them a loan. In so ruling, we noted our earlier observations that while the

certificate of title act provides the exclusive method for the transfer of title to a vehicle, it is not conclusive on the issue of ownership, and we declared that as between the buyer and seller of a motor vehicle, the certificate of title is prima facie evidence, but is not conclusive proof of ownership. We reasoned that to hold otherwise would unjustly enrich those unscrupulous sellers inclined to withhold certificates of title after successfully procuring the amount of the purchase price from an unwitting buyer.

While General Motors correctly points out that it did not sell the vehicle to the husband, it does not dispute that it was the manufacturer, and there is no question that by virtue of the subject litigation, General Motors knew before compromising the wife's claim that the husband had contributed to the purchase price of the vehicle and that he, too, claimed to have suffered damages as the result of the claimed breach of warranties. Under those circumstances, General Motors, as the manufacturer of the vehicle, is, for the purposes under consideration, in no different position than a seller who possessed full knowledge of the events surrounding a sale. Thus, we hold that as between the buyer and manufacturer of an allegedly defective motor vehicle, the certificate of title is not conclusive proof of ownership.

Contrary to the contention of General Motors, *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989), another replevin action, does not suggest a different result. Therein, pursuant to a business arrangement between the two, the certificate of title to a motor vehicle purchased by the plaintiff was issued in the name of the first defendant. That defendant subsequently conveyed the title to the second defendant. In dismissing the plaintiff's effort to enforce a special ownership interest in the vehicle, we ruled that as the first defendant did not have possession of the vehicle, replevin could not lie against him, and that in the absence of fraud, theft, misrepresentation, or breach of contract, the act protected the second defendant. Again, the obvious distinction in this case is that having acted with full knowledge of and in complete disregard of the husband's contribution to the purchase of the subject vehicle and of his claim for damages, General Motors is not in the position in

which the second *Nelson* defendant found himself. See, also, *The Cornhusker Bank of Omaha v. McNamara*, 205 Neb. 504, 288 N.W.2d 287 (1980) (§ 60-105 protects innocent purchaser who receives possession of vehicle, together with properly executed and assigned certificate of title on which no lien noted).

As we have often held, summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Antelope Cty. Farmers Coop v. Citizens State Bank*, 240 Neb. 760, 484 N.W.2d 822 (1992). Inasmuch as the certificate of title in this case is not conclusive on the issue of ownership, the husband does indeed have standing to sue, and, thus, General Motors is not entitled to judgment as a matter of law.

REVERSED AND REMANDED WITH DIRECTION.

HASTINGS, C.J., not participating.

IN RE INTEREST OF L.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, v. T.W., APPELLANT.

486 N.W.2d 486

Filed July 24, 1992. No. S-91-751.

1. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the appellate 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. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
3. **Final Orders: Words and Phrases.** To be final, an order must dispose of the

whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory. Furthermore, if a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final.

4. **Juvenile Courts: Child Custody: Parental Rights: Jurisdiction: Appeal and Error.** Where the juvenile court by its order refuses to stay proceedings under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), and pursues a plan which calls for the eventual custody of the child with one parent, that order is tantamount to a permanent denial of the other parent's parental rights in the child and therefore is appealable, and an appellate court does have jurisdiction to address the merits of the case.
5. **Juvenile Courts: Child Custody: Jurisdiction.** The Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), gives jurisdiction to the juvenile court over dependency proceedings.
6. **Juvenile Courts: Child Custody: Jurisdiction: Abandonment.** Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1988) of the Nebraska Child Custody Jurisdiction Act permits a juvenile court to assume jurisdiction of a child who is physically present in this state and (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected. Physical presence in this state of the child is alone sufficient to confer jurisdiction on a court to make a child custody determination under § 43-1203(1)(c) and (2).
7. **Courts: Child Custody: Jurisdiction.** The emergency jurisdiction provisions of the Uniform Child Custody Jurisdiction Act retain and reaffirm parens patriae jurisdiction, which a court must assume when a child is in a situation requiring immediate protection. This concept signifies a philosophy whereby the State has a responsibility to act as a "superparent."
8. **Child Custody: Jurisdiction: States.** Exclusive continuing jurisdiction under the Uniform Child Custody Jurisdiction Act is not affected by the child's residence in another state for 6 months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.
9. _____: _____: _____. The notion of continuing jurisdiction is in accord with the purpose of the Uniform Child Custody Jurisdiction Act to achieve greater stability of custody arrangements and to avoid forum shopping.
10. _____: _____: _____. Where a grave emergency exists affecting the immediate needs and welfare of the child, a court may enter appropriate orders for the protection of the child present in that state even if its orders contravene those of a sister state that still retains jurisdiction over custody.
11. **Child Custody: Modification of Decree: Jurisdiction: States.** The special power to take protective measures under the Uniform Child Custody Jurisdiction Act

does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction. Emergency jurisdiction confers authority to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the act.

12. _____: _____: _____: _____. When another state has entered a child custody decree and one of the parents remains a resident of that state, generally the courts of this state are without jurisdiction to make a permanent change of custody unless the first state affirmatively declines jurisdiction or fails to take appropriate action.
13. **Pleadings: Child Custody: Jurisdiction.** If a party fails to file the information required by Neb. Rev. Stat. § 43-1209 (Reissue 1988), the court cannot exercise jurisdiction in conformance with the Nebraska Child Custody Jurisdiction Act.
14. **Pleadings: Child Custody: Appeal and Error.** Failure to comply with the pleading requirements of Neb. Rev. Stat. § 43-1209 (Reissue 1988) in a dependency proceeding may constitute harmless error, which can be cured by the juvenile court.
15. **Juvenile Courts: Child Custody: Jurisdiction: Appeal and Error.** It is error for the juvenile court in the first instance to fail to determine whether it had jurisdiction under the Nebraska Child Custody Jurisdiction Act. However, this error does not deprive the court of emergency jurisdiction.
16. **Federal Acts: Child Custody: Visitation: Words and Phrases.** According to 28 U.S.C. § 1738A(b)(2) (1988) of the federal Parental Kidnaping Prevention Act, a "contestant" is a person, including a parent, who claims a right to custody or visitation of a child, but a state, acting in the role of parens patriae, does not fit within that definition.

Appeal from the District Court for Custer County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Custer County, KEITH J. KOVANDA, Judge. Judgment of District Court reversed, and cause remanded with directions.

William J. Erickson, Custer County Public Defender, for appellant.

Glenn A. Clark, Custer County Attorney, and Howard W. Spencer, guardian ad litem, for appellee.

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

HASTINGS, C.J.

This is a juvenile case in which a petition was filed in the juvenile court of Custer County by the county attorney on April 5, 1989. It alleged that the child, L.W., was in a situation injurious to her morals for the reason that between January 1

and April 5, 1989, said child, residing within Custer County, was subjected to an act of sexual penetration by her stepfather while the child was in the custody of her mother and stepfather. The State asked that the child be adjudicated a juvenile within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and that she be cared for and protected according to law.

On the same day the petition was filed, a motion was also filed which showed that the juvenile had been taken into protective custody under the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1988) and placed with the Nebraska Department of Social Services (DSS), pursuant to Neb. Rev. Stat. § 43-250(4) (Reissue 1988). The motion also requested a hearing pursuant to Neb. Rev. Stat. § 43-253 (Reissue 1988). Again on the same day, with the mother present in court, an order awarding temporary custody to DSS was entered. A guardian ad litem was appointed for the child.

A further hearing was held on April 11, 1989, at which hearing counsel was appointed for the mother and an adjudication hearing was set for May 9. The hearing was in fact held on May 15, 1989, and the order entered recited that the "father" waived appearance, the mother appeared with counsel, and the mother and the juvenile admitted the allegations. The court determined there was a factual basis for the admissions, and an adjudication was entered accordingly. The case then proceeded immediately to a dispositional hearing, at which the court continued custody in DSS, terminated a previous support order entered against the mother, and set the matter for a review hearing on November 6, 1989.

A review hearing was in fact held on November 13, 1989, with the mother and her counsel and the *natural* father appearing, at which evidence was adduced and the court ordered that custody continue in DSS. It also recommended placement of the child in a foster home and ordered DSS to submit a plan within 30 days.

On May 21, 1990, a review hearing was held, attended by the mother and her counsel. A case plan was filed with the court, to which the mother objected. The hearing was continued to July 10, and the court made temporary findings that reasonable

efforts had been made to eliminate the need for removal of the child from her family home, but that such efforts had failed and that return of the child to her family home would be contrary to the welfare of the child.

A review hearing was held on July 23, 1990, with the mother and her counsel present. The mother objected to the case plan, the court ordered the plan be adopted, and, on motion, the stepfather was dismissed from the proceedings. A review hearing was set for January 8, 1991.

At a review hearing held on January 15, the mother's counsel was permitted to withdraw and the public defender was appointed in his stead to represent the mother. At that hearing, the record indicates no objection to the case plan. Further hearing was set for July 15, 1991.

On March 5, 1991, a pleading entitled "Objection to Plan" was filed, in which it was alleged by the mother through her counsel that the pleadings required by "N.R.S. Section 43-1209" had not been made; the examination necessary under "43-1206(2) was not made" and therefore the necessary jurisdictional findings under "N.R.S. Section 43-1203(1)(d)(i)" could not be made; that there was a prior custody determination in Pottawattamie County, Iowa, in a dissolution of marriage action styled *Woods v. Woods*; that the Iowa court had continuing jurisdiction of the minor child by virtue of 28 U.S.C. § 1738A(d) (1988); and that as a result, the trial court should reject the plan and dismiss the action for want of subject matter jurisdiction.

During a hearing held on April 1, 1991, the court overruled the mother's motion to dismiss. The mother also, through counsel, and based on Neb. Rev. Stat. § 43-1206(3) (Reissue 1988), stated, "I submit that a stay in these proceedings might be worthwhile." The court treated that as a motion for stay and overruled it. The mother filed a notice of appeal to the district court on April 23, 1991, complaining of the trial court's action in overruling her two motions.

On appeal to the district court, that court found that the mother is and has been a resident of the State of Nebraska for at least 6 months prior to the filing of the petition; the natural father of the child is and has been a resident of the State of Iowa

during the pendency of the action; the child has been a resident of the State of Nebraska for at least 6 months prior to the filing of the petition; the juvenile court could properly take jurisdiction for the protection of the child under "Sections 43-247 and 43-1203(a)(b)(c)(d) NEB. REV. STAT. (Reissue 1988)"; the appellant mother did not object to the jurisdiction of the juvenile court of Custer County from "4/5/89, until 3/5/91"; and the

> evidence does not clearly show that an action is still pending in Iowa, requiring the County Court to communicate with the Iowa Court under Section 43-1206(3) NEB. REV. STAT. (Reissue 1988). *This may be required if the County Court intends to change the custody from the mother to the father in the future.*

(Emphasis supplied). Accordingly, the district court affirmed the judgment of the juvenile court in all respects and remanded the cause to the county court for further proceedings consistent with that order. It is from that order, dated July 1, 1991, that the mother appeals to this court.

The mother assigns as error the finding by the court that the provisions of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), did not apply to matters arising under § 43-247(3); the failure of the court to find that the provisions of the Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A (1988), were applicable to this matter; the finding that the juvenile court had subject matter jurisdiction of this matter in the absence of compliance with the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) and the PKPA; and the court's refusal to stay the proceedings and communicate with the appropriate foreign court as required by the UCCJA and the PKPA. We are governed in our review by the following rule:

> On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the appellate 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.

In re Interest of D.M.B., 240 Neb. 349, 352, 481 N.W.2d 905, 909 (1992).

The juvenile was born on August 2, 1976, and is the biological child of T.W., the mother, and M.W., the natural father. The parents were divorced in Iowa in 1976, and custody of the child was granted to the mother. After the divorce, the mother married H.G., who became the child's stepfather. Sometime after January 1, 1989, and before April 5, 1989, while in Custer County, Nebraska, the child was subjected to sexual abuse by her stepfather.

As previously noted in the recitation of the various orders entered, the mother was present at all hearings, was represented by counsel, and admitted the allegations of sexual abuse. DSS concluded and advised the court that it could not be assured of the child's safety with the mother, due to the instability of the mother's relationships and the fear expressed by the child of the men in her mother's life. As a result, DSS prepared a case plan, which anticipated the placement of the child with her natural father. The father's situation, safety, and stability would be investigated by the Iowa Department of Social Services through a home study. The juvenile court adopted the plan on January 15, 1991. This change in placement, if accomplished, conflicts with the Iowa divorce decree which granted custody to the mother.

Section 43-247 provides:

> The juvenile court shall have exclusive original jurisdiction . . . as to any juvenile defined in subdivision (3) of this section . . . .
>
> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) who is . . . in a situation . . . dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

The record is rather sketchy as to the details of the molestation other than the mother's admission. However, a document entitled "Court Report" which is part of the certified transcript from the juvenile court, the county court for Custer

County, and which is included within the bill of exceptions from the district court recites in part as follows:

> [The child] has been attending counseling in North Platte with Linda Perry of Mental Health Specialists. According to Ms. Perry [the child] has been consistent in attendance with the counseling and meets with her on an every other week basis. In counseling [the child] has dealt with issues of her molestation and is in a survivor stance with that issue. She is currently working on family issues. Ms. Perry feels [the child] has made great progress in personal growth issues. However, her mother . . . has not attended counseling regularly. She has not been at a session with [the child] since 11/1/90. At that session she brought her boyfriend and focused her attention to him instead of to [the child] and their relationship.
>
> . . . .
>
> [The child] was placed in foster care 4/4/90 after an investigation by the Department of Social Services revealed that [the child] was at risk of maltreatment after her mother . . . allowed [the stepfather] who has previously sexually abused [the child] back into her life. . . . [The mother] continues to be influenced and directed by the men in her life.

Section 43-1201 provides as follows:

> (1) The general purposes of sections 43-1201 to 43-1225 are to:
>
> (a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
>
> (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
>
> (c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise

of jurisdiction when the child and his family have a closer connection with another state . . . .

Section 43-1203 provides:

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding . . .

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;

(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction . . . .

Section 43-1206 provides:

(1) A court of this state shall not exercise its jurisdiction under sections 43-1201 to 43-1225 if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other

information supplied by the parties under section 43-1209 and shall consult the child custody registry established under section 43-1216 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 43-1219 to 43-1222. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

Section 43-1209 provides:

(1) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

. . . .

(b) He has information of any custody proceeding concerning the child pending in a court of this or any other state; and

. . . .

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in

this or any other state of which he obtained information during this proceeding.

Section 43-1214 provides in part:

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

Pertinent to the record in this case, as alleged by the mother in her brief, is the following portion of the PKPA, 28 U.S.C. § 1738A:

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the laws of such State; and

(2) one of the following conditions is met:

. . . .

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

In her first assignment of error, the mother argues that the juvenile court erred as a matter of law in finding that the provisions of the Nebraska Child Custody Jurisdiction Act did not apply to matters arising under § 43-247(3). In addition, the mother contends that the act deprives the court of jurisdiction. These complaints were raised in substance on March 5, 1991, when the mother filed her motion to dismiss for want of subject matter jurisdiction, and on April 1, 1991, in her "motion" for a stay of proceedings. These motions were overruled by the juvenile court. The mother is thus, in fact, attempting to appeal

the denial of her motion to dismiss and motion for stay.

The first issue to be determined is whether those orders of the juvenile court were appealable orders.

The plan which led to the motions which were overruled was prepared by DSS at the request of the court and stated and concluded as follows:

> F. Assessment:
>
> Since the last court review [the mother] has quit her job and moved to the Cozad, Lexington area with her boyfriend. She has not cooperated with counseling to address the safety issues needed in her home to protect [the child].
>
> Due to the instability of [the mother's] relationships and the fear expressed by [the child] of the men in her mother's life, the Nebraska Department of Social Services cannot be assured of [the child's] safety with her mother.
>
> G. Recommendations to the Court:
>
> It is recommended that [the child] remain in the custody of the Nebraska Department of Social Services and that she remain in foster care. Reunification efforts with the mother . . . have been unsuccessful. However, [the child's] father . . . has exhibited increased interest in [the child's] care and well being and has expressed a desire for [the child] to live with him. Due to this interest we recommend that the Nebraska Department of Social Services initiate an Interstate Compact request for a home study of the [father's] home to determine if the father's home could be considered for future placement.

In *Larsen v. Ralston Bank*, 236 Neb. 880, 883, 464 N.W.2d 329, 332 (1991), this court said:

> In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. [Citation omitted.]
>
> To be final, an order must dispose of the whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further

> action, the order is interlocutory. [Citation omitted.] Furthermore, if a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final. [Citations omitted.]

In addition to the citation from *Larsen v. Ralston Bank, supra*, we are aware of the following language from *Gruenewald v. Waara*, 229 Neb. 619, 621, 428 N.W.2d 210, 213 (1988):

> While it is clear that an order sustaining the plea [in bar] would have had the effect of precluding the maintenance of Waara and Minkoff's suit [citation omitted], and therefore would have been final, the order overruling the plea is not final, for the presently unsuccessful parties may ultimately prevail following a trial on the merits.

We agree that here the mother may eventually prevail in this matter and it is conceivable that the court would ultimately return custody of the child to her; however, we believe that it would be highly unlikely in view of the approved plan which is being pursued. It is quite obvious that DSS and the juvenile court have given up on the mother, and as time passes with the forced separation of mother and child, any familial relationship will be destroyed.

Although the situation here is "the other side of the coin" from that in *Carpenter v. Carpenter*, 326 Pa. Super. 570, 474 A.2d 1124 (1984), the reasoning in the latter case is helpful. That case involved the UCCJA in that temporary custody of a child had been placed with the maternal grandmother by a Massachusetts court. The father and paternal grandparents petitioned a Pennsylvania court for custody, and that court, unaware of the Massachusetts custody order, issued an order granting temporary custody to the father and paternal grandparents. The maternal grandmother and mother then petitioned the Pennsylvania court for a stay of the custody proceedings there because of the exercise of jurisdiction by Massachusetts. The Pennsylvania trial court granted the stay and vacated its earlier order granting temporary custody to the father and grandparents. The father and grandparents appealed. On appeal, the order granting the stay was affirmed.

However, a footnote in the opinion of the appellate court explains why that court accepted jurisdiction:

> Although "orders staying proceedings to await the termination of related proceedings in another court are generally interlocutory in nature, [this] should not be viewed as a blanket rule without exception to be applied in all cases involving stay orders. Whether or not a stay order should be considered final for appeal purposes depends to a large extent upon the practical effect and impact the stay order might have on the relief requested by the litigants. If the effect of the stay order is tantamount to a dismissal of the cause of action or amounts to a permanent denial of relief requested, the party aggrieved should undoubtedly be afforded the opportunity to appeal on the basis that such stay order is a final disposition of some, if not all, of the rights involved." [Citation omitted.] Here, appellants request that we order the trial court to exercise its jurisdiction to decide custody. Under the Uniform Child Custody Jurisdiction Act . . . the courts of this Commonwealth must recognize and enforce out-of-state custody decrees. . . . By its order of May 20, vacating its earlier award of temporary custody and staying the custody proceeding before it, the trial court effectively precluded appellants from litigating the case in Pennsylvania. Its order thus has the same effect as a dismissal and is therefore a final appealable order.

Carpenter, 474 A.2d at 1126-27 n.2.

Where, as here, the juvenile court by its order refuses to stay proceedings under the Nebraska Child Custody Jurisdiction Act, § 43-1201 et seq., and pursues a plan which calls for the eventual custody of the child with the father, that order is tantamount to a permanent denial of the mother's parental rights in the child and therefore is appealable, and we do have jurisdiction to address the merits of the case.

We agree with the mother that the Nebraska Child Custody Jurisdiction Act gives jurisdiction to the juvenile court over dependency proceedings. Section 43-1202(3)(b) incorporates § 43-247(3) into the Nebraska Child Custody Jurisdiction Act by stating that the term "custody proceeding" shall include

"[p]roceedings in a juvenile court in which a person under the age of eighteen years is alleged to be a child as described in subdivision (3) of section 43-247." See, also, *Matter of Pima County Juvenile Action*, 147 Ariz. 527, 711 P.2d 1200 (1985), *modified, Matter of Appeal in Pima County*, 147 Ariz. 584, 712 P.2d 431 (1986) (under the UCCJA, a trial court can assume jurisdiction of a dependency proceeding). Accord *T. L. v. State, Dept. of Health & Etc.*, 392 So. 2d 288 (Fla. App. 1980).

The first inquiry to be made is whether a juvenile court can acquire jurisdiction under § 43-1203, which contains the general jurisdiction provisions of the Nebraska Child Custody Jurisdiction Act and lists four separate bases of jurisdiction.

The first jurisdictional basis applies if this state is the home state of the child or has been the home state within the 6 months prior to the commencement of the action. § 43-1203(1)(a). The term "home state" is defined as the state in which the child lived with his or her parent or parents, or a person acting as a parent, immediately preceding the time involved, for at least 6 consecutive months. § 43-1202(5).

Since the record shows that the child is now and had been a resident of the State of Nebraska for at least 6 months prior to the filing of the petition, the juvenile court could assume jurisdiction over the case under this provision.

The second jurisdictional basis is found under § 43-1203(1)(b), which states that a court can assume jurisdiction in the best interests of the child because (1) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (2) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships. The juvenile court could also assume jurisdiction under this provision, since mother and child both reside in this state and there is substantial evidence available in Nebraska concerning the child. The record shows that the mother did not take proper care of her daughter and that as a result the child was exposed to sexual abuse.

Section 43-1203(1)(c) contains the third jurisdictional provision, also referred to as the "emergency jurisdiction provision." This provision permits the juvenile court to assume

jurisdiction of a child who is physically present in this state and (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected. Physical presence in this state of the child is alone sufficient to confer jurisdiction on a court to make a child custody determination under § 43-1203(1)(c). § 43-1203(2).

The emergency jurisdiction provisions of the UCCJA retain and reaffirm parens patriae jurisdiction, which a court must assume when a child is in a situation requiring immediate protection. This concept signifies a philosophy whereby the State has a responsibility to act as a "superparent." *Silva v. Tucker*, 500 A.2d 947 (R.I. 1985).

The juvenile court can assume jurisdiction under this provision, since the child is physically present in this state and was sexually abused by her stepfather. The emergency situation is ongoing, since the case report shows that the mother continues to be influenced and directed by the men in her life and does not attend the child's counseling sessions. The record also shows that due to the instability of the mother's relationships and the fear expressed by the child of the men in her mother's life, DSS cannot be assured of the child's safety if she is returned to her mother.

The fourth jurisdictional provision, listed in § 43-1203(1)(d), which applies when no other state would have jurisdiction or when another state has declined to exercise jurisdiction, is not applicable in this case.

As we conclude that the juvenile court can assume jurisdiction under § 43-1203(1)(a), (b), or (c), it is necessary to decide next whether the court can exercise this jurisdiction by modifying an out-of-state custody decree.

Even if jurisdiction exists under § 43-1203, a Nebraska court may be precluded from modifying a custody decree. Modification could be held improper under § 43-1214, which states in part:

> (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court

> which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

According to this section, the Nebraska trial court must inquire whether Iowa still has jurisdiction under its equivalent to § 43-1203(1), which is Iowa Code Ann. § 598A.3(1) (West 1981). The Iowa court cannot assume jurisdiction under subsection 1a because Iowa is no longer the child's home state. The Iowa court does not have jurisdiction under subsection 1c, either, because the child is not physically present in Iowa. Nor does the Iowa court have jurisdiction under subsection 1d because the Nebraska juvenile court properly asserted jurisdiction over the case. The only remaining provision is therefore 1b, which applies if the child and at least one of the parents (or contestants) have a significant connection with Iowa and there is substantial evidence available in that state concerning the child.

A case with a slightly similar fact pattern is *Range v. Range*, 232 Neb. 410, 440 N.W.2d 691 (1989), where this court held that a Nebraska court had jurisdiction over a custody modification proceeding instigated by the father, even though the child had moved with the custodial mother to Georgia, which had become the child's home state. The mother argued that the State of Georgia had jurisdiction as the home state of the child. This court disagreed and stated:

> " 'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.' "

(Emphasis omitted.) *Id.* at 414, 440 N.W.2d at 694, quoting *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982), quoting Brigitte M.

Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203 (1981). See, also, *G.S. v. Ewing*, 786 P.2d 65 (Okla. 1990) (wherein the Oklahoma Supreme Court held that a state court which renders the original divorce decree retains continuing jurisdiction to modify the custody decree if one parent resides in that state and significant parental contact was maintained). The notion of continuing jurisdiction is in accord with the purpose of the UCCJA to achieve greater stability of custody arrangements and to avoid forum shopping. See *State in Interest of D.S.K.*, 792 P.2d 118 (Utah 1990).

The notion of continuing jurisdiction, adopted in *Range, supra*, would indicate that the Nebraska court has to defer its jurisdiction to the Iowa court, since the child's father is still a resident of that state and there is significant contact between the father and the child. However, the juvenile court is entitled to exercise temporary jurisdiction over the child under the emergency provision of the Nebraska Child Custody Jurisdiction Act. "Where a grave emergency exists affecting the immediate needs and welfare of the child, a . . . court may enter appropriate orders for the protection of the child present in [that state] even if its orders contravene those of a sister state that still retains jurisdiction over custody." *State in Interest of D.S.K.*, 792 P.2d at 127.

With respect to the scope of jurisdiction a court should exercise under the emergency provision, Professor Bodenheimer has made the following comment:

> [T]his special power to take protective measures does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction. Emergency jurisdiction confers authority to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the Act.

Bodenheimer, *supra* at 225-26. The court in *State in Interest of D.S.K.*, 792 P.2d at 127, reworded this theory as follows:

> Thus, an assumption of emergency jurisdiction is an assumption of temporary jurisdiction only; it does not

> confer upon the state the authority to make a permanent custody disposition. . . .
>
> Further, a temporary order should continue only as long as necessary to contact the decree state and determine which court is the correct forum to handle the emergency abuse or neglect claim and to litigate the modification issue.

The notion of temporary jurisdiction was also recognized in *Matter of Pima County Juvenile Action*, 147 Ariz. 527, 711 P.2d 1200 (1985), *modified, Matter of Appeal in Pima County*, 147 Ariz. 584, 712 P.2d 431 (1986), a case very similar to the one before us. The children in that case were placed in the custody of their guardians, residents of Arkansas, after their parents had died. The maternal grandfather filed a dependency petition in Arizona based on physical and sexual abuse. The juvenile court entered temporary orders making the children temporary wards of the court, awarding temporary legal custody to the Department of Economic Security, and granting temporary physical custody to the grandfather. The guardians appealed, claiming that the court did not have jurisdiction under the UCCJA. The appellate court held that the juvenile court had properly assumed emergency jurisdiction. However, the court noted that Arkansas had retained continuing jurisdiction through the guardian proceeding and that the record did not support a finding that Arkansas had declined jurisdiction. Therefore, the Arizona court had jurisdiction to grant temporary orders only. See, also, *In re Custody of Cox*, 536 N.E.2d 520 (Ind. App. 1989) (father filed petition in Indiana seeking emergency modification of custody decree rendered by Kentucky court; the appellate court upheld a temporary order of custody but required the trial court to refrain from modifying the decree, since Kentucky had continuing jurisdiction); *Garza v. Harney*, 726 S.W.2d 198 (Tex. App. 1987) (Texas trial court had jurisdiction to enter a temporary order on emergency grounds for a child who was subject to custody determination in a Mexican divorce proceeding, but could not take any action that would change the orders of the Mexican court).

In the case before us, the juvenile court, unaware of the Iowa

divorce decree, initially assumed original jurisdiction under § 43-247(3) only. It was not until March 5, 1991, that the mother informed the court of a prior out-of-state custody determination. Since the child was assaulted in Custer County, the juvenile court had temporary emergency jurisdiction under § 43-1203(1)(c) which would include a temporary custody placement of the child with a responsible person. However, we determine that the Iowa court retains continuing jurisdiction to render a final custody determination. We therefore order the juvenile court to refrain from modifying the Iowa divorce decree and to communicate with the Iowa court to determine the appropriate forum for this case. The Nebraska juvenile court will have permanent jurisdiction over the case if the State of Iowa declines jurisdiction or fails to take appropriate action. When another state has entered a child custody decree and one of the parents remains a resident of that state, generally the courts of this state are without jurisdiction to make a permanent change of custody unless the first state affirmatively declines jurisdiction or fails to take appropriate action. See §§ 43-1203(1)(d) and 43-1214(1).

The mother next contends that the State did not comply with the mandatory pleading requirements of § 43-1209 and argues that the State should have informed the court of the child's prior addresses and the Iowa custody decree. The mother claims that absence of these pleadings requires dismissal of the case.

This court recognizes the general rule that if a party fails to file the information required by § 43-1209, the court cannot exercise jurisdiction in conformance with the act. See, *Walt v. Walt*, 574 So. 2d 205 (Fla. App. 1991); *Perez v. Perez*, 519 So. 2d 1104 (Fla. App. 1988); *Mouzon v. Mouzon*, 458 So. 2d 381 (Fla. App. 1984); *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980). However, the trial court's failure to require this information to be filed does not always result in a deprivation of jurisdiction. Some courts have distinguished intrastate dependency proceedings from interstate custody disputes and have held that a failure to satisfy the pleading requirements in a dependency proceeding constitutes a harmless error. See, *Walt, supra*; *In re Palmer*, 12 Ohio St. 3d

194, 465 N.E.2d 1312 (1984), *cert. denied, Pihlblad v. Starke County Welfare Department*, 469 U.S. 1162, 105 S. Ct. 918, 83 L. Ed. 2d 930 (1985). The court in *In re Palmer*, 12 Ohio St. 3d at 197, 465 N.E.2d at 1315, defined the distinction as follows:

> Under the present circumstances a rigid interpretation of [the pleading requirements] would only serve to prolong the agony of the children herein. Moreover, in instances when a public agency is a party, rigid adherence to [the pleading requirements] would open the door to the contingency where a child, inarticulate, injured, neglected and found by the roadside, could not be provided for because the public agency could not ascertain the information . . . with regard to the places where the child had lived within the past five years, and the names and present addresses of those persons with whom the child had lived during that period.
>
> The prefatory note to the Uniform Child Custody Jurisdiction Act . . . makes it quite clear that the Act is designed to prevent interfamilial custody tug of wars between differing jurisdictions, not create them. As we noted in *Pasqualone*, the mandatory jurisdictional requirement applies to "a parent" bringing an action.

This court finds that failure to comply with the pleading requirements of § 43-1209 in a dependency proceeding may constitute harmless error, which can be cured by the juvenile court. In addition, in this case a remand on such a technical violation would serve no useful purpose because the information necessary to determine subject matter jurisdiction, i.e., the sexual assault which occurred in Nebraska, had been provided. The facts furnished ample basis for the juvenile court to assume jurisdiction under the emergency provision of § 43-1203. See, also, *In re Marriage of Bolson*, 394 N.W.2d 361 (Iowa 1986).

In her next assignment of error, the mother argues that the juvenile court should have granted her request for stay and should have communicated with the Iowa court that rendered the divorce decree, based on § 43-1206(3).

The mother refers to the cases *Matter of Pima County Juvenile Action*, 147 Ariz. 527, 711 P.2d 1200 (1985), *modified,*

Matter of Appeal in Pima County, 147 Ariz. 584, 712 P.2d 431 (1986), and *Zappitello v. Moses*, 458 N.W.2d 784 (S.D. 1990), for the proposition that refusal to inquire with the foreign court divests the court of subject matter jurisdiction. These cases, however, do not stand for that proposition. The court in *Zappitello*, 458 N.W.2d at 787, stated only that "a court has an affirmative duty to question its jurisdiction." The court in *Matter of Pima County Juvenile Action, supra*, found only that once a court is apprised of a pending out-of-state proceeding, it has to communicate with the foreign court, inform the latter of the pending instate proceeding, and determine with that court which is the more appropriate forum for the case.

Section 43-1206(3) applies only when a custody proceeding is pending in another state. Iowa Code Ann. § 598.21(8) (West 1981) authorizes the divorce court to subsequently modify custody orders. Since the Iowa divorce court has the authority under Iowa law to modify the decree and therefore would be considered to have continuing jurisdiction over the case, that proceeding would be considered as pending for purposes of § 43-1206(3). We direct that the juvenile court must stay this proceeding and communicate with the court in Iowa to decide which court is the more appropriate forum in which to proceed.

Next, the mother argues that the juvenile court failed to determine whether it had jurisdiction under the Nebraska Child Custody Jurisdiction Act, which in turn deprived the court of its jurisdiction over the case. The mother bases this contention on *Zappitello, supra*, and *Matter of Pima County Juvenile Action, supra*. Again, these cited cases do not stand for that proposition. The juvenile court did err in failing to determine whether it had jurisdiction under the Nebraska Child Custody Jurisdiction Act. However, this error does not deprive the court of emergency jurisdiction.

Finally, the mother argues that the juvenile court erred in finding that the PKPA, 28 U.S.C. § 1738A, was not applicable to the case. In addition, the mother argues that Iowa retained jurisdiction under the act. We agree with the juvenile court that the PKPA does not apply to dependency proceedings. The act, unlike the Nebraska Child Custody Jurisdiction Act, does not incorporate child neglect and dependency proceedings. In

addition, the act stresses the importance of preventing "child snatching" and should not be applied in a case where the State is not an arbiter but a party to the action. See *State ex rel. Dept. of Hum. Serv. v. Avinger*, 104 N.M. 255, 720 P.2d 290 (1986), *aff'g* 104 N.M. 355, 721 P.2d 781 (1985). The notion that the act does not apply to dependency proceedings can also be inferred from language of the act. The act provides that the court which granted the initial custody decree retains continuing jurisdiction if that court has jurisdiction under state law and the state remains the residence of the child or of any *contestant.* 28 U.S.C. § 1738A(c) and (d). According to 28 U.S.C. § 1738A(b)(2) of the PKPA, a "contestant" is a person, including a parent, who claims a right to custody or visitation of a child, but the State of Nebraska, acting in the role of parens patriae, does not fit within that definition. This assignment of error does not have merit.

The judgment of the district court is reversed, and the cause is remanded with directions to remand to the county court, which shall comply with the requirements of the Nebraska Child Custody Jurisdiction Act before proceeding further with this matter.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD JAKSHA, PLAINTIFF, V. STATE OF NEBRASKA ET AL., DEFENDANTS.

486 N.W.2d 858

Filed July 24, 1992. No. S-91-1111.

1. **Constitutional Law: Taxation: Property.** Real and personal property are in the same class for purposes of the uniformity clause of article VIII, § 1, of the Nebraska Constitution.
2. **Constitutional Law: Legislature: Statutes.** An act of the Legislature that is forbidden by the state Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the state Constitution authorizing it to pass such an act.
3. **Constitutional Law.** A state constitution is the supreme written will of the people of a state regarding the framework for their government and is subject only to

the limitations found in the federal Constitution.

4. _____. The state Constitution, as amended, must be read as a whole.
5. _____. A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.
6. _____. If inconsistent, a constitutional amendment prevails over a provision in the original instrument; but a court will find distinct constitutional provisions repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and are incapable of enforcement without substantial conflict.
7. **Constitutional Law: Taxation: Property.** The principal concern of the uniformity clause is preventing a multiplicity of exemptions from the tax on tangible property and the resulting shift of the property tax burden to the remaining taxpayers. Neb. Const. art. VIII, § 1.
8. **Constitutional Law: Taxation: Property: Statutes.** In determining whether exemptions enacted pursuant to Neb. Const. art. VIII, § 2, are valid under the uniformity clause, a court must consider (1) whether the exemptions improperly shift the property tax burden to the remaining tax base, and (2) whether there is a substantial difference of situation or circumstance justifying differing legislation for the objects classified.
9. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
10. **Constitutional Law: Statutes: Proof.** The burden is upon the party claiming a statute is unconstitutional to establish its unconstitutionality.
11. **Constitutional Law: Taxation: Property: Statutes.** The reasonableness of a classification alone will not save a legislative system of exemptions which violates the uniformity clause by improperly shifting the property tax burden to the remaining taxpayers.
12. _____: _____: _____: _____. A statute exempting virtually all personal property from the property tax rolls improperly shifts the property tax burden to owners of real property and therefore is unconstitutional under the uniformity clause, Neb. Const. art. VIII, § 1.
13. **Courts: Jurisdiction.** Existence of an actual case or controversy is a prerequisite to the exercise of judicial power in Nebraska.
14. **Actions: Declaratory Judgments.** The case or controversy requirement applies to actions for a declaratory judgment.
15. **Moot Question: Standing.** The doctrine of mootness is a key component in determining whether an actual case or controversy exists.
16. **Statutes.** A statute passed with an emergency clause goes into effect the day following its approval by the Governor.
17. **Actions: Constitutional Law: Taxation: Statutes: Moot Question.** An action challenging the constitutionality of a tax statute is not moot despite subsequent repeal of the statute if the statute was utilized in calculating the challenger's taxes for a previous year and thus the challenger may be entitled to a refund.
18. **Constitutional Law: Taxation: Statutes: Moot Question.** Repeal of a tax statute

prior to its application in any tax year moots a constitutional challenge to the statute.

19. **Constitutional Law: Statutes.** Generally, when part of an act is held unconstitutional the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
20. **Constitutional Law: Statutes: Legislature: Intent.** In determining whether an unconstitutional provision is severable from the remainder of a statute, courts must take into consideration the following factors: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.
21. **Constitutional Law: Legislature: Taxation.** The constitutional provision prohibiting the commutation of a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax. Neb. Const. art. VIII, § 4.
22. _____: _____: _____. The Legislature is prohibited from changing the method of payment of any tax once it is levied. Neb. Const. art. VIII, § 4.
23. **Constitutional Law: Taxation: Statutes.** A statute does not violate the constitutional provision prohibiting the commutation of a tax when it is enacted and goes into effect prior to the date the tax is levied. Neb. Const. art. VIII, § 4.
24. **Constitutional Law: Statutes.** If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate article III, § 14, of the Nebraska Constitution.
25. **Constitutional Law: Courts.** The judicial power in Nebraska is vested solely in the courts. Neb. Const. art. II, § 1.
26. **Constitutional Law: Administrative Law: Courts: Legislature.** Administrative agencies have no general judicial powers and, unless permitted by the state Constitution, the Legislature may not authorize them to exercise powers which are essentially judicial in nature, or to interfere with the exercise of such powers by the courts.
27. **Constitutional Law: Courts: Statutes.** Construction and interpretation of the state Constitution are judicial functions, and it is the duty of the judicial branch to determine whether an act of the Legislature contravenes the provisions of the Constitution.
28. **Constitutional Law: Statutes.** The duty to determine the constitutionality of legislative enactments necessarily includes the authority to determine what effect, if any, an unconstitutional statute shall have upon the rights of parties which may have been affected by it.
29. **Administrative Law: Appeal and Error.** Delegation of quasi-judicial functions to administrative agencies is allowable when the duties relate to matters peculiarly within the public interest and provision is made for appeal to the

courts.

30. **Constitutional Law: Taxation: Statutes: Judgments: Appeal and Error.** Determination of the prospective or retroactive effect of a judgment declaring a statute unconstitutional is essentially judicial in nature, and therefore a statute vesting the Tax Commissioner with authority to determine whether judicial decisions holding a tax or penalty unconstitutional should apply prospectively, subject only to review by the court rendering the decision in the same manner as a motion for rehearing, is unconstitutional.

Original action. Judgment for plaintiff.

David A. Domina and Denise E. Frost, of Domina & Copple, P.C., for plaintiff.

Don Stenberg, Attorney General, and L. Jay Bartel for defendants.

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

PER CURIAM.

The plaintiff, Edward Jaksha, a Nebraska resident and owner of taxable personal and real property in the state, seeks a declaratory judgment as to the constitutionality of 1991 Neb. Laws, L.B. 829, which the Legislature passed with an emergency clause, and the Governor signed into law on June 10, 1991. He brings this action against the State of Nebraska, Governor E. Benjamin Nelson, State Treasurer Dawn Rockey, Tax Commissioner M. Berri Balka, and Attorney General Donald Stenberg (State). In his petition and briefs the plaintiff asserts several grounds in support of his claim that L.B. 829 is unconstitutional.

I. SECTION 7

The plaintiff argues that § 7 of L.B. 829 violates the uniformity and special legislation clauses of the Nebraska Constitution, Neb. Const. art. VIII, § 1, and art. III, § 18, as well as the Equal Protection Clause of the federal Constitution, U.S. Const. amend. XIV. In order to address these arguments it is necessary to separately discuss § 7 as it relates to the 1991 tax year and as it relates to subsequent tax years.

1. 1991 TAX YEAR

For tax year 1991 only, § 7 of L.B. 829 exempts from the

property tax rolls all personal property except motor vehicles registered for use on the state's highways. 1991 Neb. Laws, L.B. 829, § 7 (codified at Neb. Rev. Stat. § 77-202(12) (Supp. 1991)). The plaintiff argues that by exempting virtually all personal property from taxation, yet retaining the tax on real property, L.B. 829 violates the mandate of article VIII, § 1, that real and personal property be equalized and taxed uniformly. See *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966) (real and personal property are in the same class for purposes of the uniformity clause). Though recognizing that a 1970 amendment to the state Constitution authorizes the Legislature to classify and exempt any or all personal property from taxation "in such manner as it sees fit," Neb. Const. art. VIII, § 2, the plaintiff insists that we "struck" this provision in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). The State responds by arguing that *MAPCO Ammonia Pipeline* is inapplicable to this case and that the 1991 exemptions are expressly authorized by article VIII, § 2.

In resolving this dispute, we note that on May 12, 1992, the people of this state voted to amend the uniformity clause of article VIII, § 1, to grant the Legislature greater authority to administer the property tax in a nonuniform manner. However, " '[a]n act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act.' " *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 128, 219 N.W.2d 726, 729 (1974). We therefore review L.B. 829 under the Constitution as it existed on June 11, 1991.

A state constitution is the supreme written will of the people of a state regarding the framework for their government and is subject only to the limitations found in the federal Constitution. *Ramsey v. County of Gage*, 153 Neb. 24, 43 N.W.2d 593 (1950). The state Constitution, as amended, must be read as a whole. *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other

provisions so as to give effect to every section and clause as well as to the whole instrument. *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937). If inconsistent, a constitutional amendment prevails over a provision in the original instrument; but a court will find distinct constitutional provisions repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and are incapable of enforcement without substantial conflict. *Id.*

With these principles in mind, we begin by briefly reviewing the constitutional history surrounding the uniformity and classification clauses at issue.

(a) The Uniformity Clause

Prior to the Constitutional Convention of 1919-1920, tangible and intangible property were classified together and taxed at the same rate. See *International Harvester Co. v. County of Douglas*, 146 Neb. 555, 20 N.W.2d 620 (1945). Taxation at the same rate as tangible property worked a hardship on owners of such intangibles as bank accounts and notes, however, because the tax often amounted to more than 50 percent of the interest earned in 1 year. 1 Proc. Const. Convention 629 (1919-1920). As a result, such property was often left off the tax rolls. *Id.* at 630. In an effort to reestablish the tax on intangibles as a viable revenue source, the framers of the current Constitution included a provision authorizing the Legislature to separately classify intangible property and tax it at a lower rate. *Id.*

Some at the Constitutional Convention of 1919-1920 supported a provision authorizing the subclassification of tangible property as well. 2 Proc. Const. Convention at 2364, 2367. Others, however, strongly opposed granting the Legislature such authority, fearing constant attempts by various groups to achieve exemptions for their property and thereby "unload the taxation of property onto the other class." *Id.* at 2366, 2371. The uniformity clause was inserted to quell these concerns and give effect to the underlying principle that "the only equitable system for taxation is one that bears equally upon all the citizens of the state in proportion to the property they hold or in proportion to their ability to pay." 1 Proc.

Const. Convention at 626.

The principal concern of the framers in inserting the uniformity clause was to prevent a plethora of special-interest-driven exemptions from the tax on tangible property. 2 Proc. Const. Convention at 2371. The uniformity clause is therefore similar to the special legislation provision of article III, § 18, in that both abhor the dispensing of "special favors" by legislative bodies. See *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 845 (1991). For this reason, principles of equal protection form much of this court's uniformity clause jurisprudence. In the context of taxes, however, the concern with granting "special favors" takes on added significance because the grant of exemptions to one group necessarily entails raising the taxes of another disfavored group. *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 62, 425 N.W.2d 320, 322 (1988) ("governmental costs not shared by one group of taxpayers must necessarily be shifted to and be borne by the remaining taxpayers"). See, also, 1 Proc. Const. Convention at 310 (William Jennings Bryan stated, "If you will take from one man ten dollars when you should only take five, and then take from some other man only five when you should take ten . . . you simply take five dollars from one man's pocket and put it into another man's pocket"). Thus, while the equal protection clause speaks primarily in terms of the *justification* for a legislative classification, the uniformity clause focuses on the *effect* of such classifications on the remaining tax base.

We note that recently the U.S. Supreme Court upheld, against a federal equal protection challenge, California's system of assessing real property at its "acquisition value," despite the fact that the system creates tremendous disparities in the property taxes levied upon owners of similar property. *Nordlinger v. Hahn*, 60 U.S.L.W. 4563 (U.S. June 18, 1992) (No. 90-1912). However, in so doing, the Court expressly reaffirmed its prior decision in *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), holding that the practice of assessing recently purchased property on the basis of its purchase price while making only minor modifications in the assessments of

property not recently sold did violate the 14th Amendment. Thus, the precise contours of the federal Equal Protection Clause in the context of state taxation are far from clear.

It is also important to point out that the guarantees contained in the federal Constitution represent only a floor below which the states may not fall in protecting individual rights. They in no way preclude a holding that a similar provision in a state's constitution affords its citizens even greater protections than they enjoy at the national level. See Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Calif. L. Rev. 273 (1973). Indeed, this court recently held that the extremely deferential "rational basis" test—the same test applied in *Nordlinger*—does not apply to a challenge based upon the special legislation provision of article III, § 18. See *Haman v. Marsh, supra*. Moreover, as discussed previously, the uniformity clause of article VIII, § 1, reflects values independent of those protected by the federal Constitution. Thus, the decision in *Nordlinger, supra*, in no way affects our analysis of the state constitutional issues presented in this case.

This court had the opportunity to address the implications of the uniformity clause in *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). That case grew out of a 1984 amendment to the state Constitution authorizing the Legislature to separately classify agricultural and horticultural land. See Neb. Const. art. VIII, § 1. Subsequently to passage of the amendment, the Legislature passed 1985 Neb. Laws, L.B. 271, which included provisions requiring the valuation of agricultural land according to a formula prescribed in a land valuation manual issued by the Tax Commissioner.

The county assessor for Banner County used the land manual to establish values for all agricultural land in the county for tax year 1986. Problems developed when the county board of equalization discovered that the valuations for irrigated lands in the county increased substantially from the previous year and were higher than the valuations of irrigated lands in adjoining counties. Moreover, the county board found that the Banner County lands were in fact worth less than lands in neighboring counties because of their sandy soil and

susceptibility to severe erosion. Noting that in past years the valuations of irrigated lands in the county were adjusted to reflect these deficiencies, the county board again reduced the valuations of irrigated lands in Banner County for 1986 from those determined by the land manual. Upon review of the county board's action, the State Board of Equalization and Assessment found that the county board acted outside its authority in deviating from the valuations prescribed in the land manual and ordered restoration of the original valuations. The county appealed.

On appeal this court reversed the state board's decision. The court emphasized the fact that in passing the resolution to amend the state Constitution, the Legislature left intact the uniformity clause. Thus, the court concluded, "L.B. 271 must meet the requirements of both clauses to pass the test of constitutionality." *Banner County*, 226 Neb. at 253, 411 N.W.2d at 46. The court went on to hold that the provisions requiring valuation of agricultural land according to the land manual's formula did not conform to the uniformity clause because their purpose was to "preserve the historic undervaluation of agricultural land in comparison to other tangible property." *Id.* at 255, 411 N.W.2d at 47.

(b) The 1970 Amendment and *Stahmer*

In 1967, the Legislature for the first time enacted a state sales tax and an income tax. 1967 Neb. Laws, ch. 487, p. 1533 (codified as amended at Neb. Rev. Stat. § 77-2701 et seq. (Reissue 1990 & Supp. 1991)). Thereafter, concerns arose that certain groups were shouldering a disproportionate share of the tax burden. One such group was farmers, who were forced to pay both sales and property taxes on large amounts of equipment, livestock, and inventory, as well as on their extensive landholdings. Revenue Committee Hearing, L.B. 290, 80th Leg. 2 (April 16, 1969). Certain businesses with large inventories of merchandise and slow turnover rates, such as automobile and lumber dealers, also complained that they were being taxed unfairly in comparison to service-oriented enterprises. *Id.* at 2-5. In response to this problem the Legislature submitted, and the people adopted, a constitutional

amendment authorizing the Legislature to separately classify and exempt personal property for purposes of taxation. See Neb. Const. art. VIII, § 2.

Pursuant to the authority granted in article VIII, § 2, the Legislature in 1972 partially exempted several categories of property from the personal property tax. These categories included most agricultural income-producing machinery and equipment; livestock; grain, fertilizer, seed, and other farm inventories; business inventories; and poultry, fish, honeybees, and fur-bearing animals. 1972 Neb. Laws, L.B. 1241, § 1 (codified as amended at § 77-202(6) through (9)). The bill further directed the State Treasurer to reimburse the county taxing authorities for any revenues lost due to the exemptions, the money to come from funds generated by the sales tax and the income tax. 1972 Neb. Laws, L.B. 1241, § 6.

This court upheld the 1972 exemptions against a constitutional challenge in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), *overruled, MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). In so doing, the court relied heavily on the authority granted in article VIII, § 2, as a specific exception to the general requirement of uniformity contained in article VIII, § 1. Nonetheless, the court recognized the possibility that legislative exemptions from personal property taxation remain subject to a standard of "reasonableness" emanating from the uniformity clause and the special legislation provision of article III, § 18, the state's "equal protection" clause. *Stahmer*, 192 Neb. at 67, 218 N.W.2d at 896. Assuming such a limitation existed, the court concluded that the exemptions were a reasonable attempt to alleviate the heavy tax burden placed upon farmers and businesses with large inventories.

Stahmer represents the court's first attempt to balance the authority granted in article VIII, § 2, with the requirement of uniformity contained in article VIII, § 1. In analyzing the decision, it is important to note that the 1972 exemptions did *not* affect the property tax burden of the remaining owners of real or nonexempt personal property because the exemptions were "fully funded" with moneys from the sales tax and the income tax. See Revenue Committee Hearing, L.B. 299 and

829, 92d Leg., 1st Sess. 3 (March 20, 1991). In the absence of any increase in the property tax burden of the remaining taxpayers, the chief evil targeted by the framers of the uniformity clause, the only issue remaining for the *Stahmer* court was the reasonableness of the classifications drawn.

The approach taken in *Stahmer* is very similar to that exhibited in *Banner County*. In *Banner County*, the court recognized that a statutorily prescribed method of assessment resulting in lower valuations of agricultural lands cannot conform to the requirements of the uniformity clause. A systematic undervaluation of agricultural land necessarily involves a reduction in the property taxes levied upon owners of such property. Because the level of funding necessary to sustain local government remains constant, such a reduction also necessarily entails a shift of the property tax burden to the remaining tax base. Thus, despite express constitutional authority to separately classify agricultural land, the *Banner County* court struck down 1985 Neb. Laws, L.B. 271, to prevent the Legislature from doing "indirectly what it is prevented by the Constitution from doing directly—[taxing] agricultural land in a nonuniform manner from the taxation of other tangible property." *Banner County*, 226 Neb. at 254, 411 N.W.2d at 46. Significantly, the court noted that had the uniformity clause been repealed, the only limitation on the Legislature's scheme would be the reasonableness of the classifications under the Equal Protection Clause of the federal Constitution.

Just as the Legislature left the uniformity clause intact in submitting the amendment at issue in *Banner County*, it did so in submitting the 1970 amendment to article VIII, § 2, as well. For that reason we cannot agree with the State's contention that the "classification clause" of article VIII, § 2, is an "express exception to the requirement of uniformity in Article VIII, § 1." Brief for defendants at 30. Instead, in exercising its power to exempt, the Legislature must adhere to the dictates of both clauses. *Banner County* and *Stahmer* indicate that in determining whether exemptions enacted pursuant to article VIII, § 2, are valid, this court must consider (1) whether the exemptions improperly shift the property tax burden to the

remaining tax base, and (2) whether there is a substantial difference of situation or circumstance justifying differing legislation for the objects classified.

(c) Erosion of the Property Tax Base

In 1977, the Legislature amended the property tax statutes. The amended provisions called for the complete exemption by 1980 of the categories of property partially exempted in 1972. 1977 Neb. Laws, L.B. 518, §§ 2, 4, and 6. More importantly, the amendments placed a ceiling on the amount of money available to counties for reimbursement of revenues lost due to the exemptions. The Legislature set this ceiling amount at $58.6 million, $62.2 million, and $70 million for the 1978, 1979, and 1980 tax years respectively. 1977 Neb. Laws, L.B. 518, §§ 3, 5, and 7. After 1980, the Legislature discontinued the policy of using moneys collected from the sales tax and the income tax to reimburse counties for revenues lost due to exemptions from the personal property tax. 1980 Neb. Laws, L.B. 882, § 9.

The Legislature's decision to place a cap on, and then to completely eliminate, the availability of sales and income tax revenues as replacement funds for moneys lost due to the exemptions changed significantly the nature of the property tax distribution. Because the level of funding necessary for the State's local subdivisions continued to increase after 1980, owners of real property and nonexempt personal property inherited the burden of not only replacing revenues lost due to the exemptions, but of paying for a proportionate share of this increased funding as well. Revenue Committee Hearing, L.B. 299 and 829, 92d Leg., 1st Sess. 3 (March 20, 1991).

A combination of events resulted in the plight of property owners becoming even more grim during the remainder of the decade. The Legislature further reduced the property tax base by granting exemptions for certain earthmoving equipment, see 1980 Neb. Laws, L.B. 882, § 7 (codified as amended at Neb. Rev. Stat. § 77-202.46 (Reissue 1988)), and for jet airplanes, mainframe computers, and agricultural processing equipment used by businesses qualifying for incentives under Nebraska's Employment and Investment Growth Act. See 1987 Neb. Laws, L.B. 775, § 5 (codified at Neb. Rev. Stat. § 77-202(10) (Supp.

1991)). The situation was exacerbated as the courts were called upon to protect the rights of those adversely affected by the Legislature's catalog of exemptions.

In *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied* 490 U.S. 1066, 109 S. Ct. 2065, 104 L. Ed. 2d 630 (1989), the U.S. Court of Appeals for the Eighth Circuit upheld a lower court decision enjoining the Nebraska Tax Commissioner from collecting a personal property tax on the plaintiff's railcars. The court based its decision on a finding that Nebraska's system of exempting 75.75 percent of the state's commercial and industrial personal property discriminated against railroads in violation of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54 (codified as amended at 49 U.S.C. § 11503(b)(4) (1988)) (the 4-R Act).

Following the decision in *Trailer Train Co.*, owners of centrally assessed gas and hydrocarbon pipeline systems began seeking declarations that their pipelines were personal property and that they were entitled to "equalization" of the assessed value of those pipelines with the personal property of the railroads. In *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), this court held that the plaintiffs were entitled to such relief. The court noted that the proper remedy when the board or the Legislature arbitrarily undervalues a particular class of property, thereby valuing another class of property at a disproportionately higher rate, is to lower the latter's valuation to such an extent as to equalize it with the former. *Northern Natural Gas Co., supra*, citing *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984) (where use of different methods to determine the assessed value of different classes of property results in systematic undervaluation of one class, owners of property taxed at actual value are entitled to a proportionate reduction). Thus, the court reasoned, "no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the

imposition of a state tax." *Northern Natural Gas Co.*, 232 Neb. at 815, 443 N.W.2d at 256.

Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991), involved another suit by owners of centrally assessed gas transmission pipelines seeking equalization of their personal property with that of the railroads and carline companies, this time for the 1988 and 1989 tax years. The board of equalization denied the requests, and the plaintiffs appealed. Subsequently to perfection of the appeals, the Legislature passed two bills which the State claimed mooted the case. One modified the definition of "real property" to include "pipelines." 1989 Neb. Laws (1st Spec. Sess.), L.B. 1, § 1. The other expressly exempted railroad rolling stock from personal property taxation, pursuant to the authority granted in article VIII, § 2. 1989 Neb. Laws (1st Spec. Sess.), L.B. 7, § 1. Despite the "unusual" procedure posture of the case, the court proceeded to address the effect of L.B. 1 and L.B. 7 as if they were in existence and relied upon by the board at the time of its decision.

The court first rejected the State's claim that L.B. 1 supported the board's decision, holding that application of the statute to the 1989 tax year would result in an impermissible commutation of a tax and in any event was irrelevant to the matter of equalization. Turning to L.B. 7, the court struck down the exemption of railroad rolling stock as unconstitutional. Drawing upon principles of equal protection, the court stated:

> "The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class."

Natural Gas Pipeline Co., 237 Neb. at 370, 466 N.W.2d at 470, quoting *State, ex rel. Cone v. Bauman*, 120 Neb. 77, 231 N.W. 693 (1930). Based upon this standard, the court found no real

distinction between railroads and other common carriers which would justify exemption of the former's personal property but not that of the latter. The court therefore declared the statute violative of both the special legislation provision of article III, § 18, and the uniformity clause of article VIII, § 1, and reversed and remanded the cause for imposition of the requested remedy.

Though the court in *Natural Gas Pipeline Co.* expressly relied upon the arbitrary nature of the classification drawn in striking down L.B. 7, implicit in the decision are concerns with the shrinking property tax base. Prior to the first set of exemptions in 1972, real property accounted for 78 percent of the tangible property subject to taxation, and income-producing personal property the remaining 22 percent. Revenue Committee Hearing, L.B. 299 and 829, 92d Leg., 1st Sess. 3 (March 20, 1991). By 1991, additional legislative exemptions and judicial rulings combined to reduce the percentage of the property tax base consisting of nonexempt personal property to 8 percent, while real property increased to 92 percent of the tax base. *Id.* at 5. These figures indicate that, with the Legislature's refusal since 1980 to reimburse counties for revenues lost due to additional exemptions, the property tax burden between 1972 and 1991 "shifted very heavily towards the people remaining on the tax roll . . . ." *Id.*

Unlike the situation in *Stahmer*, where the exemptions *did not affect* the property tax burden of the remaining tax base, each additional "exemption" occurring during the 1980's resulted in a proportionate increase in the tax burden of the remaining property owners. This shifting of the tax burden raised constitutional problems with regard to owners of both types of property still on the tax rolls, real property and nonexempt income-producing personal property. The shifting of virtually the entire burden for funding the State's political subdivisions to owners of these categories of property implicated the chief evil associated by the framers of the uniformity clause with the power to grant exemptions.

In a concurring opinion in *Natural Gas Pipeline Co.*, two judges recognized these concerns. They warned that the Legislature's perpetuation of an increasingly discriminatory

system of exemptions threatened "the entire property tax base for school districts and other local units of government . . . ." *Natural Gas Pipeline Co.*, 237 Neb. at 373, 466 N.W.2d at 471 (White and Fahrnbruch, JJ., concurring). The judges reasoned:

> When property, regardless of whether it is real or tangible personal property, is classified so that it provides exemption from taxation to all but a small amount of property, the classification and exemption may well be unreasonable and arbitrary and may fall within the prohibition of Neb. Const. art. III, § 18, which is this state's "equal protection clause."

Id. at 375, 466 N.W.2d at 472.

(d) The *MAPCO Ammonia Pipeline* Decision

MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991), involved a request by several pipeline companies for equalization of their personal property with that of the railroads and carline companies for tax year 1990. The board rendered its decision prior to the release of *Natural Gas Pipeline Co.* and, therefore, denied the requests, based upon L.B. 1 and L.B. 7. The companies appealed, arguing that both statutes were unconstitutional and, thus, any taxation of their personal property would violate the uniformity clause of the Nebraska Constitution and the Equal Protection Clause of the U.S. Constitution.

Having struck down L.B. 7 in *Natural Gas Pipeline Co.*, the court proceeded to strike down L.B. 1 as well, holding that the Legislature's attempt to "designate as a 'fixture' that which is, in fact and in truth, personal property" exceeded its common-law powers of definition and violated the special legislation provision of article III, § 18. *MAPCO Ammonia Pipeline*, 238 Neb. at 573, 471 N.W.2d at 740. With both L.B. 1 and L.B. 7 rendered ineffectual, the court noted that the plaintiffs were left in essentially the same position as the parties in *Northern Natural Gas Co., supra*, and *Natural Gas Pipeline Co., supra*. However, rather than simply following those cases and reversing and remanding for "equalization" of the plaintiffs' personal property with that of the railroads, the

court revisited the question of whether "equalization" was an appropriate remedy under the circumstances.

In *Northern Natural Gas Co.* and *Natural Gas Pipeline Co.*, the court held that the uniformity and equal protection clauses required the board to equalize the valuation of the plaintiffs' pipelines with that of railroad rolling stock left untaxed due to the decision in *Trailer Train Co.* In *MAPCO Ammonia Pipeline*, the court recognized that railroad rolling stock, agricultural income-producing machinery and equipment, and other personal property not taxed due to either legislative action or judicial decision is not assessed at "zero percent" of value for tax purposes. Rather, such property is simply not assessed at all because it is not taxed. Therefore, because

> "[t]he purpose of equalization of assessments is to bring the *assessment* of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax." . . . The process of equalization . . . cannot be applied to property that is not taxed.

(Emphasis supplied.) *MAPCO Ammonia Pipeline*, 238 Neb. at 577, 471 N.W.2d at 742, quoting *Natural Gas Pipeline Co., supra*. Accordingly, the court expressly disapproved any language in *Northern Natural Gas Co.* implying that "equalization" is an appropriate remedy in these cases.

Faced with the same discriminatory tax structure at issue in *Northern Natural Gas Co.* and *Natural Gas Pipeline Co.*, but no remedy, the *MAPCO Ammonia Pipeline* court embarked on a significantly different approach to the personal property tax dilemma. The court recognized that if the Legislature's system of exemptions *prevents* the uniformity required by the Constitution, the exemptions themselves are unconstitutional, and thus the exempt property must be returned to the tax rolls. This approach essentially transformed *MAPCO Ammonia Pipeline* from a case involving a claim for "equalization" to a declaratory judgment action regarding the constitutionality of the exemptions contained in § 77-202(6) through (9).

In overruling *Stahmer* and holding the exemptions contained in § 77-202(6) through (9) unconstitutional, the court relied upon both components of the uniformity clause analysis set out

above. With regard to the first prong of the test, the court distinguished *Stahmer*, noting that "enforcement of [the 4-R Act] by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to Neb. Const. art. VIII, § 1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers." *MAPCO Ammonia Pipeline*, 238 Neb. at 582, 471 N.W.2d at 745. This passage reflects the court's recognition of the fundamental changes in the property tax distribution which occurred between 1972 and 1991. Specifically, the removal of large amounts of income-producing personal property from the tax rolls due to a confluence of legislative and judicial action, combined with the Legislature's refusal after 1980 to "fill" these "hole[s]" by reimbursing the counties with moneys derived from other sources, resulted in an unfair shift of the tax burden to the remaining taxpayers. See Revenue Committee Hearing, L.B. 299 and 829, 92d Leg., 1st Sess. 3-5 (March 20, 1991).

As to the second prong of the test, the court noted that, as in *Northern Natural Gas Co.* and *Natural Gas Pipeline Co.*, the plaintiffs were "entitled to the same tax treatment as the railroads, carline companies, and other centrally assessed taxpayers pursuant to Neb. Const. art. VIII, § 1." *MAPCO Ammonia Pipeline*, 238 Neb. at 577, 471 N.W.2d at 742. In previous cases the court achieved this equality of treatment by prohibiting the inclusion of pipelines in the board's "unit value" determinations. In *MAPCO Ammonia Pipeline*, however, the court reasoned that operation of the 4-R Act prevented the State from uniformly taxing income-producing personal property owned by railroads and carline companies at the same rate as that owned by pipeline companies. The court further recognized that by failing to repeal the discriminatory exemptions after *Trailer Train Co.*, the Legislature in effect decided to perpetuate the favorable treatment of the railroads and carline companies. In this sense *MAPCO Ammonia Pipeline* is simply a reprise of the decision in *Natural Gas Pipeline Co.*, with the court again holding that there is no substantial difference in situation or circumstance justifying favorable treatment of income-producing personal property

owned by the railroads and carline companies, but not similar property owned by pipeline companies and other centrally assessed entities.

Because the 4-R Act did not exist at the time *Stahmer* was decided, no questions of federal law were involved in that decision. In *MAPCO Ammonia Pipeline*, the court held that subsequent to passage of the 4-R Act in 1979, the equality of treatment mandated by the uniformity and equal protection clauses of the Nebraska Constitution became impossible and thus rendered obsolete the reasoning in *Stahmer*. In so doing, the court balanced the authority granted in the "classification" clause against the constraints imposed by the uniformity clause based upon consideration of the two factors discussed above. We similarly rely upon a consideration of these two factors in analyzing the constitutionality of § 7 of L.B. 829.

(e) Analysis of L.B. 829

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). The burden is upon the party claiming a statute is unconstitutional to establish its unconstitutionality. *Id.*

Here, the State argues that § 7 of L.B. 829 is constitutionally valid because elimination of the personal property tax is "eminently reasonable." Brief for defendants at 32. Specifically, the State points to the administrative difficulties associated with collection of a tax on personal property—difficulties resulting in its oft-repeated characterization as a "liar's tax." The State also argues that the exemption is a legitimate economic development measure designed to prevent the loss of certain inventory-intensive industries to neighboring states which do not tax personal property. As we made clear in *Bann County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987), however, the reasonableness of a classification will not save a legislative enactment violative of the uniformity clause. Therefore, it is first necessary to determine whether § 7 of L.B. 829 improperly shifts the property tax burden to the remaining taxpayers.

When the Legislature initiated the current system of exemptions in 1972, it "fully funded" them with revenues derived from the sales tax and the income tax. The scheme did not shift any of the property tax burden to the remaining taxpayers, and thus the only issue confronting the *Stahmer* court was the reasonableness of the classifications drawn. As noted earlier, however, subsequent events resulted in a dramatic shift in the property tax burden. In *MAPCO Ammonia Pipeline*, this court held that the burden on the remaining taxpayers was too great and declared the exemptions contained in § 77-202(6) through (9) unconstitutional.

For tax year 1991, § 7 of L.B. 829 essentially codifies the situation as it stood prior to *MAPCO Ammonia Pipeline*, with the additional exemption of the small sliver of personal property remaining on the tax rolls at that time. The State focuses on this small sliver of personal property in attempting to distinguish *MAPCO Ammonia Pipeline* and persuade us that § 7 is valid. According to the State, *MAPCO Ammonia Pipeline* turns on the constitutional repugnancy of exempting approximately 75 percent of the state's income-producing personal property, while taxing the remaining 25 percent. In support of this interpretation, the State relies upon language from a concurrence in *Natural Gas Pipeline Co.* questioning the exemption of "all but a small amount of property." *Natural Gas Pipeline Co.*, 237 Neb. at 375, 466 N.W.2d at 472 (White and Fahrnbruch, JJ., concurring). In this case, the State points out, the situation is "effectively reversed" because real property constitutes approximately 75 percent of the property tax base and personal property only 25 percent. Thus, the State concludes that § 7 is valid because it "retains the taxation of tangible property as to nearly three-fourths of property available for taxation." Brief for defendants at 39.

The State's reading of *MAPCO Ammonia Pipeline* is overly narrow. The concurring opinion in *Natural Gas Pipeline Co.* relied upon by the State makes clear that the concern with the shifting property tax burden extends to owners of real property. This concurrence concludes by noting that

> the boards of equalization cannot exercise their duty of valuing uniformly if the federally protected property and

> exempt property are not taxed and nonprotected and nonexempt property is valued and taxed.
>
> The decision in [*Trailer Train Co.*] has sounded the death knell for personal property taxation in this state unless the preferential treatment to certain classes of personal property is abandoned. *Taxation of real estate may also be at risk for the same reasons.*

(Emphasis supplied.) *Natural Gas Pipeline Co.*, 237 Neb. at 376, 466 N.W.2d at 473. Similarly, *MAPCO Ammonia Pipeline* overruled *Stahmer* because subsequent developments "had the effect of making Nebraska's system of taxation increasingly discriminatory as to *the remaining taxpayers*." (Emphasis supplied.) *MAPCO Ammonia Pipeline*, 238 Neb. at 582, 471 N.W.2d at 745. It is clear that in *MAPCO Ammonia Pipeline*, this court adopted the reasoning of the concurring opinion in *Natural Gas Pipeline Co.*

The avowed purpose of the uniformity clause was to prevent special interests from achieving tax exemptions and thereby "unload the taxation of property onto the other class." 2 Proc. Const. Convention at 2371. Between 1972 and 1991, real property increased from 78 percent to 92 percent of the property tax base due to the large proportion of personal property taken off the tax rolls. We perceive no reason why it is less unfair to shift the property tax burden to owners of real property than to owners of income-producing personal property and, therefore, reject the narrow interpretation of *MAPCO Ammonia Pipeline* advanced by the State.

We note that § 26 of L.B. 829 provides for the reimbursement of the State's political subdivisions for any revenues lost due to "the exemption from taxation of personal property which was immediately prior to [June 11, 1991], subject to tax for tax year 1991 but which is exempt from tax solely because of the changes made to section 77-202 by [L.B. 829]." 1991 Neb. Laws, L.B. 829, § 26 (codified at Neb. Rev. Stat. § 77-27,138.01 (Supp. 1991)). The only personal property subject to taxation "immediately prior to [June 11, 1991]" was the small sliver of income-producing personal property not already legislatively or judicially "exempted" at the time of the decision in *MAPCO Ammonia Pipeline*. Thus, as regards the

property tax burden on real property owners, § 26 of L.B. 829 merely retains the status quo as it existed at that time. In other words, the plight of the state's landowners for tax year 1991 does not get any worse with passage of L.B. 829, but it does not get any better either.

In *MAPCO Ammonia Pipeline,* we concluded that the Legislature's system of exemptions placed an unconstitutionally heavy burden on owners of property remaining on the tax rolls, which included real property owners. As it relates to tax year 1991, § 7 of L.B. 829 imposes an identical burden. Therefore, we hereby declare § 7 of L.B. 829, as it relates to tax year 1991, unconstitutional as a violation of the uniformity clause of Neb. Const. art. VIII, § 1.

2. Tax Year 1992

The plaintiff also challenges § 7 of L.B. 829 as it relates to tax year 1992 and subsequent tax years. The provision in § 7 exempting all personal property except automobiles from the tax rolls applies only to tax year 1991. Thereafter, the bill essentially recodifies the schedule of exemptions as they existed at the time of the *MAPCO Ammonia Pipeline* decision. The plaintiff argues that not only are the exemptions which this court struck down in *MAPCO Ammonia Pipeline* still invalid, but the remainder of the statute is invalid as well. See § 77-202(1) through (11). It is unnecessary to address this issue, however, because subsequent events have rendered the question moot.

Existence of an actual case or controversy is a prerequisite to the exercise of judicial power in Nebraska. *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989) (*Mullendore I*). The case or controversy requirement "applies with equal, if not stronger, force to an action for a declaratory judgment, since the right to maintain the action is expressly granted only to those 'person[s] . . . whose rights, status or other legal relations are affected by a statute.' " *Id.* at 926, 434 N.W.2d at 515, quoting Neb. Rev. Stat. § 25-21,150 (Reissue 1989). The doctrine of mootness is a key component in determining whether an actual case or controversy exists. *Mullendore I.*

On March 18, 1992, the Governor signed 1992 Neb. Laws, L.B. 1063, into law. The bill contained an emergency clause so that its provisions became effective the following day. 1992 Neb. Laws, L.B. 1063, § 215. See Neb. Const. art. III, § 27; *Wilson & Co. v. Otoe County*, 140 Neb. 518, 300 N.W. 415 (1941) (a statute passed with an emergency clause goes into effect the day following its approval by the Governor). L.B. 1063 provides for the repeal of § 77-202 as of January 1, 1992. 1992 Neb. Laws, L.B. 1063, §§ 213 and 210.

For 1991, persons required to list property with the county assessor for property tax purposes were required to do so by March 1, 1991. See Neb. Rev. Stat. § 77-1229 (Reissue 1990). Property taxes for that year were required to be levied by, and became a lien on, November 1, 1991. See Neb. Rev. Stat. §§ 77-1601, 77-1613, 77-1616, and 77-205 (Reissue 1990). Thus, tax year 1991 was completed on November 1, 1991. See *Natural Gas Pipeline Co., supra*. The provisions of § 7 of L.B. 829 were still in effect when the plaintiff's 1991 taxes were levied, and therefore his challenge as regards that year presents a justiciable controversy. See *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986) (repeal of tax statute did not moot constitutional challenge where taxpayer may have already paid taxes under the statute and a declaration of unconstitutionality would entitle him to a refund).

Taxpayer personal property lists for 1992 were not due in the assessor's office until June 1, 1992. 1992 Neb. Laws, L.B. 1063, § 98. From that date, the county boards have until September 20 to levy the 1992 property taxes. *Id.* at § 130. Because the exemptions contained in § 7 of L.B. 829 were repealed as of January 1, 1992, they do not affect the calculation of property taxes for tax year 1992 or any year thereafter. Therefore, the plaintiff's assertion that § 7 of L.B. 829 is unconstitutional as it relates to tax years subsequent to 1991 is now moot. See *Mullendore I* (repeal of statute establishing tax levy corresponding to nonresident high school tuition rates and relator's failure to prove any adverse impact occurring while the statute was in effect mooted constitutional challenge to the statute).

II. SECTION 5

The plaintiff next argues that L.B. 829 is unconstitutional because § 5 of the act, which defines "real property" to include "mobile homes," results in an impermissible commutation of a tax. See Neb. Const. art. VIII, § 4.

Having struck down § 7 of L.B. 829 as it relates to the 1991 tax year, we note the general rule that when part of an act is held unconstitutional the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions. *Fitzgerald v. Kuppinger*, 163 Neb. 286, 79 N.W.2d 547 (1956). This court has identified several factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act. *State ex rel. Spire v. Strawberries Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991).

Based upon a consideration of these factors, we conclude that § 7 is severable from § 5 of L.B. 829. First, L.B. 829 includes a provision expressly stating that a declaration of unconstitutionality as to any section does not affect the validity of the remaining sections. 1991 Neb. Laws, L.B. 829, § 35. Second, we note that in repealing the exemptions contained in § 7, the Legislature retained the definition of real property contained in § 5. See 1992 Neb. Laws, L.B. 1063, § 44 (codified at Neb. Rev. Stat. § 77-103 (Supp. 1991)). From this it is clear that § 5 is independently enforceable and that a workable plan remains. Lastly, our review of the legislative history surrounding passage of L.B. 829 reveals nothing to indicate that § 5 would not have passed in the absence of § 7 or that severance of the two provisions would do violence to the intent of the Legislature.

Proceeding to the plaintiff's argument regarding § 5, it is

noteworthy that he challenges the provision *only* on the basis that it constitutes a commutation of a tax. Cf. *Natural Gas Pipeline Co., supra* (redefinition of term "real property" to include pipelines exceeded Legislature's common-law power of definition and violated the special legislation provision of the state Constitution). We therefore restrict our analysis to consideration of that issue.

The constitutional proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax. *State ex rel. Meyer v. Story*, 173 Neb. 741, 114 N.W.2d 769 (1962). In *Natural Gas Pipeline Co., supra*, this court noted that by virtue of this constitutional proscription, " 'the legislature is prohibited . . . from changing the method of payment of any tax *once levied*. . . .' " (Emphasis supplied.) *Natural Gas Pipeline Co.*, 237 Neb. at 368, 466 N.W.2d at 469, quoting *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936). *Natural Gas Pipeline Co.* involved a statute redefining the term "real property" to include pipelines. See 1989 Neb. Laws (1st Spec. Sess.), L.B. 1, § 1. The statute was passed by the Legislature on November 17, 1989, with an emergency clause and was signed into law by the Governor on November 21, 1989. Noting that "[t]he power to tax is exercised when the tax is levied" and that the tax year with respect to property taxes ended on November 1, 1989, the court held that application of the statute to the 1989 tax year would result in an impermissible commutation of a tax. *Natural Gas Pipeline Co.*, 237 Neb. at 367, 466 N.W.2d at 468.

Natural Gas Pipeline Co. is clearly distinguishable from the case at hand. L.B. 829 was signed into law by the Governor on June 10, 1991, with the effective date of § 5 retroactive to January 1, 1991. 1991 Neb. Laws, L.B. 829, § 34. As noted previously, county boards have until September 15 to levy taxes for all political subdivisions and the county officers responsible for preparing the tax lists until November 1 to extend the 1991 levies for all property. See §§ 77-1601 and 77-1613. Whereas in *Natural Gas Pipeline Co.* the levy was completed and the taxing power exercised 20 days *prior* to enactment of the statute, here personal property taxes for 1991 would not be levied until

several months *after* enactment of the statute. Thus, the plaintiff's contention that § 5 results in the commutation of a tax is without merit.

III. MULTIPLE SUBJECTS IN ONE ACT

The plaintiff also argues that L.B. 829 is unconstitutional because it contains more than one subject, in violation of article III, § 14, of the Nebraska Constitution. The plaintiff points out that the act includes provisions relating to property taxes, which exist as a revenue source for political subdivisions only, as well as provisions regarding the sales and use tax and the corporate income tax, which exist as revenue sources for the State. See 1991 Neb. Laws, L.B. 829, §§ 7, 21, 22, and 24. The plaintiff also notes the inclusion of provisions governing such diverse topics as the procedure for obtaining a tax refund and the retroactive application of judicial decisions declaring a tax or penalty unconstitutional. *Id.* at §§ 13, 14, and 15.

A statute does not violate article III, § 14, if it can fairly be said that the title calls attention to the subject matter of the bill. *Blackledge v. Richards*, 194 Neb. 188, 231 N.W.2d 319 (1975). In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed* 390 U.S. 714, 88 S. Ct. 1418, 20 L. Ed. 2d 254 (1968), the plaintiffs challenged a bill providing for a sales tax, a use tax, an income tax, and a franchise tax as violating the constitutional prohibition against including more than one subject in a single bill. In rejecting the plaintiffs' claim, the court stated:

> If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution. [Citation omitted.]
>
> . . . This court holds that the provisions of [the challenged statute] contain but one general subject, taxation, and that it does not violate the Constitution of Nebraska.

Id. at 408-09, 155 N.W.2d at 332.

The title of L.B. 829 discloses that it relates to taxation and revenue. All of the provisions in the bill relate and are germane

to the general subject of taxation. *Blackledge* and *Anderson* make clear that this is enough. We cannot say the bill violates article III, § 14, of the Nebraska Constitution.

Finally, in connection with his argument that L.B. 829 contains more than one subject, the plaintiff argues that § 14 of the act violates the doctrine of separation of powers contained in Neb. Const. art. II, § 1. Section 14 vests the Tax Commissioner with authority to determine whether judicial decisions holding a tax or penalty unconstitutional should apply prospectively, subject only to review by the court rendering the decision in the same manner as a motion for rehearing. 1991 Neb. Laws, L.B. 829, § 14 (codified at Neb. Rev. Stat. § 77-1736.04 (Supp. 1991)). The provision further vests exclusive jurisdiction in the Supreme Court to determine the constitutionality of tax laws of statewide application. *Id.*

The Nebraska Constitution firmly establishes that the judicial power in Nebraska is vested solely in the courts. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979), citing Neb. Const. art. II, § 1, and art. V, § 1.

> As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts.

Transport Workers of America, 205 Neb. at 34, 286 N.W.2d at 107. In *Transport Workers of America*, the court held that the entry of declaratory judgments and the ordering of accountings are clearly judicial functions which the Legislature may not delegate to the Commission of Industrial Relations.

Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907 (1964), involved a series of statutes passed by the Legislature relating to installment sales contracts and installment loans. One of these statutes included a provision that any declaration of unconstitutionality as to the statutes would apply prospectively only. This court held that the provision violated the doctrine of separation of powers. The

court reasoned:

> It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function and it is the duty of the judicial branch of our government to determine whether an act of the Legislature contravenes the provisions of the Constitution. [Citation omitted.] This power and duty necessarily include the authority to determine what effect if any an unconstitutional statute shall have upon the rights of parties which may have been affected by it.

Id. at 871, 127 N.W.2d at 912.

The State seeks to avoid the effect of *Davis* by noting that L.B. 829 provides for judicial review of the Tax Commissioner's determination in the same manner as a motion for rehearing. Cf. *Anderson v. Tiemann, supra* (delegation of quasi-judicial functions to the Tax Commissioner is allowable when the duties relate to matters peculiarly within the public interest and provision is made for appeal to the courts). *Anderson*, however, involved only a challenge to the general rulemaking authority of the Tax Commissioner. *Davis* makes clear that determination of the prospective or retroactive effect of a judgment of unconstitutionality is essentially judicial in nature, as opposed to merely a quasi-judicial function, and therefore may not be delegated to an administrative agency.

For the same reasons discussed above in relation to § 5 of L.B. 829, we find that § 14 is severable from the remainder of the act. Therefore, in addition to declaring § 7 of L.B. 829 unconstitutional as it relates to tax year 1991, we also declare § 14 of L.B. 829 unconstitutional as a violation of the separation of powers doctrine contained in Neb. Const. art. II, § 1.

JUDGMENT FOR PLAINTIFF.

SHANAHAN, J., dissenting.

With a boost from today's decision, taxes of many Nebraskans are going up. Meanwhile, referring to its previous and fundamentally erroneous opinions, the majority whistles as it walks by a tax statute graveyard nearly filled to capacity with tax legislation garroted by this court's decisions that fail or refuse to recognize the Legislature's constitutional authority to

set tax policy for the State of Nebraska.

DEFECTIVE CONSTRUCTION

As a preamble for its discussion about 1991 Neb. Laws, L.B. 829, the majority mentions generally accepted rules for construction of the Nebraska Constitution:

> A state constitution is the supreme written will of the people of a state [and], as amended, must be read as a whole. . . . A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument. . . . If inconsistent, a constitutional amendment prevails over a provision in the original instrument; but a court will find distinct constitutional provisions repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and are incapable of enforcement without substantial conflict.

However, in the majority's usage, the Nebraska Constitution, the "supreme written will of the people," becomes a vehicle for judicial expression of tax policy. An amended constitution, required to be read "as a whole" or single document with harmonized parts, becomes a black hole that results from this court's tax decisions which have caused the collapse of constitutional power expressly conferred on the Legislature to classify and exempt tangible personal property for tax purposes. Regarding the principle that a "constitutional amendment prevails over a provision in the original" constitution, that rule of construction, after the majority's lip service, sails into a constitutional sunset and apparently falls off the edge of the Earth, for preeminence of a constitutional amendment is never seen or heard again in the majority's opinion.

THE 1919-1920 CONSTITUTIONAL CONVENTION

Rather than basing its decision on the content of the Nebraska Constitution, the majority refers to comments and cryptic "concerns" at the 1919-1920 constitutional convention, at which the uniformity clause was placed in this state's

Constitution some 72 years ago. Bear in mind that Nebraska's electorate in 1970 adopted the constitutional amendment which expressly confers on the Legislature the power to enact laws exempting tangible property from taxation and classify personal property "as it sees fit," to the end that the Legislature "may exempt any of such classes, or may exempt all personal property from taxation." Neb. Const. art. VIII, § 2. Thus, the majority operates from a premise that the 1919-1920 constitutional conventioneers enjoyed the gift of prophecy and, envisioning the 1970 constitutional amendment for tax exemption for property, elevated the uniformity clause to its zenith in a hierarchy of constitutional provisions pertaining to property taxation. Thus, foreseeing the future, those conventioneers chiseled into constitutional granite the monolithic uniformity clause, impervious to any later amendatory action by the people of Nebraska. So long as the majority is captivated by William Jennings Bryan, consider some of his other remarks at the 1919-1920 convention:

> Ours is a people's government . . . . The people will, if they have the power, destroy the breeding places of plutocracy. The initiative and referendum give them this power. They put the people in possession of their government and make it possible for them to secure *through the ballot* anything and everything they want.

(Emphasis in original.) 1 Proc. Const. Convention 327 (1919-1920). In light of the foregoing, imagine Bryan's reverence for a constitutional amendment adopted by the people. By the way, records of the 1919-1920 constitutional convention show that Bryan was not even a delegate to the convention, and, after lecturing to the assembly and preparing to depart for Washington, D.C., to celebrate adoption of the 18th Amendment to the U.S. Constitution, imposing nationwide prohibition, Bryan informed the conventioneers: "[T]here will never be another legalized saloon in the United States." Obviously, Bryan did not share in the gift of prophecy that the majority attributes to the constitutional conventioneers, for the will of the people, expressed in the 21st Amendment adopted in 1933, repealed the 18th Amendment. The established lack of credibility for Bryan's augury is no less

than the lack of credibility for the constitutional conventioneers' precognition of the 1970 amendment for tax classification and exemption of tangible property, when the uniformity clause was made a part of the Nebraska Constitution in 1920. The only salient fact is that the "will of the people" should never be underestimated or overlooked by a court construing a constitution.

A NOVEL FISCAL IMPACT TEST FOR CONSTITUTIONALITY

At this point, it is instructive to consider the plain language of the Nebraska Constitution and the statutory provision which this court declares unconstitutional today. The uniformity clause, Neb. Const. art. VIII, § 1, adopted by the 1919-1920 constitutional convention, provides that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles . . . ." The classification clause, Neb. Const. art. VIII, § 2, adopted by popular vote in 1970, provides in pertinent part that "[t]he Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." L.B. 829, § 7(12), which the court condemns as a violation of the foregoing constitutional provisions, states that "[f]or tax year 1991, all personal property . . . other than motor vehicles . . . shall be exempt from property taxation."

Given the principles of constitutional construction previously mentioned, and the fact that the Legislature enacted a statute precisely in accord with the authority expressly granted by the constitutional amendment embodied in article VIII, § 2, no prolonged examination of L.B. 829's constitutionality should have been necessary.

Instead of applying those accepted principles for construing a constitution, the majority delves into the tax axiom: maintaining or increasing a particular level of tax revenue, while granting exemptions from taxation, necessitates an increase of taxation on the remaining objects of taxation. Resorting to that axiom, the majority declares that "because

the grant of exemptions to one group necessarily entails raising the taxes of another disfavored group," the uniformity clause focuses on the "*effect* of [property tax exemption] classifications on the remaining tax base." (Emphasis in original.) Thus, according to the majority, the purpose of the uniformity clause is prevention of new property tax exemptions that increase the tax burden borne by owners of property remaining subject to taxation. At that point, and without any suggestion by the parties, the majority conjures up its fiscal impact theory of "fully funded" tax exemptions and creates a constitutionally estranged and peculiarly novel test to determine validity of a tax exemption statute. "Creates" is the appropriate term in reference to the majority's new test, for the Nebraska Constitution contains nothing textually or by implication that serves as a basis for the majority's test announced today. As used by the majority, "fully funded" means that for constitutional validity, tax exemptions must be accompanied by a corresponding and contemporaneous tax measure to assure full compensation or restitution for tax revenue lost through the exemptions. Hence, the majority today reveals a test that requires a court to consider "(1) whether the exemptions improperly shift the property tax burden to the remaining tax base, and (2) whether there is a substantial difference of situation or circumstance justifying differing legislation for the objects classified." Consequently, the majority concludes that any exemption which is not "fully funded" results in an "unfair shift of the tax burden to the remaining taxpayers," violates the uniformity clause, and, therefore, is unconstitutional. For this court's majority, then, "unfair" is equated with "unconstitutional," terms that are used interchangeably and synonymously in determining constitutionality of a tax statute.

In some rather slipshod sophistry as an attempt to explain "fully funded," and as a veil over the void in its position, the majority diverts attention to the sales and income tax programs enacted before the 1970 constitutional amendment that authorized exemption of property from taxation. Even to an alien in the world of taxation, sales and income taxes are different from and essentially unrelated to ad valorem taxation

of tangible property. Nevertheless, revenues from sales and income taxes, the majority says, softened the impact on political subdivisions that suffered a loss of tax revenue, taxes that would have been collected if there were no exemptions from property taxation as a result of the exemptive legislation in 1972. When distribution of sales and income taxes to political subdivisions was subsequently discontinued by the State in 1980, but local budgets retained demands for the lost revenue, taxing authorities turned their eyes to taxable tangible property and increased property taxes to offset or compensate for the loss of sales and income tax revenue. That ensuing increase of property taxes, the majority asserts, makes the exemptions authorized by the 1970 constitutional amendment "unfair" and, therefore, "unconstitutional." Yet, the majority fails to explain how changes in sales and income tax laws are inextricably and constitutionally interwoven with property tax exemptions which, according to the majority's new test, must be evaluated on the basis of an exemption's relationship to and immediate direct effect on the burden imposed on taxable property. In short, by dragging the sales and income tax program into the picture, the majority subverts and flunks its own novel test revealed today.

Furthermore, the majority announces that property tax exemptions which are not fully funded are unconstitutional because those exemptions unfairly shift an additional property tax burden to the remaining taxable property. What has escaped the majority's attention is the fact that L.B. 829 follows the majority's fully funded requirement exactly. In § 7 of L.B. 829, the Legislature exempted all personal property from taxation in 1991, but at the same time, in § 20 of L.B. 829, replaced all lost tax revenues by imposing a 2 percent surcharge on depreciation claimed by a taxpayer property owner as a deduction for determining income subject to federal taxation under the Internal Revenue Code of 1986. Of course, that depreciation surcharge, as a source of tax revenue, has been today struck down and eliminated as inseparable from the exemptive provisions at issue in this case. See *Bahensky v. State, post* p. 147, 486 N.W.2d 883 (1992). This leaves the court in the remarkably illogical position of striking down property tax

exemptions in L.B. 829 because the exemptions have not been fully funded by a provision for replacement of lost tax revenue, and then striking down the replacement funding provision in L.B. 829 because there are no longer any exemptions that require funding to replace lost tax revenues.

Beyond question, a lack of confidence and the absence of a constitutional foundation for its new test have prompted the majority to rewrite several of its recent tax decisions concerning the uniformity clause in relation to the legislative power of classification and exemption for tax purposes. Before today, this court has not suggested, or even remotely indicated, that the uniformity clause permits ununiform or variable taxation so long as an exemption is fully funded, or so long as an increased tax burden is not shifted to remaining taxable property. The majority dismisses the actual language of previous tax decisions and instead misreads between the lines for obscure "indicat[ions]," "implications," "concerns," and even "implicit . . . concerns." For instance, in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), this court never concluded or laid judicial groundwork for striking down exemptions because their "burden on the remaining taxpayers was too great." Whatever else today's majority may attribute to *MAPCO Ammonia Pipeline*, the fact remains that the *MAPCO Ammonia Pipeline* majority struck down certain exemptions believed to result in ununiform taxation contrary to the classification clause in article VIII, § 2, and contrary to preemptive federal law that eventually affected Nebraska's tax structure. Thus, the majority rewrites *MAPCO Ammonia Pipeline* in an abortive attempt to fashion some precedent for its novel and constitutionally indefensible approach to a test for validity of exemptions from property taxation. However, rewriting previous decisions, compared with rewriting the Constitution, is a feat of rather small import.

As one additional observation at this point, the majority, elevating the uniformity clause to a position of constitutional preeminence in property taxation, has characterized the uniformity clause as a measure "to prevent a plethora of special-interest-driven exemptions from the tax on tangible

property." Ironically, L.B. 829, exempting all tangible property from taxation, was not the product of concerted effort by special interest groups, but was necessitated by this court's constitutionally unwarranted unwillingness to recognize the Legislature's power to classify property and exempt property from taxation.

Ultimately and unfortunately, the majority offers an illusory explanation in striking down L.B. 829, definitely disregards the Legislature's explicit constitutional power to "exempt all personal property from taxation," and declares L.B. 829 unconstitutional because the Legislature "improperly shift[s] the property tax burden to the remaining tax base." The burden of taxation, as an incident of the power to tax, is a political matter for consideration and determination by the Legislature, not by this court.

As Aldous Huxley noted: "Facts do not cease to exist because they are ignored." While this court ignores the Legislature's constitutional power to classify and exempt property for tax purposes, this does not mean that the people of Nebraska have not conferred those powers on their Legislature.

EQUAL PROTECTION

Steeped in its perception of tax "fairness," the majority seeks refuge in the "principles of equal protection." Indeed, this court has specifically held that the analysis required under the uniformity clause comes from the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. See *State ex rel. Douglas v. State Board of Equalization and Assm't*, 205 Neb. 130, 286 N.W.2d 729 (1979).

Although there is no equal protection clause in the Nebraska Constitution, this court has often noted that the special legislation clause of article III, § 18, is the equivalent of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution in reference to disparate treatment. See, *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986); *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). Also, this court has directly tied its analysis of article III, § 18, to the U.S. Supreme Court's analysis of the 14th Amendment's Equal Protection Clause. See *Willis v. City of Lincoln*, 232

Neb. 533, 441 N.W.2d 846 (1989). This accounts for the attempt by some members of this court to use the 14th Amendment's Equal Protection Clause as a reason for striking down property tax classifications and exemptions in earlier property tax cases. See *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991) (White and Fahrnbruch, JJ., concurring) (Grant, J., concurring). See, also, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (Fahrnbruch, J., concurring). The equal protection echoes are heard again in today's decision, when the majority states that "principles of equal protection form much of this court's uniformity clause jurisprudence."

Very recently, in *Nordlinger v. Hahn*, 60 U.S.L.W. 4563 (U.S. June 18, 1992) (No. 90-1912), the U.S. Supreme Court considered a California property tax system that included unequal or disparate real estate taxes on similar pieces of property, depending on the date of acquisition by the property owner. Under the California system, property taxes might vary as much as 1,700 percent, since long-term owners paid lower taxes, reflecting historic property values at the time of acquisition, while newer owners paid higher taxes, reflecting more recent values based on the current real estate market. In upholding the constitutionality of the California tax law challenged under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, the U.S. Supreme Court expressed the standard for correct consideration of property tax classifications:

> The appropriate standard of review is whether the difference in treatment [between the classes] rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation omitted], the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, [citation omitted], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, [citation omitted]. This standard is especially deferential in the context of classifications made by

> complex tax laws. "[I]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.[']" *Williams v. Vermont*, 472 U.S. 14, 22 (1985), quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). See also *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

Nordlinger, 60 U.S.L.W. at 4566.

In *Nordlinger*, the Court found at least two rational bases for the California tax program and further noted that "[f]or purposes of rational-basis review, the 'latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy.' " *Id.* at 4567. The *Nordlinger* Court concluded:

> Time and again, however, this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted" . . . .

Id. at 4568.

Today this court attempts to divert attention from its previously expressed misconception of the U.S. Constitution's Equal Protection Clause related to state taxation. In *Nordlinger*, the U.S. Supreme Court has thoroughly discredited and rejected this court's singular view of equal protection as a basis to repudiate the Legislature's power to classify for tax purposes. Abruptly and quite noticeably backpedaling from equal protection concerns manifested in its earlier tax decisions, the majority now falls back on the comment that equal protection under "the federal Constitution represent[s] only a floor," since obviously the U.S. Supreme Court has pulled the rug from under this court's previous and erroneous equal protection analysis. Nevertheless, the Equal Protection Clause of the 14th Amendment to the U.S.

Constitution, as construed by the U.S. Supreme Court, is the law of the land, even in Nebraska.

What is more curious about today's decision is that after begrudgingly acknowledging that its previous and fallacious equal protection analysis is decimated by *Nordlinger*, the majority, apparently referring to tax classifications and exemptions, alludes to article III, § 18, Nebraska's constitutional prohibition against impermissible classifications. Yet, amendment 1, the constitutional amendment pertaining to tax classifications and exemptions adopted in 1992, contains the language "[n]otwithstanding . . . Article III, § 18 . . . of this Constitution or any other provision of this Constitution to the contrary," which is immediately followed by the expression of legislative authority to classify and exempt tangible property for tax purposes. By specifically mentioning the Nebraska Constitution's prohibition against impermissible classifications, is the majority foretelling a tax Armageddon involving article III, § 18, and amendment 1? More important and disconcerting, is the majority indicating, as surely seems to be the situation, that article III, § 18, will prevail to the chagrin of Nebraska voters who adopted amendment 1? Also, will amendment 1 suffer the same tortured fate that befell the 1970 constitutional amendment for tax classifications and exemptions as the result of today's decision? If so, then this court has unfortunately arrived at the awkward judicial incongruity of creating lawsuits, not resolving them. We shall see; we shall see.

BACK INTO THE LITIGATION LABYRINTH

As a result of today's decision, some Nebraska property owners will very likely find themselves in considerable tax trouble. According to the majority, the Legislature might constitutionally (1) tax all tangible property, real and personal, in an identical manner; (2) exempt all real and personal property from taxation; or (3) exempt some tangible property from taxation, but from some source replace tax revenue lost through exemptions and thereby prevent increasing the tax burden on remaining property owners. Consequently, under today's decision, the Legislature cannot exempt all personal

property from taxation, while retaining the property tax on real estate; therefore, Nebraska political subdivisions have either collected too much property tax from property owners who have paid an unconstitutional property tax, or not collected enough taxes from property owners who have availed themselves of unconstitutional property tax exemptions. This situation presents two courses of action: (1) honor claims for refunds on all property tax revenues which were unconstitutionally imposed and collected, or (2) collect additional taxes from those who were undertaxed or escaped taxation as the result of unconstitutional exemptions.

The majority's novel test, proclaimed today, is in nowise limited to personal property exemptions. Although the Nebraska Constitution authorizes tax exemptions for property of charitable, religious, and educational organizations, exemptions are not automatic and require enabling legislation to achieve the actual exemption. See *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987) (Nebraska's Constitution does not extend automatic tax exemptions to property of a charitable, religious, or educational organization, but authorizes exemption achieved by legislative implementation). Within the majority's new test is a tax equation: if, as the majority announces, all real and personal property is entitled to equal tax treatment, and tax exemptions that are not fully funded are constitutionally impermissible, then, as a result, all Nebraska's property tax exemptions, existing by legislation and unfunded, are unconstitutional. Consequently, in the absence of constitutionally valid property tax exemptions, all tangible property, whether real estate or personal property and without exception, must be placed on the tax rolls for 1991. The tax equation in today's decision leaves no room for any property tax exemptions, including exemptions for business and agricultural inventories, a private school building, or property previously exempt under Nebraska's Employment and Investment Growth Act, that is, L.B. 775 enacted in 1987 and now codified as Neb. Rev. Stat. § 77-4105 et seq. (Reissue 1990). As a patent paradox springing from its novel test, the majority strikes down the tax exemptions available under L.B.

775, which has generated new employment and an increase in Nebraska's work force, with corresponding increases in revenue from sales and income taxes paid by new employees as consumers and taxpayers. Enabling legislation for the aforementioned illustrative exemptions of tangible property and many other personal property exemptions was contained in § 7 of L.B. 829 pertaining to 1991, legislation which has been struck down by this court. Therefore, as the result of the majority's approach based on absolutely equal tax treatment for real estate and tangible personal property, all tangible property has become taxable for the year 1991. Thus, the potential tax horribles set out in the dissent in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (Shanahan, J., dissenting), have today become reality in Nebraska.

Perhaps, there may be a question whether and how far the State or its political subdivisions can reach into past tax years to collect additional taxes from taxpayers who have already paid their tax liability under existing statutes. If the State or political subdivisions can reach back and collect additional taxes on property which was, at the time, unconstitutionally exempted from taxation, then Nebraskans owning tax-exempt tangible property may be subject to taxation for all their tangible property previously omitted from taxation. On the other hand, it may be unfair to collect additional taxes from those who, relying on existing tax statutes, were unknowingly undertaxed or untaxed.

If the State's political subdivisions are forced to refund taxes that are unconstitutional as the result of the majority's new test and tax equation, the amount of money at risk absolutely staggers the imagination. According to the majority, an unfair tax burden was shifted to owners of tangible property in 1980, when the State discontinued distribution of sales and income tax revenues to political subdivisions, that is, if local budget and tax revenue requirements remained constant or were increased after termination of the distributions. The inescapable conclusion, based on the majority's test and decision, is that Nebraska's property tax structure has continuously violated the uniformity clause since 1980 and, therefore, has been

continuously unconstitutional since 1980. Assume a 2-year statute of limitations, although in view of today's decision, the statute of limitations for a tax refund is no settled question. In the tax year 1990, Nebraska Department of Revenue figures show that the total of all Nebraska property taxes levied was $1.219 billion. Preliminary figures from the Department of Revenue indicate that the amount may be as high as $1.258 billion for 1991. After today, and with the assumed 2-year statute of limitations, every property tax dollar collected for 1990 and 1991 is potentially subject to refund. A billion here, a billion there, and pretty soon you are talking about a lot of money. The burden of such a cataclysmic tax refund would, paradoxically, fall on all the state's taxpayers through higher property taxes, increases in sales and income taxes, or any other form of additional taxes earmarked as a source of revenue to defray property tax refunds.

APPLICABLE STATUTE OF LIMITATIONS

Since the majority has effectively concluded that Nebraska's property tax has been unconstitutional since 1980, the ultimate cost of today's decision is closely tied to the applicable statute of limitations. Obviously, more money is at risk the farther back in time that tax overpayments must be refunded or tax underpayments collected. L.B. 829, § 14, specified that any claim for a refund based on unconstitutionality of a property tax must be brought within the tax year of levy or assessment and that refunds might be obtained by only those who successfully contested constitutionality of the tax. However, because the majority has nullified § 14 of L.B. 829, other statutes of limitations may have to be examined regarding time limits for refunds and commencement of tax actions. Which statute or statutes apply is another question left for another day.

CONCLUSION

After the great public upheaval caused by this court's previous tax decisions, the people of Nebraska adopted amendment 1 in May 1992 and constitutionally separated the uniformity clause from the classification and exemption clause in the Nebraska Constitution relative to taxation of personal property. Amendment 1 is an extensive constitutional

amendment concerning taxation and exemption of personal property, although the amendment does not contain emphatic language by the voters—"and this time we really mean it!" While many might have hoped that amendment 1 would be the last turn in a legal labyrinth of tax turmoil, in reality today's decision marks the entrance into yet another tax maze. As a consequence of the lack of judicial insight and explanation, many crucial questions that should have been answered today remain unanswered as subjects for future lawsuits. Although Benjamin Franklin believed that "in this world nothing is certain but death and taxes," if he were alive in Nebraska today he would likely add "with confusion and litigation." One has to wonder whether the tax policy poltergeists, believed to have been exorcised by amendment 1, may yet haunt this court's tax decisions.

MELVIN BAHENSKY, PLAINTIFF, V. STATE OF NEBRASKA ET AL., DEFENDANTS.
486 N.W.2d 883

Filed July 24, 1992. No. S-91-846.

1. **Constitutional Law: Statutes.** When part of an act is held unconstitutional the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
2. **Constitutional Law: Statutes: Legislature: Intent.** Courts must consider several factors in determining whether an unconstitutional provision is severable from the remainder of the statute: namely, (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Original action. Judgment for plaintiff.

John W. DeCamp, of DeCamp Legal Services, for plaintiff.

Don Stenberg, Attorney General, and L. Jay Bartel for defendants.

Robert J. Huck, James F. Kasher, and David G. Wilwerding, of Croker, Huck, Kasher, Lanphier, DeWitt & Anderson, P.C., for amicus curiae Metropolitan Omaha Builders Association.

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

PER CURIAM.

This is an original action, pursuant to a stipulated set of facts, seeking a declaratory judgment as to the constitutionality of 1991 Neb. Laws, L.B. 829, § 20, which bill the Legislature passed with an emergency clause, and the Governor signed into law on June 10, 1991. Named as defendants were the State of Nebraska, Governor E. Benjamin Nelson, Secretary of State Allen J. Beermann, Auditor of Public Accounts John Breslow, State Treasurer Dawn Rockey, Tax Commissioner M. Berri Balka, and Attorney General Donald Stenberg.

The stipulated facts reveal that the plaintiff, Melvin Bahensky, is a Nebraska resident and taxpayer. He owns a farm rental business, in connection with which he purchased irrigation pipe and a copying machine. In computing his federal income taxes, the plaintiff has in past years taken a deduction for cost recovery regarding the irrigation pipe and copying machine. The amount of this deduction is based upon depreciation of the property as calculated according to the Internal Revenue Code. See 26 U.S.C. §§ 167, 168, 169, and 179 (1988 & Supp. II 1990). The plaintiff planned to take a similar deduction for the 1991 tax year.

For tax year 1991 only, L.B. 829, § 20 (codified at Neb. Rev. Stat. § 77-2716.02 (Supp. 1991)), imposes "a surcharge of two percent of all depreciation." "Depreciation" is defined in § 20 as "any deduction for cost recovery allowable under section 167, 168, 169, or 179 of the Internal Revenue Code of 1986, as amended, on tangible property used in a trade or business or tangible property held for the production of income . . . ."

It is the plaintiff's contention that § 20 violates Neb. Const. art. VIII, § 1A, which prohibits the State from "levying a

property tax for state purposes," as well as Neb. Const. art. VIII, § 1, which requires uniformity and proportionality in the taxation of all tangible property and franchises, with certain exceptions. Due to our decision in the companion case *Jaksha v. State, ante* p. 106, 486 N.W.2d 858 (1992), however, it is unnecessary to address these contentions.

In *Jaksha*, we held that L.B. 829, § 7, as it relates to the 1991 tax year, violates the uniformity clause of the Nebraska Constitution, article VIII, § 1. As we noted in that case, generally, "when part of an act is held unconstitutional the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions." *Jaksha, ante* at 129, 486 N.W.2d at 873, citing *Fitzgerald v. Kuppinger*, 163 Neb. 286, 79 N.W.2d 547 (1956). We also identified several factors courts must consider in determining the severability of an unconstitutional provision: namely, (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act. *Jaksha, supra*, citing *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991).

Section 7 of L.B. 829 (codified at Neb. Rev. Stat. § 77-202(12) (Supp. 1991)) purported to exempt virtually all personal property from the property tax rolls for tax year 1991. Section 26 of the act (codified at Neb. Rev. Stat. § 77-27,138.01 (Supp. 1991)) provides for the reimbursement of the State's political subdivisions for revenues lost due to the additional exemption of personal property which was not already exempt when § 7 was passed. During floor debate on L.B. 829, it was estimated that exemption of this remaining sliver of personal property would result in a $95 million shortfall to the counties. Floor Debate, 92d Leg., 1st Sess. 5090-93 (May 14, 1991).

Much of the debate concerning L.B. 829 centered upon the sources from which the reimbursement contemplated in § 26 of

the act should derive. The senators ultimately agreed on a plan which would do the following: (1) impose a surcharge on tax deductions taken for depreciation of business property, which is the provision challenged by the plaintiff; (2) decrease the fee allowed for collection by retailers of the sales and use tax on tangible personal property, L.B. 829, §§ 21 and 23 (codified, respectively, at Neb. Rev. Stat. §§ 77-2703(2)(d) and 77-2708(1)(d) (Supp. 1991)); (3) impose a utility tax on energy used in manufacturing, in generation of electricity, and by hospitals, L.B. 829, § 22 (codified at Neb. Rev. Stat. § 77-2704(1)(j)(ii) (Supp. 1991)); (4) impose a surcharge on the income tax rate for corporations earning in excess of $200,000, L.B. 829, § 24 (codified at Neb. Rev. Stat. § 77-2734.17 (Supp. 1991)); and (5) require payment of a one-time fee of $150 by most corporations in the state, L.B. 829, § 25 (codified at Neb. Rev. Stat. § 21-330 (Supp. 1991)).

According to comments made in the floor debate, the funding mechanisms just described would generate approximately $97 million in state funds if implemented. Floor Debate, L.B. 829, 92d Leg., 1st Sess. 6942 (June 3, 1991). In contrast to the provisions deemed severable from § 7 in *Jaksha, supra*, each of the provisions here was specifically designed to last only 1 year. Arguing in support of the appropriation bill for L.B. 829, Senator Eric Will summarized the intent of the measure: "The bill right now authorizes an appropriation of $97 million in General Fund monies, and that simply reflects the amount that we are estimating local subdivisions will lose from the removal of personal property from the tax rolls for the '91 tax year." Floor Debate, 92d Leg., 1st Sess. 6360 (May 29, 1991).

Sections 20 through 25 of L.B. 829 are clearly part of a package designed to raise the revenues needed to reimburse the State's political subdivisions for moneys lost due to the effect of § 7 in the 1991 tax year. Without passage of § 7, the Legislature lacked any reason to enact these additional revenue measures and undoubtedly would not have done so. We conclude that § 7 of L.B. 829 was a specific inducement to passage of §§ 20 through 25 and that enforcement of the latter in the absence of the exemptions contained in the former would do violence to

the intent of the Legislature. As a result, we hereby declare §§ 20 through 25 of L.B. 829 unconstitutional by virtue of our decision in *Jaksha, supra.*

JUDGMENT FOR PLAINTIFF.

SHANAHAN, J., dissenting.

Because this court, relying on the majority's opinion in *Jaksha v. State, ante* p. 106, 486 N.W.2d 858 (1992), strikes down the depreciation surcharge authorized by 1991 Neb. Laws, L.B. 829, § 20, I certainly disagree with the majority's decision in this case, a decision which only exacerbates the state's property tax woes by requiring refund of all taxes collected pursuant to § 20.

Furthermore, I disagree with the court's assertion that § 20 is inseverable from L.B. 829, § 7. As the court admits, only one of the numerous factors to achieve inseverability is present in Bahensky's case, namely, § 7 as an inducement to passage of § 20. Moreover, in view of the result in *Jaksha*, the court's protestations of unwillingness to "do violence to the intent of the Legislature" have a hollow ring and cannot be taken seriously. Also, there is nothing in §§ 7 and 20 of L.B. 829 to indicate that they are inextricably intertwined, nor is there any apparent ambiguity in the statutory language. Therefore, the provisions of §§ 7 and 20 should be construed in terms of the statutory plain language appearing on the face of the legislation. Senatorial verbal exchanges on the floor of the Legislature have no role in determining constitutionality of the legislation presently under judicial examination. To single out a senator's statement in the legislative chamber and then transform that statement into the collective voice of the Legislature is unquestionably farfetched. Moreover, the day that an expression on the floor of the Legislature determines constitutionality of a statute will be a sad day for the constitutional separation of powers and judicial authority to construe statutes. That sad day has apparently arrived today.

Finally, the only issue presented in this appeal, the issue ignored by this court's majority, is whether the 2 percent surcharge imposed on the exercise of the federal depreciation deduction is a property tax in violation of Neb. Const. art. VIII, § 1A, which prohibits levying of a property tax for state

purposes. An excise tax is an indirect tax, one not directly imposed upon persons or property [citation omitted], and is one that is 'imposed on the performance of an act, the engaging in any occupation, or the enjoyment [of] a privilege.' " *New Neighborhoods v. W. Va. Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989). See, also, *State v. Galyen*, 221 Neb. 497, 500-01, 378 N.W.2d 182, 185 (1985):

> " 'An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes.' " [Citation omitted.]
>
> On a number of occasions this court has similarly recognized that a tax imposed upon the doing of an act is an excise tax and not a property tax.

The depreciation surcharge under § 20 of L.B. 829 is imposed on a taxpayer's voluntary act of asserting the privilege to claim depreciation as a tax deduction allowed in determining income tax liability under the federal Internal Revenue Code. Therefore, the depreciation surcharge is a constitutional excise tax, not a property tax prohibited by Neb. Const. art. VIII, § 1A. Hence, § 20 of L.B. 829 is constitutional.

IN RE COMPLAINT AGAINST WILLIAM D. STALEY, JUDGE OF THE SEPARATE JUVENILE COURT OF SARPY COUNTY, NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. WILLIAM D. STALEY, RESPONDENT.

486 N.W.2d 886

Filed July 31, 1992. No. JQ-89-004.

1. **Judges: Disciplinary Proceedings.** A clear violation of the Code of Judicial Conduct constitutes a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1989).
2. **Judges: Disciplinary Proceedings: Appeal and Error.** In a disciplinary proceeding originating from a complaint by the Commission on Judicial Qualifications, if no new evidence is received by the Supreme Court, the matter is reviewed de novo upon the record.

3. **Judges: Disciplinary Proceedings: Proof.** In a proceeding upon a complaint before the Commission on Judicial Qualifications, the charges must be supported by clear and convincing evidence.
4. **Attorney and Client: Waiver.** Counsel cannot waive rights which are personal to their clients. Personal rights of a litigant must be waived by the litigant personally.
5. **Juvenile Courts: Records: Waiver.** The dispositional phase of a juvenile proceeding is an integral and extremely important part of the proceeding, and a verbatim record must be made of that part of the proceeding in the absence of a valid waiver by all parties.

Original action. Judgment of removal.

Patrick T. O'Brien, of Bauer, Galter, O'Brien & Allan, for relator.

E. Dean Hascall for respondent.

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

PER CURIAM.

This is an original proceeding in this court upon a complaint filed by the Nebraska Commission on Judicial Qualifications charging, in five counts, misconduct by the respondent, William D. Staley, a judge of the separate juvenile court of Sarpy County. The original complaint was filed on December 26, 1989. An amended complaint was filed by the commission on August 20, 1990.

Pursuant to Neb. Const. art. V, § 30, and Neb. Rev. Stat. § 24-721 (Reissue 1989), this court appointed the Honorable Lyle Winkle as special master to conduct hearings concerning the allegations. These hearings commenced on September 17, 1990, and were completed on September 20, 1990.

The master found that the charges contained in counts 1, 2, 3, and 4 were supported by clear and convincing evidence and that the respondent's conduct violated Neb. Rev. Stat. § 24-722(1), (2), and (6) (Reissue 1989) and Canon 3A(3) and (4) of the Code of Judicial Conduct. The commission adopted the master's findings with respect to counts 2 and 3, but dismissed counts 1 and 4. Neither the master nor the commission found sufficient evidence to support the charges contained in count 5.

The commission recommended the following disciplinary action against the respondent:

> A. That Judge William D. Staley be given a public reprimand because of the violations set out above.
>
> B. That Judge William D. Staley be directed to abide by the rules and court decisions requiring the making and preserving of a verbatim transcript of all court proceedings in connection with juvenile matters, except in such cases in which all parties agree to waive a record, and the judge concurs in such waiver, and Judge Staley shall, however, cause a record to be made of such waiver by means of either a verbatim record or a written waiver signed by the waiving party or his or her attorney; that Judge William D. Staley further be reminded of the requirement that except in special circumstances, all court proceedings shall be open to the public and that those proceedings which are for a good cause closed shall nevertheless be reported verbatim by the court reporter for preservation of the record.
>
> C. That all costs and expenses of this proceeding, excluding the fees of the prosecuting attorney, Patrick T. O'Brien, for his legal services only, be taxed against William D. Staley.

On January 25, 1991, the respondent filed a "Petition/Brief" asking this court to modify or reject the commission's recommendations.

The statute, § 24-722, which the respondent is alleged to have violated provides in relevant part:

> A Justice or Judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for (1) willful misconduct in office, (2) willful disregard of or failure to perform his or her duties . . . or (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . .

The relevant portion of Canon 3 of the Code of Judicial Conduct as adopted by this court is as follows:

A. ADJUDICATIVE RESPONSIBILITIES.

. . . .

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he or she deals in an official capacity, and should require similar conduct of lawyers, and of his or her staff, court officials, and others subject to his or her direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or a party's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. . . .

The commentary to Canon 3A(3) states: "The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate."

The object of the Code of Judicial Conduct adopted by this court is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a clear violation of the code constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987).

Since this court received no evidence in addition to that heard by the master, the matter is to be reviewed in this court de novo upon the record made before the master. *In re Complaint Against Kelly, supra.* This court must first determine, upon its own independent inquiry, whether the charges against the respondent are supported by clear and convincing evidence; next, we must determine which, if any, canons of the Code of Judicial Conduct and subsections of § 24-722 may have been violated; and finally, we must determine what discipline, if any, is appropriate under the circumstances. *In re Complaint Against Kelley, supra.*

COUNT 1

Count 1 of the amended complaint alleged:

> 1. That said William Staley did on the 25th day of February 1988 conduct himself in a manner prejudicial to the administration of justice, that brought the judicial office into disrepute contrary to Neb. Rev. Stat. §24-722(6) (Reissue 1985) in that he did fail to be patient, dignified and courteous to the litigants, lawyers and others with whom he dealt in an official capacity in that he did in case number Docket 17 Page 254 state that he did not believe an in-court statement by a lawyer on the record, to wit, Lisa Swinton, Attorney for the Department of Social Services, and in case number Docket 20 Page 173 by in several instances berating the family of the subject juvenile, and in cases number Docket 18 Page 316 and Docket 19 Page 302, by making disparaging comments to the juvenile's mother in a manner that was neither patient, dignified or courteous, all in violation of Canon 3(A)(3) and (4) of the Code of Judicial Conduct.

With respect to the allegations involving Lisa Swinton, the record shows that on February 25, 1988, Swinton represented the Nebraska Department of Social Services (DSS) at a hearing before the respondent in a case involving the placement of a juvenile at the Lincoln Regional Center. Previously the juvenile had been placed at the Youth Development Center at Geneva, Nebraska, but when he was returned to Sarpy County pending placement in the Lincoln Regional Center it was determined that an interim placement for the juvenile would be necessary until an opening became available at the Lincoln Regional Center. A conflict then arose regarding the juvenile's interim placement. DSS personnel contended, on the advice of a psychologist, that the youth should be placed in a locked, secure facility, but a probation officer sought placement for the juvenile in a less restrictive facility. Although the probation officer requested a hearing to resolve the dispute, the conflict was resolved prior to the hearing when space at the Lincoln Regional Center unexpectedly became immediately available for the youth.

Nevertheless, the respondent proceeded to conduct a hearing concerning the youth's placement. At this hearing the

respondent voiced general displeasure with DSS' placement of juveniles, and the hearing concluded with the following exchange:

> THE COURT: . . . I have no doubt whatsoever in this case that the recommendation made by the Department of Social Services to place this young man in jail was based on the lack of alternatives and not because he needed to be incarcerated in the jail. And I will for one — I will not allow this court system to be utilized to — at the expense of kids and their families to compensate for the incompetence of the system that we need to — to be competent.
>
> . . . And I think some things have to be changed in the Department of Social Services so we don't keep putting kids in places they don't belong just because we don't have any other choice.
>
> . . . .
>
> [DSS EMPLOYEE]: Your Honor, I was told myself by Dr. Riedler before Brian left there that . . . this child should not be on the street, he should not be home, he should not be in foster care, he needs to be in a locked facility.
>
> THE COURT: Like St. Josephs [sic] Hospital. That's why he was in St. Josephs [sic] Hospital before he left for the Youth Development Center at Geneva. But talking about a locked facility at St. Josephs [sic] Hospital and isolation in the Sarpy County Jail are two severely different things.
>
> And I will tell you up front I am not going to put kids in the youth center and I'm not going to put kids in jail just because the Department of Social Services wants to save a few bucks.
>
> MS. SWINTON: Your Honor, this has never been a question of saving money. This situation —
>
> THE COURT: You'll excuse me, Counselor, if I just don't believe you.
>
> We are adjourned.

It is clear from the record that Swinton was not allowed to present and defend DSS' position with respect to the placement

of the youth in question. Of course, when space at the Lincoln Regional Center suddenly became available, the placement issue became moot and there was no purpose for the hearing. Nevertheless, the respondent did conduct a hearing, during the course of which he berated DSS, the agency which Swinton represented. Thus, particularly in view of the respondent's condemnation of DSS, the respondent's conduct with respect to Swinton was at least a violation of Canon 3A(4), which requires a judge to "accord to every person who is legally interested in a proceeding, or a party's lawyer, full right to be heard according to law . . . ."

The amended complaint also alleges misconduct by the respondent in a case involving a mother who was having behavioral problems with her daughter. Apparently, in that case the respondent found that it would be in the best interests of the daughter for her to be placed in the custody of her father, who lived in South Carolina. The mother testified that the respondent "seemed to be picking on me" and that "he had a very arrogant look on his face." According to the mother, when she asked how she was going to have a relationship with her daughter if the youth were sent to South Carolina, the respondent said, "You may never have a relationship with her."

Another case which was heard by the respondent involved a 16-year-old boy who had been cited for a curfew violation. On March 13, 1989, the juvenile appeared before the respondent for his arraignment on the curfew violation; at the hearing the juvenile was accompanied by his attorney, his parents, and two uncles. However, the respondent refused to allow the juvenile's two uncles to remain in the courtroom and required all persons not a party to the proceeding to leave the courtroom. After the juvenile had admitted the curfew violation, his attorney requested an immediate disposition and waived a record of the dispositional hearing. There is no indication that the juvenile's mother and custodial parent waived a record.

Then, before proceeding with the dispositional hearing, the respondent ordered everyone except the juvenile to leave the courtroom, but apparently, his attorney was allowed to remain in the room with the juvenile and the respondent. After being excluded from the courtroom for 15 to 20 minutes, the

juvenile's mother was allowed to return to the courtroom.

According to the juvenile's attorney, the respondent's private conversation with the juvenile consisted primarily of a discussion of the effect of the juvenile's father's alcoholism upon the juvenile and his family. The record further shows that the respondent was well acquainted with the juvenile's father, a deputy Sarpy County attorney who is divorced from the juvenile's mother, and that the respondent and the juvenile's father had attended Alcoholics Anonymous meetings together.

Later, the juvenile's mother spoke with her son and discussed what the respondent had said to him in the courtroom in her absence. The mother testified that when she attempted to obtain a transcript of the court proceeding, court personnel initially said that a transcript would be made available to her, but she was later informed by court personnel that "[t]he Judge said [she] couldn't have it." She knew that the respondent's "private dispositional hearing" with her son would not be available, since that portion of the proceeding had occurred after the respondent had ordered the court reporter and everyone else except the juvenile to leave the courtroom. She further testified that the juvenile himself was denied access to a transcript of the proceeding. After her exclusion from the court proceeding and the refusal of her request for a transcript, the mother hired an attorney; her attorney was refused access to the juvenile's court file.

Later, the respondent conducted a second and final dispositional hearing with respect to the juvenile, at which jurisdiction over the juvenile was terminated. This hearing was attended by the juvenile and his attorney, the mother and her attorney, and an aunt who was initially present for the hearing. Referring to her sister, the aunt, the mother testified: "She came into the courtroom with me and we were all getting ready to be seated, the Judge . . . yelled, 'The lady in the back, get outta here.' Which, she was the only lady in the back, so she left."

The mother then described what transpired next:

> The Judge might have read that little bit they read at the beginning of court proceedings, you know, what it's all about and then he started telling us a quote from Oscar Wilde. My attorney had picked up his pen to begin writing

> [the juvenile's] name down and what the whole thing was about, and Mr. [sic] Staley *yelled* at him, "Put the pen down, you're not in the classroom anymore! I don't allow writing in my courtroom."

(Emphasis supplied.) The mother's attorney, Michael Lustgarten, testified that the respondent's tone was stern and abrupt when the judge told him to put his pen down. The mother testified that the respondent's conduct "shocked" her, then continued to describe what transpired during the hearing:

> First, he spoke to my husband and said — spoke — called him by name, I can remember that, and said, "I realize you're in this — it's an off-hand situation with you, but" — and then he turned to me and told me, that I was being manipulative. I was using my son. He told me that if my brothers and sisters would stay out of his life, he'd be much better off. I don't know. I just felt it was very inappropriate. I don't know that man, he doesn't know me.

With respect to count 1 of the amended complaint, the master found:

> The acts of the judge in reference to Lisa Swinton violated both Canons 3 (A)(3) and (4) of the Code of Judicial Conduct, in that the Judge did not act in a patient, dignified and courteous manner to her as a lawyer and did deny her, her full right to be heard according to law and the Judge did have ex parte or other communications concerning a pending or impending matter that she was interested in.
>
> And in reference to [the juvenile charged with a curfew violation], the Judge violated Canon 3 (A), (4) in that he did not accord to the mother as a legal interested party in the proceeding or her lawyer a full right to be heard according to law and was in violation of [§ 24-722(6)], for conduct prejudicial to the administration of justice and that brings the judicial office into disrepute.

However, the commission determined that the respondent's comment to Swinton (i.e., "You'll excuse me, Counselor, if I just don't believe you") "in the context in which it was made, did not support the allegation that Judge Staley failed to be

patient, dignified, and courteous." And with respect to the case involving the juvenile charged with a curfew violation, the commission determined that

> although apparently the mother and father were excused from the courtroom while Judge Staley conducted the brief interview with the juvenile in the presence of the juvenile's attorney, and even though no record was made of this conversation, nevertheless the court shortly thereafter dismissed the complaint against the juvenile and there does not seem to be a violation of the right of an interested party to be heard, and that charge is dismissed.

COUNT 2

Count 2 of the amended complaint alleged:

> 2. That Judge William Staley, on a regular basis, conducts dispositional hearings without providing for a verbatim record, by dismissing his court reporter and announcing the disposition informally contrary to the provisions of Neb. Rev. Stat. §43-2,111 (Reissue 1988) as construed in In Re Interest of R.A. 226 Neb. 160 410 N.W.2d 110 1987, and more particularly in the case of In The Interest of J.A.N., Docket 20 Page 173, Docket 17, Page 254, Docket 18 Page 316 and Docket 19, Page 302 of the Separate Juvenile Court of Sarpy County, Nebraska contrary to the provisions of Neb. Rev. Stat. §24-722(2) (Reissue 1985), which is a willful disregard or failure to perform his duties, and Neb. Rev. Stat. §24-722(6) (Reissue 1985), conduct prejudicial to the administration of justice, or that brings the judicial office into disrepute and Canon 3(A)(4) of the Code of Judicial Conduct and further by failing to allow a person legally interested in a proceeding or a party's lawyer full right to be heard according to law. More specifically in case Docket 20 Page 173, he refused to allow the mother to attend in the courtroom while he announced the dispositional order regarding her son on March 13, 1989.

The master found that the respondent regularly "conducts dispositional and 'further' dispositional hearings without providing for a verbatim record by dismissing his court reporter

and announcing his decision informally" and that this practice continued to the date of the hearing regarding the charges against the respondent.

While the record does not show that the respondent has ever refused to permit the making of a verbatim record where one has been specifically requested, it is clear that he regularly conducts proceedings "off the record" without having all of the parties waive a verbatim transcript as required by *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). In *In re Interest of A.M.H.*, a case originating in Judge Staley's court, this court stated:

> We have noted at the outset the absence of a record of several court proceedings. The separate juvenile court is a court of record. Neb. Rev. Stat. § 43-2,111 (Reissue 1988). In the absence of a valid waiver by all parties to the proceedings, a verbatim transcript of those proceedings shall be made and preserved. See, also, *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

233 Neb. at 618-19, 447 N.W.2d at 46.

According to the master, the respondent "normally invites the off the record proceedings by inquiring of the attorneys as to whether they want it on the record." Indeed, the testimony of Deputy Sarpy County Attorney Larry Gendler indicates that Judge Staley apparently deems the State to have waived a record by its nonappearance at many dispositional hearings. The record also indicates that Judge Staley may deem parties appearing pro se to have waived a record, as he apparently does not even inquire as to whether such parties waive a verbatim record. The case involving the juvenile accused of a curfew violation is an example of this. That case is discussed above with respect to count 1. While the juvenile's mother in that case was aware that the respondent had asked the court reporter to leave the room when he spoke with the juvenile, it is clear that she did not waive a record of any portion of the proceeding.

With respect to the matter of waiving the rights of parties, in *In re Interest of D.M.B.*, 240 Neb. 349, 360, 481 N.W.2d 905, 913 (1992), a juvenile case, we stated: "Counsel cannot waive rights which are personal to their clients. Personal rights of a litigant must be waived by the litigant personally."

It is also clear that the mother was a party to the proceeding. See Neb. Rev. Stat. § 43-245(2) (Reissue 1988). By ordering the mother out of the courtroom, the respondent wrongfully denied her her full right to be present and to be heard according to the law, in violation of Canon 3A(4) of the Code of Judicial Conduct. Furthermore, the respondent does not contend that the case involving the mother is an isolated incident, as indicated by his own testimony: "Q. Okay. It's not the first time you've sent parents out of the courtroom when you talked to a child in similar circumstances, is it? [JUDGE STALEY:] I don't have a specific recollection of the case, but I wouldn't deny your comment."

In addition, in the instance discussed previously with respect to count 1, Swinton was denied an opportunity to be heard according to the law when the respondent abruptly adjourned the hearing at which she attempted to respond to his criticism of DSS.

The commission found the following with respect to count 2:

> Judge Staley admitted that many of his dispositional hearings and postdispositional hearings are conducted off the record. Although in each instance it was Judge Staley's claim that the parties and attorneys were always asked whether they wished to proceed on or off the record, the problem is that there was no evidence that a record was made of such waiver. The Supreme Court in two decisions involving appeals from Judge Staley's court has commented on his failure to have a record made. These cases are: In re Interest of R.A., 226 Neb. 160, 410 N.W.2d 110 (1988); and In re Interest of A.M.H., 233 Neb. 610, 447 N.W.2d 40 (1989). Although the latter of these two cases was released at or about the time these charges were filed, as recited by the Master in his report the record is replete with evidence that Judge Staley has conducted dispositional and further dispositional hearings without providing for verbatim records by dismissing the court reporter and announcing his decision informally. In addition to the two cases cited, [rule 4b(2) of] the Revised Rules of the Supreme Court of the State of Nebraska, March 1989, Rules Relating to Official Court Reporters

> [provides]: "The court reporter shall make a verbatim record of . . . [t]he testimony or other oral proceedings." Additionally, the Commission finds that under the Guidelines for Use by Nebraska Courts in Determining When and Under What Conditions a Hearing Before Such Court May be Closed in Whole or in Part to the Public, as a general rule no one should be excluded from a legal proceeding of any type or nature except under certain circumstances, and in the event the court enters an order of closure, a record shall be made of such hearing held in camera. The Commission finds that the evidence before the Master establishes that such guidelines have not been followed. The Commission further adopts the findings and conclusions of the Master as to Charge 2, as contained in his report, and finds that this charge has been sustained by clear and convincing evidence.

In his petition/brief, the respondent demonstrates his lack of understanding and his disregard of the law by engaging in a lengthy discussion of the definition of a "court of record," noting that such a court is not required to create a verbatim transcript of all proceedings. He also argues that a juvenile dispositional hearing is a "post-trial proceeding," falling under rule 4b(11) of the Rules Relating to Official Court Reporters, rather than "testimony or other oral proceedings," falling under rule 4b(2) of those rules. Rule 4b(2) requires a verbatim record of "testimony or other oral proceedings," while rule 4b(11) requires a verbatim record of "[a]ny post-trial proceedings, *at the request of counsel, any party, or the court*." (Emphasis supplied.) Although the respondent argues that based upon the Rules Relating to Official Court Reporters, dispositional hearings need not be recorded verbatim absent a request for such recordation, he is completely in error. The dispositional phase of a juvenile proceeding is an integral and extremely important part of the proceeding.

Although the meaning of "post-trial proceedings" is not specifically defined in the Rules Relating to Official Court Reporters, rule 4c states that "[t]he recording of any part of the proceedings herein *required* to be made may not be *waived* without the consent of the judge." (Emphasis supplied.) Thus,

the opinion in *In re Interest of A.M.H.*, when read in conjunction with rule 4c of the Rules Relating to Official Court Reporters, makes it abundantly clear that a dispositional hearing is an "oral proceeding," falling under rule 4b(2), *requiring* a verbatim transcript *unless waived*. This court made it clear in that case that verbatim transcripts of dispositional hearings in a separate juvenile court are *required* in the absence of a valid *waiver* by all parties.

Nevertheless, with reference to this court's statement in *In re Interest of A.M.H.*, 233 Neb. at 618-19, 447 N.W.2d at 46, that "[t]he separate juvenile court is a court of record. . . . In the absence of a valid waiver by all parties to the proceedings, a verbatim transcript of those proceedings shall be made and preserved," Judge Staley asserts:

> If the Nebraska Supreme Court wishes to change the Rules, then it should do so. But it should do so by specific amendment to them and not by casually announcing dicta based upon misapplication of Section 43-2,111. And it certainly should not do so in this kind of proceeding. See Section III, Rule No. 2, Rules of Procedure of the Judicial Qualifications Commission.

Judge Staley also contends that the Guidelines for Use by Nebraska Courts in Determining When and Under What Conditions a Hearing Before Such Court May Be Closed in Whole or in Part to the Public, a part of the rules of the Nebraska Supreme Court, should not apply to juvenile courts, asserting that the National Council of Juvenile Court Judges' Handbook for New Juvenile Court Judges suggests that "[t]he hearing itself should be private." However, when read more completely, the handbook states in part:

> The hearing itself should be private with only interested parties present. The hearings are bifurcated with two phases: The adjudicatory, where evidence is taken to establish the allegations of the petition and thus invoke the court's jurisdiction, if the allegations are true; then, the dispositional phase wherein "sentence" is imposed. . . .
>
> . . . .
>
> At the dispositional hearing emphasis now shifts from the offense to concern for the child, and the atmosphere

> can be more relaxed and friendly. . . . As much as possible the court should share the information with the family that will influence his decision. Open communication between the parties, the judge and the probation officer is desirable. . . .
>
> *Verbatim* recording of the hearing should be taken in most cases.

(Emphasis supplied.) Regnal W. Garff, National Council of Juvenile Court Judges, Handbook for New Juvenile Court Judges 14-15 (1973).

COUNT 3

Count 3 of the amended complaint alleged:

> 3. That Judge William Staley violated the provisions of Neb. Rev. Stat. §24-722(6) (Reissue 1985) in that he engaged in conduct prejudicial to the administration of justice, and that brings the judicial office into disrepute in that he entered a Findings and Order and Capias on August 28, 1989 in a case appearing at Docket 21 Page 194 and Docket 21 Page 274, which Capias directed that a juvenile "be taken into custody and placed in the custody of Sarpy County for detention by delivery to Laddie Kozeny, Sarpy County Administrator", and that on the 29th of August, 1989 he entered an amended Capias in each case which provided for the delivery of the juveniles to "Laddie Kozeny, Sarpy County Administrator or other county department personnel designated by the Sarpy County Board of Commissioners", when such orders were beyond his legal authority and constituted a violation of Neb. Rev. Stat. §24-722(1) (Reissue 1985), willfull [sic] misconduct in office, and Neb. Rev. Stat. §24-722(6) (Reissue 1985), conduct prejudicial to the administration of justice or that brings the judicial office into disrepute.

The record shows that on Monday, August 28, 1989, the respondent issued two capias orders directing law enforcement officers to take two juveniles into custody and place them in the custody of "Laddie Kozeny, Sarpy County Administrator." No capias order issued by the respondent prior to those issued on August 28, 1989, had ordered the Sarpy County administrator

to take custody of a juvenile who was the subject of a capias order. The county administrator is more in the nature of a business officer, having fiscal and administrative duties but no direct authority for involvement with the detention of persons detained by law enforcement officials or the courts of Sarpy County. Prior capias orders had instead placed juveniles in the custody of designated youth detention facilities in other counties or in the custody of probation officers who then secured placement for a detained juvenile.

The circumstances surrounding the issuance of the capias orders reveal that for several years prior to the issuance of these orders, the respondent had voiced his concern that action needed to be taken to provide a juvenile detention facility in Sarpy County. According to the respondent, he had been kept apprised of a remodeling project at the Sarpy County Jail which was to result in a temporary juvenile detention facility in Sarpy County. Then, on August 24, 1989, the respondent learned that the Sarpy County Board of County Commissioners had decided to cancel the remodeling project, thereby eliminating the creation of a temporary juvenile detention facility. The respondent testified that it was his opinion that the county had a legal responsibility to provide a detention alternative with respect to juveniles who were subject to the court's jurisdiction and that he issued the capias orders on August 28, to get the attention of Sarpy County officials and to make them aware of this responsibility.

After the two capias orders were issued on August 28, 1989, copies of the orders were delivered to Laddie Kozeny. Kozeny brought the orders to the attention of members of the Sarpy County Attorney's office, which then sought to have the orders amended. The respondent amended the orders the following day, August 29, but merely changed the placement of the custody of the juveniles in "Laddie Kozeny, Sarpy County Administrator, *or other county department designated by the Sarpy County Board of Commissioners*." (Emphasis supplied.)

Then members of the Sarpy County Attorney's office again sought amendment of the capias orders, while Deputy Sarpy County Attorney Gendler prepared a petition for a writ of mandamus to be filed in this court with respect to the capias

orders. On August 31, 1989, after a meeting with members of the Sarpy County Attorney's office, the respondent finally vacated the amended capias orders, and instead issued capiases directing the subject juveniles to be placed in the "temporary custody of the Sarpy County Sheriff for continued detention in a secure juvenile facility, or as approved by the Juvenile Probation Office." Despite the issuance and amendment of the capias order, the subject juveniles were never taken into custody.

While the respondent testified that the capias orders were issued to get the attention of the Sarpy County Board of County Commissioners, the record shows that some county officials believed that Judge Staley's capias orders were issued vindictively as a result of a dispute between the judge and Kozeny concerning parking spaces at the courthouse.

Kozeny testified that as part of his duties as Sarpy County administrator, he had reassigned parking spaces during the week of August 21, 1989. According to Kozeny, the respondent confronted him on Friday, August 25, regarding the reassignment of parking spaces, and Kozeny noted that the respondent "might have been a little irritated that we didn't notify him that we were going to make the change." Kozeny testified that when he informed the respondent that the parking space reassignment was "going to stand," the judge "said something about, 'Well, we'll see about that.' And then he left." The record indicates that apparently the parking dispute was resolved early the following Monday, August 28, before the respondent issued the capias orders, but upon receiving copies of the capiases later that same day, Kozeny thought they might be somehow connected to the dispute concerning parking spaces.

It is apparent that this dispute over parking spaces may have been on the minds of then Chief Deputy Sarpy County Attorney Michael Wellman and Deputy Sarpy County Attorney Gendler when they attempted to arrange the meeting with the respondent after which the amended capiases were vacated. Wellman and Gendler each testified that they did not wish to meet with the respondent in his chambers because they were afraid that the judge would find them in contempt of

court. The meeting which was arranged took place in the county attorney's office and included the respondent, Wellman, Gendler, and former Sarpy County Attorney John Patrick Kelly. Wellman's testimony describes the meeting:

> Q. One of the things you said earlier was that Mr. Kozeny indicated to you, that the Judge had made some comment with regard to parking spaces.
>
> [WELLMAN:] Yes.
>
> Q. Did that issue ever come up during the meeting you've just described?
>
> A. It did.
>
> Q. How did it come up?
>
> A. At one point, Mr. Kelly said to Judge Staley, "You know damn well the only reason you issued those Orders was because of those parking stalls out back anyway."
>
> Q. What happened?
>
> A. I looked at Judge Staley, Larry Gendler, who is seated here, looked at Judge Staley, the room went dead silent for about 30 seconds and then Judge Staley changed the topic of discussion.
>
> Q. Would you describe that meeting as a genial meeting, a friendly meeting?
>
> A. Oh, no. Very tense.

The commission adopted the findings and conclusions of the master with respect to count 3 of the amended complaint. The report of the master states:

> The factual basis alleged in this paragraph is relatively uncontroverted. The Judge conceded he worded the Capiases in such a manner as to get the attention of the Board of Supervisors and felt satisfied that he succeeded in making his point as to a juvenile detention facility. The juvenile detention facility was an ongoing problem between the Judge and the Board of Supervisors for some years. The dispute regarding parking stalls was well known in the courthouse, although having been resolved a very short time before the Capiases had been issued. The issuance of the Capiases in the form that the Judge utilized certainly gave the appearance to any courthouse observer that they were issued for a vindictive purpose. Even

> though their questionable validity was drawn to the attention of the Judge, his retraction and issuances of the second Capias reemphasized that attitude. The fact that the County Attorney, Chief County Attorney and Deputy County Attorney assigned to Judge Staley's court, were apprehensive about being held in contempt of court if they confronted Judge Staley in his chambers, is disheartening. It convincingly appears that Judge Staley willfully and intentionally misused a court process for other than its proper purpose.
>
> . . . The Judge had no legal or justifiable right to require the Board of Commissioners to fulfill their statutory duties in any particular way. The circumstances surrounding the issuance of the Capiases amply demonstrates [sic] that it was done in bad faith and is willful misconduct. His conduct was prejudicial to the administration of justice and did in fact bring that office into disrepute.

COUNT 4

Count 4 of the amended complaint alleged:

> 4. That Judge William Staley violated the provisions of Neb. Rev. Stat. §24-722(6) (Reissue 1985) by engaging in conduct prejudicial to the administration of justice and that brings the judicial office into disrepute in that he habitutally [sic] conducts in camera proceedings at which he excludes attorneys for the Nebraska Department of Social Services. When such in camera proceedings are the meeting at which the disposition of the case is actually decided whereby dispositional orders effecting [sic] wards of the Nebraska Department of Social Services are determined while the legal representatives of the Department are excluded from such hearings contrary to the provisions of Neb. Rev. Stat. §24-722(6) (Reissue 1985).

Count 4, like count 1, involves DSS attorney Swinton, who claims to have been excluded from in camera proceedings.

One instance in which Swinton claims to have been excluded from in camera proceedings pertains to a case involving a

15-year-old boy who was residing with his 36-year-old wife in Iowa after having married her in North Dakota. In that case, Deputy Sarpy County Attorney Gendler was concerned over the juvenile's welfare and the legality of his marriage after his parents had reported him as a runaway. Eventually the boy was returned to Nebraska, and the respondent placed him in the custody of DSS. DSS then placed him in Saint Joseph Hospital because, according to Gendler, "[t]here were some concerns also that he had been brainwashed, that maybe there was alcohol or drugs going on and for that reason, we wanted him in a secure environment to be evaluated." The attorney for the juvenile's wife, Vincent Sutera, then filed a petition for a writ of habeas corpus, seeking his release.

Swinton later informed Gendler that, contrary to his wishes, DSS intended to "terminate [the boy] from their case load." When asked his reaction to this, Gendler testified:

> I was upset. . . . I went and told the Judge what my concerns were, that it appeared without D.S.S., we really had no appropriate vehicle, if you will, to assist this family and this child because Iowa would not get involved. And I told him, in all likelihood, I'd be dismissing the case, because I didn't see a very good chance of changing D.S.S.'s mind. . . .

The record shows that Gendler's conversation with the respondent took place when the parties interested in the case met in Sarpy County. Swinton's testimony describes the circumstances:

> Q. What is your recollection of the parties that were involved in that case?
>
> A. To my recollection, Larry Gendler was the county attorney, Vincent Sutera was the attorney for the child's spouse. There was another attorney that was appointed to act as his personal attorney, the child's, whose name I cannot recall. And there was still one other attorney who represented the child's parents.
>
> Q. And you attended Sarpy County in connection with a hearing on this particular aspect, with the intention to discharge the child?
>
> A. Yes, I did.

Q. Approximately when did that occur?

A. On February 25, 1988.

Q. In the Separate Juvenile Court of Sarpy County?

A. Yes, it did.

Q. What did you do in connection with that matter?

A. I appeared with the case worker at that — in the courthouse. I was able to have one discussion with all the other attorneys regarding our position. And at that time also, the case worker's supervisor was with us. And the county attorney still made it clear that that was not his wish to proceed with discharge. Then there was a subsequent proceeding - - -

Q. Okay. And each of the other attorneys had some position ranging from the Department's to the county attorney's?

A. Yes.

Q. All right. And then what happened?

A. Then there was a movement of all the parties towards the courtroom to see if they were ready for hearing.

Q. Okay. So this discussion occurred outside the courtroom?

A. Yes, it did. No one was in the hearing room. One of the attorneys went to the Judge's office and all the attorneys followed into that room and I was the last one in — into the enter room and at that point I was advised that the Judge did not want me to come in.

Q. By whom?

A. One of the other attorneys there.

Q. Do you remember which one it was?

A. I believe it was Larry Gendler.

Q. Then what'd you do?

A. I waited outside in the hall.

Q. What happened after that?

A. A few minutes later, Vincent Sutera come [sic] out saying he too had now been excluded, so we both waited in the hallway.

Q. Did you and Sutera have a conversation about your exclusion?

A. Yes, we did.
Q. What happened after that?
A. Then all the parties emerged from the Judge's office.
Q. To the hallway?
A. To the hallway.
Q. What happened then?
A. As I recall, no one went toward the courtroom, the child, his attorney, his spouse and her attorney all went to another corner of the building by the door. And I believe I learned from them that there was not going to be a hearing. That, in all likelihood, the child would be discharged....

Gendler testified that while he did recall the meeting of the parties described above, he did not recall that Swinton had been excluded from any proceeding.

Swinton also testified that she was excluded from court proceedings in a case involving another juvenile who had been placed in the custody of DSS. According to Swinton, on one occasion in September 1987, interested parties, including the juvenile's guardian ad litem, Patricia Lamberty, met with the respondent in his courtroom to resolve a dispute concerning the child's continued placement. Swinton testified as follows regarding this proceeding:

Q. Okay. And, I take it from what you've said, that you fully participated in that particular proceeding?
A. I participated on what went on in the courtroom - - -
Q. Did anything else go on?
A. There was an in chambers discussion with Ms. Lamberty and Judge Staley that I did not participate in.
Q. Was anybody else in that in chambers discussion?
A. I do not believe so. I did not see anyone exit from the office other than those two.
Q. Did you attempt to go into that matter — that meeting?
A. That, I do not recall.
Q. Did you have any discussion with anybody about whether you could go into that meeting?
A. Only — by discussion with the case worker. Actually I believe I asked her, "Where did they go?" Because at that

time, only the staff — the D.S.S. staff were present in my view.

Q. So the people had left the courtroom then?

A. Yes.

Q. And this was after you'd initially been in the courtroom?

A. Uh-huh.

Q. How did you determine that the judge and Patricia Lamberty were in his chambers?

A. I saw the Judge exit to his chambers and Ms. Lamberty go through the door.

Swinton also described an October 22, 1987, hearing involving parties interested in the same matter:

Q. Who all was present?

A. Myself, Meg Morris-Berry, who is another worker with the Department of Social Services, Pat Lamberty, the child's mother and the child.

Q. And where did this proceeding take place?

A. In the Sarpy County Juvenile Court.

Q. Was anyone present other than the parties you have described?—The child?

A. Well, the child was present. I believe the case worker was present for a portion of the time, that would have been Paulette Sombke.

Q. What about the Judge?

A. The Judge was in the courtroom, but it was at a time when I was not allowed in.

Q. You say you were not allowed, what happened that caused you not to be allowed?

A. The matter came up for hearing, the child's mother and the child and the Guardian ad Litem went into the courtroom and as I proceeded behind her, could see the Judge — Staley from the bench and he told me that he did not want me in there.

Q. And what did you do?

A. I exited the door.

Q. Did you stay in the vicinity of the courtroom?

A. Yes. I stayed in the waiting area with the other Department staff.

Q. Did something or anything subsequently happen involving you, in connection with that case on that day?

A. A few minutes later, the child and mother exited. The Guardian ad Litem motioned for the rest of us to come in and I and Meg Morris-Berry then went into the courtroom. Judge Staley was there, but not sitting at the bench, sitting at the — where the court reporter usually sits.

Q. What happened then?

A. There was some discussion about what was appropriate for [the juvenile].

. . . .

Q. Did anything else happen in connection with that proceeding on that day?

A. Not that I participated in.

Q. Did you subsequently receive copies of an Order that was entered on that particular day?

A. Yes, I did.

Q. Did you do anything about the Order that you received?

A. Yes. The Order that I received indicated that there had been a hearing and all the person [sic] that I named had been present. Since that was incorrect, I forwarded that to the Attorney General's Office to Royce Harper and asked him, could he file a motion to have the Order amended.

Q. Did he do so?

A. Yes, he did.

In her testimony, Swinton also described two other occasions in which she was or may have been excluded from proceedings concerning the juvenile. On February 9, 1989, Swinton appeared for a proceeding at the request of the DSS caseworker who had asked Swinton to be there with her because she believed that her case plan would be in dispute. According to Swinton: "We both went to the courthouse and waited. We did see that Ms. Lamberty was there and would come in and out of the Judge's office, but then nothing else happened." When asked whether she inquired as to what was going on in the judge's chambers, Swinton testified: "I did not inquire of Ms.

Lamberty what was going on. I did though go into the office and let them know I was there. . . . Later, someone who's — I believe it was Ms. Lamberty, then said that we could go, there wasn't going to be anything further."

On March 15, 1988, Swinton appeared for another hearing regarding the juvenile's placement; according to Swinton, DSS and the guardian ad litem, Lamberty, had differing positions regarding the juvenile's placement. Swinton's testimony described what transpired on March 15:

> Q. Was there a proceeding on that — Well, let's back up. Was [sic] there any events occurring in the Judge's chambers on that day?
>
> A. Yes, there was [sic]. At some time while we were all waiting in the waiting area, Ms. Lamberty came out to say that the Judge wanted - - -
>
> Q. Wait a minute. By saying, we were all waiting in the waiting area, who are we?
>
> A. The attorney — Each of the attorneys representing the Department, the foster parent and the school district and the members of their staff that they had brought with them. Ms. Lamberty came out to indicate that the Judge wanted all the attorneys to come into chambers. As I followed I believe, Mr. Breuman, who's the attorney that we hired for the foster parent, Ms. Lamberty stopped me and said, the Judge didn't want you in there.
>
> Q. Okay. And what'd you do?
>
> A. I waited outside in the hall.
>
> Q. Was there any proceeding in the courtroom that day involving that particular case?
>
> A. There was approximately like a three-minute hearing to bring everyone in, as each of the staff had been subpoenaed and the purpose of their proceeding was to advise that all subpoenaed parties had cooperated with their subpoenas and were now free from their obligation.
>
> Q. Was that the end of the hearing?
>
> A. That was the end.

Contrary to Swinton's testimony, when Lamberty was asked if she could recall any in camera conferences with the respondent to the exclusion of Swinton, Lamberty responded:

"Not to my knowledge." Lamberty also testified that she did not recall telling Swinton, "[T]he Judge didn't want you in there," and further testified that she would recall the statement if she had made it. The respondent testified that he did not recall telling Swinton or any other attorney that he did not want him or her to appear before him.

The master found that the allegations made in count 4 of the amended complaint were supported by the evidence, stating:

> Any ex parte communications with one party where information is communicated, which information could or might effect [sic] the decision of the Court would be improper. In the . . . juvenile proceedings of February 25, 1988, it appears that the Deputy County Attorney and others had such a communication with the Judge to the exclusion of the Department of Social Services attorney. It also appears that [in] the In re: . . . case, a transcript of which appears at Exhibit No. 3, that the Court had received some out of court information that did in fact affect his decision before the hearing. It was also apparent to other observers that the Judge and Lisa Swinton were not on cordial terms and the evidence is persuasive and convincing that at least in one other occasion in the . . . juvenile proceedings, an in chambers (ex parte) meeting took place to her exclusion.

However, the commission dismissed count 4 of the amended complaint, stating:

> The Commission finds that the record supports the claim by one attorney for the Department of Social Services that she was told by someone other than Judge Staley that she was not to come into the Judge's chambers on at least one occasion. However, there is no evidence that Judge Staley ever made such an order, and therefore the Commission finds that this charge is not supported by clear and convincing evidence, and this charge is dismissed.

COUNT 5

Count 5 of the amended complaint alleged:

> 5. That Judge William Staley violated the provisions of Neb. Rev. Stat. §24-722(6) (Reissue 1985) by engaging in

conduct prejudicial to the administration of justice and brings the judicial office into disrepute, and the provisions of Canon 3(A)(3) of the Code of Judicial Conduct in that he habitually and regularly told juveniles or other persons in the courtroom one or more of the following:

1. They will be little burned out whores by age 21.
2. Hoped that they would die of AIDS or suicide before they were let out in the community again.

These statements were made by Judge William Staley while conducting "off the record" proceedings involving dispositional matters for juveniles in his court.

The record shows that the respondent made statements similar to those described in the amended complaint, but it also shows they were conditional statements. For example, in at least two instances the judge told juveniles something to the effect that "[i]f you don't change your ways you'll be a little burned out whore by the time you're 21." Such statements were made to "streetwise" juveniles, and according to the DSS caseworkers, in each of the cases the comments appeared to have had a positive effect and prompted improvement in the juvenile's behavior.

With respect to the AIDS/suicide comment, the record indicates that the respondent's comments were to the effect that he thought that if DSS did not take serious action the juvenile would die of AIDS or suicide. While Swinton testified that the respondent stated that he "hoped" a juvenile would die of AIDS or suicide, this testimony was not corroborated by other witnesses.

While the master concluded that some of the respondent's statements "cannot be classified as dignified," neither the master nor the commission found a violation of either § 24-722(6) or Canon 3A(3) with respect to count 5.

DISCIPLINE

As stated previously, the master found that the charges contained in counts 1, 2, 3, and 4 were supported by clear and convincing evidence and that the respondent's conduct violated § 24-722(1), (2), and (6) and Canon 3A(3) and (4) of the Code of Judicial Conduct. The commission adopted the master's

findings with respect to counts 2 and 3, but dismissed counts 1 and 4. Neither the master nor the commission found sufficient evidence to support the charges contained in count 5.

From our de novo review of the record, we find, as did the master, that counts 1 through 4 are supported by clear and convincing evidence and that the respondent has violated § 24-722(1), (2), and (6) and Canon 3A(3) and (4) of the Code of Judicial Conduct.

We further find that the recommendation of the commission, that the respondent be publicly reprimanded, is inadequate under the facts and circumstances of this case.

This court has, in two relatively recent instances, issued opinions sanctioning members of the judiciary. In *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984), we suspended a member of the judiciary for 3 months for threatening reprisals against and cursing certain police officers who were engaged in lawful performance of their duties and for asking a county attorney and his partner to "help or see what could be done" for an acquaintance who had been charged with driving while under the influence of intoxicants. In *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987), we removed a member of the judiciary who acted to prevent the timely prosecution of his son for a traffic violation.

In *In re Complaint Against Kneifl*, we discussed sanctions which have been administered in other jurisdictions for various violations of the standards for judicial conduct. However, in *In re Complaint Against Kneifl* we also noted that

> [i]n the final analysis . . . any effort to design the appropriate discipline in this matter by comparing it with that imposed in any case by any other jurisdiction is of limited value. Although analyzing what other jurisdictions have done is instructive, the responsibility of defining and enforcing proper conduct for Nebraska judges falls upon this tribunal. Neb. Const. art. V, § 30(2), and § 24-723. See, also, Neb. Const. art. V, § 1, vesting in this court general administrative authority over all courts.

217 Neb. at 485, 351 N.W.2d at 700.

In determining the appropriate discipline to be imposed in this case, we have considered the entire record as whole. In

doing so, we first note that not only has Judge Staley been discourteous, in violation of Canon 3A(3) of the Code of Judicial Conduct, he in fact denied parties to proceedings before his court the right to participate in those proceedings. A prime example of this is the case involving the juvenile who had been charged with a curfew violation, where during the court proceeding the respondent ordered the juvenile's mother and other members of the juvenile's family to leave the courtroom so that he could talk privately to the juvenile. Furthermore, the respondent's own testimony indicates that his conduct in that case was not merely an isolated incident.

While the respondent's denial of the right of legally interested parties to be heard according to the law violates Canon 3A(4) of the Code of Judicial Conduct, what is more alarming is that it is representative of a course of conduct which appears to be systematically designed to preclude appellate review of proceedings in his court. As stated previously, the master found that the respondent regularly conducts "off the record" proceedings without having all parties waive a verbatim transcript as required by *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). Despite the fact that *In re Interest of A.M.H.* was an appeal from his own court, it is evident that the respondent has failed and refused to adhere to our mandate in that case requiring verbatim transcripts in juvenile courts and continued to improperly conduct proceedings off the record, as demonstrated in *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992), another appeal from the respondent's court.

An example of the respondent's conspicuous desire to preclude the recordation of proceedings in his court is his strange behavior in ordering a party's attorney to put his pen down and declaring that he did not allow writing in his courtroom. A juvenile court is not a star chamber where proceedings may be conducted in secrecy, in the absence of some of the parties, and free from appellate review.

The record in this case clearly and convincingly shows that the respondent has deliberately conducted proceedings in his court in such a manner as to discourage and prevent parties from appealing his decisions to an appellate court. Such

behavior constitutes willful misconduct in office and also is a willful disregard of his duty, in violation of § 24-722(1) and (2).

We finally note the capias orders issued by the respondent which have been discussed. The record clearly and convincingly shows that these orders were issued in bad faith in an attempt to manipulate county officials through the wrongful use of a judicial order. See *In re Complaint Against Kelly, supra*. While the respondent testified that he issued the capias orders to get the attention of county officials regarding the need for a youth detention facility, the record is persuasive that the capias orders were issued, at least in part, as a retaliatory move in a dispute over the assignment of parking spaces. In either case, the respondent's conduct was an abuse of judicial authority.

We believe that the respondent's conduct, as illustrated by the entire record before us, demonstrates that he is unfit to continue to serve in a judicial capacity as a juvenile court judge. We therefore order that William D. Staley be removed from office forthwith.

JUDGMENT OF REMOVAL.

HASTINGS, C.J., not participating.

SUE E. PRESTON, APPELLEE, V. RICHARD H. PRESTON, APPELLANT.
486 N.W.2d 902

Filed July 31, 1992. No. S-89-1495.

1. **Divorce: Appeal and Error.** In a dissolution of marriage appeal, an appellate 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 appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Property Division.** In a dissolution of marriage action, property acquired by one of the parties through gift or inheritance ordinarily is set off to the party receiving the inheritance or gift and is not considered a part of the marital estate, except where both parties have contributed during the marriage to improving or operating the property, or where a party, not owning the property prior to marriage or receiving the inheritance or gift, has significantly

cared for such property during the marriage.

3. _____: _____. In a dissolution of marriage action, if an inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate to be divided.
4. **Property Division.** The ultimate test for determining an appropriate division of marital property is one of reasonableness.
5. _____. Property division is not subject to a rigid mathematical formula, but, rather, turns upon the facts and circumstances of each individual case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1988).
6. _____. In dividing marital property in a marriage of long duration where the parties are the parents of all the children, the award should generally be from one-third to one-half of the marital estate.
7. **Divorce: Property Division.** In a dissolution of marriage action, the debts of the parties should be considered in making a property division.
8. **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.
9. _____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
10. _____. One consideration in the awarding of alimony is the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children.
11. **Divorce: Attorney Fees: Appeal and Error.** The award of attorney fees in a dissolution of marriage action is discretionary with a trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
12. **Divorce: Attorney Fees.** The award of attorney fees in a dissolution of marriage action depends on a variety of factors, among them the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed as modified.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

George P. Burke, of Van Steenberg, Myers, Burke & Wilson, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this dissolution of marriage action, the respondent-

appellant husband, Richard H. Preston, charges that the trial court erred in its (1) failure to cancel the judgment against him arising from the temporary allowance of child support to the petitioner-appellee wife, Sue E. Preston; (2) property and debt allocations; (3) award of alimony to the wife; and (4) award of an attorney fee to the wife. We affirm as modified.

II. FACTS

The issues presented by the assignments of error are such that a detailed summary of the record is necessary. The marriage took place on June 15, 1963, and produced four children: Galen, born February 8, 1966; Lara, born August 10, 1968; Christopher, born June 8, 1974; and Daniel, born November 23, 1975. On the date of the trial, November 13, 1989, the husband was 47 years old. While the record does not reveal the wife's exact age, it suggests that at the time of the trial, she too was in her late forties. Unfortunately, as the following paragraph and succeeding pages will reveal, this is not the only area in which the record is less than precise.

In any event, the wife presumably filed this action sometime in late 1988; we say "presumably" because the copy of the petition in the transcript bears no filing stamp. All the record tells us in this regard is that the wife signed the petition in the presence of a notary public on October 5, 1988.

The record does tell us that the husband graduated from college in the fall of 1964 with a bachelor of science degree in philosophy, with minors in physics and mathematics. From 1964 until 1966, he worked as a draftsman and in the area of electrical engineering until he left to enter a seminary in January 1966. He graduated in the spring of 1969 with a master of divinity degree. Beginning in the late 1960's, he also began taking various courses in emergency medicine and advanced emergency medicine technology.

Upon graduation from the seminary, he accepted his first call to yoked parishes in two Iowa towns. He remained at these churches from 1969 until June 1972, when he transferred to a Presbyterian church in Kansas, where he remained until 1978. In April 1978, he was transferred to a Presbyterian church in

Sidney, Nebraska, where he served until October 1987. The record does not reflect why this position ended. He has not served as a pastor since that time, but testified he would not be opposed to accepting a call from a church, should one arise. He stated, however, that there is a surplus of ministers and that it takes a search of approximately 24 months to generate a call.

In 1987, the husband purchased a corporation through which he operated an ambulance service, but this business failed and left him unemployed from May to September 1989. At the time of trial, he was employed by a telemarketing firm in Lincoln, where he worked 30 hours a week and earned an average of $5.50 an hour. In addition, he was temporarily employed for approximately 15 hours a week with a group which raises funds and support for ecological causes, where he earned $7 per hour.

Although the husband testified that he was interested in pursuing a doctorate in health and education in preparation for working as a minister with patients and families, he had not taken any courses in furtherance of this goal.

The wife attended college for four semesters and has, in addition, taken a few business school courses and various continuing education courses in the health and ambulance fields through the technical college in Sidney. She recently completed a 35-hour nurse's aide certification course.

Prior to her marriage, the wife worked for a municipal court doing clerical work and then as a bookkeeper and salesclerk for a jeweler. It appears that after the parties were married, the wife continued to work at various jobs, including clerical and bookkeeping work. The record is unclear, however, as to whether she was employed consistently from 1963 to 1969. The record does tell us that while the parties were in Iowa from 1969 until 1972, she did not work outside the home. During the 6 years that the parties lived in Kansas, the wife was employed in various capacities, including as a nurse's aide in a nursing home, an executive secretary for a development corporation, and an office manager, personnel director, and accountant for a foundry. When the parties moved to Nebraska, the wife continued to work in various temporary jobs, including as a busdriver, a telephone salesperson, a nurse's aide, and a florist's

apprentice. In October 1987, she became employed as a nurse's aide and was so employed at the time of trial. Although there is no testimony as to what she earned when she started such work, other than a reference to "minimum," she did testify to various pay increases, and at the time of the trial was earning $4.50 an hour. In addition, she operates a telephone answering service out of her home, at which she currently earns approximately $250 a month.

At the time of trial, the parties owned no real property, and there is little in the record with regard to personal property owned by them with which the trial court concerned itself. The parties had divided their household goods between themselves. The wife kept china, silver, crystal, and many of the household furnishings with an estimated value of $5,500; the husband kept tools, computer equipment and software, various professional and other books, some amateur radio equipment, and other miscellaneous items with a stipulated value of approximately $10,000. He testified that he brought into the marriage a number of items, including a 1959 automobile worth $800, some amateur radio equipment worth $600, books worth $850, tools worth $250, electronic test equipment worth $300, and a life insurance policy with a $5,000 face value.

The parties also owned a 1969 Volkswagen automobile titled in the wife's name, a 1967 Mercedes automobile titled in both their names, a 1980 Mazda automobile titled in the husband's name, and a 1984 Jeep Cherokee vehicle titled in the husband's name. The Volkswagen had an estimated value of between $750 and $1,000. It was awarded to the wife. The husband was awarded the Jeep Cherokee, which he estimated had a value of $3,200, although he acknowledged that the blue book value was $6,000. The trial court ordered him to pay the wife $2,000 in monthly installments of $150 to "equalize the division of vehicles." The parties stipulated that their daughter was to receive the Mazda and the Mercedes.

The parties also owned five life insurance policies as follows: (1) a Principal Mutual Life policy owned by the husband prior to the parties' marriage and awarded to him, having a cash value of $4,340.92, but according to the husband, this policy is "borrowed to the max . . . there was a hundred dollars left

possibly for loan value, if that"; (2) a Northwest National Life policy having an unencumbered cash value of $2,570, which policy was awarded to the wife; (3) two Woodmen Accident and Life policies owned by the wife, one having a cash value of approximately $700 and the other having no cash value until 1990; and (4) a Guarantee Insurance group policy owned by the wife through her employment, apparently having no cash value. Although the decree is not completely clear (it refers to the three policies owned by the wife in the singular, stating that "[p]etitioner's life insurance policy is set over to her"), we interpret the decree to mean that all policies owned by the wife were awarded to her.

The trial court also awarded to the wife certain telephone answering equipment the parties had purchased. This asset was valued at $1,500.

The husband owned a pension fund derived from his service as a Presbyterian minister. While the trial court makes no specific finding as to the value of the fund, and the testimony regarding its value is confusing, an exhibit recites that as of December 31, 1989, the fund had $8,459.09 of "pension credits." The decree awards the wife 38 percent of the pension fund, to be distributed to her as and when payment is made to the husband. Although the decree is silent on the matter, we read the pension award to the wife to mean that she received 38 percent of the value of the fund as of the undisclosed date on which the wife filed her petition.

During the early 1980's, the husband had inherited approximately $42,000 from his father's estate, receiving $17,000 in cash sometime in mid-1980. That money was spent on various items, including medical bills, as well as on household and general living expenses. In 1982, he received an additional $25,000, which was used to purchase the house in Sidney that the parties acquired in January 1984. While the record tells us this house was sold in January or February 1987, it reveals neither the total purchase price nor the sale price of the property. The record tells us only that the husband applied $25,000 of his inheritance toward the purchase of the house and that $22,342 was realized from its later sale.

The husband also testified that in February 1987, he used the

proceeds from the sale of the house to finance the purchase of the capital stock of the corporation through which he operated the ambulance service mentioned earlier. He bought 72 of the 80 existing shares in the corporation, for a total purchase price of $55,000, paying the $22,000 in cash and signing a note for the balance. He eventually acquired the remaining eight shares and thus became the sole stockholder and president of the corporation.

In the husband's opinion, the corporation was bankrupt, and he testified, without objection, that the Internal Revenue Service had told him the corporation was "defunct." However, the record shows that as of the day of trial, the assets of the corporation totaled approximately $43,700, including a building valued at $40,000 and equipment worth roughly $3,700. The corporate debts totaled approximately $40,611.60, including a $22,237.79 mortgage on the building, an $8,551.57 judgment against the corporation, $2,989.24 in accounts payable, a $6,083 debt to the Internal Revenue Service, and what appears to be approximately $750 in miscellaneous expenses. Based on the testimony, the value of the assets of the corporation obviously exceeds the amount of the obligations by $3,088.40. However, the husband still owes $14,000 on the purchase of the capital stock of the corporation. He was awarded all the interest in and obligations of the corporation.

The record establishes the following additional debts: Sidney Roofing, in the amount of $1,300 for repairs to the house the parties owned; Memorial Hospital, in the amount of $438, the reason for the charge not shown by the record. There also is no indication as to the reason for a $500 debt to a Dr. Nelson or a $350.57 debt to Dr. C.W. Cutright. The husband testified that there are bills outstanding for the medical care of the parties' son, Galen, in the amount of $9,600.

In February 1985, the parties borrowed $10,000 from the wife's parents. Half of the loan was spent to repair the house and garage. The remainder was applied toward the creation of High Plains Telecommunication, the telephone answering service mentioned earlier. It is this answering equipment which the wife received at a value of $1,500.

The parties also testified that they each cosigned on their

daughter's student loan in the amount of $4,283.43. There is no evidence, however, which suggests that the daughter has defaulted on the loan or that either party has been approached to pay this obligation.

Thus, the record suggests that the parties are jointly obligated on $22,188.57 of debt, exclusive of the potential liability on the daughter's student loan and of the husband's individual $14,000 obligation for the purchase of the previously described corporate stock. The trial judge ordered the wife to pay half of the $10,000 owed to her parents and ordered the husband to pay the other half and all other debts.

The record further establishes that pursuant to the stipulation of the parties, the two minor boys have been in the husband's custody since at least August 1, 1989. Prior to this time, the boys had been with the wife, and pursuant to a temporary support order, the husband was paying $250 per month in temporary support. After both boys started living with the husband, he stopped making any support payments as of July 1989. The wife made no monetary contribution toward their support. The decree continues custody of the two boys in the husband and orders the wife to pay $225 per month toward their support, commencing December 1, 1989. The decree recites that the husband's

> education, training, experience, age and health are such that it can be reasonably contemplated that he will soon secure employment at substantially higher compensation than he now receives. On the other hand, [the wife's] education, training, experience, age and health are such that it can be reasonably contemplated that she will not soon secure employment at any higher compensation than she now receives. Accordingly, the Court will not at this time forecast what child support obligations will be when the oldest child attains his majority, it being assumed the matter of child support will be again addressed as the parties' financial situation changes.

The husband orally moved that since he had been providing all of the boys' support since July 1989, the trial court should give him credit toward the support payments he had not made. We find no ruling on this motion.

The husband was also ordered to pay the wife alimony in the amount of $150 per month for 12 consecutive months commencing December 1, 1989, and then increasing to $275 per month for the succeeding 48 consecutive months. In addition, the husband was ordered to pay $1,000 toward the wife's attorney fees.

III. ANALYSIS

1. JUDGMENT FOR TEMPORARY CHILD SUPPORT

The first assignment of error, by which the husband asserts the trial court erred in failing to cancel the judgment arising out of the award of temporary child support, must be resolved against the husband because the record is such that no meaningful review of the issue can be conducted.

Other than a reference to the fact that the amount of the temporary allowance was $250, the sum total of the record on the matter is the following exchange between the husband and his attorney:

> [Attorney:] Now, Mr. Preston, I do know that there was a temporary order made. Do you pay support to Mrs. Preston; is that right?
>
> [Husband:] Yes, there was.
>
> [Attorney:] Have you made the support from the month of July on, I mean, meaning to this date?
>
> [Husband:] I thought I had made the July payment, according to the clerk I did not, so from July on I have not made that payment.
>
> [Attorney:] Why have you not done that?
>
> [Husband:] I have not had income, I have had, you know, the boys came in during that time and the expenses definitely did go up during that time and there wasn't money there to pay it.
>
> [Attorney:] Are you asking the Court pursuant to the power of the Court to give you credit for taking and providing 100 percent of the boys' support since July?
>
> [Husband:] Yes, I would, if that is possible.

This exchange does not establish that the temporary support was for child support only. Without the actual order before us, we cannot determine whether the temporary allowance was for

child support, alimony, or both. The applicable rule in this connection is that an appellant has the obligation 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*, 234 Neb. 661, 452 N.W.2d 283 (1990).

2. PROPERTY AND DEBT ALLOCATIONS

The second assignment of error questions the allocation of the property and debts. The oft-repeated general rule which guides the resolution of this and the succeeding assignments of error is that in a dissolution of marriage appeal, an appellate 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. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schmale v. Schmale*, 240 Neb. 499, 482 N.W.2d 268 (1992); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992).

The principal question concerning the property and debt allocations is whether the ambulance service corporation is to be considered as part of the marital estate.

In a dissolution of marriage action, property acquired by one of the parties through gift or inheritance ordinarily is set off to the party receiving the inheritance or gift and is not considered a part of the marital estate. *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986); *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). An exception to this general rule is recognized, however, where both parties have contributed during the marriage to improving or operating the property, or where a party, not owning the property prior to marriage or receiving the inheritance or gift, has significantly cared for such property during the marriage. *Sullivan v. Sullivan, supra*; *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Van Newkirk v. Van Newkirk, supra*.

In *Sullivan*, we noted that

> there was no evidence indicating that [the noninheriting spouse] either contributed to improvement or operation

> of [the inheriting spouse's] property owned jointly with her brother or that [the noninheriting spouse] had significantly cared for the property during his marriage to [the inheriting spouse]. The record is silent regarding any involvement by [the noninheriting spouse] in the care of [the inheriting spouse's] jointly owned farmland or the farm operations conducted on that property.

Id. at 276, 388 N.W.2d at 519. We thus concluded that the inherited property should have been excluded from the marital estate and set over to the inheriting spouse. Here, there is no evidence in the record that the wife contributed to the improvement or operation of the property or that she significantly cared for the property during the marriage. The record shows only that $25,000 of the husband's inheritance was used to purchase a house which was later sold and that $22,342 of the sale proceeds were used to acquire the corporation.

The wife admitted that she had neither a part in this purchase nor any other association with the corporation. It has been stated that if the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate to be divided. See, *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985). Since the husband's inheritance can be readily traced to the purchase of the corporation and there is no evidence that the wife falls within the *Van Newkirk* exception, the corporation must be excluded from the marital estate and set aside to the husband.

Having removed the corporation from the marital estate, we turn our attention to the remaining property.

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 . . . .

> 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 a property division is to distribute the marital assets equitably between the parties. 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.

In applying § 42-365, this court has repeatedly held that the ultimate test for determining an appropriate division of marital property is one of reasonableness. *Mellor v. Mellor*, 235 Neb. 361, 455 N.W.2d 177 (1990); *Hallan v. Hallan*, 233 Neb. 261, 444 N.W.2d 896 (1989); *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989). Although property division is not subject to a rigid mathematical formula, but, rather, turns upon the facts and circumstances of each individual case in light of the factors set forth in § 42-365, *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988), and *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), it has been stated that the "one-third to one-half" rule in dividing marital property is of particular significance when the marriage is of long duration and the parties are the parents of all the children, see, *Sullivan v. Sullivan, supra*; *Taylor v. Taylor, supra*; and *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982).

Here, the parties were married for 26 years and produced four children. The record reveals that both parties were employed consistently throughout the marriage and that both contributed to the support of the family. The marital estate has an approximate value of $33,000. The wife was awarded property having an approximate value of $14,500. She was also awarded $2,000 to equalize the value of the vehicles; thus, the wife was awarded approximately $16,500. The husband was awarded approximately $18,444.64 in property. Taking into account the $2,000 equalization payment, he, too, was awarded approximately $16,500 in property. Thus, at first glance, it would appear that the marital estate was divided equally between the parties.

However, in *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849

(1985), we stated that the debts of the parties should be considered in making a property division. See, also, *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991); *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988). When the debts are considered, it is obvious that the property was not divided equally between the parties. They had $26,472 in current joint obligations. (We obviously do not consider in this figure the potential liability of the parties on the daughter's student loan or the husband's sole liability on the $14,000 he owes in connection with his purchase of the ambulance service corporation.)

The wife was made responsible for one-half of the $10,000 loan from her parents, and the husband was allocated all remaining debts. Thus, the wife received approximately $16,500 in assets less $5,000 in debts, for a net award of about $11,500. The husband, on the other hand, received $16,500 of the marital assets less $17,200 in joint current debts. The wife, therefore, actually received more than all of the marital estate, which is an abuse of discretion.

The decree must therefore be modified so as to obligate the wife to pay one-half of each of the joint obligations of the parties and to require each party to pay one-half of the daughter's student loan, should that go into default. The husband alone is to remain obligated on the debt arising out of his purchase of the capital stock of the ambulance service corporation.

3. Alimony

Next, in his third assignment of error, the husband questions the award of alimony to the wife.

As noted in part III(2) above, § 42-365 provides that "[t]he 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." In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982). The husband testified that he was

earning approximately $660 a month gross at one job and $420 a month gross at a second job, for a total of $1,080 a month. The expenses for himself and the two minor boys were $1,563 a month. The wife testified that she was earning $4.50 an hour as a nurse's aide; pay stubs for the month of October reveal that she earned $679.38 net. In addition, she was earning approximately $250 a month from her telephone answering service, for a total income of a little over $900 a month. She submitted an itemized list of expenses for October of $1,000.75; however, a review of these expenses reveals that not all would need to be incurred every month. In addition, she testified that she had a houseguest during the month of October and that the expenses for groceries and electricity she submitted included costs incurred by the guest.

As stated in *Kimbrough v. Kimbrough*, 228 Neb. 358, 362, 422 N.W.2d 556, 559 (1988):

> In determining whether alimony should be awarded, the trial court should consider what effect, if any, the marriage has had upon the ability of the wife to secure employment in the future and the earning capacity of the husband. . . . Alimony is not to be used simply to equalize the income of the parties or to punish one of the parties. It may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or for that period to get proper training for employment.

Although it is true that the wife is not in a very good financial position, the husband is in no better position.

In addition, it must be remembered that the husband has custody of the minor children. One consideration in the awarding of alimony is the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children. *Buche v. Buche, supra*; *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977).

In *Hennings v. Hennings*, 233 Neb. 523, 446 N.W.2d 221 (1989), the record showed that the father's net earnings per month were approximately $2,700, while the mother was earning $542 net a month. We found that the father's income was adequate to pay the indebtedness on the residence property

and to support the children, but that it would not justify an award of alimony. We went on to state that "[i]n view of the limited earning capacity of the [mother] and the award of no alimony, we believe the decree should be modified to eliminate the award of child support to the [father]." *Id.* at 524, 446 N.W.2d at 222.

Although in this case the trial court seems to have been under the impression that the husband had a much better likelihood of improving his financial outlook, the record shows otherwise. While it is true that the wife did not have a degree on which she could rely to improve her employment, she has worked continuously throughout the marriage and has had experience in various occupations. On the other hand, the husband had spent 18 of the last 20 years working as a Presbyterian pastor. Therefore, the husband's most likely prospect for employment is as a minister.

Although the ministry may be a respectable and commendable calling, it is not a financially rewarding one. The testimony reflects that the average salary of a Presbyterian minister in 1989 was $13,375. (The record does not tell us the average value of any benefits which may be part of a minister's pay.) Although the husband has a degree in philosophy, with minors in mathematics and physics, this degree, as well as any employment experience in these fields, was attained over 20 years ago. Thus, the record suggests that the husband will continue to experience substantial difficulties in securing lucrative employment.

Under the circumstances, it was an abuse of discretion to award the wife alimony.

4. Attorney Fee

Last, in his fourth assignment of error, the husband questions the award of an attorney fee to the wife. The testimony is that while the wife's attorney fee totaled $5,336.37, the husband's totaled $2,476.62.

In addition to the rule stated in subpart (2) above, we have specifically declared that in an action for dissolution of marriage, the award of attorney fees is discretionary with a trial court, is reviewed de novo on the record, and will be affirmed in

the absence of an abuse of discretion. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

The award of attorney fees depends on a variety of factors, among them the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Pittman v. Pittman*, 216 Neb. 746, 345 N.W.2d 332 (1984); *Whitney v. Whitney*, 214 Neb. 565, 334 N.W.2d 799 (1983). In *Ziebarth v. Ziebarth*, 238 Neb. 545, 557-58, 471 N.W.2d 450, 459 (1991), we proclaimed:

> In awarding attorney fees in a dissolution action we consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of questions, and the customary charges for similar services.

See, also, *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989); *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988).

In view of the routine nature of the issues involved, the size of the marital estate, and the fact that the record fails to detail the work performed to justify the fees charged by the wife's attorney, the award of a fee to the wife also constitutes an abuse of discretion.

IV. RULING

The decree of the trial court is, as we first noted in part I above, affirmed as modified in this opinion.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ELMER JANSEN, APPELLANT.

486 N.W.2d 913

Filed July 31, 1992. No. S-91-360.

1. **Alcoholic Liquors: Minors.** 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.
2. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to

supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.

3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Verdicts: Appeal and Error.** 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.

Appeal from the District Court for Cedar County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Cedar County, PAUL R. ROBINSON, Judge. Judgment of District Court reversed, and cause remanded with directions.

William J. Klimisch, of Goetz, Hirsch & Klimisch, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

FAHRNBRUCH, J.

Elmer Jansen appeals the affirmation of his Cedar County Court conviction and sentence for "allow[ing] the distribution and possession of alcoholic liquor by one or more of 42 minors, on property owned by him, knowingly permitting the possession of alcohol by minors to occur." Upon his conviction, Jansen was sentenced to 15 days in jail and fined $900.

We note first that much of the language in the charge contained in the complaint filed against Jansen is surplusage and does not constitute conduct prohibited by the statute under which the defendant was charged, see Neb. Rev. Stat. § 53-180 (Reissue 1988).

In relevant part, § 53-180 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.*" (Emphasis supplied.)

It is a fundamental principle of statutory construction that

penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, *or to supply that which is not there. State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). There is no language in § 53-180 declaring that it is a crime for an individual to "allow" or to "permit" the *possession* of alcohol by minors to occur. Thus, language in the charge against Jansen accusing him of *allowing* or *permitting* one or more minors to possess alcohol is mere surplusage and cannot be the basis for convicting him of violating § 53-180.

We will, therefore, review the record to determine if there was sufficient evidence for a fact finder to find beyond a reasonable doubt that Jansen permitted the sale, gift, or procuring of any alcoholic liquors to or for any minor.

In his appeal, Jansen claims that (1) there was insufficient evidence to convict him and that (2) the trial court erred in refusing to suppress evidence used to convict him.

We agree with Jansen that the evidence was insufficient to prove beyond a reasonable doubt that he permitted the sale, gift, or procuring of alcoholic liquor to or for any minor, and we therefore need not discuss his second assignment of error. The judgment is reversed and the cause remanded to the district court for Cedar County with directions to remand it to the Cedar County Court with directions to vacate the conviction and sentence and to dismiss the complaint.

> In reviewing a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

State v. Sassen, 240 Neb. 773, 774, 484 N.W.2d 469, 470 (1992).

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. Vance*, 240 Neb. 794, 484 N.W.2d 453 (1992).

Taking the view most favorable to the State, the record reflects that at all relevant times, Jansen owned a farmstead in

Cedar County. The farmstead house was not occupied, and the other buildings were used for the storage of grain and machinery. Cattle were kept at the farmstead.

On May 23, 1990, a State Patrol trooper received an anonymous telephone call advising him that a "keg party" involving underage individuals was taking place in Cedar County. County and state law enforcement officers gathered and determined that the alleged keg party was being held at an unoccupied farmstead owned by Jansen.

About 1:05 p.m., law enforcement officers in two unmarked cars drove to the farm site. When the officers were an eighth to a quarter mile east of the farm site, they observed a large gathering of individuals at the farm site. When the officers reached the long lane from the county road to the unoccupied farmhouse, they saw five or six vehicles parked on the county road, and they also observed a pickup truck being driven from the county road into the farmstead. They further observed Jansen driving his pickup toward the county road from the farmstead. On the dashboard of Jansen's truck was a makeshift sign bearing the words "Not Responsible for Accidents" written in red ink. There was evidence of a similar sign propped up against the porch of the unoccupied farmhouse. Jansen denied that he had displayed any such signs.

Without prior permission from the owner of the farm, without observing any crimes being committed, and without obtaining a search warrant, the law enforcement officers entered the lane to the farmstead. When they were an eighth of a mile from the county road, the officers observed 42 individuals, all of whom were under the age of 21 years, and a keg of beer and other beer containers. No individual 21 years of age or older was present. The individuals present dropped beer cups and bottles and ran when they saw the law enforcement officers. The officers confiscated a 15-gallon keg of beer, together with a tap; a Fiberglas vessel that contained the keg; and over 50 cans of beer from various places around the farmstead, including the roof and the inside of the unoccupied farmhouse.

Jansen testified that the day before the party, he had taken cattle to the farmstead. He said he went to the farmstead about

12:30 or 1 p.m. on May 23, 1990, to check the cattle. He checked the cattle, saw the young people on his property, did not know them, and did not know they were going to be there. No one asked him if they could be there or if his farmstead could be used for a party. He testified he did not furnish the beer for the party. Jansen explained that he did not say anything to the youths because he did not live on the farmstead and that he was afraid if he turned people in to the police they would get mad and wreck his farmstead.

As a matter of law, there is insufficient evidence in the record for a finder of fact to find beyond a reasonable doubt that Jansen had any connection with the alcoholic beverages at the farmstead or that he sold, gave away, disposed of, exchanged, or delivered, or *permitted the sale, gift, or procuring of any alcoholic liquors, to or for any minor.*

In essence, the State would have a fact finder infer that Jansen became aware that underage individuals were in possession of or drinking alcoholic liquor on a farmstead owned by him and that he had a duty to prevent them from doing so. Section 53-180 does not make it a crime to permit the possession or consumption of alcohol by a minor. What it does is prohibit permitting *the sale, gift, or procuring of any alcoholic liquors, to or for any minor.* As a matter of law, there is insufficient evidence in the record to prove beyond a reasonable doubt that Jansen committed any of those acts. At most, one could infer that Jansen became aware that minors had possession of beer and were drinking it on property he owned and that he walked away from it. His actions do not constitute a violation of § 53-180 when that statute is strictly construed. His conviction and sentence must be vacated.

The judgment is reversed and the cause remanded to the district court for Cedar County with directions to remand the cause to the Cedar County Court with directions to vacate Elmer Jansen's conviction and sentence and to dismiss the State's complaint due to insufficient evidence.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DEAN JANSEN, APPELLANT.

486 N.W.2d 501

Filed July 31, 1992. No. S-91-361.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Convictions.** A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.
3. **Proof.** Conjecture and speculation are not proof.
4. **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.

Appeal from the District Court for Cedar County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Cedar County, PAUL R. ROBINSON, Judge. Judgment of District Court reversed, and cause remanded with directions.

William J. Klimisch, of Goetz, Hirsch & Klimisch, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

FAHRNBRUCH, J.

Twenty-one-year-old Dean Jansen appeals the affirmation of his Cedar County Court conviction and sentence for delivering and procuring alcoholic liquor, consisting of beer, for 42 minors, in violation of Neb. Rev. Stat. § 53-180 (Reissue 1988). He was sentenced to 15 days in jail and fined $900.

In relevant part, § 53-180 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."

In his appeal, Jansen claims that (1) there was insufficient evidence to convict him and that (2) the trial court erred in refusing to suppress evidence used to convict him.

Because we agree with the defendant's first assignment of error and find, as a matter of law, that there was insufficient evidence to convict Jansen, it is not necessary to discuss his second assignment of error.

> "In reviewing a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction."

State v. Jansen, ante p. 196, 198, 486 N.W.2d 913, 914 (1992), quoting *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992). See, also, *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992).

In *State v. Klutts*, 204 Neb. 616, 619, 284 N.W.2d 415, 418 (1979), quoting this court's syllabus point in *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949), we said: " '[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.' "

In the present case, there was no eyewitness or other direct evidence that Dean Jansen delivered or procured alcoholic liquor for one or more minors. In its effort to convict Jansen, the State relied upon circumstantial evidence.

When we take the view most favorable to the State, the record reflects that at all relevant times, Dean Jansen's father, Elmer Jansen, owned a farmstead in Cedar County. The farmstead house was not occupied, and the other buildings were used for the storage of grain and machinery. Cattle were kept at the farmstead.

On May 23, 1990, a State Patrol trooper received an anonymous telephone call advising him that a "keg party" involving underage individuals was taking place in Cedar

County. County and state law enforcement officers gathered and determined that the alleged keg party was being held at an unoccupied farmstead owned by Jansen.

About 1:05 p.m., law enforcement officers in two unmarked cars drove to the farm site. When the officers were an eighth to a quarter mile east of the farm site, they observed a large gathering of individuals at the farm site. When the officers reached the long lane from the county road to the unoccupied farmhouse, they saw five or six vehicles parked on the county road, and they also observed a pickup truck being driven from the county road into the farmstead. They further observed Elmer Jansen driving his pickup truck toward the county road from the farmstead. An officer testified that on the dashboard of Jansen's truck was a makeshift sign bearing the words "Not Responsible for Accidents" written in red ink. There was testimony of a similar sign propped up against the porch of the unoccupied farmhouse. Elmer Jansen denied that he had displayed any such signs.

Without Elmer Jansen's prior permission, without observing any crimes being committed, and without obtaining a search warrant, the law enforcement officers entered the lane to the farmstead. When they were an eighth of a mile from the county road, the officers observed 42 individuals, all of whom were under the age of 21 years, and a keg of beer and other beer containers. No individual 21 years of age or older was present. The evidence is uncontroverted that Dean Jansen was not present at the party. He testified that he was at work. The individuals present dropped beer cups and bottles and began to leave when they saw the law enforcement officers. They stayed when requested to do so by the officers. The officers conducted interviews and obtained the names, addresses, and birth dates of 42 underaged individuals. The officers confiscated one 15-gallon keg of beer, together with a tap; a Fiberglas vessel that contained the keg; and over 50 cans of beer from various places around the farmstead, including the roof and the inside of the unoccupied house. Elmer Jansen testified that he had not furnished the beer for the party. Because there was insufficient evidence to convict him of permitting the sale, gift, or procuring of any alcoholic liquors to or for any minor, we set

aside Elmer Jansen's conviction. See *State v. Jansen, supra.* The two cases of Elmer Jansen and Dean Jansen were consolidated for trial.

There was evidence that sometime during the evening of May 22, 1990, Dean Jansen purchased a keg of beer from a Yankton, South Dakota, gas and convenience store. A store employee wrote a number on the keg which was visible only under a black light. The number was supposed to correspond with the number of the keg on an inventory list of kegs sold, apparently in compliance with city of Yankton ordinance No. 625. The salesclerk testified the keg Dean Jansen purchased "would have that number N22 on it — or N21." "N-21" was the number listed on the inventory sheet. A deputy sheriff testified that when the keg confiscated at the party on Elmer Jansen's unoccupied farmstead was placed under a black light, "We saw the letter N and a number, and the number is kind of scribbled, but it's 22. N22." The inventory sheet, which was received in evidence, reflects that the keg Dean Jansen purchased was "N-21." After the deputy was shown the inventory sheet, he testified on cross-examination that the number on the keg "is not real legible. It looks more like a 22 than a 21." "[F]rom what you could tell it had N22 on the keg?" the deputy was asked. He replied, "That's what it looks like." On redirect, the deputy sheriff testified: "The last two digits are hard to read. It looked more like a 22 than a 21 to me, but you can hardly read it." Jansen's purchase of keg N-21 was listed at the top of the inventory sheet received in evidence. Whether the preceding inventory sheet, if any, reflects a sale of keg N-22 or any other keg sale on May 22 is not reflected in the evidence. The inventory sheet does reflect that keg N-22 was sold on May 25 to another person.

Dean Jansen and two of his friends testified that they were to have a reunion of their high school class on the Friday evening following Jansen's purchase of the keg on May 22 and that Jansen was to purchase the beer. The reunion was scheduled for May 25. Jansen testified that he bought the keg on Tuesday because it was hard to find a keg "at the last minute," particularly at that time of year. After he purchased the keg, Jansen said he placed the keg, with ice around it, in a white

barrel in his father's garage at the home where he and his parents lived. He said he laid the tap he had obtained from the convenience store with the keg and covered the keg with a burlap sack to keep the beer cool.

The defendant testified that when he got home from work the next day, which would have been May 23, he did chores and then checked the keg. He said the keg was gone. Jansen said he ate supper, cleaned up, and went to the "Lazy D" in Yankton, where there was a dance. There he talked to a friend. Jansen's friend rode with Jansen to where he purchased the keg of beer. Jansen testified he told the salesclerk that he had bought a keg and tap there the previous night and that "it got stolen out of my garage." He paid the clerk $37 in cash for the cost of the keg and tap. In return, he said he obtained a check he had left as a deposit on the keg and tap. The salesclerk testified that Jansen wanted the inventory sheet, but she refused to give it to him. Jansen denied asking for the sheet. Jansen further testified, "I didn't furnish no beer for no minors." He denied knowing anything about the underage beer party on his father's unoccupied farmstead.

The salesclerk who sold Jansen his keg of beer testified that exhibit 2, which was identified as the keg obtained by law enforcement officers at the unoccupied farmstead owned by Elmer Jansen, was the type of keg sold to the defendant on May 22, but that the tap "doesn't look like one of ours." She could not testify whether Jansen had obtained a tap with the keg of beer he purchased from her store. The salesclerk further testified that without looking at the store's number on the keg she could not say whether the keg found at the unoccupied Jansen farmstead was the keg she sold to Dean Jansen. The tap introduced in evidence was seized along with the keg at the site of the underage beer party.

At trial, Dean Jansen was entitled to the presumption of innocence and could not be convicted until the State proved him guilty beyond a reasonable doubt of delivering or procuring alcoholic liquor for minors. See *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992). Conjecture and speculation are not proof. *Id.*

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, 463 N.W.2d 616 (1990).

As previously indicated, the evidence presented by the State to convict Dean Jansen was purely circumstantial. The fact that Jansen purchased a keg of beer and his testimony that it was stolen from his father's garage are consistent with his innocence. The State's failure to adduce evidence that the beer keg the law enforcement officers seized at the underage beer party was the identical keg that Jansen purchased does not lend credence to the State's theory that Jansen supplied beer to one or more of the 42 underage individuals at the party. Taken as a whole, the State's evidence, at most, casts a cloud over Jansen as the supplier of the beer for an underage beer party. Taking into consideration the presumption of innocence surrounding Jansen and the evidence adduced at trial, the State's evidence is insufficient as a matter of law for a fact finder to conclude beyond a reasonable doubt that Dean Jansen supplied beer to the juveniles drinking on his father's farmstead. His conviction and sentence must be vacated.

The judgment is reversed and the cause remanded to the district court for Cedar County with directions to remand the cause to the Cedar County Court with directions to vacate Dean Jansen's conviction and sentence and to dismiss the State's complaint due to insufficient evidence.

REVERSED AND REMANDED WITH DIRECTIONS.

RONALD LEE DOWIS, INDIVIDUALLY AND AS FATHER AND NEXT FRIEND OF JUSTIN DOWIS, A MINOR, APPELLANT, V. CONTINENTAL ELEVATOR COMPANY, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

486 N.W.2d 916

Filed August 7, 1992. No. S-89-1271.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** For actionable negligence, there must be a defendant's legal duty to protect or not injure the plaintiff, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty.
4. _____. Foreseeability is a factor in establishing a defendant's duty.
5. _____. When one under no obligation to act does undertake action, one must act with reasonable care.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded for further proceedings.

Joseph B. Muller, of The Law Offices of Ronald J. Palagi, P.C., for appellant.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Continental Elevator Co.

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

SHANAHAN, J.

This is a negligence action in which Ronald Lee Dowis, individually and as next friend of his minor son, Justin Dowis, appeals from the summary judgment granted to Continental Elevator Company, Inc., in the district court for Douglas County. Justin Dowis is a 2-year-old child who was injured in a fall down a freight elevator shaft. Continental Elevator maintained the elevator equipment involved in the accident. We

reverse, and remand for further proceedings.

STANDARD OF REVIEW

In his appellate brief, Dowis refers to *Bank of Valley v. Shunk*, 208 Neb. 200, 205-06, 302 N.W.2d 711, 715 (1981), for the proposition that "[s]ummary judgment . . . should be awarded only when the issue is clear beyond all doubt." However, in *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 878-79, 485 N.W.2d 170, 174-75 (1992), we recently and expressly disapproved of the "clear beyond all doubt" standard for a summary judgment and stated:

> " 'A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citation omitted.]' " *Murphy v. Spelts-Schultz Lumber Co., ante* p. 275, 277, 481 N.W.2d 422, 425 (1992) (quoting from *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988)). Accord, *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989); *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988).
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> " 'On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.' " *Murphy v. Spelts-Schultz Lumber Co., ante* at 277-78, 481 N.W.2d at 426 (quoting from *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988)).
>
> " 'The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment

as a matter of law if the evidence presented for summary judgment remains uncontroverted. [Citations omitted.] After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.' " *Murphy v. Spelts-Schultz Lumber Co., ante* at 278, 481 N.W.2d at 426 (quoting from *Wilson v. F & H Constr. Co., supra*). Accord *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

ACTIONABLE NEGLIGENCE

"For actionable negligence, there must be a defendant's legal duty to protect or not injure the plaintiff, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty." *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 851, 438 N.W.2d 485, 490 (1989).

" ' "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .

" 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).

"Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): ' "[F]oresight of the consequences involves the creation of a duty . . . .' " See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): ' " 'Foresight, not retrospect, is the standard of diligence. . . .' " ' . . ."

. . . "The view currently prevailing in this country [limits] the scope of the duty to do or refrain from doing a given act to (1) those persons that are likely to be

> endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent."

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 172-73, 425 N.W.2d 872, 881 (1988). Accord, *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987).

BACKGROUND

The Accident.

On September 28, 1981, the Dowis family was using a freight elevator to move some personal belongings into a part of an industrial building leased by Ronald Dowis' employer. At a rear corner of the elevator was a 10- to 14-inch opening between the elevator's unused rear door and a side wall of the elevator car. The opening, with its height sufficient to accommodate an average-sized standing adult, exposed the car's interior directly to the elevator shaft. At some point, while the Dowis family was returning to the stationary elevator car that had transported the Dowises, 2-year-old Justin ran ahead of everyone, entered the opening at the rear of the elevator, and fell 16 feet to the bottom of the shaft, sustaining severe injuries.

Pleadings and Motion for Summary Judgment.

Ronald Dowis brought suit on behalf of himself and his son against various defendants, including Continental Elevator; Guardsmark, Inc., a Tennessee corporation; and City of Omaha, a municipal corporation. In Dowis' amended petition, he alleged that Continental was under "an oral contract to do maintenance and repair work on the elevator," had negligently maintained an unsafe elevator which Continental knew or should have known that children were likely to enter and be injured, and had failed to warn elevator users concerning the elevator's unsafe condition.

The Dowis petition further alleged that Continental was also negligent:

> a. In maintaining an elevator which had a recess located at a position which was not necessary for loading, unloading, or for the installation of elevator equipment;
>
> b. In maintaining an elevator which had a clearance

between the side wall of the car platform and the enclosure in excess of five inches;

c. In maintaining an elevator which was not enclosed on all sides;

d. In failing to provide car doors or gates;

e. In failing to warn individuals entering onto the elevator, and specifically Justin Dowis, of the unsafe condition of the elevator and the danger in utilizing the same.

Continental generally denied Dowis' allegations concerning the alleged negligence and later filed its motion for summary judgment.

Summary Judgment Hearing.

Testimony for the summary judgment hearing was supplied through depositions with corresponding exhibits.

Under a March 3, 1980, "Oil & Grease" contract with Midwest Animal Products, Inc. (Midwest), owner of the building in which the subject elevator is located, Continental was required to clean, lubricate, and make minor adjustments to the elevator mechanism for a flat fee of $150 per month under the contract, which also provided in pertinent part:

EXTENT OF COVERAGE

The Continental Elevator Company, Inc. will service the elevator equipment as hereinafter described on terms and conditions subsequently set forth. We will use trained, qualified men directly employed and supervised by us. This service shall consist of all labor required to make 1 examinations per month, and only such labor and materials as specified herein will be furnished under this agreement including:

Cleaning and Oiling Machine, Motor and Controller	Necessary Minor Adjustments at the Time of Regular Examinations
Lubricating Bearings and Guides	Furnishing the Necessary Rope Preservatives and Cotton Waste

We also propose to furnish without charge all necessary lubricants and cleaning materials except reservoir oil for

lifting medium on hydraulic elevators unless specified.

We also will examine, lubricate and adjust the following accessory equipment:

NONE

The Purchaser agrees to report immediately any condition which may indicate the need for correction before the next regular examination. You agree to accept our judgment as to the means and methods to be employed for any corrective work under consideration.

The oil and grease contract contained no provision requiring Continental to make safety inspections of elevators or elevator equipment involved in the contract.

Continental's records of service for the elevators reflect that Continental's work was not restricted to cleaning and lubricating elevator equipment, and included safety tests on the elevator in question, before and after the Dowis accident. For instance, the service records disclose that Continental had on occasion provided extensive repairs on the elevators in Midwest's building. One invoice shows 28 man-hours of labor for the installation of a "new Hollister Whitney safety plank, assembly, new bottom guide shoes & new lift rod & bracket assembly, shortened governor rope, repaired governor tension sheave" at a cost of $4,138. Another invoice, reflecting Continental's charges for $7,449, shows installation of "new safety's [sic] for car B and C elevators. Installed new governor, and governor tail sheave. Added two new springs for 'B' elev. (buffer) Did two Syro. safety test 'B' and 'C.' elev." Thus, although descriptions of these repairs are somewhat sketchy, nonetheless the service records show that Continental had undertaken activities much more extensive than cleaning and lubricating elevator machinery and equipment. Additionally, at some point before the accident, Continental signed a Nebraska "Safety Test Report" for the elevator in question and, regarding a safety test, marked a safety test tag "fair," and attached that tag to the elevator used by the Dowises.

According to Richard and David Neubauer, officers of Midwest, Continental was under contract to inspect the elevator before the accident, and it rendered services whenever the elevator required any technical work. Neubauers always

employed Continental for any work on the elevators.

In the view of Russell Kramer, an elevator expert for Dowis, Continental's activity regarding the elevator violated the standard of care prescribed by national elevator standards. As Kramer expressed, Continental "should have notified the building owner about this hole [at the rear of the elevator car]," and the elevator should have been taken out of service until the hazardous situation was rectified. Kramer further indicated that in the elevator maintenance industry, oil and grease contracts, such as Continental's agreement with Midwest, impose on the service provider the duty to issue a warning concerning unsafe elevator conditions.

A professional engineer, testifying for Dowis, stated that the elevator's condition presented a hazard which should have been removed or indicated by appropriate warnings.

The district court, determining "from the evidence introduced on behalf of the parties" that there was no genuine issue of material fact, concluded that Continental was entitled to judgment as a matter of law and, therefore, granted Continental summary judgment, dismissing the Dowis action.

ASSIGNMENTS OF ERROR

Dowis asserts that summary judgment was improper because genuine material fact questions existed regarding (1) the scope of Continental's duties under its elevator maintenance contract with the building's owner, (2) whether Continental had contracted to make safety inspections of the elevator, and (3) whether Continental, by signing a Nebraska "Safety Test Report" and attaching a safety test tag to the elevator, had represented that the elevator was in a safe condition for use.

Responding to Dowis, Continental contends, in substance, that the express terms of its oil and grease contract determine Continental's entire responsibility regarding the elevator.

GENUINE ISSUES OF MATERIAL FACT

Despite Continental's position that its duties regarding the elevator were limited to the maintenance tasks described in the oil and grease contract, the record shows that, before and after the accident, Continental was actually engaged in much more extensive work regarding the elevator, work that may have been

performed pursuant to the oil and grease contract, or perhaps performed pursuant to an oral contract, as alleged in Dowis' petition. Substantial charges paid by Midwest in addition to, or in lieu of, the monthly flat fee prescribed in the oil and grease contract support an inference that Continental and Midwest had an agreement or agreements other than the oil and grease contract regarding Continental's work on Midwest's elevators. Testimony from experts, if believed, indicates that the oil and grease contract implicitly imposed additional duties regarding safety measures and warnings based on custom prevailing throughout the elevator industry.

Finally, even if Continental had no express contractual duty to perform the safety inspections which they apparently undertook, the failure to exercise reasonable care in performing those inspections may, nonetheless, be a basis for imposition of tort liability on Continental.

> " 'If a party undertake[s] to perform work, and proceed[s] on the employment, he makes himself liable for any misfeasance in the course of that work . . . .' " See *Hart v. Ludwig*, 347 Mich. 559, 562, 79 N.W.2d 895, 896-97 (1956), citing and quoting from *Elsee v. Gatward*, 5 Durnform & East's 143, 101 Eng. Rep. 82 (1793).
>
> The oft-quoted rule was aptly and simply expressed by Judge Benjamin Cardozo in *Glanzer v. Shepard*, 233 N.Y. 236, 239-40, 135 N.E. 275, 276 (1922): "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all (*Coggs v. Bernard*, 2 Ld. Raymond, 909; *Shiells v. Blackburne*, 1 H. Bl. 158; Willes, J., in *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 631, 636; Kent, Ch. J., in *Thorne v. Deas*, 4 Johns. 84, 96)."
>
> Judge Cardozo later paraphrased the rule in *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928): "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all."

McGinn v. City of Omaha, 217 Neb. 579, 597-98, 352 N.W.2d 545, 555 (1984).

As we noted in *Wickersham v. State*, 218 Neb. 175, 181-82, 354 N.W.2d 134, 139 (1984), an action brought under the State Tort Claims Act:

> When one under no obligation to act does undertake action, one must act with reasonable care. See *Indian Towing Co. v. United States*, [350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955)]. . . . [A]n individual, must act with reasonable care in reference to action undertaken without an obligation to act. See *Barnum v. Rural Fire Protection Company*, 24 Ariz. App. 233, 537 P.2d 618 (1975); accord *Wolf v. City of New York*, 39 N.Y.2d 568, 349 N.E.2d 858, 384 N.Y.S.2d 758 (1976). See, also, *Wulf v. Rebbun*, 25 Wis. 2d 499, 131 N.W.2d 303 (1964). Having acted in this case, the State's conduct must be evaluated by the standard of reasonable care.

We conclude that the evidence presented at the hearing on Continental's summary judgment motion, when viewed in the light most favorable to Dowis, who is entitled to the benefit of all reasonable inferences deducible from the evidence, raises genuine issues of material fact, questions that remain to be answered, such as:

(1) Did any contract between Continental and Midwest, or the nature of Continental's services, impose on Continental a duty to conduct safety inspections of the elevator?

(2) Did any contract between Continental and Midwest, or the nature of the work rendered by Continental, require that Continental warn prospective elevator passengers concerning the unsafe condition of the elevator?

(3) Did Continental have a duty to repair the unsafe condition or eliminate the hazard from the elevator?

(4) In the absence of an express contract to conduct safety inspections of the elevator, did Continental undertake to conduct elevator safety inspections, and, if so, did Continental exercise reasonable care in those inspections?

CONCLUSION

Since there are at least the issues of material fact which we have noted above, we conclude that the district court improperly granted summary judgment to Continental.

Therefore, the summary judgment granted to Continental is reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBIE CROWDELL, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. MICHAEL CROWDELL, APPELLANT.
487 N.W.2d 273

Filed August 7, 1992. Nos. S-90-1070, S-90-1071.

1. **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, which are within a fact finder's province for disposition.
2. _____: _____. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Intent: Words and Phrases.** The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
4. **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.
5. **Trial: Appeal and Error.** An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
6. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
7. **Sentences: Probation and Parole.** In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.

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

Kevin V. Schlender for appellants.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

COLWELL, D.J., Retired.

Defendants, Robie Crowdell and Michael Crowdell, each appeal their separate convictions on one count of intentional abuse of a minor child, their son John Jeffrey Crowdell (Jeff), in violation of Neb. Rev. Stat. § 28-707 (Reissue 1989), a Class IV felony punishable by maximum imprisonment for 5 years, a $10,000 fine, or both such imprisonment and fine, Neb. Rev. Stat. § 28-105(1) (Reissue 1989). Following entry of not guilty pleas, defendants' cases were joined for a bench trial, which resulted in their separate convictions as charged. Each defendant was sentenced to serve not less than 20 months nor more than 5 years' imprisonment. Separate appeals were perfected and consolidated for argument. We affirm.

Defendants assign two errors: First, the evidence was insufficient to sustain their convictions. Second, the court imposed excessive sentences.

Section 28-707 provides:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.
>
> . . . .
>
> (4) Child abuse is a Class IV felony if the offense is committed knowingly and intentionally.

BACKGROUND FOR CHARGES

At the outset, a summary of the facts and circumstances leading to the charges against defendants is helpful. Defendants are the parents of five children. Jeff, the next oldest child, was born on June 19, 1977, and weighed 4 pounds 15 ounces; at age

12½ he was 49½ inches tall and weighed 46 pounds. Defendants testified that at an early age Jeff was moody and displayed aggressive interaction with his siblings. For this, defendants consulted several medical experts, including Dr. Richard Brouillette, a family practitioner, who conducted a blood sugar test and reported to defendants that Jeff's blood sugar level was low. From this report, defendants, particularly Robie Crowdell, concluded that Jeff's behavioral problems were caused by hypoglycemia. However, Dr. Brouillette testified that he did not at any time prescribe dietary restrictions to be imposed on Jeff. An entry in Dr. Brouillette's patient records on August 9, 1983, noted Jeff's small size and contained a notation that "mom really doesn't want to investigate it much so I guess we'll leave it go at that." In September 1985, defendants consulted Dr. Carol Huseman and requested that she test Jeff for hypoglycemia. Dr. Huseman conducted the test, confirmed that Jeff was borderline hypoglycemic, and recommended that Jeff receive frequent feedings to alleviate the problem. Dr. Huseman stated that restricting food intake, especially in children, can cause a decrease in blood sugar levels, causing hypoglycemia.

Nevertheless, in direct opposition to Dr. Huseman's recommendation regarding frequent feedings, defendants imposed continuous dietary restrictions upon Jeff in order to limit his sugar intake. A typical meal at home for Jeff consisted of half a cheese sandwich and a hard-boiled egg, except approximately once a week when Jeff was allowed to eat beef, mashed potatoes, and green beans. His school lunch was made up of half a cheese sandwich and a small bag of potato chips.

To satisfy his hunger, Jeff began sneaking food from the kitchen and garbage, for which discipline was finally imposed in 1985 by Jeff's being locked at night in a dark, unheated, and filthy bedroom. Jeff's nighttime detention continued until February 6, 1989, when a search warrant was executed by York County officers at approximately 9:30 p.m., pursuant to a complaint made by Jeff's teacher.

The temperature on February 6, 1989, reached a high of 10 to 12 °F. When the deputies entered the house, they conducted a search of the second floor and discovered two bedrooms, one

with the door partially ajar and the other with the door closed and secured with a padlock on the outside of the door. Sleeping in the unlocked room were three children, later identified as Michael James Crowdell, born December 25, 1974; Jesse Aaron Crowdell, born December 9, 1978; and Jacqueline Sue Crowdell, born May 11, 1981. The unlocked bedroom was heated by an electric heater and was described by the deputies as "very warm."

In order to investigate the contents of the locked room, the deputies were required to remove the padlock from the door and unlatch a clasp. The deputies noticed that the room was much colder than the unlocked bedroom. Deputy Dale Radcliff stated that the room was "very cold" and further testified: "I had . . . my heavy winter jacket on and I was cold in that room."

Inside the room the deputies found a small boy, later identified as Jeff, huddled up and sitting on the floor. Jeff was attempting to keep warm by covering himself with three badly soiled blankets placed on the linoleum floor to fashion a makeshift bed. Although there was a rollaway bed folded up in one corner of the room, Jeff stated that he was not allowed to use it because he had previously been caught smuggling food upstairs and using the bed as a "stashing" place to hide food for later consumption. Jeff's bedroom also contained a large table saw and several piles of lumber stacked against two walls and resembled a storage room or a workshop instead of a child's bedroom. The room did not contain a working light fixture and was not heated by any source other than the heat radiated into the room from the adjoining rooms and the chimney which passed through one wall. Further, compounding the lack of heat reaching the room, two of the outside walls of the house contained numerous holes through which light was visible during the day and one of which was apparently large enough to allow a small bird to find its way into the room. Jeff was locked up each evening at approximately 8:30 and forced to remain there, alone, until the following morning, when one of his parents or one of his siblings, with permission from a parent, would remove the lock and release him. Although the testimony of Jeff and his parents conflicted as to what age Jeff was when his confinement began, the defendants admitted the practice

had been ongoing for over 2 years, while Jeff testified the period of confinement was over 5 years.

At trial, Jeff described the bathroom conditions he was forced to endure while confined in his room:

> Q. . . . Jeff, what would you do if you had to go to the bathroom, after you were put in the room?
>
> A. Usually, I'd have to — Well, if I had to urinate, I'd go out my window. If I had to do otherwise, I'd usually go in my shirt or something.
>
> Q. Okay. Would you ever try to let anybody know that you had to go to the bathroom . . . [?]
>
> A. Sometimes. I'd just knock on the floor, or knock on the door to be let out. But, sometimes they weren't supposed to let me out and stuff.
>
> Q. Would your parents let you out when you'd knock and say you had to go to the bathroom?
>
> A. Sometimes.

Although unable to get out of his room to use the bathroom, Jeff was punished by the defendants for defecating in his room and was forced to clean up the feces and wash his clothing. Jeff testified: "[O]nce . . . when they were really getting fed up with it, one time I had to carry it [feces] downstairs with my hands."

Michael Crowdell testified that Jeff was confined in a locked, unheated, and dirty room each night "[a]s a last resort. Because he kept sneaking down at night and snitching food and getting into other things, causing damage. We finally, as a last resort, after warning him several times, locked his door so that he could not get out at night." Additionally, Michael Crowdell stated that Jeff was kept separated from his siblings because when Jeff was 9 years old he told his younger brother and sister "scary stories" and tried to convince them to place a paper clip into an electrical outlet. As further justification for confining Jeff, Robie Crowdell stated that when Jeff was 4 years old he often had temper tantrums and once choked his younger brother. Further, Robie Crowdell stated that Jeff misbehaved by refusing to play when asked to do so by the other children and by going to bed without brushing his teeth or going to the bathroom.

Defendants asserted at trial and on appeal that they did not

knowingly and intentionally violate § 28-707. However, at trial Jeff testified: "I had been told to tell everybody that I sleep on a sleeping bag in — in the kids' room, on the floor, and that's how I sleep." Jeff stated that his "mom and dad" had instructed him to relate the preceding information to anyone who inquired regarding his sleeping arrangements. Additionally, Michael Crowdell stated that prior to Jeff's removal from the home he did not ever tell anyone that Jeff was being locked in a separate room at night.

When Jeff was removed from defendants' home, he was 12 1/2 years old; however, he was the height and weight of an average 7 1/2- to 8-year-old. Following his placement in foster care and receipt of a balanced diet, Jeff began to gain weight and continued to gain weight "very well" throughout the remainder of 1989. During the first 7 months following his placement in foster care, Jeff gained over 12 pounds merely by eating a balanced diet. Jeff's teachers described him as a small, inquisitive, quiet, well-disciplined boy who was an above-average student and who was not inclined to complain about his treatment at home.

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, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

" 'The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.' " *State v. Witt*, 239 Neb. 400, 401, 476 N.W.2d 556, 558 (1991).

From our examination of the evidence, which is construed in favor of the State in light of defendants' convictions, we

conclude that the evidence fully supports the judgments of conviction for each defendant, acting both individually and jointly in violation of § 28-707.

Jeff was placed in a situation which endangered his health and physical growth by being confined at his home in an unheated room under unsanitary conditions and fed a harshly restrictive diet.

Although defendants as parents were generally justified in using and imposing reasonable disciplinary measures on Jeff, see *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985), the continuous unlawful acts of defendants, including extended confinement in a room and denial of adequate nutrition, shelter, and care, which resulted in Jeff's poor physical health, were cruel and inhuman treatment and punishment.

As to the element of intent, it is clear from the record that both defendants intended, and by their independent and joint acts did implement, the abusive treatment of Jeff in violation of § 28-707. Defendants' excuse that Jeff's treatment was a "last resort" has an empty ring when it is related to the sordid facts of this case.

EXCESSIVE SENTENCES

Defendants contend that their sentences should have been probation rather than incarceration, that the sentences were excessive in duration, and that the district court abused its discretion by not ordering the sentences to be served alternately to allow one of the parents to remain at home with the other children while the other parent served his or her respective sentence. Defendants were sentenced to imprisonment for not less than 20 months nor more than 5 years, a penalty statutorily authorized by § 28-105(1) for a Class IV felony. " '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. Johnson*, 238 Neb. 206, 208, 469 N.W.2d 761, 763 (1991). See *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992).

An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v.*

McCaslin, supra.

"Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion." *State v. Zitterkopf*, 236 Neb. 743, 749-50, 463 N.W.2d 616, 621 (1990).

Defendants note that the probation officer's presentence reports, made available to the trial court, contained a recommendation that a sentence of probation should be imposed for each defendant. These reports are proper sources of information for the judge to consider; however, the sentencing judge is not bound by recommendations of the probation officer. *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981).

Michael and Robie Crowdell were married July 19, 1974, and five children were born of the marriage (the fifth child, Joseph Allen, was born September 9, 1989, after defendants' arrest in this matter). At the time of their arrest, defendants were living with the children in a home owned by defendants. The home was in poor repair. Michael has a history of regular employment as a plumber; his education includes high school and 1 year of college. He has two prior misdemeanor convictions and a history of alcoholism. Robie is a high school graduate with no prior criminal history. At the time of sentencing, Jeff was in a foster home and the other children resided with defendants.

Defendants contend that sentences of probation should have been imposed in response to Neb. Rev. Stat. § 29-2260(2)(a) (Reissue 1989), which provides in part:

> (2) 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.

Defendants argue that there is no risk that either defendant will engage in criminal conduct and that therefore the sentences of imprisonment should have been withheld. However, § 29-2260(2)(a) is only one guide to be considered by the sentencing court, and, there being no record to the contrary, we assume that § 29-2260(2)(a) and other options were considered by the judge.

"In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law." *State v. McCaslin*, 240 Neb. at 493, 482 N.W.2d at 566.

Defendants also rely on § 29-2260(3)(k), which provides: "(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment: . . . (k) Imprisonment of the offender would entail excessive hardship to his or her dependents." However, § 29-2260(3)(k) is also intended only as a sentencing guide to be considered by the sentencing judge. See *State v. Thornton*, 225 Neb. 875, 408 N.W.2d 327 (1987). We have no doubt that this provision and the factual situation presented in the record did weigh heavily upon the sentencing judge, and we are not unmindful of the same.

Under the same statutory subsection, § 29-2260(3), we note that there are additional sentencing guides related to the record that were not favorable to defendants:

> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;
>
> (e) The victim of the crime induced or facilitated commission of the crime.

Defendants' criminal abuse lasting over several years did cause serious harm to Jeff, and such harm may yet threaten future physical and emotional harm to him. Their criminal acts were

committed intentionally, and defendants knew such acts contributed to Jeff's poor health. There was no justifiable provocation or inducement for their acts.

Throughout the trial, defendants contended that their treatment of Jeff was a "last resort" response to control Jeff's behavioral problems. At the sentencing hearing, both defendants changed this justification approach by admitting their treatment of Jeff was wrong; however, they stated they did not know what else to do.

In light of the crime, the record, and the relevant information contained in the presentence reports presented and considered at sentencing, we cannot say that the judge abused his discretion by imposing sentences of imprisonment for each defendant which were within the statutory limits.

The conviction and sentence of defendant Robie Crowdell, case No. S-90-1070, should be, and is, affirmed. The conviction and sentence of defendant Michael Crowdell, case No. S-90-1071, should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRADLEY A. STEIN, APPELLANT.
486 N.W.2d 921

Filed August 7, 1992. No. S-91-441.

1. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
2. _____. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
4. **Statutes: Blood, Breath, and Urine Tests.** It is a question of fact as to whether any particular individual is a qualified technician for the purpose of withdrawing blood for a test under Neb. Rev. Stat. § 39-669.14 (Cum. Supp. 1990).

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed.

Phillip G. Wright and Casey J. Quinn, of Quinn & Wright, for appellant.

Don Stenberg, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

BOSLAUGH, J.

The defendant, Bradley A. Stein, was convicted of operating a motor vehicle while under the influence of alcoholic liquor and was sentenced to probation for 180 days, was fined $100 and costs, and had his driver'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 contends that the trial court erred in overruling his motion to suppress the results of his blood test and in receiving the blood test results in evidence over objection.

On June 8, 1990, at approximately 1:30 a.m., the defendant was stopped by an officer of the Omaha Police Division because he was exceeding the speed limit by 18 miles per hour. The officer noticed a strong odor of alcohol about the defendant and that his eyes were bloodshot, so he requested the defendant to perform certain field sobriety tests. Based upon the defendant's performance of the field sobriety tests, the officer arrested the defendant for driving while under the influence. The defendant consented to giving a blood sample and subsequently was transported to Methodist Hospital for the purpose of obtaining a blood test to determine his blood alcohol content.

Patricia Maca, a medical technologist at Methodist Hospital, drew a sample of the defendant's blood. A chemical analysis of the sample by Bill Ihm, who holds a Class A permit or license to use a gas chromatograph to test blood for alcohol concentration, showed that the defendant had .12 grams of alcohol per 100 milliliters of blood.

The defendant filed a motion to suppress the result of the blood test. The motion alleged that the blood test was not done in conformity with the rules and regulations promulgated by

the Nebraska Department of Health in Neb. Admin. Code tit. 177, ch. 1 (1987). The motion to suppress was overruled, and the results of the blood test were received in evidence at the trial over the defendant's objection.

The defendant argues that his blood sample was not drawn by a person authorized to do so, pursuant to Neb. Rev. Stat. §§ 39-669.14 and 39-669.11 (Cum. Supp. 1990).

Section 39-669.14 provides:

> Any person arrested for any offense involving the operation or actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs shall be required to submit to a chemical test or tests of his or her blood, breath, or urine as provided in section 39-669.08 . . . . Only a physician, registered nurse, or qualified technician acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic or drug content therein, but this limitation shall not apply to the taking of a urine or breath specimen.

Section 39-669.11 provides in part:

> Any test made under the provisions of section 39-669.08, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor or drugs or involving driving or being in actual physical control of a motor vehicle when the concentration of alcohol in the blood, breath, or urine is in excess of allowable levels, in violation of section 39-669.07 or a city or village ordinance. Tests to be considered valid shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. The department is authorized to approve satisfactory techniques or methods and to ascertain the qualifications and competence of individuals to perform such tests and to issue permits which shall be subject to termination or revocation at the discretion of the department.

It is important to note that § 39-669.14 does not define the term "qualified technician" and that the requirement in § 39-669.11 of a valid permit issued by the Department of Health applies only to the individual performing the test or analysis of the sample of bodily fluid, not to the individual withdrawing blood from the defendant.

At the hearing on the motion to suppress, Dr. Gerald R. Schenken, a certified pathologist who is the president of the Pathology Center of Methodist Hospital, testified that the terms "medical technologist" or "certified medical technologist" refer to persons with college training at the bachelor's level whose jobs include drawing blood. The Pathology Center functions as the laboratory for Methodist Hospital, and Maca has been employed there for more than 10 years.

Maca testified that she has a bachelor of science degree in medical technology from the University of Nebraska Medical Center. She has been, after examination, certified by the American Society for Clinical Pathologists. Her training included taking blood samples, and at one time, 70 to 80 percent of her time was spent drawing blood. For 10 years, Maca has taken blood samples an average of 15 to 30 times per night, for a total number of samples gathered well into the thousands.

At the trial, Maca admitted that she does not hold a license from the Department of Health and that she does not have a permit issued by the Department of Health which authorizes her to withdraw blood.

The defendant contends that Maca was not a qualified technician as provided in § 39-669.14 because she did not possess a permit from the Department of Health which authorized her to draw blood for the purposes of the statute.

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. 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). In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd,

result. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

Webster's New Collegiate Dictionary 943-44 (1973) defines qualified as "a : fitted (as by training or experience) for a given purpose : COMPETENT b : having complied with the specific requirements or precedent conditions (as for an office or employment)." Technician is defined as "1 : a specialist in the technical details of a subject or occupation . . . 2 : one who has acquired the technique of an art or other area of specialization." *Id.* at 1197.

Since the statute does not define the term "qualified technician," and there is no procedure by which an individual withdrawing blood for the purpose of a test under § 39-669.14 can obtain a permit or license for that purpose from the Department of Health, it is a question of fact as to whether any particular individual is a qualified technician under the statute.

Several other jurisdictions with statutes similar to § 39-669.14 have considered whether a person who withdrew blood in order to determine blood alcohol content was qualified to do so. In *State v. Taylor*, 483 So. 2d 250 (La. App. 1986), the court held that no permit or license is required for a qualified technician to withdraw blood for the purpose of determining the alcoholic content therein.

"The only requirement to be met by a person (not a physician, [or] registered nurse . . .) withdrawing blood is that he [or she] be a 'qualified technician.' " *Id.* at 252. See, also, *Gooch v. State*, 155 Ga. App. 708, 272 S.E.2d 572 (1980) (full-time employee of medical center, whose only job was to draw blood, who had trained at the center to perform this function, and who drew blood from approximately 50 people a day, was a qualified person within the meaning of the statute); *State v. Winquist*, 247 N.W.2d 256, 259 (Iowa 1976) ("The question is one of training in withdrawal of blood. Unlike the situation of physicians and registered nurses, the Code does not provide for state licensing of medical technologists. Nor do statutory educational or training standards exist. The test to determine whether a person holding himself out as a medical technologist is a medical technologist within the meaning of [the statute] is whether a satisfactory showing can be made that he has sufficient training in the withdrawal of blood to

accomplish the legislative objectives of protecting the individual's health, guarding against infection and pain, and assuring the accuracy of the test, all in accordance with accepted medical standards. . . . The concern is with the competence of the person withdrawing the blood rather than with an occupational label he may have been awarded by a private association"); *State v. Carter*, 202 Kan. 63, 446 P.2d 759 (1968) (resident doctor who was a foreign medical school graduate was a "qualified medical technician"); *State v. Bailey*, 76 N.C. App. 610, 334 S.E.2d 266 (1985) (medical laboratory technologist who had a degree in medical laboratory technology with over 3 years' experience as a technologist and whose normal duties consisted of drawing blood was a "qualified person" to withdraw blood sample to be used to determine defendant's blood alcohol concentration); *McGuire v. State*, 504 P.2d 1247 (Okla. Crim. App. 1972) (practical nurse with 28 months of training, which included the taking of blood samples, was "qualified technician" for purposes of statute).

The evidence in this case shows that Maca was a qualified technician for the purpose of the statute by both training and experience. The record shows that Maca possesses a bachelor of science degree in medical technology. She has been certified by the American Society for Clinical Pathologists. She has worked at the Pathology Center for over 10 years and has drawn thousands of blood samples. Her training and experience clearly show that she is qualified to withdraw blood for the purpose of determining the alcoholic content under the statute.

The defendant has cited an opinion of the Attorney General dated October 2, 1990, and addressed to the director of the Department of Health. The purpose of the opinion appears to have been to advise the director that § 39-669.14 does not authorize the department to issue licenses or permits to individuals for the purpose of withdrawing blood for analysis under the statute to determine alcoholic content. In the course of the opinion, the Attorney General stated that "Neb.Rev.Stat. § 39-669.14 does not recognize that unlicensed individuals may withdraw blood." Op. No. 36, Rep. of the Att'y Gen. of Neb. 2 (Oct. 2, 1990). To the extent that the quoted statement conflicts with this court's opinion, it was in

error.

If we were to adopt the defendant's view of the statute, we would reach an absurd result by concluding that there cannot be a "qualified technician" under the statute because the Nebraska Department of Health does not license individuals to withdraw blood for the purpose of analysis under the statute.

We conclude that the trial court did not err in overruling the motion to suppress and that the results of the blood test were properly received in evidence.

The Legislature has amended § 39-669.14, effective January 1, 1993, to read:

> Only a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in section 71-2017.01 or clinical laboratory certified pursuant to the Nebraska Clinical Laboratories Certification Act, the federal Clinical Laboratory Improvement Act of 1967, as amended, or Title XVIII or XIX of the federal Social Security Act to withdraw human blood for scientific or medical purposes, acting at the request of a law enforcement officer, may withdraw blood for the purpose of determining the concentration of alcohol or the presence of drugs, but this limitation shall not apply to the taking of a urine or breath specimen.

1992 Neb. Laws, L.B. 291, § 8.

Furthermore, by amending § 39-669.11 the Legislature has made it clear that a permit or license from the Department of Health is not required for a qualified person to withdraw blood for purposes of testing for blood alcohol concentration. That section will now read:

> To be considered valid, tests of blood, breath, or urine made under section 39-669.08 shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in section 71-2017.01 or clinical laboratory certified pursuant to the Nebraska Clinical Laboratories Certification Act, the federal Clinical Laboratory

> Improvement Act of 1967, as amended, or Title XVIII or XIX of the federal Social Security Act to withdraw human blood for scientific or medical purposes, acting at the request of a law enforcement officer, may withdraw blood for the purpose of a test to determine the alcohol concentration or the presence of drugs and no permit from the department shall be required for such person to withdraw blood pursuant to such an order. . . .

1992 Neb. Laws, L.B. 291, § 6.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF L.H., A.H., W.H., AND T.H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. D.H., APPELLANT.

487 N.W.2d 279

Filed August 7, 1992. Nos. S-91-598, S-91-599.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate 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: Due Process: Evidence: Proof.** The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that the parental rights should be terminated.
3. **Parental Rights: Judicial Notice.** The concept of judicial notice of disputed allegations has no place in hearings to terminate parental rights.
4. **Parental Rights: Trial: Rules of Evidence.** In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1989).
5. **Trial: Evidence: Waiver.** If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is

considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence.

6. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
7. **Parental Rights: Evidence: Proof: Appeal and Error.** Factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record; impermissible or improper evidence is not considered by the appellate court. In an appeal from a judgment or order terminating parental rights, the appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
8. **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 and child presents an independent reason justifying termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988).
9. **Parental Rights: Juvenile Courts.** When a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before failure to comply with the plan can be an independent reason for termination.
10. **Parental Rights: Proof.** In order to terminate parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988), the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.
11. **Parental Rights: Evidence: Proof.** Regarding parental noncompliance with a court-ordered rehabilitative plan as a ground for termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
12. **Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law.
13. _____. Where a parent is unable to rehabilitate herself within a reasonable time, the best interests of the children require termination of the parental rights.
14. _____. The fact of participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.
15. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Mary C. Gryva, of Frank & Gryva, for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

COLWELL, D.J., Retired.

These two juvenile cases involving four children of the appellant, D.H., have been consolidated for briefing and argument in this court. Case No. S-91-598 concerns L.H., appellant's oldest child, and case No. S-91-599 concerns appellant's other three children, A.H., W.H., and T.H. After a long series of dispositional hearings, the juvenile court terminated appellant's parental rights in the children. D.H. appeals the orders of the juvenile court. We affirm.

FACTS AND PROCEDURES

On March 6, 1985, the State filed a petition (case No. S-91-598) alleging that D.H.'s oldest child, L.H. (a daughter born out of wedlock on August 9, 1984), was a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984) because she lacked proper parental care by reason of the faults or habits of her mother. The State specifically alleged:

> A. On or about February 18, 1985, said child was placed in protective custody because the whereabouts of [D.H.] were unknown.
>
> B. On numerous occasions, said child has been left with relatives and non-relatives by [D.H.], for prolonged periods, without making prior arrangements, and her whereabouts are unknown during said absences.
>
> C. [D.H.] suffers from a dependence upon alcoholic beverages which impairs her ability to provide the necessary parental care, protection and supervision required by said child.

The court entered an order placing temporary custody of the child in the Nebraska Department of Social Services (DSS), and

at the detention hearing on March 18, 1985, the court continued temporary custody in DSS and directed that visitation rights be established between the mother and child.

At the adjudication hearing on June 27, 1985, D.H. admitted the allegations contained in counts IIA and IIB of the petition. The court determined that it had jurisdiction by virtue of § 43-247(3)(a).

At a dispositional hearing held on August 14, 1985, attended by D.H. and her counsel, the court received four exhibits: a report containing a rehabilitation plan, a foster care report, a chemical dependency evaluation, and a home evaluation of D.H.'s uncle and aunt, who wanted to provide a home for L.H. The court also ordered a rehabilitative plan, which required the appellant to (1) regularly visit with L.H., (2) attend an inpatient alcohol treatment program, (3) obtain and maintain full-time employment, (4) obtain and maintain adequate housing, (5) attend the weekly Mother's Support Group Meetings, and (6) cooperate with the workers involved with the case.

A further hearing was held on February 14, 1986. The court concluded at the hearing that D.H. had not fully complied with the rehabilitation plan; she did not enter the inpatient alcoholism treatment program, but instead involved herself in outpatient counseling; she had not maintained full-time employment; she had not provided for adequate housing; and she had not entered the Mother's Support Group. The court changed the order concerning alcohol treatment in the rehabilitative plan, so that D.H. was ordered to participate in outpatient counseling at the North Omaha Alcoholism Counseling Center, and if necessary participate in an inpatient treatment program. The court renewed its order regarding the custody of L.H.

At the next review hearing on August 20, 1986, W.D. admitted being the father of L.H., and the court allowed him to intervene as a party. The record shows that D.H. still did not comply with the plan. She failed to visit L.H., to participate in the alcohol counseling, and to maintain stable housing. She had attended the Mother's Support Group only twice since the previous review hearing. The court renewed the custody order in DSS, and temporary physical custody of L.H. was placed

with D.H.'s uncle and aunt.

Another review hearing was held on February 20, 1987. The court noted that the appellant had entered an inpatient alcohol treatment program but did not comply with any of the other court orders. The court changed the rehabilitative plan and ordered D.H. to participate in inpatient alcohol treatment and to provide child care for A.H., her second child, during this treatment period. The order requiring D.H. to attend the weekly Mother's Support Group Meetings was deleted.

At a review hearing on June 16, 1987, the court noted some progress in D.H.'s rehabilitation. The appellant had completed the inpatient alcohol treatment program, and she was going to the South Omaha Alcoholism Counseling program. She paid regular visits to L.H. The court again changed the rehabilitation plan and ordered the appellant to participate in ongoing outpatient alcohol treatment, plus individual counseling sessions. Temporary custody of L.H. remained with DSS.

During the next hearing, on December 16, 1987, the court became aware of some domestic violence that occurred between D.H. and W.D., her boyfriend and L.H.'s father. In addition, the court noted that D.H. had started drinking again. The court included W.D. in the provisions of the rehabilitation plan and added an additional provision which ordered D.H. and W.D. to attend domestic violence counseling and couples counseling. In addition, the court ordered D.H. to attend Alcoholics Anonymous (AA) meetings and Women Against Violence counseling.

At the hearing on May 13, 1998, the court took notice of the facts that D.H. did not maintain stable housing, that there had again been some physical abuse between her and W.D., and that D.H. had not attended the domestic violence groups. The court ordered D.H. and W.D. to enter into chemical dependency and codependency treatment.

At the next review hearing, held on November 14, 1988, the evidence showed that since the preceding hearing, D.H. had missed three visits with L.H. and had attended only one chemical dependency or codependency group meeting. In addition, she had not participated in either domestic violence

groups or AA meetings.

During the next review hearing, on February 13, 1989, the court noted that D.H. still had not complied with the visitation orders, had not participated in the chemical dependency and codependency programs, and had not gone to the domestic violence counseling. The court ordered D.H. to attend relinquishment counseling.

On March 28, 1989, the county attorney filed a petition (case No. S-91-599) alleging that D.H.'s other three children, A.H. (a daughter born out of wedlock on June 7, 1986), W.H. (a son born out of wedlock on October 21, 1987), and T.H. (a daughter born out of wedlock on December 5, 1988), were juveniles under § 43-247(3)(a) (Reissue 1988) due to lack of care by reason of the faults or habits of their mother. The petition alleged:

> A. On or about March 10, 1989, [T.H.] was left with a caretaker for what was to be an overnight stay; [D.H.] had not returned as of March 13, 1989, when said child was taken into protective custody; the whereabouts of [D.H.] were unknown during this period.
>
> B. On or about January 27, 1989, said children were placed with a caretaker for what was to be an overnight stay; [D.H.] did not return for said children until February 11, 1989; [her] whereabouts were unknown during this time; [D.H.] had not provided money, food or clothes to meet said children's needs during [her] absence.

T.H. was taken into protective custody on March 13, 1989, and on March 28, 1989, the court ordered DSS to retain custody of T.H. for placement in a foster home.

A detention hearing regarding A.H., W.H., and T.H. was held on April 19, 1989, with the mother and her counsel present. D.H. did not resist the children's detention, and the court entered an order placing temporary custody of the three children with DSS. The court ordered a foster placement for T.H. and placed A.H. and W.H. in the physical custody of their mother.

At a review hearing held for L.H. on June 2, 1989, the court took notice of the fact that D.H. and W.D. had made only one visit to L.H. through Child Protective Services (CPS) since

April 14, 1989, but that they had visited L.H. on their own at her foster home. D.H. had attended the orientation session and two programs of the chemical dependency and codependency treatment. D.H. indicated that she had attended eight AA meetings, but she did not show proof of an AA card. She had not attended any relinquishment counseling.

On November 14, 1989, the court held an adjudication hearing regarding A.H., W.H., and T.H. D.H.'s aunt testified that on about January 27, 1989, D.H. asked her to babysit A.H., W.H., and T.H. for a weekend. D.H. returned 15 days later. Her aunt had not known where she was. D.H. had not provided her aunt with enough supplies for the children. Her aunt also did not know the whereabouts of W.D. A babysitter testified that D.H. brought T.H. over to her house in March 1989 and asked her whether she could take care of the baby for one night. D.H. brought her baby supplies for 1 day. D.H. did not return for her baby, and the babysitter was not aware of her whereabouts. D.H. never called to ask about her baby. The babysitter turned the baby over to the police on March 13, 1989. D.H. testified that she left her children with her aunt because she wanted "some space to try to find myself." She stated that she did not intend to leave for 2 weeks. She spent her time away cleaning the house, buying a bed for the children, and talking to friends. She testified that she was working as a nurse's aide. She admitted leaving T.H. at the babysitter's house. She denied having a habit of leaving her children at other people's houses. D.H. stated that W.D. is not the father of the three youngest children. The court granted the State's motion to strike W.D.'s name from the petition. The court adjudicated the children to be children within the meaning of § 43-247(3)(a).

A disposition hearing was held on December 20, 1989, concerning A.H., W.H., and T.H. The record indicates that D.H. had not made herself available to the probation officer and CPS. The court ordered D.H. to (1) visit her children through DSS on a regular basis; (2) provide adequate medical care and supervision, along with a chemical-free and safe environment, for her children A.H. and W.H., who remained in her home; (3) attend ongoing treatment for codependency and chemical dependency; (4) maintain stable and adequate

housing which is kept clean; (5) attend a domestic violence group; (6) maintain adequate and stable income and provide proof thereof; (7) attend two AA meetings per week and show proof of attendance; and (8) cooperate with all workers on the case.

On January 22, 1990, the court, on its own motion, ordered that custody of A.H. and W.H., the two children still residing with the mother, be placed with DSS. The court held a detention hearing on February 9, 1990. Betty Burton, a CPS worker assigned to the case, testified that on January 12, 1990, A.H. and W.H. had been left with an uncle. The uncle had brought the children to the home of the aunt who had custody of L.H. The court ordered a temporary placement of the children in the aunt's home. The court took notice of the fact that D.H. was working, staying in touch with CPS, maintaining a stable place of residence, and carrying out the other portions of the court's order. The court ordered that DSS retain legal custody of the children but that A.H. and W.H. be placed with the mother. The court also ordered D.H. not to leave the children with anyone without approval of the CPS officer.

The court held a review hearing regarding the three youngest children on March 19, 1990. The record shows that D.H. had been keeping a clean house, that she had been caring for the two children, and that she had been employed. In addition, D.H. had started participating in a domestic violence group and the AA meetings. She had not yet attended the chemical dependency and codependency groups. The mother had only visited the children with DSS personnel once at the foster home since December 20, 1989, although she did visit T.H. on her own, without permission. The court ordered T.H. to be placed with her mother.

Another review hearing was held for L.H. on June 13, 1990. The evidence shows that D.H. and W.D. still failed to fully comply with the court orders.

On July 15, 1990, the State took protective custody of A.H., W.H., and T.H., pursuant to Neb. Rev. Stat. § 43-248(3) (Reissue 1988), and the court ordered detention of the children because continuation of the children in their home would be contrary to their welfare. Apparently, the mother again left her

children with her aunt and other caretakers for extended periods of time, which resulted in D.H.'s conviction for child abuse on July 16, 1990. The record also shows a shooting incident between D.H. and W.D.

On July 24, 1990, the court ordered a further detention of the children and sustained D.H.'s counsel's motion to withdraw.

Another review hearing for the three youngest children was held on October 17, 1990. The court found at the hearing that D.H. still had not complied with the court orders and that the children could not be returned to her. D.H. had not attended the domestic violence group and the chemical dependency and codependency sessions. D.H. claimed to have attended AA meetings but did not show any proof.

On December 5, 1990, the State filed a motion for termination of the parental rights between D.H. and her four children, L.H., A.H., W.H., and T.H., based on Neb. Rev. Stat. § 43-292 (Reissue 1988), which states in part:

> The court may terminate all parental rights between . . . the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

A hearing on the motion to terminate the parental rights was held on May 9, 1991, with D.H. present in person and with counsel. The testimony shows that D.H. had not successfully completed the chemical dependency and codependency treatment; she had lived in 18 different residences since 1985; she had never fully participated in the domestic violence group, despite the fact that there was much violence between D.H. and W.D.; she had not maintained a stable income; she had attended AA meetings on only an irregular basis and had not always provided proof of attendance; she had left her three youngest children at other people's residences for extended

periods of time and was charged with three counts of child abuse as a result of that; she had not provided her children with adequate care and supervision; she had not kept in contact on a regular basis with officers assigned to the case; and she had often not made scheduled visits to L.H. In her own defense, D.H. testified that she had lived at 7 or 8 locations, not 18.

The court terminated D.H.'s parental rights to all four children on May 15, 1991. D.H. timely appealed to this court and assigns as error (1) the trial court's act of taking judicial notice of and admitting into evidence exhibits submitted on August 14, 1985, which contain hearsay and were received without a hearing; (2) the trial court's finding that there was clear and convincing evidence to support the termination of her parental rights; (3) the trial court's finding that the children were juveniles under § 43-247(3)(a) and that reasonable efforts have failed to correct the conditions leading to the determination; and (4) that the court's order to terminate the parental rights was contrary to law.

SCOPE OF REVIEW

> In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate 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.

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 701-02, 484 N.W.2d 68, 69 (1992).

JUDICIAL NOTICE

In her first assignment of error, D.H. argues that the juvenile court, during the termination hearing, erred in taking judicial notice of exhibits offered at the August 14, 1985, hearing. From D.H.'s argument, it appears this error is based on a claim that the August 14 dispositional hearing did not take place; consequently, the four exhibits were not properly a part of the record and a part of the State's motion for judicial notice, and

therefore, the mother did not have an opportunity to either object to or cross-examine the authors of the exhibits, amounting to a denial of her due process rights.

Concerning the alleged August 14, 1985, hearing, the bill of exceptions for that date includes only the four exhibits, with one exhibit bearing the typed notation: "No Hearing was held. Reports submitted." The transcript includes a signed court order of a hearing held on August 14, 1985, attended by D.H. with counsel; it shows that the exhibits were received into evidence and that the court entered a rehabilitation order with terms, which order was subject to review in 6 months. The bill of exceptions shows that reference was made during the February 14, 1986, hearing to a hearing held on August 14, 1985.

We assign no verity to the typed notation on the exhibit, and conclude that a dispositional hearing was held on August 14, 1985, attended by D.H. with counsel, and that the four exhibits were part of the court records and therefore exhibits in case No. S-91-598.

At the consolidated termination hearing, attended by D.H. with counsel, the State moved the court to take judicial notice of the court's own records, exhibits, and orders, using the language found in *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979). No objection being made, the court agreed to the motion.

At issue here are the following four summarized exhibits from case No. S-91-598: (1) a report to the court, dated August 2, 1985, and drafted by Anna Foster, a DSS service officer; Burton, the CPS worker; and David Stickman, the guardian ad litem, which report proposed a rehabilitation plan that was generally adopted at the hearing; (2) a printed form, dated July 9, 1985, of a foster care case plan review with recommendations by Burton; (3) a chemical evaluation of D.H., dated July 16, 1985, by Barbara Preston, counselor; and (4) a home evaluation, dated June 17, 1985, concerning the home of D.H.'s aunt and uncle in Omaha, Nebraska, prepared by Linda Hruska of DSS. All these exhibits were clearly hearsay evidence and subject to objection if promptly made.

"The requirements of due process control a proceeding to

terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that the parental rights should be terminated." *In re Interest of P.D.*, 231 Neb. 608, 616, 437 N.W.2d 156, 162 (1989). "In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 265, 417 N.W.2d 147, 157 (1987). The concept of judicial notice of disputed allegations has no place in hearings to terminate parental rights. *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). "[I]n proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 198[9]) . . . ." *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 705, 414 N.W.2d 266, 269 (1987).

> " 'If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence.' "

In re Interest of E.G., 240 Neb. 373, 380, 482 N.W.2d 17, 22 (1992).

Since the failure of D.H.'s counsel to object to the judicial notice motion constituted a waiver of her rights to cross-examine the authors of the exhibits, the court did not commit a procedural error in granting the motion to take judicial notice of the documents. Absent a showing to the contrary, it is presumed that the trial court disregarded all incompetent and irrelevant evidence. See *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Further considering D.H.'s first error claim, it must fail for two reasons. First, the improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of

prejudice must be made. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). D.H. failed to show that the inclusion of the exhibits in the evidence was prejudicial to her due process rights. Secondly, because

> factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, impermissible or improper evidence is not considered by the appellate court. In an appeal from a judgment or order terminating parental rights, the appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 710, 484 N.W.2d 68, 74 (1992). The first assignment of error fails.

§ 43-247(3)(a)

Next, D.H. assigns as error the juvenile court's finding that her children were juveniles within the meaning of § 43-247(3)(a). This assignment of error will not be considered, since D.H. has not discussed this assignment in her brief. " '[C]onsideration of the case will be limited to errors assigned *and* discussed.' " *In re Interest of C.W. et al.*, 239 Neb. 817, 832, 479 N.W.2d 105, 116 (1992).

CLEAR AND CONVINCING EVIDENCE

In her next assignment of error, D.H. argues that the decision of the juvenile court terminating her parental rights was not supported by clear and convincing evidence.

D.H. claims that she did substantially comply with the rehabilitation plan and that any noncompliance did not indicate a willful disregard for the court order.

A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent and child presents an independent reason justifying termination of parental rights under § 43-292(6). *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992). When a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before

failure to comply with the plan can be an independent reason for termination. See *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

In order to terminate parental rights pursuant to subsection (6) of § 43-292, the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so. *In re Interest of S.B.E. et al.*, 240 Neb. 748, 484 N.W.2d 97 (1992); *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990). We begin by considering the plan and the mother's performance with respect to it.

Regarding parental noncompliance with a court-ordered rehabilitative plan as a ground for termination of parental rights under § 43-292(6), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

"Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code?" *In re Interest of J.S., A.C., and C.S.*, 227 Neb. at 268, 417 N.W.2d at 158. Materiality regarding a rehabilitative plan exists when a parent's noncompliance results in a continued condition which was the basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the rehabilitative plan. *In re Interest of J.S., A.C., and C.S., supra.*

The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. *In re Interest of D.L.S., supra.* Where a parent is unable to rehabilitate herself within a reasonable time, the best interests of the children require

termination of the parental rights. *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

With regard to the provision requiring D.H. to visit her children on a regular basis through DSS, that provision was material and D.H. did not fully comply with it. The record shows that D.H. and W.D. seldom visited L.H. through DSS, although contrary to the court order they visited L.H. at the foster home. The record also indicates that D.H. did not consistently visit her other three children after they were put in protective custody.

Concerning the provision requiring D.H. to participate in ongoing treatment for codependency and chemical dependency, it was never fully met. D.H. attended only the orientation session and two programs. This provision was material, since it was designed to assist D.H. with her alcoholism problem and domestic abuse.

With regard to the provision ordering treatment for alcohol addiction, the record shows that D.H. attended AA meetings on an irregular basis, and she did not provide proof of attendance, even though this was required. Appellant contends the State has to show proof of willful noncompliance with the rehabilitative plan in order to terminate the parental rights under § 43-292(6). She argues that the State did not meet this burden of proof, since the record shows examples of her substantial compliance. As an example, she points out her attendance at various alcohol programs, including a successful completion of inpatient treatment. However, this court has held:

> "[T]he fact of participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation."

In re Interest of M., 235 Neb. 61, 68, 453 N.W.2d 589, 593 (1990).

Thus, the fact that D.H. partially complied with one

provision of the rehabilitative plan does not prevent termination of her parental rights.

The record also shows that D.H. did not maintain stable and adequate housing, since she changed residences 18 times since 1985. This provision is also material in that it was designed to provide a stable home for the children upon their return.

The provision with regard to the domestic violence group was also never met. D.H. argues that she never understood what the domestic violence group was to address and questions the materiality of the provision. D.H.'s argument has no merit, since the record indicates that D.H. had been physically abused by W.D. on several occasions and that D.H. had shot W.D. in his hand.

D.H. also did not fully comply with the provision that required her to maintain adequate and stable income. The record indicates that D.H. had been engaged in several short-term employments. She worked at a McDonald's restaurant from April until June 1988. She drove a schoolbus from January until April 1990. She started receiving Aid to Dependent Children in May 1990, which was cut off in July when her children were removed from her home. She worked at a Little King restaurant from August until she was fired in September 1990. Subsequently, she was allegedly employed by Kentucky Fried Chicken from September until October 1990, but the fast-food restaurant did not confirm this information. Finally, D.H. was employed by a Wendy's restaurant at the time the motion to terminate the parental rights was filed in December 1990. This provision is material, since its purpose was for D.H. to be able to provide a living for four children upon reunification.

The record also indicates that D.H. did not always cooperate with the workers on the case. The workers have on occasion had difficulties locating D.H., and her whereabouts have not always been known. Several times D.H. also failed to make contact with the officers and did not give notice of a change of residence.

The rehabilitation plan for the case concerning the three youngest children included a provision requiring D.H. to provide adequate medical care and supervision, along with a

chemical-free and safe environment, for her children. D.H. argues that no evidence was presented at the termination hearing to prove that there was any problem with medical care and supervision. The record shows that the purpose of this provision was to prevent D.H. from leaving her children with other people for an extended period of time. D.H.'s children were staying with various people in June and July 1990, and as a result, D.H. was convicted of child abuse on July 16, 1990. The record shows D.H.'s noncompliance with this provision.

D.H. was provided with a reasonable opportunity to rehabilitate herself according to the court-ordered plans and failed to do so. The order terminating the parental rights of D.H. to her four children, supported by clear and convincing evidence, should be affirmed.

BEST INTERESTS OF CHILDREN

Finally, D.H. assigns as error the court's finding that termination of D.H.'s parental rights was in the best interests and for the welfare of the minor children.

The evidence in this case underscores three glaring concerns with D.H.'s parental ability: use of alcohol, failure to provide a stable home, and lack of supervision. The rehabilitation plans reflect the court's and DSS' attempts to eliminate or at least reduce these problems.

" 'Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay.' " *In re Interest of M.*, 235 Neb. 61, 68, 453 N.W.2d 589, 593 (1990). Accord *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992).

D.H. had the habit of leaving her children with other caretakers for extended periods of time. D.H. moved the children from one caretaker to another while the children were in her court-ordered care. She did not regularly make the scheduled visits with her children after they were placed in a foster home. There is evidence that the children became upset when D.H. visited them on her own account at their foster address and told them that they would be coming home. In addition, the evidence contains incidents of domestic violence,

including two shootings.

The evidence shows, clearly and convincingly, that D.H. has failed and neglected to provide her children with a stable home. The rehabilitation plans were designed to reunite D.H. with her children, and they were in all respects reasonable. The only alternative to termination of parental rights is continued efforts to rehabilitate by DSS, while the children remain in foster homes.

L.H. has been under the jurisdiction of the court since 1985 and her siblings since 1989. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989).

The judgments of the juvenile court terminating the mother's parental rights are affirmed.

AFFIRMED.

JAMES WICHMAN, APPELLANT, V. DEAN NAYLOR, APPELLEE.
487 N.W.2d 291

Filed August 14, 1992. No. S-91-368.

1. **Demurrer: Pleadings: Final Orders.** A court's dismissal of an action after a demurrer has been sustained to a petition and a plaintiff declines to replead is a final order.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
3. **Demurrer: Pleadings.** If a demurrer to a petition is sustained and the defective pleading can be remedied by amendment, the plaintiff may amend, with or without assessment of costs, as the court in its discretion may direct.
4. _____: _____. When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition.
5. _____: _____. After a demurrer has been sustained, but there is a reasonable possibility that a defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.
6. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

James Wichman, pro se.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellee.

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

SHANAHAN, J.

James Wichman, an inmate at the Nebraska Penal and Correctional Complex, commenced a civil rights action, see 42 U.S.C. § 1983 (1988) and Neb. Rev. Stat. § 20-148 (Reissue 1991), in the district court for Lancaster County regarding disciplinary action taken by Dean Naylor, director of security for the penal complex. Naylor demurred and claimed that Wichman's petition did not allege sufficient facts to state a cause of action. See Neb. Rev. Stat. § 25-806(6) (Reissue 1989) (insufficient factual allegations for a cause of action). The district court sustained Naylor's demurrer, but failed to allow Wichman an opportunity to amend his petition, and dismissed the action.

A court's dismissal of an action after a demurrer has been sustained to a petition and a plaintiff declines to replead is a final order. *Crow v. Giebelhaus, ante* p. 4, 486 N.W.2d 207 (1992); *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991). See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

STANDARD OF REVIEW

"In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader." *Balfany v. Balfany*, 239 Neb. at 392, 476 N.W.2d at 683. Accord, *Crow v. Giebelhaus, supra*; *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988).

> "When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions,

> are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial."

Security Inv. Co. v. State, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989) (quoting *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988)). Accord, *Crow v. Giebelhaus, supra*; *Balfany v. Balfany, supra*.

"As used in § 25-806(6) concerning a demurrer, a statement of 'facts sufficient to constitute a cause of action' means 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " *Schuyler State Bank v. Cech*, 228 Neb. at 593, 423 N.W.2d at 468. Accord, *Crow v. Giebelhaus, supra*; *Balfany v. Balfany, supra*.

WICHMAN'S PETITION

In framing his petition, Wichman relied on 42 U.S.C. § 1983 and Neb. Rev. Stat. § 20-148. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The U.S. Supreme Court has stated:

> The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law."

Adickes v. Kress & Co., 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L.

Ed. 2d 142 (1970).

Neb. Rev. Stat. § 20-148 states:

> (1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.
>
> (2) The remedies provided by this section shall be in addition to any other remedy provided by Chapter 20, article 1, and shall not be interpreted as denying any person the right of seeking other proper remedies provided thereunder.

According to the petition, Wichman, an inmate at the penal complex, removed several small blocks of wood from a trash bin located in the prison's hobby shop and carved the blocks into "symbols" which Wichman asserts were used in his religious practices. Neither Wichman's ethnic background nor his affiliation with a generally recognized religious organization or denomination appears in the record. Nevertheless, according to the petition in question, Wichman's religious beliefs include the persuasion that religious articles "possess a spirit" and that destruction of such articles is "tantamount to killing a being's spirit." Wichman asserts that he has a property interest in the wood carvings by virtue of the prison's abandonment of the wood scraps used for the carvings and Wichman's subsequent retrieval and exclusive possession of the scrap wood used for the carvings.

On December 12, 1990, Naylor ordered prison guards to confiscate and remove the carved wooden symbols from Wichman's cell. As a result of a disciplinary hearing convened after confiscation of Wichman's carvings and conducted pursuant to prison regulations, prison officials determined that the carvings were contraband within the meaning of 68 Neb. Admin. Code, ch. 5 § 005III[C] (1990), the Nebraska Department of Correctional Services' rule "Possessing or Receiving

Unauthorized Articles," because the items had not been issued to Wichman, purchased via proper channels, or otherwise specifically approved by prison officials and, thus, were unauthorized articles characterized as contraband.

After the disciplinary hearing, Naylor issued an order requiring that the wood carvings be destroyed as contraband after 90 days. Wichman requested that Naylor allow Wichman to send the carvings to a designated and acceptable person outside the prison and stated that destruction of the carvings would violate Wichman's religious beliefs. Naylor refused the request.

In his petition, Wichman asserts that there "is no justifiable penological reason or security interest in denying [Wichman] the right to send his personal religious articles to approved persons outside the prison" and contends that Naylor has "designedly, willfully and corruptly injured and harmed" Wichman, see Neb. Rev. Stat. § 28-926 (Reissue 1989) (misdemeanor offense: oppression under color of public office), by Naylor's refusal to send the religious articles to a person outside the prison and by Naylor's insistence that the articles be destroyed.

DISMISSAL OF WICHMAN'S ACTION

When Naylor demurred to Wichman's petition, claiming that the petition did "not state facts sufficient to constitute a cause of action," the court sustained the demurrer and immediately dismissed Wichman's petition and action.

In an attempt to justify the district court's sustaining his demurrer, Naylor argues that Wichman's civil rights action is "blatantly frivolous." Brief for appellee at 3. However, Naylor's position and contention are inconsistent with the U.S. Supreme Court's longstanding recognition that only two factual allegations are necessary to state a cause of action under 42 U.S.C. § 1983: (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States, and (2) the deprivation occurred "under color of law." See, *Hafer v. Melo*, ____ U.S. ____, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Adickes v. Kress & Co., supra*; *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972); *Cooper v.*

Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964). Cf. Neb. Rev. Stat. § 20-148.

In Wichman's appeal, notwithstanding the parties' focus on a civil rights action, the important feature of the district court's ruling is not a question of correctness in the court's sustaining Naylor's demurrer, but, rather, the propriety of dismissing the proceedings without first allowing Wichman the opportunity to amend his petition.

Neb. Rev. Stat. § 25-854 (Reissue 1989) states: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct."

> [I]f a demurrer to a petition is sustained and the defective pleading can be remedied by amendment, the plaintiff may amend, with or without assessment of costs, as the court in its discretion may direct. See *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition.

Crow v. Giebelhaus, ante p. 4, 7-8, 486 N.W.2d 207, 210 (1992). See, *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984); *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981). "After a demurrer has been sustained, but there is a reasonable possibility that a defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion." *Crow v. Giebelhaus, ante* at 8, 486 N.W.2d at 210. Accord *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977).

> [A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters

submitted for disposition through a judicial system. *State v. Juhl*, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

Although Wichman does not assign as error the district court's failure to provide Wichman with an opportunity to amend his petition, we note the district court's omission as a matter of plain error. "Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process." *In re Estate of Fischer*, 227 Neb. 722, 726, 419 N.W.2d 860, 862 (1988). Accord, *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992); *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990); *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988). See, also, Neb. Rev. Stat. § 25-1919 (Supp. 1991): "The . . . Supreme Court may at its option consider a plain error not specified in appellant's brief." See, further, Neb. Ct. R. of Prac. 9D(1)d (rev. 1991): "The court may, at its option, notice a plain error not assigned." Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

In Wichman's case, after the court sustained Naylor's demurrer, the court immediately dismissed Wichman's action without affording Wichman the opportunity to replead by amending his petition. Under the circumstances, and assuming that sustaining the demurrer was proper in the first instance, we are unable to conclude that Wichman cannot allege a civil rights cause of action against Naylor. Therefore, the district court's dismissal of Wichman's action without allowing an opportunity for an amended petition was an abuse of discretion by the trial court.

Accordingly, we reverse the judgment of the district court and remand this cause to the district court with direction to reinstate Wichman's action for further proceedings.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. ALICE GARZA, APPELLANT.

487 N.W.2d 551

Filed August 14, 1992. No. S-91-538.

1. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; hence, in a bench trial, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.
2. **Theft: Value of Goods.** An act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense under Neb. Rev. Stat. § 28-518 (Reissue 1989).
3. **Trial: Evidence: Photographs.** A photograph is admissible in evidence if the photograph's subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence.
4. **Trial: Evidence: Photographs: Appeal and Error.** Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion.
5. **Theft: Value of Goods.** Unless specified by the statute defining a criminal offense of theft, the value of property is not an element of the crime of theft, but is relevant to the grade of the offense and determines the penalty that may be imposed on conviction.
6. **Theft: Value of Goods: Appeal and Error.** Regarding the grades of theft, expressed in Neb. Rev. Stat. § 28-518 (Reissue 1989), the value of property is a question for the fact finder, whose finding will not be set aside unless clearly erroneous.
7. **Theft: Value of Goods: Proof.** Although value is not an element of theft, the State must prove, by evidence beyond a reasonable doubt, the value of the property that is the subject of the theft charge.
8. _____: _____: _____. Value to be proved concerning a theft charge is market value at the time and place where the property was criminally appropriated.
9. **Theft: Value of Goods.** Rules for establishing value in civil actions apply in a criminal case, to determine the grade of the theft prosecuted.
10. _____: _____. In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft.
11. **Theft: Value of Goods: Words and Phrases.** Price is the amount that a willing seller indicates as acceptable payment for an article offered for sale, whereas value, in relation to a theft charge, is the price obtainable for property offered for sale in a market.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

SHANAHAN, J.

Alice Garza appeals from her conviction in a bench trial in the district court for Hall County on the charge of felony shoplifting, theft of movable property with a value more than $300, but less than $1,000, see Neb. Rev. Stat. § 28-518 (Reissue 1989) (grades of theft offenses), which is a violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1989) of the Nebraska Criminal Code, that provides in relevant part:

> (1) A person commits the crime of theft by shoplifting when he or she, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession of such property or its retail value, in whole or in part, does any of the following:
>
> (a) Conceals or takes possession of the goods or merchandise of any store or retail establishment . . . .

GARZA'S TRIAL

Evidence of Theft.

Late in the afternoon of September 29, 1990, Timothy Meguire, an off-duty Grand Island police officer, was working as a security or "loss-prevention" officer for Dillard's department store at the Conestoga Mall in Grand Island. Meguire noticed a couple "weaving through the display racks" in the juniors department at Dillard's. Meguire, as a result of his previous police work, recognized Alice Garza as one of the couple. Garza was wearing a "new suede black jacket" and had "a large black and white shopping bag over her shoulder that

was stuffed full." Meguire followed as Garza and her companion left Dillard's and proceeded to an automobile in the mall parking lot, where Meguire observed Garza place the suede jacket in the car.

Meguire, who had returned to Dillard's, used a store telephone to contact a salesperson in Dillard's juniors department and ascertain whether any jackets had been sold. At that point, Meguire saw Garza and her companion reenter Dillard's, where Meguire detained the couple and summoned Nancy VanBibber, Dillard's assistant store and operations manager. When VanBibber appeared on the scene, Meguire recounted what he had observed and asked Garza to accompany him to the car in the parking lot. En route, Garza, without any inquiry or prompting from Meguire, said: "Okay, I'll be honest with you. I took two jackets and two dresses." When Garza and Meguire arrived at the car, Garza opened the car's door, "reached in, pulled the two jackets and the two dresses out and gave them" to Meguire. On returning to Dillard's with Garza, Meguire took the articles that Garza had handed over and placed them on a store counter in the presence of VanBibber. Meguire then took a color photograph of the suede jacket, brown jacket, gold dress, and blue dress which Garza had removed from the car in the parking lot. Garza "admitted stealing" the jackets and dresses. Police were summoned and, apparently, arrested Garza for shoplifting.

Under Dillard's procedure, a clerk at a checkout counter "rings a sale on the register" and then, without removing the sales or price tag, places the sold item in a bag with a Dillard's receipt. Sales or price tags were still affixed to the dresses surrendered by Garza and depicted in the photograph taken by Meguire.

At Garza's trial, the photograph taken by Meguire was offered during the State's case. Meguire testified that the photograph "fairly and accurately represented the condition of the property [that he] received from [Garza] on September 29, 1990." VanBibber, who was present when the photograph was taken, testified that the depicted items were offered for sale at Dillard's. When the State offered the photograph as evidence, there was no accompanying written statement containing

verification by the arresting officer. Over Garza's objection (relevance, foundation), the court received the photograph into evidence on the basis of § 28-511.01(2), which provides:

> In any prosecution for theft by shoplifting, photographs of the shoplifted property may be accepted as prima facie evidence as to the identity of the property. Such photograph shall be accompanied by a written statement containing the following:
>
> (a) A description of the property;
>
> (b) The name of the owner or owners of the property;
>
> (c) The time, date, and location where the shoplifting occurred;
>
> (d) The time and date the photograph was taken;
>
> (e) The name of the photographer; and
>
> (f) Verification by the arresting officer.
>
> The purpose of this subsection is to allow the owner or owners of shoplifted property the use of such property during pending criminal prosecutions.

Evidence of Property Value.

Regarding the items surrendered by Garza and depicted in the photograph taken by Meguire, the court sustained Garza's objection to VanBibber's testifying about the "value" of the four items. Immediately thereafter, over Garza's objection and referring to the price or sales tag for each item taken by Garza, VanBibber testified and verified Dillard's price: The suede jacket had a price of $85, while the brown jacket was priced at $170, the gold dress at $130, and the blue dress at $152, so that the total of the prices was $537.

Garza offered no evidence.

At the conclusion of the trial, the court found Garza guilty of shoplifting property with a value greater than $300, but less than $1,000, and later sentenced Garza to prison for a term of 1 to 2 years. See § 28-518(2) (Class IV felony for theft of property valued at $300 or more, but less than $1,000) and Neb. Rev. Stat. § 28-105(1) (Reissue 1989) (punishment for a Class IV felony conviction).

ASSIGNMENTS OF ERROR

Garza contends that the photograph taken by Meguire was

inadmissible under § 28-511.01(2) (photographs in shoplifting cases) and that the evidence is insufficient to sustain Garza's conviction and sentence.

STANDARD OF REVIEW

The erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; hence, in a bench trial, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. See, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991).

AGGREGATE VS. INDIVIDUAL VALUE

Before addressing Garza's assignments of error, we must consider a particular aspect of Garza's appeal that has been only obliquely and briefly mentioned by the parties in their briefs and oral arguments before this court. Each of the four items which are the subject of the charge against Garza has a price established by Dillard's. Assuming for the time being and for the present purpose that "price" is equated with or a synonym for "value" in the theft-shoplifting statutes, the four articles in question, considered collectively and in combination, have an aggregate or total value of $537, a value that serves as a basis for felony punishment on conviction. On the other hand, if each of the jackets and dresses is considered separately, without combining their values, the individual values of the brown jacket and two dresses exceed $100, but are less than $300, values authorizing punishment for theft as a Class I misdemeanor, see § 28-518(3), while the value of the suede jacket was $85, authorizing punishment for theft as a Class II misdemeanor, see § 28-518(4). Thus, an important question is whether the items in Garza's case must be considered collectively for an aggregate or total value of the items to determine the grade of the theft offense, or whether those items must be considered only individually, without reference to the

aggregate or total value of the individual items.

We note that the incident in Garza's case is one completed transaction involving Garza's simultaneous removal of four items of property from Dillard's store. An act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense under § 28-518. See, *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979) (theft committed before effective date of the Nebraska Criminal Code; value of individual items stolen from an owner in a series of acts may be considered aggregately to determine value of the stolen property); *Fair v. Com.*, 652 S.W.2d 864 (Ky. 1983) (single offense when several property items are stolen at the same time and place); *People v. Dist. Ct.*, 192 Colo. 355, 559 P.2d 1106 (1977) (stealing several articles of property at the same time and place is a single offense); *People v. Bauer*, 1 Cal. 3d 368, 461 P.2d 637, 82 Cal. Rptr. 357 (1969) (theft of several articles at the same time constitutes one offense); *Hearn v. State*, 55 So. 2d 559 (Fla. 1951) (stealing several articles at the same time and place is a single offense).

EVIDENCE OF THEFT

Garza asserts that the photograph taken by Meguire was inadmissible under § 28-511.01(2). The State, apparently acknowledging the absence of an accompanying written statement that contains verification by the arresting officer, "concedes that the photograph in the present case does not comply with §28-511.01," brief for appellee at 8, but contends that the photograph is admissible under the Nebraska Evidence Rules, independent of § 28-511.01.

Regarding authentication or identification, Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1989), states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

A photograph is admissible in evidence if the photograph's

subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. See, Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989) (relevant evidence defined); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992); *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Stephenson*, 199 Neb. 362, 258 N.W.2d 824 (1977).

"Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion." *State v. Juhl*, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989). Accord *State v. Birge*, 215 Neb. 761, 340 N.W.2d 434 (1983).

Through VanBibber and Meguire, the State presented a foundation that the photograph's subject matter, Dillard's property, was truly and accurately depicted at the time pertinent to Garza's presence in Dillard's store. Beyond question, the photograph taken by Meguire and depicting the four items of Dillard's property was relevant to the prosecution of Garza. The photograph not only complemented Meguire's and VanBibber's testimony, but made the existence of a crucial fact, namely, Garza's removal of the property from Dillard's store, more probable as the result of a depiction that the articles could easily be concealed in the bag that Garza carried over her shoulder when she left the store and proceeded into the mall's parking lot. We find no abuse of discretion in the trial court's admission of the photograph as evidence against Garza.

Without restating the several salient facts established in the State's case against Garza, we conclude that the evidence supports Garza's conviction. See *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992) (reviewing a conviction in a bench trial, an appellate court construes admissible and relevant evidence favorably to the State). See, also, *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). Consequently, we affirm the district court's judgment that Garza was guilty of theft by shoplifting, in violation of § 28-511.01.

EVIDENCE OF VALUE

Next is the question concerning the punishment imposed on

Garza.

Unless specified by the statute defining a criminal offense of theft, the value of property is not an element of the crime of theft, but is relevant to the grade of the offense and determines the penalty that may be imposed on conviction. See, *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992); *State v. Weaver*, 237 Neb. 185, 465 N.W.2d 470 (1991); *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). See, also, *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983). Cf. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) (pecuniary loss is not an element of the crime of criminal mischief, but establishes the grade of the offense to determine which punishment or penalty may be imposed on conviction). Thus, under § 28-518, the greater the value of the property involved in a theft, the more severe the punishment which may be imposed on conviction for the theft. Regarding the grades of theft, expressed in § 28-518, the value of property is a question for the fact finder, whose finding will not be set aside unless clearly erroneous. See, *State v. Weik*, 206 Neb. 217, 292 N.W.2d 289 (1980); *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971). Although value is not an element of theft, the State must prove, by evidence beyond a reasonable doubt, the value of the property that is the subject of the theft charge. See, *State v. Sexton, supra*; *State v. Schaaf, supra*.

Value to be proved concerning a theft charge is market value at the time and place where the property was criminally appropriated. See, *State v. Sexton, supra*; *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987); *State v. Weik, supra*; *State v. Hayes, supra*. Rules for establishing value in civil actions apply in a criminal case, to determine the grade of the theft prosecuted. See, *State v. Weik, supra*; *State v. Carroll*, 186 Neb. 148, 181 N.W.2d 436 (1970). In *Robinson v. State*, 107 Neb. 591, 592, 186 N.W. 977, 978 (1922), which involved a prosecution for theft, this court stated: "As to the proof of value, there is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market." See, also, *State v. Sexton, supra* (value of a stolen article is proved by showing the price at

which the article and like articles are being offered and sold at the site where the articles were stolen). Thus, in reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft.

The State contends that, by themselves, price tags for the items taken by Garza establish value for the property and, in support of its position, refers us to a series of decisions to the effect that price tags alone establish value of property. See, *State v. Stout*, 273 N.W.2d 621 (Minn. 1978); *Kowalczk v. State*, 195 Ga. App. 714, 394 S.E.2d 594 (1990); *Scott v. State*, 519 So. 2d 734 (Fla. App. 1988); *Norris v. State*, 475 S.W.2d 553 (Tenn. Crim. App. 1971).

However, we bear in mind those Nebraska decisions, previously mentioned, regarding the nature of value in reference to the crime of theft, and point out an important distinction between "price" and "value." "Price" is "the amount of money given or set as the amount to be given as a consideration for the sale of a specified thing." Webster's Third New International Dictionary, Unabridged 1798 (1981). Thus, price is the amount that a willing seller indicates as acceptable payment for an article offered for sale, whereas value, in relation to a theft charge, is the price obtainable for property offered for sale in a market. Consequently, a price tag merely expresses the amount at which a seller offers an article for sale, a sum the seller hopes to obtain, and does not necessarily indicate the amount obtainable in the market through payment for the article offered for sale.

In Garza's case, VanBibber's testimony was directed toward the price tags on the articles taken by Garza and the price asked by Dillard's for those articles. VanBibber's testimony on price was irrelevant to the issue of value for the property taken by Garza and should have been excluded pursuant to Garza's relevance objection. Therefore, the evidence failed to establish that the amount expressed on the price tags, or the prices mentioned by VanBibber, were the amounts that purchasers were paying for similar articles offered for sale in proximity to the Dillard's store. Asking is one thing; getting is something

quite different. As a commercial truism, the preceding can be attested by any retailer who, confronted with lethargic consumers, reduces prices in the hope of achieving sales. This is not to say or be construed as saying, however, that a price tag, reflecting a seller's expression of the price for a sale, is never evidence of value. Evidence of price, when determined by and reflective of current market conditions for the sale of an item, may be admissible on the issue of value. See, *State v. McPhie*, 104 Idaho 652, 662 P.2d 233 (1983); *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978); *People v. Codding*, 191 Colo. 168, 551 P.2d 192 (1976).

In the final analysis, the State presented evidence on price, but nothing on value to justify a finding of theft punishable as a felony. The district court obviously used VanBibber's testimony equating price with value and, consequently, found that the stolen property had a value greater than $300, but less than $1,000. That finding is unsupported by relevant evidence, and, therefore, is an erroneous finding that was the basis for the felony sentence imposed on Garza. However, the evidence shows, beyond a reasonable doubt, that the property stolen by Garza had some intrinsic value that translates into nominal market value, notwithstanding the absence of evidence establishing a specific value for the stolen property. For that reason, we set aside the felony sentence imposed on Garza and remand this matter to the district court with direction to impose an appropriate sentence on Garza for misdemeanor theft of property with a value less than $100, a Class II misdemeanor. See § 28-518(4).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

BOSLAUGH, J., dissenting.

I dissent only from that part of the opinion that holds there was a failure of proof that the value of the merchandise stolen was in excess of $300.

The statute, Neb. Rev. Stat. § 28-511.01 (Reissue 1989), requires only proof of the "retail value" of the merchandise stolen. The statute itself refers to "retail price," "price marking," and, in three different places, to "price tag."

The assistant store manager testified that the four items

stolen had price tags of $85, $170, $130, and $152. This evidence was sufficient to establish that the total retail value of the items stolen was in excess of $300 on the day they were stolen.

In *Robinson v. State*, 107 Neb. 591, 186 N.W. 977 (1922), the petitioners in error were convicted of stealing merchandise from two Lincoln, Nebraska, department stores: Rudge & Guenzel Company and Miller & Paine. With regard to proof of the value of the items stolen, we said: "As to the proof of value, there is no better way of showing the market value of any article than the *price* at which it and others of its class are being *offered* and sold on the market." (Emphasis supplied.) *Id.* at 592, 186 N.W. at 978.

In *People v. Vanderhall*, 168 A.D.2d 655, 563 N.Y.S.2d 517 (1990), the court held that testimony by store security personnel who referred to the price tag on the item stolen was sufficient proof of value. In *Norris v. State*, 475 S.W.2d 553, 555 (Tenn. Crim. App. 1971), the court held that evidence that merchandise was displayed for regular sale at a "marked price representing its retail price," where uncontradicted, was sufficient to support a conviction grounded upon the marked price as its value. See, also, *Scott v. State*, 519 So. 2d 734 (Fla. App. 1988); *Kowalczk v. State*, 195 Ga. App. 714, 394 S.E.2d 594 (1990); *State v. Stout*, 273 N.W.2d 621 (Minn. 1978).

In this case, the uncontradicted evidence established the prices at which the merchandise was being offered for sale by the owner, Dillard's department store. That evidence was sufficient to permit the trier of fact to find that the retail value of the items stolen was in excess of $300.

The judgment should have been affirmed.

FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANKING CORPORATION, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

488 N.W.2d 343

Filed August 21, 1992. No. S-89-844.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Pleadings.** A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover.
3. _____. Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
4. **Appeal and Error.** The law of the case doctrine teaches that the holdings of an appellate court on questions presented to it in reviewing the proceedings of the trial court become the law of the case; those holdings conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.
5. **Tort Claims Act.** The applicability of the discretionary function exception in the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), depends on the conduct in question, not on the identity of the actor.
6. **Tort Claims Act: Negligence: Liability.** The discretionary function exception of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), includes a governmental regulatory agency and its action, conduct, and decisions. Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act.
7. **Tort Claims Act: Public Policy.** The discretionary function exception of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), protects or excepts only governmental decision, action, or conduct based on a permissible exercise of a public policy judgment.
8. **Tort Claims Act.** The discretionary function exception is inapplicable to a claim under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct.
9. _____. When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.
10. _____. Discretionary conduct is not confined to the policy or planning level.

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

James B. Cavanagh, of Lieben, Dahlk, Whitted, Houghton & Jahn, P.C., and, on brief, Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellant.

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

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

CAPORALE, J.

The district court sustained the demurrer of the defendant-appellee, State of Nebraska, to the third amended petition filed by the plaintiff-appellant, First National Bank of Omaha, and dismissed the suit. First National has appealed, asserting, in summary, that the district court erred in concluding that it failed to state a cause of action. We affirm.

First National instituted its suit under the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987). In *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988) (*First Nat. Bank of Omaha I*), this court affirmed the sustainment of the State's demurrer, but reversed the order of dismissal, writing that "it is reasonably possible that [First National] may be able to state a cause of action in support of its theory of recovery." *Id.* at 268, 430 N.W.2d at 900. First National thereafter filed an amended petition, and the State again successfully demurred. First National responded by filing the petition which is the subject of this appeal.

The subject petition alleges that in April 1980, First National entered into several loan agreements with James and Nancy Gillette and two corporations the Gillettes controlled, Beatrice State Company and Olympic Investment Company. The proceeds from the loans were used to purchase the stock of First Security Bank and Trust Company of Beatrice, a state-chartered bank, and First Security Savings of Beatrice, a state-chartered industrial loan and investment company. First National took possession of the stock as collateral for the loans.

Because the loans became delinquent and both Security Bank and Security Savings were on the verge of insolvency, First

National notified the Nebraska Department of Banking and Finance that it intended to dispose of the stock it held as collateral at a public sale. The financial problems of Security Bank and Security Savings "were primarily due to a number of non-performing loans" the two institutions had made to "Newt Copple of Lincoln, Nebraska, or his associates or related entities." As of April 8, 1983, Newt Copple was indebted to Security Bank in the amount of $1,181,661 and to Security Savings in the amount of $1,537,308.08.

The department attempted to dissuade First National from selling the stock and encouraged it instead to take over both Security Bank and Security Savings. First National rejected that proposal and, on March 25, 1983, sent potential buyers notice that the stock would be sold.

In the meantime, on or about March 10, 1983, the department had received written notice from the Federal Bureau of Investigation in regard to "what appeared to be criminal conduct in the form of fraudulent loan transactions involving [Security Bank]." The bureau also advised that it "had information indicating that there had been similar fraudulent loan transactions involving Commonwealth Savings Company, a state chartered industrial loan and investment company, and S. E. Copple." At no time did the department make First National aware of this letter or of its contents.

On April 1, 1983, the department's director held a meeting with S.E. Copple, representatives of First National, the Gillettes, and the Nebraska Depository Institution Guarantee Corporation, among others. The director proposed that First National acquire Security Bank and Security Savings and accept the stock of those corporations in satisfaction of the loans. It was also proposed that Security Bank and Security Savings lend S.E. Copple "sufficient funds to permit him to purchase the Newt Copple loans from their respective institutions . . . ." The guarantee corporation "would make a capital contribution of $200,000.00 to [Security Savings] and provide a guarantee in the amount of $680,000.00 against further losses . . . ."

On April 8, 1983, First National entered into an agreement with its borrowers which incorporated the elements proposed at

the April 1 meeting. However, the agreement was contingent upon S.E. Copple's purchase of Newt Copple's loans "on terms and conditions acceptable to the Banking Department"; the guarantee corporation's agreeing to the proposed advances and guarantees; the department's assuring First National of "the capital adequacy of, quality of assets in, and absence of violations of law by both [Security Bank] and [Security Savings]"; and the department's approval of the agreement. These conditions were met, and First National thereafter acquired Security Bank and Security Savings. Immediately after acquiring the two institutions, First National announced that it would stand behind their obligations. However, had First National been properly informed of the condition of Security Bank or Security Savings, it would not have acquired them.

S.E. Copple, as "a direct and proximate result of a long standing course of fraudulent and illegal lending practices engaged in between he [sic] and other members of his family and Commonwealth Savings Company," later defaulted "on the promissory notes he had given [Security Bank] and [Security Savings] to purchase the Newt Copple loans."

The subject petition concludes that the department was negligent in (1) failing to investigate the allegations of misconduct by S.E. Copple; (2) failing to conduct periodic examinations of Security Bank, Security Savings, and Commonwealth Savings; (3) approving the S.E. Copple loans when it knew or should have known it lacked adequate information; (4) approving the agreement of merger when it lacked adequate information; (5) providing assurances that Security Bank and Security Savings were stable; (6) failing to conduct periodic examinations of Security Bank as permitted by Neb. Rev. Stat. § 8-108 (Reissue 1991); (7) failing to conduct periodic examinations of Security Savings and Commonwealth Savings as required by Neb. Rev. Stat. § 8-401 (Reissue 1991); and (8) failing to advise First National of the alleged fraudulent conduct involving S.E. Copple and Commonwealth Savings.

We begin our analysis by recalling that when ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference

from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Crow v. Giebelhaus, ante* p. 4, 486 N.W.2d 207 (1992); *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. See *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991). That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Id.*

The gravamen of First National's position is that by fostering and approving the agreement resulting from the April 1 meeting, the department undertook a self-imposed duty to act with due care, but instead acted negligently, to First National's detriment.

In support of this position, First National argues, in part, that in determining that it had failed to state a cause of action, the district court erred by failing to apply the law of the case as announced in *First Nat. Bank of Omaha I*. The law of the case doctrine teaches that the holdings of an appellate court on questions presented to it in reviewing the proceedings of the trial court become the law of the case; those holdings conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication. See *Bass v. Dalton*, 218 Neb. 379, 355 N.W.2d 225 (1984).

In this regard, First National postulates, in essence, that by observing in *First Nat. Bank of Omaha I* that it was reasonably possible that First National might be able to state a cause of action; that one who, without an obligation to act, nonetheless undertakes to act must do so with reasonable care; and that the State Tort Claims Act recognizes a cause of action based upon the breach of a statutory or common-law duty, this court ruled that a cause of action had arisen under the act. Such, however, is not the fact.

First Nat. Bank of Omaha I held only that as the petition under consideration was confusing, the district court should have granted First National an opportunity to replead. In no

sense did *First Nat. Bank of Omaha I* rule that First National possessed a cause of action.

In continuing its argument, First National recognizes that the act waives the State's sovereign immunity with respect to certain, but not all, types of tort actions. See, *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984); *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984). Section 81-8,219 reads, in relevant part, that its operating provisions shall not apply to any claim

> (a) . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused;
>
> . . . .
>
> (d) . . . arising out of . . . misrepresentation . . . .

However, First National urges that its effort at recovery is defeated neither by the discretionary function exemption nor by the misrepresentation exception.

We recently treated the discretionary function exemption in another suit involving the department, *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989). The plaintiff therein alleged that as the result of the department's negligent monitoring of another industrial loan and investment institution, the plaintiff had lost its deposit insurance and customer accounts and, as a consequence, was obligated to undergo reorganization under the provisions of the federal Bankruptcy Act. In determining that the plaintiff's claims regarding the department's regulatory activities were barred by the discretionary function exemption, we observed that the

> applicability of the discretionary function exception in the State Tort Claims Act [§ 81-8,209 et seq.] depends on the conduct in question, not on the identity of the actor. The discretionary function exception of the State Tort Claims Act includes a governmental regulatory agency and its action, conduct, and decisions. Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act. The discretionary function exception of the State Tort Claims Act protects or excepts only

> governmental decision, action, or conduct based on a permissible exercise of a public policy judgment. The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct.

231 Neb. at 546, 437 N.W.2d at 446.

We specifically found that while Neb. Rev. Stat. § 8-102 (Reissue 1991) and § 8-401 empower the department to supervise and control banks and industrial loan and investment companies, "none of the statutes . . . requires the [d]epartment to execute any of its authorized powers." 231 Neb. at 548, 437 N.W.2d at 447. Moreover, we noted that the department's course of conduct in such cases is guided by "important considerations of public policy." *Id.* Cf. *Wickersham v. State, supra*; *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977).

The U.S. Supreme Court in *U.S. v. Gaubert*, ____ U.S. ____, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), recently applied the same reasoning with respect to the discretionary function exemption of the Federal Tort Claims Act, as did the *Security Inv. Co.* court with respect to the State Tort Claims Act. The Home Owners' Loan Act of 1933 authorized the Federal Home Loan Bank Board, " 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation' " of federal savings and loan associations. 111 S. Ct. at 1271. See 12 U.S.C. § 1464(a) (1988). Gaubert, the largest shareholder and chairman of the board of Independent American Savings Association, alleged that the bank board and the Federal Home Loan Bank-Dallas negligently carried out their supervisory functions in managing the day-to-day functions of Independent American. The bank board attempted to have Independent American merge with Investex Savings, a failing Texas thrift institution. In order to facilitate the merger, the bank board and the loan bank had Gaubert removed from the management team of Independent American and had him post a "$25 million interest in real property as security for his personal guarantee that [Independent American's] net worth would exceed

regulatory minimums." 111 S. Ct. at 1272. Thereafter, the bank board and the loan bank recommended that Independent American hire certain individuals in management and consultative positions, mediated salary disputes, interfered with the Texas savings and loan department's attempts to oversee Independent American, and managed other of Independent American's day-to-day affairs. Prior to the involvement of the bank board and the loan bank, Independent American was considered a financially sound institution; however, under the government regulators, it was announced that Independent American "had a substantial negative net worth." *Id.* Independent American thereafter sustained a $75 million loss in share value, and Gaubert lost $25 million in real property. Gaubert then filed an action under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. (1988).

The U.S. Supreme Court ruled that Gaubert's claims were barred by the discretionary function exemption of 28 U.S.C. § 2680(a) (1988):

> [I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. . . . If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.
>
> . . . .
>
> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.

111 S. Ct. at 1274.

The *Gaubert* Court observed, further, that decisions "made

at the operational or management level of [Independent American] involved in this case" were exempted from liability. 111 S. Ct. at 1275. The Court refused to limit application of the exemption only to those discretionary acts made in a policymaking or planning context:

> Day-to-day management of banking affairs, like the management of other businesses, regularly require [sic] judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines, supra*, at 813, 104 S.Ct., at 2764.

111 S. Ct. at 1275. Thus, the *Gaubert* Court concluded operational level decisions made on the basis of a statute giving broad powers are not necessarily outside the discretionary function exemption. We agree.

The regulatory statutes which First National claims the department violated, §§ 8-108 and 8-401, merely give the department the power to examine the books of state banks and savings institutions. Granted, § 8-401 requires the department to examine, at least annually, industrial loan and investment companies, but the statute does not require the department to respond to its findings in any specified manner. Hence, these statutes do nothing more than provide the vehicle by which the department may oversee state-chartered banks and savings institutions.

The department's involvement in the merger of Security Bank and Security Savings with First National may have involved operational or managerial decisions, but, as illustrated by the *Gaubert* analysis, those decisions were discretionary. The department's efforts to facilitate First National's purchase of Security Bank and Security Savings by actively participating in the negotiations and drafting the agreements may have been operational acts, but they were based on broad statutory directives. As the U.S. Supreme Court observed, "If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising

day-to-day supervisory authority would be actionable. This is not the rule of our cases." 111 S. Ct. at 1279.

Since the department's actions in this instance were discretionary and the discretionary function exemption applies "whether or not the discretion be abused," § 81-8,219(a), we need not determine whether the misrepresentation exemption of the act applies as well.

Inasmuch as First National has pled facts establishing that the department's actions fall within the discretionary function of the act, the district court correctly dismissed First National's suit.

AFFIRMED.

WHITE, J., not participating in the decision.

HAZEL SCOTT, APPELLANT, V. DARLENE MATTINGLY ET AL., APPELLEES.

488 N.W.2d 349

Filed August 21, 1992. No. S-89-848.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the reasonable inferences which may reasonably be drawn from the evidence.
2. _____. The party moving for summary judgment is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
3. **Administrative Law.** An unreviewed administrative hearing can preclude later litigation of the same issues.
4. **Administrative Law: Collateral Attack.** The order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith.
5. _____: _____. Where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Robert F. Bartle, Special Assistant Attorney General, for appellees.

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

BOSLAUGH, J.

Hazel Scott, the plaintiff-appellant, brought this civil rights action based on 42 U.S.C. §§ 1983 to 1988 (1988) and Neb. Rev. Stat. §§ 28-926 (Reissue 1989) and 20-148 (Reissue 1991) against the defendants-appellees, the State of Nebraska, the State of Nebraska Department of Health, the State of Nebraska Bureau of Examining Boards, and various individuals, both individually and in their official capacities, employed by those entities. Scott claims denial of due process and equal protection. Appellees moved for summary judgment based on res judicata, collateral estoppel, waiver, failure to state a claim for which relief may be granted, statute of limitations, laches, and no dispute of material facts.

The district court sustained the motion and entered summary judgment, finding it was "swayed by the cumulative arguments put forth by the defendants." The plaintiff has appealed and contends that the district court erred in "sustaining the Motion for Summary Judgment as there are material facts in question which require that this matter be tried before the court and a jury" and in denying her a jury trial and the right to seek punitive damages. We affirm.

Appellant was born in Calcutta, India, but she received her nurse's training in England and the United States. Appellant obtained a registered-nursing license from New York in 1973, which license she still holds. Appellant worked briefly at several institutions in New York, and she worked for a short time in a federal hospital on a Native American reservation in South Dakota before coming to Nebraska.

The appellant's dispute with the Nebraska nursing authorities has an 18-year history. She first applied for a Nebraska registered-nursing license by reciprocity in 1974 (the first application). She reapplied in 1978, 1980, and 1983 (the

second, third, and fourth applications).

A hearing on the first application was held by the Nebraska Board of Nursing in 1975, after which the board denied the appellant a license. She appealed from that order to the district court, which reversed the order of the Board of Nursing. The State then appealed to this court, which affirmed the board's earlier ruling, finding that there was sufficient evidence of appellant's unprofessional conduct to justify denial of the license. *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976). The unprofessional conduct, which was detailed in our 1976 opinion, consisted largely of insubordination and inattentiveness to patient welfare " ' "of a nature likely to jeopardize the interest of the public." ' " *Scott*, 196 Neb. at 690, 244 N.W.2d at 689.

The appellant applied for a license for the second time in 1978. The license was again denied, and Scott appealed to the district court for Lancaster County, which upheld the denial. Scott did not appeal that decision further.

In 1980, when appellant applied for her license for the third time, the Director of Health found that the appellant's second application had been denied because she had failed to show any substantial change in her conduct to prove that she was qualified to practice nursing. In regard to the third application, the director again found no substantial changes in appellant's practices to prove that she was qualified to practice.

Although the Director of Health denied appellant's third application for a license, he offered her an alternative to outright denial of an unconditional license (the 1981 order). That order stated:

> 1. That Hazel E. Scott be issued a temporary permit to practice professional nursing in the State of Nebraska concurrent with her enrollment in a refresher course acceptable both to her and to the Department of Health and Board of Nursing. The refresher course must, as a minimum, have both a theoretical component of at least eighty hours and a clinical component of at least sixty hours. Should the applicant withdraw from the course prior to successful completion the temporary permit will terminate at once. The temporary permit will be issued

upon submission of written proof to the Department of Health that the applicant has been accepted into an approved refresher course.

2. That, upon successful completion of the refresher course, Hazel E. Scott will be given a probationary registered professional nurse license contingent upon the following provisions:

a. That she practice nursing only under the direct supervision of a Registered Nurse. Direct supervision means that her nursing practice must be directly supervised by a Registered Nurse who is present in the unit at all times when Miss Scott is on duty.

b. That Hazel E. Scott and her employer report to the Department of Health and Board of Nursing in writing every three months for a period of one year, regarding all aspects of her nursing practice; and thereafter every six months for two years of nursing practice. The reports must reflect safe and satisfactory nursing practice.

c. Failure to comply fully with the preceding provisions on the part of the applicant, or a verified report of unsafe or unsatisfactory nursing practice by her, will result in reconsideration and reappraisal of her eligibility and aptitude to practice as a Registered Nurse subject to conditions.

In 1983, when the appellant applied for a license for the fourth time, the Director of Health looked to whether the appellant had complied with the terms of the 1981 order. A hearing on the fourth application before the director was held in December 1983. Both parties were represented by counsel, extensive testimony was taken, numerous exhibits were received, and formal rules of evidence were applied. After the hearing, the attorneys for both parties submitted briefs.

At the hearing, the appellant admitted that she had not complied with the conditions of the 1981 order. During the 2-day hearing, her attorney did not concentrate on whether or not she had met the conditions of the order, but rather on the alleged constitutional violations present in the 1981 order. The appellant's brief before the director on the fourth application not only dealt with alleged constitutional violations dating back

to 1974, but alleged more violations, and dealt with them in far more detail than the briefs before us in the current action.

The director determined that the appellant's license had been properly denied and refused to grant her an unconditional license, but again offered her a conditional license for 1 year, after which an unconditional license would be issued if Scott met all the conditions. She did not appeal from the administrative hearing held on her fourth application.

The findings of the Director of Health after the administrative hearing included a finding that the department had acted on Scott's application in a timely manner; that she was properly notified of the hearing; that the hearing was conducted under formal rules of evidence; that the Director of Health properly presided over the hearing; that the findings of the Board regarding Scott's 1974 application were supported by the facts and were not unreasonable nor arbitrary; that Scott had not complied with any of the terms or conditions described above in the denial of her 1980 application, in that she had not completed continuing education courses that would prepare her to return to the work force and practice safely, she had not entered a refresher course, and she had never requested a permit for supervised nursing; that the conditions placed on Scott requiring supervised nursing were "operative" because it was determined that Scott had unsafe and unsatisfactory nursing practices; that Scott engaged in unprofessional conduct because of unsafe and unsatisfactory nursing practices prior to 1975; that Scott had not shown any substantial change in her unsafe and unsatisfactory nursing conduct since 1975; that Scott had not shown that she met the qualifications required of those licensed without examination; and that the director could impose such limitations upon a license as are necessary and proper.

The appellant now seeks to relitigate these issues in the civil rights action she brought in the district court for Lancaster County, claiming violations of equal protection and due process under 42 U.S.C. §§ 1983 to 1988 and Neb. Rev. Stat. §§ 28-926 and 20-148. She maintains that she was treated differently from other applicants because she is from India and is licensed in New York.

Neb. Rev. Stat. § 25-1332 (Reissue 1989) states that summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the reasonable inferences which may reasonably be drawn from the evidence. The party moving for summary judgment is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.

Hines v. Pollock, 229 Neb. 614, 615-16, 428 N.W.2d 207, 208 (1988).

Summary judgment is appropriate in this case because the issues before us have already been litigated at least once, and this action is precluded. Any issues which were not litigated and resolved before us or before the district court were litigated and resolved before the Department of Health. An unreviewed administrative hearing can preclude later litigation of the same issues. The U.S. Supreme Court recently discussed the standard for determining when such issues would be precluded in *Astoria Federal Sav. and Loan Ass'n v. Solimino*, ____ U.S. ____, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). The Court stated:

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 [86 S. Ct. 1545, 16 L. Ed.

> 2d 642] (1966). Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 [99 S. Ct. 645, 58 L. Ed. 2d 552] (1979). The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, see *University of Tennessee v. Elliott*, 478 U.S. 788, 798 [106 S. Ct. 3220, 92 L. Ed. 2d 635] (1986), which acts in a judicial capacity.
>
> Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, the question is not whether administrative estoppel is wise but whether it is intended by the legislature. The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established, as are the rules of preclusion . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident."

Solimino, 111 S. Ct. at 2169-70. In *Solimino*, the lower court had found that the Age Discrimination in Employment Act (ADEA) contained language showing a legislative intent that the principles of preclusion do not apply to cases brought under the ADEA.

The U.S. Supreme Court reached a different result, however, when considering § 1983 legislation. It determined that the federal courts will give preclusive effect in § 1983 actions to unreviewed administrative hearings, if the state in which the court is sitting would give preclusive effect to those hearings. *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S. Ct.

3220, 92 L. Ed. 2d 635 (1986). In *Elliott*, the university informed a black employee that he would be discharged for inadequate work performance and misconduct. The employee filed an administrative appeal under state law and also brought suit in the federal district court under Title VII of the Civil Rights Act and § 1983. A university official, acting as an administrative law judge, determined that the charges were not racially motivated and that some of them had been proven. The employee did not seek review of the administrative decision in the state courts. The district court granted summary judgment on both causes of action.

The U.S. Supreme Court held that the employee was entitled to a de novo trial on his Title VII claim because that statute contained language showing that the legislature intended that preclusion should not apply to Title VII actions. The Court also determined, however, that the employee's § 1983 claim was precluded because language, similar to that in Title VII, showing the legislature's intent to deviate from the traditional principles of preclusion was not present. The Court stated, "We also see no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century." *Elliott*, 478 U.S. at 797. After discussing the values protected by preclusion, including repose, the avoidance of extra costs and duplicative litigation, the preservation of judicial resources, and the preservation of federalism, the Court held that

> when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Elliott, 478 U.S. at 799.

Professor Davis agrees. "When an agency conducts a trial-type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that

has used the same procedure." Kenneth C. Davis, Administrative Law Treatise, *Res Judicata of Informal Administrative Hearings* § 21.3 at 51 (2d ed. 1983).

This court previously discussed the preclusive effect of unreviewed administrative decisions in *Ohmart v. Dennis*, 188 Neb. 260, 196 N.W.2d 181 (1972). One of the issues in dispute in *Ohmart* was the validity of a certain mineral lease. The validity of the lease had been determined previously in intermediate administrative proceedings within the Department of the Interior, from which no appeal had been taken. We stated:

> The preclusive effect of an administrative decision depends upon many factors. It is important that the fact-finding process of the administrative body approximate that of a court, that the body observe fair standards of evidence, that the facts be adjudicative, and that the process not deprive a party of his right to a jury trial. Those criteria are not exclusive, but they assist us in outlining the applicability of preclusion. . . . The administrative decision against Dennis and Banner precluded them from challenging the validity of the lease in this proceeding.

Ohmart, 188 Neb. at 263-64, 196 N.W.2d at 184.

In *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965), the dissolution of a corporation was in dispute. The Secretary of State had dissolved the corporation, but the plaintiff contended that the dissolution was not proper. We held that this was an improper collateral attack on the administrative decision and stated, "The order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith." *Id.* at 438, 138 N.W.2d at 721.

In *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980), the Nebraska State Board of Education ordered the school district to pay to the plaintiff a certain percentage of the tuition that the plaintiff had previously paid. The school district did not appeal from that decision, but when the plaintiff sued in district court for the money, the school district defended by claiming that the board's award of the money was unconstitutional. We found that the school district

was attempting to collaterally attack the decision of the board, and we stated, " 'The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration . . . .' " *Id.* at 26, 290 N.W.2d at 809. See, also, *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983).

In *State ex rel. Kizzier Chevrolet Co., Inc. v. GMC*, 211 Neb. 626, 319 N.W.2d 735 (1982), an automobile dealership filed an application with the Motor Vehicle Industry Licensing Board requesting that the board order a competing dealership to cease dealing in a particular make of car. After a hearing, the board refused to do so. The complaining dealer had appealed from that order, but the disposition of the appeal was not in the record. The complaining dealer then filed an action in the district court asking that the court restrain a competitor from dealing in that make of car. The district court held for the complaining dealer, but we found that the action in the district court was a collateral attack on the decision of the administrative agency, and we reversed the judgment and ordered that the action be dismissed. We stated, "It is settled law that where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack." *Id.* at 630, 319 N.W.2d at 737.

Appellant's first assignment of error is without merit. Because of our disposition of this case, we need not reach the other assignments of error.

AFFIRMED.

GRANT, J., not participating.

KIM C. BROWN, APPELLANT, V. SCRIVNER, INC., DOING BUSINESS AS FOOD 4 LESS, STORE NO. 2152, APPELLEE.

488 N.W.2d 17

Filed August 21, 1992. No. S-89-1395.

1. **Summary Judgment: Appeal and Error.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Negligence: Evidence.** When an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence.
3. **Negligence: Circumstantial Evidence.** Regarding res ipsa loquitur, the requirement that the occurrence be one which ordinarily does not happen without negligence is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent.
4. **Negligence: Evidence.** The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply.
5. _____: _____. While the doctrine of res ipsa loquitur is unavailable where the precise cause is shown, the plaintiff does not lose the benefit of the doctrine by introducing evidence of specific acts of negligence, where the evidence leaves the cause of the accident in doubt or does not clearly show the cause. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury.
6. **Trial: Negligence: Circumstantial Evidence.** Res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. Consequently, if res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination whether the defendant is negligent.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for further proceedings.

Dennis P. Crawford, of Friedman Law Offices, for appellant.

Donald R. Witt 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.

Kim C. Brown claims she was unexpectedly struck twice by an automatic door at a Scrivner, Inc.'s Food 4 Less grocery store in Lincoln. She claims she was injured. In her second amended petition for damages, Brown alleged that the doctrine of res ipsa loquitur applied to her cause of action.

The district court for Lancaster County entered a summary judgment denying Brown relief and dismissing her lawsuit because "the doctrine of res ipsa loquitur is not applicable to the undisputed facts in this case."

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

> " 'A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. . . . In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. . . .' "

Anderson v. Service Merchandise Co., 240 Neb. 873, 878, 485 N.W.2d 170, 174-75 (1992).

Viewed in a light most favorable to Brown, the evidence reflects that on April 29, 1986, Brown, a customer at the Food 4 Less store, was leaving the grocery store with a bag of groceries

in one arm and a bag of ice in the other. Brown testified in her deposition that she stepped on the mat which activated an electrically operated exit door. She passed through the door and was on about the last one-fourth of the mat when the door slammed shut, striking her left shoulder and elbow. Brown testified that as she struggled to maintain her grip on the bag of groceries she was carrying, the door opened, bounced off a metal guardrail, and hit her a second time. Brown's husband, who was waiting in their parked car, did not see the door hit Brown the first time, but witnessed it strike her the second time.

Brown testified that she did not report the incident to store personnel until the following day, before she went to the hospital. She was eventually diagnosed as suffering from thoracic outlet syndrome, for which surgery was performed in February 1987.

In her second amended petition, based on the doctrine of res ipsa loquitur, Brown alleged, in part, that Scrivner was in exclusive control of the automatic door that allegedly injured her and that "[i]n the normal course of events, and but for some negligent act or omission on the part of defendant, its agents or employees, the door would have remained opened for a sufficient length of time to have permitted plaintiff to go through it, and the door would not have suddenly closed and struck plaintiff."

In its answer and motion for summary judgment, Scrivner claimed, and the trial court held, that the doctrine of res ipsa loquitur was not available under Nebraska law. Brown assigns as error this finding of the district court.

In *Anderson v. Service Merchandise Co.*, 240 Neb. at 879, 485 N.W.2d at 175, we explained the application of the doctrine of res ipsa loquitur as follows:

> "[W]hen an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence. . . ."

(Citations omitted.)

Scrivner claims that the doctrine of res ipsa loquitur is not applicable in this case because Brown did not prove that an automatic door cannot malfunction in the absence of negligence on the part of the store owner. No such burden rests upon a plaintiff relying upon the doctrine of res ipsa loquitur.

Regarding res ipsa loquitur,

> "[t]he requirement that the occurrence be one which ordinarily does not happen without negligence is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent."

Anderson v. Service Merchandise Co., 240 Neb. at 880, 485 N.W.2d at 175 (quoting Prosser and Keeton on the Law of Torts, *Circumstantial Evidence—Res Ipsa Loquitur* § 39 (5th ed. 1984)).

> The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply.

Anderson v. Service Merchandise Co., 240 Neb. at 880, 485 N.W.2d at 176.

In the depositions of Brown and of the store manager, there was evidence to suggest that the doors were not regularly inspected and that on windy days, such as on the day Brown was injured, the store sometimes had trouble with the doors and would lock them in an open position, but this was not done at the time that Brown was injured. The introduction of such evidence does not defeat the application of the doctrine of res ipsa loquitur. This court has cited a discussion of the doctrine contained in *McAnany v. Shipley*, 189 Mo. App. 396, 176 S.W.

1079 (1915), in which

> the court reasoned that while the doctrine [res ipsa loquitur] is unavailable where the *precise* cause is shown, the plaintiff does not lose the benefit of the doctrine by introducing evidence of specific acts of negligence, where the evidence leaves the cause of the accident in doubt or does not clearly show the cause.

(Emphasis in original.) *Beatty v. Davis*, 224 Neb. 663, 666, 400 N.W.2d 850, 852 (1987). The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 404 N.W.2d 419 (1987). Because Brown was unable to allege or prove the particular act of negligence which caused the injury, she does not lose the benefit of the doctrine.

The store manager stated that he had no idea how the accident happened and that he knew of no similar accidents involving the automatic doors. He testified that the door was not supposed to do what it did to Brown.

Res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. *Anderson v. Service Merchandise Co., supra*. Consequently, if res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination whether the defendant is negligent. *Id.*

Automatic doors do not, in the ordinary course of things, cause injury to those who pass through them. See, *Landmark Hotel v. Moore*, 104 Nev. 297, 757 P.2d 361 (1988); *Rose v. Port of New York Authority*, 61 N.J. 129, 293 A.2d 371 (1972). But see, *Johnston v. Grand Union Co.*, 189 Ga. App. 270, 375 S.E.2d 249 (1988); *Hisey v. Cashway Supermarkets, Inc.*, 77 N.M. 638, 426 P.2d 784 (1967). A reasonable person could conclude that it is more likely than not that there was negligence associated with the automatic door's malfunction.

The decision of the district court to grant summary judgment to Scrivner, Inc., is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONNA JOHNSON ET AL., APPELLEES, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

488 N.W.2d 20

Filed August 21, 1992. No. S-90-188.

1. **Equity: Appeal and Error.** On appeal from a district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Municipal Corporations: Annexation.** The annexation of land to cities and towns is a legislative function and it is for their governing bodies to determine the facts which authorize the exercise of the power granted.
3. **Municipal Corporations: Annexation: Boundaries.** A municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do.
4. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
5. **Municipal Corporations: Annexation.** The power of a municipality to annex territory is, under the specific provisions of Neb. Rev. Stat. § 16-117 (Reissue 1987), limited to annexing contiguous or adjacent land if it is urban or suburban in character and not agricultural land that is rural in character.
6. **Ordinances: Proof.** The burden is on the one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
7. **Municipal Corporations: Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" are used synonymously and interchangeably. If the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect.
8. **Municipal Corporations.** As to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.
9. **Municipal Corporations: Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.
10. **Municipal Corporations: Annexation: Words and Phrases.** Although Neb. Rev. Stat. § 16-118 (Reissue 1991) states that lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than 200 feet wide lies between the same and the corporate limits, the statute implies a situation where a strip of land is located parallel to the city limits.
11. **Municipal Corporations: Annexation: Boundaries: Words and Phrases.** As applied to annexation of streets or roads projecting beyond the limits of a municipality, "contiguous" has been construed to mean contiguous in the sense

of adjacent and parallel to the existing municipal limits. Accordingly, the annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of the highway as it adjoined the municipal boundary, generally is considered to be an invalid "strip" or "corridor" annexation.

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

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

Kenneth H. Elson for appellee Southern Nebraska Rural Public Power District.

David G. Dales for appellee Nebraska Public Power District.

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

HASTINGS, C.J.

This case is a consolidation of three actions challenging the annexation of a tract by the defendant, City of Hastings. The defendant appeals the district court's finding that the annexation was invalid. We affirm.

On October 28, 1988, the City of Hastings passed ordinance No. 3089, which annexed a saucepan-shaped tract of land extending eastward from the prior existing city limits. The tract of land is described by a single metes and bounds description. It includes a 120-foot-wide strip of U.S. Highway 6 and U.S. Highway 6 right-of-way—extending approximately three-quarters of a mile in length from the prior city limits eastward to the eastern edge of the Central Community College campus—and the Central Community College campus, including the segment of Highway 6 which abuts the campus to the north. The Central Community College campus constitutes the main body of the tract sought to be annexed. It is connected to the City of Hastings solely by the strip which includes Highway 6.

Actions challenging the annexation were filed in the district court for Adams County by Donna Johnson and Gary Duncan, by Southern Nebraska Rural Public Power District (Southern), and by Nebraska Public Power District (NPPD). Plaintiff NPPD specifically sought declaratory relief only, while

plaintiffs Johnson, Duncan, and Southern specifically sought injunctive relief against the city.

Plaintiffs Johnson and Duncan own farms within 2 miles of the territory sought to be annexed and, as a result, will be subject to the city's zoning authority, pursuant to Neb. Rev. Stat. § 16-901 (Reissue 1991), if the City of Hastings annexes the tract. Part of Southern's service area is within the annexed tract which covers Highway 6. In addition, Southern has facilities and power distribution lines within 2 miles of the area sought to be annexed. Southern serves large retail customers in the area east of the city limits of Hastings, with the exception of the area served by the City of Hastings. NPPD, also a public electric utility company, serves the customers within the annexed area.

The implications of the annexation are an increase in taxes for Johnson and Duncan, a loss of NPPD's distribution facilities and services for the Central Community College campus to the City of Hastings, and a loss of retail customers and revenue for Southern to the City of Hastings in the area surrounding Central Community College. The three cases were consolidated for trial in the district court for Adams County and tried on December 12 and 13, 1989.

The Hastings City Council, in enacting ordinance No. 3089, made a specific finding that the entire annexed area was urban and suburban in character, and contiguous and adjacent to the corporate limits of the city. Apparently relying on our holding in *Piester v. City of North Platte*, 198 Neb. 220, 223, 252 N.W.2d 159, 161 (1977), that "the character of a segment of an Interstate Highway sought to be annexed is to be determined from the areas immediately adjacent to the annexed portion," the parties focused during trial on the issue of whether the land adjacent to Highway 6 is rural or urban in character. A detailed description of the land surrounding Highway 6 need not be recited, since we do not decide the case on the issue of whether that portion of Highway 6 is urban or rural in nature.

On January 22, 1990, the trial court made the following findings and orders: "1. Specifically finds that the land adjacent to the segment of Highway 6 sought to be annexed by the defendant is agricultural land, rural in character. 2. Further

finds that as a consequence thereof, the annexation was improper and Ordinance No. 3089 is null and void." In addition, the court found that plaintiffs Johnson, Duncan, and Southern were without an adequate remedy at law and therefore enjoined the City of Hastings from enforcing its ordinance.

The city filed a motion for new trial, which was overruled by the district court.

The city timely appealed to this court and assigned that the district court erred in (1) determining that the land adjacent to the segment of Highway 6 sought to be annexed by the city is agricultural land, rural in character; (2) failing to find that all of the territory annexed by ordinance No. 3089 is urban or suburban in character; (3) finding that the plaintiffs have met their burden of proof; (4) finding that plaintiff Southern had sufficient standing to be a party in this action; (5) refusing to admit and consider evidence of the highest and best use of certain property; and (6) declaring the entire ordinance No. 3089 void, when annexation of at least one of the tracts covered by the ordinance was legally valid.

> On appeal from the district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. . . . However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

(Citation omitted.) *Dowd v. Bd. of Equal.*, 240 Neb. 437, 439, 482 N.W.2d 583, 585 (1992).

Hastings is considered a city of the first class. Neb. Rev. Stat. § 16-101 (Reissue 1991). Neb. Rev. Stat. § 16-117 (Reissue 1987), which grants cities of the first class the power to extend the city limits, states:

> The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance, except as provided in sections 13-1111 to 13-1118, and amendments thereto, at any time, include within the corporate limits of such city any contiguous or

> adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character.

"The annexation of land to cities and towns is a legislative function and it is for their governing bodies to determine the facts which authorize the exercise of the power granted." *Plumfield Nurseries, Inc. v. Dodge County*, 184 Neb. 346, 351, 167 N.W.2d 560, 563 (1969). However, "[a] municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do." *Doolittle v. County of Lincoln*, 191 Neb. 159, 161, 214 N.W.2d 248, 250 (1974). Accord, *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954); *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. *Doolittle v. County of Lincoln, supra*; *Village of Niobrara v. Tichy, supra*; *Wagner v. City of Omaha, supra*.

The power of a municipality to annex territory is, under the specific provisions of § 16-117, limited to annexing contiguous or adjacent land if it is urban or suburban in character and not agricultural land that is rural in character.

" 'The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.' " *Bierschenk v. City of Omaha*, 178 Neb. 715, 718, 135 N.W.2d 12, 14 (1965).

The terms "contiguous" and "adjacent" are used synonymously and interchangeably. *Tichy, supra*. If the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect. *Id.*

As to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. *Id.* This court recognized in *Tichy* that contiguity means that the two connecting boundaries should be *substantially* adjacent:

> It has been determined by this court that the word adjacent in this statute means contiguous or coexistent. In *Jones v. City of Chadron*, 156 Neb. 150, 55 N.W.2d 495, it is said: "It is indispensable that the petition in this kind of a proceeding should show by statement of fact that the territory sought to be detached is within the municipality and *that a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village*. Adjacent as used in this statute means contiguous **or** coexistent with."

(Emphasis supplied.) *Tichy*, 158 Neb. at 521, 63 N.W.2d at 870-71. The court concluded that the territory sought to be annexed was not contiguous with the village and that no part of its boundary was coexistent with any part of the boundary of the village.

Subsequently, in *Bierschenk v. City of Omaha, supra*, this court had to decide whether the city of Omaha, a metropolitan city, could annex a piece of land with irregular boundaries and a narrow neck which connected it to the city. The plaintiffs argued, based on *Tichy, supra*, that the trial court erred in finding that the land annexed was sufficiently connected to or contiguous with the city limits to permit its annexation. This court quoted Neb. Rev. Stat. § 14-117 (Reissue 1991), the annexation statute pertaining to cities of the metropolitan class, to show that this statute does not mention the term "contiguous." This court concluded, therefore, that the *Tichy* case did not apply, and found the annexation valid because the area sought to be annexed was not agricultural and rural in nature.

The case before us is similar to *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933), where the city of Lincoln had extended the city limits from 58th Street to 70th Street. The annexed area included a narrow piece of land which ran along O Street to 70th Street and extended only 400 feet on either side of O Street. Plaintiff's farm, which was included in the annexation, was located at the extreme east end of the annexed strip, on the north side of O Street. One of the purposes of the annexation was to build a waterline in east O Street, to the Veterans' Hospital. In striking down the ordinance authorizing

the annexation, this court said:

> We are constrained to hold that the city exceeded its power when it annexed a narrow strip of plaintiff's land, reaching out like a finger, along the exact location of an 8-inch water-main required to be constructed to the Veterans' Hospital, and that such annexation of such farm land was wrongful and without authority . . . .

Id. at 373, 250 N.W. at 250. Similarly, in this case, the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus. This fact was admitted by Orval Stahr, the city's planning consultant, during the following cross-examination:

> Q. . . . So what we are saying here is that in order to try to get this community college area to be contiguous, the city simply used a 120-foot, approximately, wide strip of a half a mile of highway to try to accomplish that?
>
> A. In connection with the policy that we formulated, that's correct.

We hold that as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. See *Tichy, supra*. The requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city. *Id.*

The appellant argues that *Tichy* has been superseded by Neb. Rev. Stat. § 16-118 (Reissue 1991), which states: "Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits." We disagree and find that this statute merely supplements *Tichy*. The statute defines the term "contiguous" and applies to a situation where the city limits and the land sought to be annexed are separated by a strip of land no more than 200 feet wide. Section 16-118 is not applicable to this case. The statute implies a situation where a strip of land is located parallel to the city limits, which is not the case here. See 2 Eugene McQuillin, The Law of Municipal Corporations § 7.20.30 (3d ed. 1988):

> As applied to annexation of streets or roads projecting

> beyond the limits of a municipality, "contiguous" has been construed to mean contiguous in the sense of adjacent and parallel to the existing municipal limits. Accordingly, the annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of the highway as it adjoined the municipal boundary, has been held an invalid "strip" or "corridor" annexation. . . .

Counsel for the City of Hastings explained the tract's odd shape during his oral argument, by stating that the city could not annex a tract of land adjacent to Highway 6 because it contains "County Industrial Area."

According to § 16-117, cities of the first class may annex land, except as provided in Neb. Rev. Stat. §§ 13-1111 to 13-1118 (Reissue 1991). Section 13-1115 provides:

> Upon designation of such tract as an industrial area [it] shall thereupon be used or reserved for the location of industry. . . . *If such tract has an actual valuation of more than two hundred eighty-six thousand dollars, it shall not be subject to inclusion within the boundaries of any incorporated city of the first . . . class* . . . except that such tract regardless of actual valuation may be annexed if (1) it is located in a county with a population in excess of one hundred thousand persons and the city . . . did not approve the original designation of such tract as an industrial area pursuant to section 13-1112, (2) the annexation is stipulated in the terms and conditions agreed upon between the county and the city . . . in any agreement entered into pursuant to section 13-1112, or (3) the owners of a majority in value of the property in such tract as shown upon the last preceding county assessment roll consent to such inclusion in writing or petition the city council or village board to annex such area.

(Emphasis supplied.) First of all, it is not clear from the record whether the tract adjacent to Highway 6 is county industrial area. The City of Hastings relies in its argument on the testimony of a Mr. Haussler, the executive director of the Hastings Economic Development Corporation, and a Mr. Wacker, city engineer and director of public works. Haussler

made the following statement in reference to this particular tract of land: "Those two particular properties are designated industrial areas by the county. I do believe that they are zoned — Well, our current Hastings Zoning Map shows that as agricultural. I don't know that that is accurate. It seems to me that that is not accurate." Wacker described the tract of land as follows: "I believe it is in the industrial — county industrial area. I would say it is in an industrial zoning." We find this testimony not persuasive as to whether the tract of land adjacent to Highway 6 is county industrial area.

Second, even if the testimony was conclusive, the record does not indicate whether the value of the land exceeded $286,000, nor does it address any of the other statutory conditions. In substance, the record does not give us enough facts to decide whether § 13-1115 precluded the annexation of the area adjacent to Highway 6, which, if it did, could provide an excuse for the strip annexation in this case. Since we hold that the territory sought to be annexed is not sufficiently adjacent to the corporate limits of the City of Hastings, we need not determine whether the land surrounding Highway 6 is urban or agricultural in nature. The last assignment of error which will therefore be addressed is whether the trial court erred in finding that plaintiff Southern had sufficient standing to be a party to this action.

The appellant argues that Southern has no personal, pecuniary, or legal interest in this action. The city contends that none of Southern's facilities are affected by the ordinance and that Southern has no customers in the annexed area. Southern argues that it has transmission lines and other electrical facilities installed within 2 miles of the area sought to be annexed. Southern refers in its brief to Neb. Rev. Stat. § 16-901 (Reissue 1991), which provides in part:

> Any city of the first class may apply by ordinance any existing or future zoning regulations, property use regulations, building ordinances, *electrical ordinances*, plumbing ordinances, and ordinances authorized by section 16-240 to the unincorporated area two miles beyond and adjacent to its corporate boundaries with the same force and effect as if such outlying area were within

the corporate limits of such city . . . .

(Emphasis supplied.) Southern claims that this statute will subject it to whatever electrical ordinances the appellant may enact. The appellant argues that the electrical ordinances will have no bearing on the facilities of Southern, even though they may extend into the 2-mile extraterritorial jurisdiction and that the city's electrical regulations are identical to those of the State of Nebraska.

The issue of Southern's standing is rendered superfluous by the fact that this court considers the annexation invalid and will grant plaintiffs Johnson and Duncan an injunction against the City of Hastings. However, an analysis of Nebraska law on this issue shows that Southern, contrary to appellant's arguments, has standing in this case.

In *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968), the court held that the appellants who did not live in or own property in any portion of the area annexed had standing to challenge the annexation ordinance because their property was located within the 3-mile zoning area of the city after the annexation. The court held that the 3-mile limit of the city of Omaha over the appellants' land subjected their property to the regulatory power of the city in several particulars, which created a personal, pecuniary, and legal interest in the annexation ordinance. The *Sullivan* court concluded that the enumeration of real parties in *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952), is not exclusive and that "[w]here a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance." *Sullivan*, 183 Neb. at 513, 162 N.W.2d at 229.

The appellant concedes that *Sullivan* solves the standing issue in favor of plaintiffs Johnson and Duncan, who own farms within the 2-mile zoning area of the city after annexation. We do not see why plaintiff Southern, which owns facilities within the 2-mile zoning area, should have no standing, since its property is also subject to the city's regulatory power.

In addition, Charles Hoke, general manager for Southern, testified that the area from the center of Highway 6 to the highway right-of-way on the north side will be taken out of

Southern's service area if the annexation is considered to be valid. This fact alone indicates that Southern has a personal, pecuniary, and legal interest which is adversely affected by the annexation.

Since the boundaries of the tract sought to be annexed are not sufficiently adjacent to the corporate limits of the City of Hastings, the annexation was improper and ordinance No. 3089 is null and void. The judgment of the district court is affirmed, and the City of Hastings is enjoined from enforcing its ordinance.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD G. BACK, APPELLANT.

488 N.W.2d 26

Filed August 21, 1992. No. S-91-158.

1. **Convictions: Verdicts: 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. On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict 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.
2. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict, proceeds with trial, and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
3. **Records: Appeal and Error.** It is incumbent upon 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.
4. **Appeal and Error.** Issues not properly presented and passed upon by the trial court may not be raised on appeal.
5. **Drunk Driving: Convictions: Witnesses: Juries: Appeal and Error.** It is not necessary, in order for a court to sustain a drunk driving conviction on appeal, that some witness offer at trial his or her opinion as to the defendant's intoxication. A jury is equally able to conclude whether or not the defendant was

under the influence of alcoholic liquor.

6. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict where such verdict is supported by relevant evidence.
7. _____: _____. 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.
8. **Trial: Evidence: Jury Instructions: Lesser-Included Offenses.** Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
9. **Criminal Law: Death: Proximate Cause: Intent.** An act or omission to act is a proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient intervening cause, to the resulting death. In many situations giving rise to criminal liability, the harm that results is unintended, yet is directly or indirectly caused by an act of the defendant. In such cases, where the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Vincent M. Powers for appellant.

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

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

HASTINGS, C.J.

Richard G. Back appeals his conviction, following a jury trial, of motor vehicle homicide, a violation of Neb. Rev. Stat. § 28-306(1) (Reissue 1989).

Back assigns as error the trial court's failure to grant the defendant's motion for dismissal at the close of the State's evidence "with respect to the charge of driving 'while under the influence,' " the court's overruling of defendant's motion for a new trial and "finding there was sufficient evidence to support the conviction that defendant was driving 'under the influence,' " the refusal of the trial court to submit to the jury the lesser-included offense of driving while intoxicated, the giving of instructions Nos. 4 and 8 because they contained the

"under the influence" theory, and the denial of Back's motion to seek discovery in forma pauperis.

> " '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. . . .' . . .
>
> " 'On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict . . . 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.' "

(Citations omitted.) *State v. Schumacher*, 240 Neb. 184, 186, 480 N.W.2d 716, 718 (1992).

The accident in which Jennifer Krantz was killed occurred on the evening of September 8, 1989. At approximately 8:30 p.m. that day, three Malcolm High School students—Sean Powell, Rhonda Griess, and Jennifer Krantz—were attempting to start Griess' stalled Ford Mustang automobile. The Mustang was parked on the east shoulder of Spur 55, a state highway running generally from south to north toward Malcolm, Nebraska, and was facing north on what would be its right-hand side of the highway.

Powell, along with Griess and Krantz, had gotten a ride into Malcolm when the Mustang would not start, and they returned in Powell's pickup truck. Eventually, Powell parked his truck on the same side of the highway as the Mustang, facing in the opposite direction, the front end of the truck pointing to the front end of the Mustang. He had done this so that the headlights of his truck would shine into the opened hood of the Mustang in order that he could see while he attempted to dry the distributor cap of the Mustang or otherwise remedy the defect. Powell admitted that his pickup was, in part, on the paved portion of the highway; precisely where is not clear. The State's accident reconstruction expert testified that the pickup could have been as far into the east traffic lane as to have been positioned with its right-hand, or passenger side, wheels 2 feet 5

inches to the inside, or west, of the white line marking the outer edge of that northbound traffic lane. The expert also testified that the pickup might have been so far to the east that its right-hand wheels were directly on that white line. The pickup truck had its headlights on.

The Griess car was parked at a slight angle to the edge of the pavement and was located on the shoulder of the northbound lane of traffic. The hub of the left front wheel of the car was 19 inches east of the inside of the white line on the edge of the northbound traffic lane. The hub of the left rear wheel was 14 inches east of that same white line.

The accident happened between 9 and 9:30 p.m. Griess was in the driver's seat of her car, and Powell was working under the hood of Griess' car. Krantz was at the driver's side window of Griess' Mustang, talking to Griess. Krantz was leaning over, resting her arms on the car door as she spoke to Griess through the open window.

Back was driving his parents' Dodge Aspen station wagon from Lincoln, Nebraska, to Malcolm via Spur 55. Back testified that he was driving at approximately 45 miles per hour when the accident happened. He said that it was dark and had been raining off and on just before the collision. He came around a curve or turn, when he met another vehicle. The lights on both vehicles were dimmed, and after the other car went past, Back put his headlights on high, and he "noticed a flash in front of us and it was too late to stop and we had a collision with the truck."

Actually, just before hitting the truck, the passenger-side front bumper of Back's vehicle struck Krantz on the upper right thigh. The right side of Krantz' head was struck by the window support post next to the windshield on the passenger side of Back's station wagon. The outside of Krantz' left ankle knocked the driver's-side mirror off Griess' Mustang. This mirror stuck out approximately 6 or 7 inches from the driver's-side door.

Back admitted drinking six beers and a portion of a seventh, beginning about noon on the day of the accident. Back claimed he drank two of these beers and a portion of a third after approximately 8:30 p.m. Back claimed he had last eaten an

hour and a half or more before drinking these final beers.

Powell smelled alcohol on Back's breath at the accident scene. The sheriff's deputy, Jeffrey Brandl, who interviewed Back in the hospital at approximately 10 p.m. smelled "a very noticeable odor of alcohol on his breath," saw that he had "bloodshot, watery eyes," and observed that Back's "speech was somewhat incoherent at times." However, the deputy was unable to give his opinion as to the sobriety of Back in the face of foundation objection.

A blood sample taken from Back at 11:52 p.m. was tested and revealed an alcohol content of .106 grams per 100 milliliters of blood. The State's pathologist calculated that Back's blood alcohol content at the time of the accident was at least .140 grams per 100 milliliters of blood. The pathologist also stated that it was "impossible" for Back to achieve that blood alcohol content had he consumed only the two-odd beers he claimed to have consumed shortly before the accident.

Back's motion to dismiss, made at the close of the State's case, was denied. Back objected to jury instruction No. 4, which allowed the jury to find Back guilty of motor vehicle homicide, based either upon driving while intoxicated or upon careless driving, or to find him not guilty. The instruction outlined the elements of each theory of guilt and allowed the jury to find Back guilty of motor vehicle homicide based upon driving while intoxicated if it found either that he was operating a vehicle while under the influence of alcohol or that he was operating a vehicle with a blood alcohol content greater than ten-hundredths of 1 percent.

Back's objections to instruction No. 4 were that it did not instruct as to the lesser-included offense of driving while intoxicated and that it did not require unanimity of the jury "as to whether or not he was either under the influence or .10." However, Back's proposed instruction No. 1, tendered to the court and refused, differed only in that it instructed the jury as to the lesser-included offense of driving while intoxicated. Neither Back's proposed instruction nor the court's instruction No. 4 required the jury to be unanimous as to which theory of driving under the influence it applied. Back concedes this to be the rule in Nebraska.

Back also objected to the court's instruction No. 8 as being "unnecessary [and] cumulative." That instruction defined "under the influence of alcoholic liquor" as ingesting alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.

Following a verdict of guilty and the apparent overruling of Back's motion for new trial, the court entered judgment and a sentence of imprisonment of 15 months to 2 years. The defendant appealed. We affirm.

After the State's rest and the court's overruling of Back's motion for an order of dismissal, Back presented evidence in his own behalf. "A defendant who moves for dismissal or a directed verdict[,] proceeds with trial[,] and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction." *State v. Gray*, 239 Neb. 1024, 1027, 479 N.W.2d 796, 798 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992). By presenting evidence, Back waived any claim of error in the denial of his motion to dismiss.

The last assignment of error, regarding the claim that the trial court failed to grant Back's motion to conduct discovery in forma pauperis, is wholly without merit, because the record does not contain an order of the district court addressing Back's motion for such discovery. There is nothing in the record to indicate that the district court considered the issue at all.

"It is incumbent upon 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." *In re Interest of R.R.*, 239 Neb. 250, 253, 475 N.W.2d 518, 520 (1991). In order for the court to address this assigned error, it is necessary that the record indicate that the district court addressed and decided the issue. See *State v. Beins*, 235 Neb. 648, 654, 456 N.W.2d 759, 763 (1990) ("[i]ssues not properly presented *and passed upon* by the trial court may not be raised on appeal"). (Emphasis supplied.)

The remaining assignments of error focus on the "driving while under the influence" theory; i.e., Back's assignments of

error claim that the record fails to support that theory and that it should not have been submitted. Actually, he also alludes to the absence of a showing of proximate cause, and although that issue is not preserved specifically in any assignment of error, we address it in the overall discussion.

Back argues that there was no evidence to show that he was operating his vehicle while impaired by alcohol and, consequently, that driving while impaired could not be the proximate cause of the accident. This ignores the issue of whether the evidence showed his blood alcohol content to be above the statutory limit. The State in this case had to prove that Back violated Neb. Rev. Stat. § 39-669.07 (Reissue 1988) (operating a motor vehicle while under the influence of alcoholic liquor or with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of blood or urine). See *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989). Section 39-669.07 defines but one offense, which can be proved in one of several ways. *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986). Actually, Back does not argue on this appeal that there was insufficient evidence to show that he was operating a motor vehicle with an illegal concentration of alcohol in his blood. Since the jury could have convicted him on that theory alone, there is no prejudice to him in submitting to the jury the issue of whether he was "under the influence" at the time of the accident.

However, the primary thrust of Back's claim of insufficiency of the evidence is that no witness offered his or her opinion that Back was intoxicated to the point of impairment at the time of the accident.

It is not necessary, in order for a court to sustain a drunk driving conviction on appeal, that some witness offer at trial his or her opinion as to the defendant's intoxication. *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982). A jury is "equally able . . . to conclude whether or not the defendant was under the influence of alcoholic liquor." *Id.* at 814, 317 N.W.2d at 85. In this case, the evidence was sufficient to allow the jury to reach its own conclusion regarding Back's intoxication.

Back himself admitted to drinking during the day of the accident, and claimed that he had his last drink just minutes

before the accident. Powell testified that he smelled alcohol on Back's breath immediately after the accident. While Powell stated on cross-examination that he did not consider Back drunk, he explained that "drunk" to him meant "falling down, staggering, really just passing out" and that he did not see Back in that state. Additionally, the sheriff's deputy who interviewed Back at the hospital at approximately 10 p.m. smelled "a very noticeable odor of alcohol on his breath" and saw that he had "bloodshot, watery eyes" and that "[h]is speech was somewhat incoherent at times."

There was also evidence that alcohol impaired Back's ability to drive. Chief among this evidence is the way in which the accident occurred. Back approached the scene where the victim and her two friends were attempting to start a stalled car on a stretch of highway that was level and straight for at least fifty-five one-hundredths of a mile before the accident. There was credible evidence that the headlights on Powell's pickup were on, and because of the truck's position on the road, at least one of the headlights would have been shining directly toward Back's car as he approached the accident scene. There was also some evidence, although contradicted by Back, that there was no traffic coming from the opposite direction toward Back's vehicle. The nature of the accident implies that an unimpaired driver would have been aware of the roadside emergency ahead and would have been able to keep to his left to avoid an accident.

The evidence of the collision of Back's vehicle and Krantz' body shows that this is not what Back did. Krantz was standing next to Griess' car, leaning against the driver's-side door. When Back hit her, she was so close to Griess' car that part of her body, as she was propelled by Back's vehicle, knocked the rearview mirror off Griess' car door. At the time she was struck, Krantz could not have been farther from Griess' car than the 6 or 7 inches the mirror protruded from the driver's-side door.

The State's pathologist also testified that as the level of alcohol in the blood rises, the senses of sight, smell, hearing, taste, and touch are affected, as are the brain and central nervous system. He said that at levels of .10 to .20 of 1 gram by weight of alcohol per 100 milliliters of blood, there is a

deterioration in the above-listed functions, which would affect such things as perception, judgment, reaction time, coordination, and sight. Additionally, he testified that as the level of alcohol in the blood increases, the cone of vision narrows, restricting more and more the peripheral field of vision. The facts of this accident, as related above, show circumstantially, at least, a limitation of vision, judgment, reaction time, and perception on Back's part which, based on the testimony of the pathologist, proximately resulted from the consumption of alcohol by Back.

" 'On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict . . . where such verdict is supported by relevant evidence. . . .' " *State v. Schumacher*, 240 Neb. 184, 186, 480 N.W.2d 716, 718 (1992). " '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.' " *Id.* There is relevant evidence to establish that at the time of the accident, Back was operating a motor vehicle while under the influence of alcohol. The facts also support a finding by a jury that defendant's condition was a contributing proximate cause of the accident and the death of Krantz. Back's argument that the evidence is insufficient to support his conviction is without merit.

Back's objections to instructions Nos. 4 and 8, insofar as they attack the sufficiency of the evidence to support a theory of "under the influence," have been discussed and shown to be without merit.

However, Back argues that the district court erred in failing to instruct the jury regarding the lesser-included offense of driving while intoxicated. "Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense." (Syllabus of the court.) *State v. Gonzales*, 219 Neb. 846, 366 N.W.2d 775 (1985). Back implicitly concedes this point of law, but argues that the evidence did not establish the essential element of proximate cause and that therefore he was entitled to a lesser-included offense instruction. We have previously discussed this point.

Back contends that "[n]o one knew where the deceased was standing at the time of the accident," brief for appellant at 6, and that, therefore, proximate cause was a controverted issue. Back bases this argument largely on Griess' testimony, on cross-examination, that she did not see Krantz struck by Back's car. This argument is unsupported by the record as a whole. At the time of the accident, Griess was in the driver's seat of her car. Krantz was leaning over, resting her arms on the car door, speaking to Griess directly through the open window. The record is clear that Griess looked directly at Krantz "a couple of seconds" before the accident. Neither Back nor his passenger controverted this evidence—neither saw Krantz struck by their car.

Proximate cause exists in a motor vehicle homicide case if the death was a foreseeable consequence of the illegal conduct underlying the charge. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989). Specifically,

> " '[a]n act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. . . . In many situations giving rise to criminal liability, the harm that results is unintended, yet is directly or indirectly caused by an act of the defendant. In such cases, where the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.' "

Id. at 88, 435 N.W.2d at 177 (quoting *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986)). There is nothing in the record but Back's speculation to indicate that his collision with Krantz was not a "foreseeable and natural result" of his driving while intoxicated. There is nothing to indicate that any efficient intervening cause broke the chain of causation. Therefore, Back's protestations aside, proximate cause was an uncontroverted issue, and the district court did not err in refusing a lesser-included offense instruction.

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. THOMAS E. SMITH, APPELLANT.

488 N.W.2d 33

Filed August 21, 1992. No. S-91-328.

1. **Trial: Evidence: Hearsay.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rules.
2. _____: _____: _____. For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. The key requirement is spontaneity, which requires a showing that the statements were made without time for conscious reflection.
3. **Trial: Hearsay: Prior Statements.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant or recent fabrication or improper influence or motive.
4. **Prior Statements: Witnesses: Impeachment.** A prior consistent statement may be accorded substantive use only if it is used to rebut an express or implied charge; impeachment of the witness is a precondition.
5. _____: _____: _____. When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless.
6. **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 effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

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

Don Stenberg, Attorney General, William L. Howland, and, on brief, Mark L. Ells for appellee.

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

FAHRNBRUCH, J.

Thomas E. Smith appeals his jury conviction in the district court for Douglas County on two counts of first degree sexual assault on a 13-year-old female child.

On appeal, Smith claims that the trial court erred (1) in admitting the victim's diary into evidence, in violation of the hearsay rules; (2) by allowing police officers and the victim's mother to testify about details of the assault; (3) in overruling Smith's motion for a mistrial; (4) by allowing the prosecutor to ask irrelevant and prejudicial questions; and (5) because "the cumulated error in the trial was such that the defendant was denied his fundamental right to a fair trial."

Because the trial court erred in allowing into evidence inadmissible hearsay testimony and in overruling Smith's motion for a mistrial, Smith's conviction on each count is reversed, and the cause is remanded for further proceedings consistent with this opinion.

The record reveals that the 13-year-old victim was Smith's stepdaughter. Smith had lived with the victim's family since 1981 and had married the victim's mother in 1987. The victim and Smith each testified that they had enjoyed a good relationship. Smith stated that he referred to the victim as his own child, that she called him "dad," and that whenever he went somewhere, she would want to "tag along." Smith described his relationship with his wife as "shaky" and marked by frequent separations due to interference from his in-laws.

In the early morning hours of June 30, 1990, the victim informed her aunt and her mother that Smith had been molesting her. The victim's mother immediately confronted Smith with a knife and forced him to leave the family home. Police officers subsequently conducted three interviews with the victim, during which she related several alleged incidents of sexual contact with her stepfather, including digital penetration. Smith was charged with two counts of first degree sexual assault on a child and one count of tampering with a witness. Smith was found not guilty on the tampering charge,

and that charge is not an issue in this appeal.

Police Officer Kristy Cook testified that she was called to the victim's home the morning of June 30, 1990, to investigate a reported sexual assault. Over a hearsay objection, Officer Cook was allowed to testify that the victim recounted six separate incidents of digital penetration by Smith. The officer was asked by the State if she believed the victim. After the officer answered, "Yes, I did," Smith objected, "That's invading the province of the jury." The court sustained the objection, ordered the answer stricken from the record, and instructed the jury to disregard it.

The victim testified about several alleged incidents of sexual contact with her stepfather, two of which included digital penetration. Over hearsay and relevancy objections, the court admitted into evidence the victim's diary, which contained the following entry, dated June 23, 1990:

> Yesterday which was Friday my sister had a routen attitude agains people but my aunt found out her problem. I fell like jumping over the nearest bridge and then maybe ever will be happy. I want to tell some about what my Dad is doing to me and if I went and try to tell someone then they won't believe me But If I don't tell someone then I might just kill me or my Dad one of these days. Because I fell dumb and like I am scared of people like my Dad. Thanks for letting me write in you See you next time

Admission of this passage into evidence had also been the subject of Smith's pretrial motion in limine, which was overruled. After testifying that the passage referred to "the sexual assault he [Smith] did to me," the victim was permitted to read the passage aloud to the jury.

The victim's mother testified that she was awakened by her sister around 3 a.m. on June 30, 1990. The mother said the victim was curled up in a fetal position on her aunt's lap. She testified that the victim appeared shaken and was crying and that the victim told her that "her daddy had been doing things to her." Smith's hearsay objection was overruled. The victim's mother then testified that the victim stated that "her stepfather Tom had been touching her in places he shouldn't be."

Police Officer Teresa Thorson testified that the victim told

her that she had been sexually assaulted by her stepfather. The officer was permitted to testify over a continuing hearsay objection as to details of four alleged incidents of sexual contact between the victim and her stepfather, two of which included digital penetration.

Smith testified that the continuing problems with his in-laws caused him to seek longer work hours and that his decreased time at home provoked resentment in the victim. Smith denied that he digitally penetrated the victim.

On cross-examination Smith was asked, in part, the following series of questions:

> [Prosecutor:] Do you have an avid interest in sexual matters, Mr. Smith?
>
> [Defense:] Judge, I would object to that as to form of the question, it's not relevant, nothing to do with this at all.
>
> THE COURT: Sustained.
>
> . . . .
>
> [Prosecutor:] May I reframe it?
>
> THE COURT: . . . [Y]ou may, because I don't know what "avid" means.
>
> [Prosecutor:] Do you have an interest in sexual matters, Mr. Smith?
>
> [Defense:] I would object —
>
> [Smith:] Of course.
>
> [Defense:] Object again as to relevance. I would assume —
>
> THE COURT: I'm going to sustain the objection on the basis of foundation as to what you mean by "sexual matters." That's a broad, broad, broad area, Counsel.
>
> [Prosecutor:] Do you enjoy reading about sexual activities?
>
> [Defense:] Judge, again, I will object as to the relevancy and it is too broad. I would assume that there's very few of us that don't. It has nothing to do with the issue here in trial.
>
> THE COURT: Well, I think we have to be more specific. I'm going to sustain that as to "sexual activity."

With regard to a telephone call made by Smith to his wife, the

following exchange took place:

[Prosecutor:] And what is the name of the establishment that you made the telephone call from?

[Smith:] The Only Chance Saloon.

[Prosecutor:] And that is a topless go-go bar, is it not?

. . . .

[Defense:] I will object as to the relevancy of this, would ask that you give an instruction that the jury disregard it, and would also make a motion for a mistrial for such irrelevant and uncalled for questions.

. . . .

THE COURT: Overruled. He may answer if he knows.

[Prosecutor:] And that is a topless —

THE COURT: And, I'm sorry, the objection is overruled and your motion is overruled.

[Prosecutor:] And that is a topless go-go bar, is it not, Mr. Smith?

[Smith:] Yes.

. . . .

[Prosecutor:] Do you like to go to establishments like that, Mr. Smith?

[Defense:] I would object as to relevancy of this, Your Honor.

THE COURT: Overruled. He may answer.

[Prosecutor:] You may answer.

[Smith:] On occasion.

. . . .

[Prosecutor:] . . . [H]ave you gone to that establishment on more than one occasion?

[Defense:] Objection as to relevancy.

THE COURT: Overruled. He may answer.

[Smith:] Maybe once a year.

. . . .

[Prosecutor:] In addition to trips to the Only Chance Saloon, do you engage in any other forms of adult entertainment?

[Defense:] I object, Your Honor, relevancy and form of the question.

THE COURT: Sustained.

. . . .

[Prosecutor:] Mr. Smith, were you having sexual difficulties with your wife in the period of May and June of 1990?

[Defense:] Asked and answered, Judge.

THE COURT: I think it was, but overruled. He may answer.

[Smith:] Yes.

[Prosecutor:] And you were not receiving sexual gratification from her at that time; is that correct?

[Smith:] It was more so due to our working hours than anything else.

[Prosecutor:] Did you obtain that gratification from [the victim]?

[Smith:] No.

The jury found Smith guilty of two counts of first degree sexual assault on a child. He was sentenced to 1 to 3 years' imprisonment on each count, to run concurrently, and given credit for 233 days of time served.

ADMISSIBILITY OF DIARY

Smith claims the district court erred in admitting the passage from the victim's diary into evidence, in violation of the hearsay rules. At a pretrial motion in limine, the court ruled that the June 23, 1990, diary entry qualified as "excited utterance or res gestae." The State argues that it is also admissible under Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1989) as a prior consistent statement or under Neb. Rev. Stat. § 27-803(2) (Reissue 1989) as a statement of the declarant's then existing state of mind. Because the diary entry constitutes inadmissible hearsay not subject to any exception, the trial court erred in admitting it into evidence.

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rules. § 27-803(1).

> For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the

> event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection."

In re Interest of D.P.Y. and J.L.Y., 239 Neb. 647, 651, 477 N.W.2d 573, 576 (1991).

The record does not reflect that the entry was written while the victim was still under the stress of the event. In addition, the very purpose of a diary being to record the conscious reflections of the writer, it is clearly inadmissible as an excited utterance.

At the pretrial motion in limine, the State argued that the diary entry was admissible under § 27-801(4)(a)(ii), which provides that

> [a] statement is not hearsay if:
>
> . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive
>
> . . . .

The State contends that the diary was admissible to rebut Smith's claim that the victim's report of sexual abuse was a lie. However, "[s]ince [a] prior consistent statement may be accorded substantive use only if it is used to *rebut* an express or implied charge, impeachment of the witness is a precondition." (Emphasis in original.) 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01] at 801-190 and 801-192 (1991).

In *U.S. v. Red Feather*, 865 F.2d 169 (8th Cir. 1989), the diary of a sexual assault victim was admissible to bolster her credibility and to rehabilitate her as a witness *after* the defendant had implied on cross-examination that the victim had been coached by social services counselors and was prejudiced against the defendant, her father, because of punishment or discipline by him. See, also, *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980) (prior consistent statements of witness are not admissible as corroborative evidence except to

rebut express or implied charge against him of recent fabrication or improper influence or motive); *U.S. v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976) (" '[w]hen the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. . . . Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected' ") (citing 4 John H. Wigmore, Evidence in Trials at Common Law § 1124 (James H. Chadbourn rev. 1972)).

In this case, the diary was admitted into evidence during the course of direct examination of the victim and before any evidence had been presented of an express or implied charge against her or recent fabrication or motive. At this point, the diary was inadmissible as a prior consistent statement. Since it was not offered after evidence had been presented implying that the victim was lying, we need not discuss that issue further.

The State is also incorrect in its assertion that the diary was admissible under § 27-803(2), which sets forth a hearsay exception for

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The victim's state of mind or emotion at the time she made the entry in her diary is not relevant. In addition, hearsay statements of memory offered to prove the fact remembered are not admissible under the state-of-mind exception. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

TESTIMONY OF OFFICERS AND VICTIM'S MOTHER

The trial court overruled Smith's hearsay objection to the testimony of Officer Cook regarding details of the sexual assaults. Citing *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), the State argues that the testimony is admissible as an excited utterance because the victim was visibly shaken and

distraught as she spoke with the officer. As in *Plant*, the crucial question in this case is whether the statements were made while the declarant was still under stress from the startling event. Again, "[t]he key requirement is that the statement be made without time for conscious reflection." *Id.* at 329, 461 N.W.2d at 264.

The record is unclear regarding the time lapse between the last sexual assault and the time the victim spoke to police officers. It is clear that there had been sufficient time for the victim to record her reactions in her diary. The diary entry was made approximately 1 week prior to June 30, 1990. There was a time lapse of over 6 hours from the time the victim awakened her aunt and mother until she spoke to Officer Cook. The victim here was 13 years of age, much older than the 4-year-old whose statements were at issue in *Plant*. Because there was ample time for conscious reflection on the part of the victim, the court erred in admitting Officer Cook's testimony.

Officer Cook was asked by the State if she believed the victim, and she answered that she did. A belated objection was then made and sustained by the court. The answer was ordered stricken from the record, and the jury was instructed to disregard it. This court has held that "it is totally improper for one witness to testify as to the credibility of another witness. The question of any witness' credibility is for the jury." *State v. Beermann*, 231 Neb. 380, 396, 436 N.W.2d 499, 509 (1989).

Smith claims that the trial court erred in overruling his hearsay objections to the testimony of Officer Thorson and the victim's mother as to details of the sexual assaults. The victim's testimony preceded that of the officer and of her mother. During the victim's cross-examination, it was implied, at least by innuendo, that the victim had falsified her story of sexual abuse. The testimony of Officer Thorson and of the victim's mother was relevant to the charges against the defendant and showed that the victim had made prior consistent statements. Subject to the balance found in rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1989)), admission of the victim's prior consistent statements was a matter within the discretion of the trial court. *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985). We find no abuse of

discretion by the trial court in admitting the victim's prior consistent statements to her mother and to Officer Thorson.

MOTION FOR MISTRIAL

Smith asserts that by simply asking the series of questions concerning his sexual interests, the State committed error so prejudicial to him that it requires reversal of his conviction. We agree.

> "A mistrial is properly granted 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. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material."

State v. Groves, 239 Neb. 660, 673-74, 477 N.W.2d 789, 799 (1991).

When asked whether a phone call made to his wife was placed from a topless go-go bar, Smith objected to the relevancy of the question, asked for a mistrial, and asked for an instruction that the jury disregard the question. His objection and motion were overruled. The entire line of questioning by the State regarding Smith's sexual interests was improper, irrelevant, and highly prejudicial. The trial court should have granted Smith's motion for a mistrial.

In view of our holding, Smith's final assignment of error need not be discussed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LAVERN VEJRASKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF NICK VOGLTANZ, DECEASED, APPELLEE, V. SUSAN M. PUMPHREY, APPELLANT.

488 N.W.2d 514

Filed August 28, 1992. No. S-89-861.

1. **Pleadings: Appeal and Error.** Cases are heard in an appellate court on the theory upon which they were tried.
2. **Principal and Agent: Gifts: Intent.** No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Lyle Joseph Koenig for appellant.

Jerry D. Anderson, of Heinisch Law Office, for appellee.

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

GRANT, J.

Plaintiff-appellee, Lavern Vejraska, personal representative of the estate of Nick Vogltanz, deceased, filed an amended petition against defendant-appellant, Susan M. Pumphrey, seeking an accounting and damages for conversion. Plaintiff prayed that the court impose a constructive trust on a $5,000 certificate of deposit. Plaintiff contended that defendant had abused her confidential relationship as Vogltanz' attorney in fact by transferring a $5,000 check received by Vogltanz into a certificate of deposit held jointly by Vogltanz and defendant and by taking sole possession of the CD after Vogltanz died.

After a trial to the court, the trial court found for the plaintiff and against the defendant for $5,000. Defendant appeals, contending that the trial court erred in (1) "finding that there was clear and convincing evidence that the decedent did not intend to give [defendant] $5,000.00," (2) "finding that the plaintiff established [her] claim for the imposition of a constructive trust by clear, convincing, and satisfactory evidence," and (3) "finding that the decedent was subject to

undue influence, that the opportunity to exercise undue influence existed, that there was a disposition to exercise undue influence, and that the result of decedent giving $5,000.00 to [defendant] was the effect of such influence." The trial court made no specific findings as set out in the defendant's assignments of error. Defendant's only defense was that Vogltanz had made a gift to her. We affirm.

We review this equity case de novo on the record and shall consider only the dispositive question as to whether the deceased, Vogltanz, made a gift to defendant.

The record shows the following facts, as testified to by the only witnesses called, defendant and Howard Ach, both of whom were called by plaintiff: Vogltanz' wife, Clara, died in September 1987. No children of Nick and Clara Vogltanz survived. Defendant, her mother, and some of her aunts went to the funeral. At a discussion after the funeral, those present discussed Vogltanz' future care. Defendant, who was Vogltanz' great-niece, was asked if she would drive from her home in Hebron to Vogltanz' home in Milligan every week or two to help Vogltanz pay his bills. Clara had performed this task previously, because Vogltanz had had difficulty writing. Defendant responded that she would think it over, and after consulting with an attorney, agreed to do it. There were apparently no others who offered to help the 91-year-old Vogltanz at this time, although five other relatives were named in his will. Substantial interest in Vogltanz' estate was evident, however, after his death.

Approximately 2 weeks after his wife's funeral, Vogltanz and defendant went to the offices of Vogltanz' attorney, Ach. Ach drew up a durable power of attorney, which made defendant Vogltanz' attorney in fact, so that she "could pay his bills."

The power of attorney document was signed by Vogltanz and defendant on September 18, 1987. Defendant testified that at that time Vogltanz was catheterized and was taking antibiotics and vitamins.

When asked about reimbursement for the help she was providing Vogltanz, defendant testified that "we [Vogltanz and defendant] agreed that I would pay myself mileage back and forth" between Hebron and Milligan. At the time, it was

intended that Vogltanz would remain in his home in Milligan.

Until the first part of November, defendant visited Vogltanz once a week to pay his bills. She would go over the bills with Vogltanz, and she paid the bills by signing the checks on Vogltanz' checking account. Vogltanz employed another woman who did his cooking and cleaning.

In early November, Vogltanz fell and had to be taken to the hospital. There was concern about Vogltanz' being alone, so it was decided that he would stay with defendant. The record is not clear as to the persons making this decision. Defendant described her new role as "to take care of him until I could find another place . . . for him." Defendant, her husband, and two children lived in a two-bedroom mobile home in Hebron. When Vogltanz moved into defendant's home, he was given his own bedroom. Defendant did Vogltanz' laundry and cooking. She took walks with him. She emptied his catheter bag and gave him his vitamins.

When Vogltanz moved in with defendant, defendant and Vogltanz agreed that Vogltanz would pay defendant $200 a week for his care, plus expenses. Vogltanz asked defendant how much a nursing home would charge for his care, and defendant and her mother determined that it would cost between $1,000 and $2,000 per month.

During December 1987, Vogltanz was often in the hospital. He had kidney surgery. He was losing blood and growing weaker, to the point where defendant had to feed him. He was incontinent, and he refused to wear diapers, so defendant had to change his clothes regularly during the day. Due to the increase in the care required, Vogltanz and defendant raised defendant's payments to $250 a week starting in January 1988. Defendant testified that she was paid in full for Vogltanz' care and that she had no claim against the estate for services she had provided.

In December 1987, while he was in the hospital, Vogltanz received an inheritance from his sister's estate. Vogltanz opened the letter containing a $5,000 check, a list of heirs, and a receipt for the check. Vogltanz himself signed the receipt, and defendant witnessed his signature.

Later, when Vogltanz had returned to defendant's home,

defendant asked him what he wanted to do with the check. Defendant testified that Vogltanz told her that he wanted her to have the check. Defendant called her mother to discuss what to do with the check. She testified that she wanted to be able to use the money for Vogltanz, so her mother advised her to put it in a joint certificate of deposit. Defendant testified that she discussed the CD with Vogltanz.

Defendant took the check to First Federal Lincoln in Hebron and bought a certificate of deposit. Defendant endorsed the check "Nicholas Vogltanz Susan M. Pumphrey P.O.A." "P.O.A." meant power of attorney. The CD was held in joint tenancy, with rights of survivorship by Vogltanz and defendant. Defendant gave the bank Vogltanz' Social Security number, and the bank was to report the interest to him.

Vogltanz was 92 years old when he died on January 29, 1988. After his death, defendant delivered Vogltanz' financial records to the personal representative. Defendant did not tell the personal representative that she had the $5,000, nor was there any mention of the $5,000 in the records she turned over to the personal representative. Neither did she inform Ach, Vogltanz' attorney, about the $5,000.

Ach called defendant about August 23, 1988, inquiring about the $5,000. Defendant testified that she told him where the money was and that Vogltanz had given it to her. Ach testified that she told him that Vogltanz had given her the money. He also testified that she said Vogltanz told her to put the money "out at interest." Ach further testified that she told him that the people at the bank had told her to put her name on the CD, that she was entitled to the money because she took care of Vogltanz, and that she was not going to give Ach the money. Ach testified that she said he should call her back and that she would make a decision as to whether she was going to return the money to the estate.

Ach testified that when he telephoned defendant on September 1, 1988, she told him that she had decided to keep the money and that he should talk to her attorney.

We must first resolve a procedural problem. In his petition, plaintiff prayed that a constructive trust be imposed on the CD in question. In her motion for new trial, defendant sets out that

the court erred "in imposing a constructive trust over the gift from Nick Vogltanz to Susan M. Pumphrey." Both parties have briefed and argued the case as though a constructive trust had been imposed on the CD. The judgment of the trial court, as shown on the trial docket, was: "The court finds for the plaintiff and against the defendant and judgment is entered against the defendant in the amount of $ 5,000.00. The defendant is ordered to pay the costs herein." Clearly, no constructive trust was imposed by the trial court in its judgment order.

Nonetheless, we shall consider the case as one concerning a constructive trust. In *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 199, 426 N.W.2d 250, 251 (1988), we held that "cases are heard in this court on the theory upon which they were tried." Similarly, in *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989), we disposed of the case on the basis of the theory presented by the pleadings on which the case was tried. We shall so consider the case before us.

The imposition of a constructive trust is a form of equitable relief. *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975).

> In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. . . . However, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite.

Biggerstaff v. Ostrand, 199 Neb. 808, 810-11, 261 N.W.2d 750, 752 (1978). See, also, *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

> "Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds

> toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced."

Guynan v. Guynan, 208 Neb. 775, 779, 305 N.W.2d 882, 885 (1981).

Our disposition of this case is based solely on consideration of the legal situation defendant found herself in after others had urged her to assist the deceased, Vogltanz, by entering into an attorney-in-fact relationship with him.

Facts similar to those before us have arisen before in this jurisdiction. In *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985), the beneficiaries of a will brought an action to impose a constructive trust on property held in joint tenancy by a decedent and the defendants. The decedent had executed a durable power of attorney naming one of the defendants as attorney in fact. The decedent added the defendants' names to her checking account and safety deposit box and changed the ownership of her house to joint tenancy with defendants. One of the defendants drew up the deed. In addition, the defendant acting as attorney in fact transferred title to existing accounts, stocks, and bonds from sole ownership by the decedent to joint ownership with defendants.

We determined that the plaintiffs-beneficiaries in *Ford* had not met the required burden of proof, stating:

> The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. . . . Further, the existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case. . . .
>
> Assuming for purposes of our analysis that a confidential relationship existed between [decedent] and [defendants] by virtue of the continuous trust placed by the former in the skill and integrity of [defendants], as claimed by the beneficiaries . . . the question becomes whether there is "clear, satisfactory, and convincing" evidence that [defendants] abused that relationship such

> that a constructive trust must be placed on all of the property held jointly by [decedent] and [defendants]. We find there is not.

Ford, 220 Neb. at 498-99, 370 N.W.2d at 718-19.

Ford is not, however, the last word on this issue. The *Ford* decision was made before a dispositive rule of law was set out by this court in *Fletcher v. Mathew*, 233 Neb. 853, 859, 448 N.W.2d 576, 581 (1989), where we stated:

> " 'In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. . . .' "

We went on to hold in *Fletcher* that no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift. We adopted the following reasoning from the South Carolina Supreme Court:

> "Effectively, absent express intention, an agent may not utilize his position for his or a third party's personal benefit in a substantially gratuitous transfer. . . .
>
> "Appellant seeks to remove himself from the operation of the general rule. He contends that Mr. Fender orally authorized the transfers. Notwithstanding such a claim, we hold today that any purported oral authorization was ineffective. The power to make any gift must be expressly granted in the instrument itself.
>
> " 'It is for the common security of mankind . . . "that gifts procurred [sic] by agents . . . from their principals, should be scrutinized with a close and vigilant suspicion." ' *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214, 218 (1958). Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in

> fact to himself or a third party absent clear intent to the contrary . . . ." *Fender* [*v. Fender*, 285 S.C. 260, 262, 329 S.E.2d 430, 431 (1985)].

Fletcher, 233 Neb. at 860-61, 448 N.W.2d at 582.

The facts in the case before us are similar to the facts in *Fletcher* in all material respects, except, of course, as to the amounts of money involved and the fact that defendant herein rendered valuable services to the 91-year-old Vogltanz when no one else would or could. Plaintiff has the burden of proving a prima facie case of fraud. In this case, plaintiff showed that the defendant held the decedent's power of attorney and that defendant, using her power of attorney, made a gift to herself. In limited situations dealing with an attorney in fact, the *Fletcher* case established that that is sufficient to establish a prima facie case.

The burden of going forward then fell on defendant to establish by clear and convincing evidence that the transfer was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor.

The trial court determined that defendant had not met this burden. That court had the opportunity to view the witnesses while testifying, and that court apparently did not find defendant convincing. In our de novo review, we also find defendant failed to meet her burden of proof. There was no power to make gifts in the power of attorney document, nor was there sufficient evidence before us to show that Vogltanz had the clear intent to make a gift to defendant. We affirm the action of the trial court.

AFFIRMED.

THOMAS G. BOWLEY AND LANETTE S. BOWLEY, APPELLANTS, V. VILLAGE OF BENNINGTON ET AL., APPELLEES.

488 N.W.2d 354

Filed August 28, 1992. No. S-89-1331.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Municipal Corporations: Streets and Sidewalks: Statutes.** Pursuant to 1879 Neb. Laws, § 3, p. 120, the vacation of public roads not used within 5 years does not apply to streets located within incorporated villages.
4. _____: _____: _____. The power to vacate streets which was granted to the village board of trustees by 1879 Neb. Laws, § 69 XXVII, p. 216, is not limited or circumscribed.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John W. Steele, of Schumacher & Achelpohl, for appellants.

John W. Iliff, of Gross & Welch, P.C., for appellee Village of Bennington.

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

BOSLAUGH, J.

The plaintiffs, Thomas G. and Lanette S. Bowley, brought this action to quiet title to a parcel of land described as the north one-half of Warehouse Street abutting Lot 3, Block 12, in the Village of Bennington, Nebraska. The Bowleys now appeal from the district court's order granting the motion of the defendant Village of Bennington for summary judgment.

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to

judgment as a matter of law. *Antelope Cty. Farmers Coop. v. Citizens State Bank*, 240 Neb. 760, 484 N.W.2d 822 (1992); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Antelope Cty. Farmers Coop. v. Citizens State Bank, supra*; *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

The record shows that on January 2, 1980, Dale V. Neumeyer executed a warranty deed to the Bowleys conveying to them "Lots 1, 2, and 3, Block 12, Village of Bennington, and the East one-half of Vermont Street, adjacent to said lots." The portion of Vermont Street described in the deed had previously been vacated by the village. The portion of Warehouse Street to which the Bowleys seek title abuts the southern boundary of lot 3.

Warehouse Street was dedicated on November 15, 1887, when the Pioneer Town Site Company acknowledged and recorded a plat for the purpose of laying out the Village of Bennington. No issue has been raised concerning acceptance.

The Village of Bennington was incorporated on April 12, 1892, and on that date the village acquired title to Warehouse Street. See, 1879 Neb. Laws, §§ 104-106, pp. 233-234; Neb. Rev. Stat. §§ 17-415 to 17-417 (Reissue 1991); *Belgum v. City of Kimball*, 163 Neb. 774, 81 N.W.2d 205 (1957); *Carroll v. Village of Elmwood*, 88 Neb. 352, 129 N.W. 537 (1911). However, the village did not open or improve Warehouse Street prior to 1987.

After purchasing Lots 1, 2, and 3, Block 12, plaintiff Tom Bowley appeared at a March 1981 meeting of the village board of trustees to ask whether Warehouse Street had been vacated. At this meeting, Bowley requested that Warehouse Street be rocked if it had not been vacated. The village later determined that Warehouse Street had not been vacated, and the following entry appears in the minutes of the meeting of the village board on July 13, 1981: "Letter from Tom Bowley was read and discussed. The Board has no plans to vacate Warehouse Street. We do not have to use the property as a street at this time but might want to at a later date."

A letter dated October 6, 1981, from the attorney for the village to the Bowleys' attorney indicates that the village board did not wish to vacate Warehouse Street at that time because the board believed that the street might be needed for access to a proposed waste-water treatment facility near Bennington.

At some time prior to March 23, 1987, the Bowleys brought an action, which preceded this quiet title action, seeking a writ of mandamus to force the village to open Warehouse Street so that they would have southern access to lot 3. At that time, a house which was occupied by a Mrs. Skidmore, an elderly widow, was located on the portion of Warehouse Street which abuts lot 3. The Skidmore house had stood on Warehouse Street for at least 18 years. At a March 23, 1987, hearing held in connection with the Bowleys' mandamus action, the district court found that there had never been any public use of Warehouse Street and that the decision to open, or not to open, Warehouse Street was one which was left to the discretion of the village board of trustees.

In May or June 1987, Mrs. Skidmore no longer needed her house, and the village board decided that the house should be removed. The minutes of the July 13, 1987, meeting of the board of trustees indicate that the Skidmore house was razed and that the area was leveled, graded, sanded, and rocked, all at the village's expense.

On November 14, 1988, the village board passed an ordinance vacating the south one-half of a portion of Warehouse Street. The parcel vacated lies south of the Bowleys' lot 3; however, the village did not vacate any part of the north one-half of Warehouse Street. Thus, the village retained title to the portion of Warehouse Street which abuts lot 3.

The Bowleys' amended petition in this action was filed June 28, 1989, and alleges, in part, that "Warehouse Street has never been officially dedicated nor opened as a public street." While the amended petition does not allege that the north one-half of Warehouse Street abutting lot 3 has ever been vacated, it does, in effect, allege that the Bowleys should be awarded title to that parcel by virtue of their adverse possession of that property. See, Neb. Rev. Stat. § 25-202 (Reissue 1989); *Hadley v. Ideus*, 220 Neb. 878, 374 N.W.2d 231 (1985). However, in this appeal,

the Bowleys concede that they cannot acquire any portion of Warehouse Street as against the village by adverse possession. See Neb. Rev. Stat. § 39-1404 (Reissue 1988). Instead, the Bowleys argue that their predecessors in interest acquired title to the disputed parcel "by operation of law."

In making this claim the Bowleys cite 1879 Neb. Laws, § 3, p. 120. This is the sole ground upon which the Bowleys, in this appeal, claim title to the disputed parcel. The section cited states:

> All roads within this state, which have been laid out in pursuance of any law of this state, or of the late territory of Nebraska, and which have not been vacated in pursuance of law, are hereby declared to be public roads: *Provided*, that all roads that have not been used within five years shall be deemed vacated.

(Emphasis in original.) The Bowleys point out that in their prior mandamus action, the district court found that there had never been any public use of Warehouse Street; they then cite the above quoted language and contend that their predecessors in interest of lot 3 acquired the north one-half of Warehouse Street by operation of law in November 1892, 5 years after the Pioneer Town Site Company acknowledged and recorded a plat for the purpose of laying out the Village of Bennington. The Bowleys assert that they, in turn, acquired ownership of the disputed parcel when they received a warranty deed granting them their interest in lot 3.

The Bowleys' claim has merit only if 1879 Neb. Laws, § 3, p. 120, applies to streets located within incorporated villages. It is clear that the cited legislation has no such application.

The section cited is part of an act amending chapter 47 of the Revised Statutes of 1866. Section 1, p. 120, of that act states in part, "The county board has a general supervision over the *public roads* of the county, with power to establish and maintain them as herein provided, and to see that the laws in relation to them are carried into effect." (Emphasis supplied.)

Section 32, p. 126, of the act states, "*All public streets of villages not incorporated are a part of the public road*; and all road overseers or persons having charge of the same, in the respective districts of such villages, shall work the same as

provided by law." It is apparent from this language that 1879 Neb. Laws, § 3, p. 120, applied only to roads located outside the borders of incorporated villages and did not apply to streets located within incorporated villages. Consequently, the disputed parcel was not vacated by operation of law as the Bowleys allege.

The fact that 1879 Neb. Laws, § 3, p. 120, did not effect a vacation of Warehouse Street by operation of law is also made apparent by a separate 1879 legislative act. In addition to the act cited by the Bowleys, the Legislature passed another act in 1879, the purpose of which was "[t]o provide for the organization, government, and powers of cities and villages." 1879 Neb. Laws, p. 193. This act gave villages the power to "*open*, widen, or otherwise improve or *vacate* any street, avenue, alley, or lane within the limits of the city or village." (Emphasis supplied.) 1879 Neb. Laws, § 69 XXVII, p. 216. This legislation further set forth the method by which owners of land could subdivide their property for the purpose of laying out a village, and specified the method by which streets designated in the plat could be vacated. 1879 Neb. Laws, § 104-112, p. 233-235.

In *Van Buren v. Village of Elmwood*, 83 Neb. 596, 599, 119 N.W. 959, 960 (1909), this court cited 1879 Neb. Laws, § 69 XXVII, p. 216, and stated: "The power to vacate streets which was granted to the village board of trustees by the act of 1879 is not limited or circumscribed. Its power to vacate streets is full and ample, and reaches to *every possible case* where a village street might properly be vacated." (Emphasis supplied.)

In the present case, on November 15, 1892, the owners of the land on which Bennington is now located filed a plat for the purpose of laying out the Village of Bennington. On April 12, 1892, 4 years 5 months later, Bennington was incorporated and thereby acquired the power to control the streets within its corporate limits. Consequently, the 5-year period prescribed in 1879 Neb. Laws, § 3, p. 120, did not elapse prior to the time it became ineffective, in this instance, by virtue of the village's incorporation, and that legislation did not effect a vacation of the disputed parcel by "operation of law" as alleged by the Bowleys.

The motion of the village for summary judgment was

properly granted, and the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROYAL D. LEWIS, APPELLANT.
488 N.W.2d 518

Filed August 28, 1992. No. S-91-073.

1. **Criminal Law: Joinder: Trial: Appeal and Error.** A trial court's ruling on a motion for consolidation of charges properly joinable will not be disturbed in the absence of an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** A party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal.
3. **Trial: Witnesses: Testimony.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness. Anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.
4. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
5. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. 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.
6. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court.

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

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

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

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

GRANT, J.

The defendant, Royal D. Lewis, was originally charged in one information with 56 counts, consisting of 10 counts of robbery, 2 counts of first degree sexual assault, 2 counts of kidnapping, 14 counts of first degree false imprisonment, and 28 counts of using a firearm to commit a felony. Defendant pled not guilty to all counts.

The 56 counts dealt with four separate criminal episodes. The 12 counts in the first two of the episodes were consolidated for trial and are at issue in this appeal. The defendant moved to prohibit the joinder of the offenses and for separate trials as to each episode. After a hearing on the motion, the first 12 counts were joined for trial, and the other 44 counts were severed and eventually dropped.

In the first of the two episodes, the State charged, in six counts, that on or about July 23, 1989, in Lancaster County, defendant robbed the first victim, used a firearm to commit the felony of robbery, kidnapped the first victim, used a firearm to commit that kidnapping, subjected the first victim to sexual penetration, and used a firearm to commit that sexual assault.

In connection with the second episode, the State charged, in an additional six counts, that on or about July 24, 1989, in Lancaster County, defendant committed the same six crimes against a second victim.

After jury trial, defendant was convicted on all 12 counts. After a presentence investigation, and after the trial court found that defendant was not a mentally disordered sex offender, the court sentenced defendant to 8 to 10 years on each of the two robbery convictions, to 5 to 10 years on each of the six convictions for use of a firearm in the commission of a felony, to 8 to 10 years on each of the two kidnapping convictions, and to 8 to 10 years on each of the two convictions of sexual assault. The twelve sentences were to run consecutively to one another. This resulted in a total sentence of 78 to 120 years. Defendant timely appealed.

In this court, defendant assigns five errors. He contends that

the trial court erred (1) in joining counts I through VI with counts VII through XII, (2) in limiting defendant's right to confront and cross-examine witness Richard Pena, (3) in failing to find that the evidence was insufficient to support defendant's convictions, (4) in instructing the jury on reasonable doubt using NJI 14.08, and (5) in imposing an excessive sentence on defendant. We affirm.

The evidence at trial, viewed most favorably to the prosecution, as we must, *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992), established the following facts:

The first victim testified that after leaving work, she drove to the Super Saver grocery store on 27th and Cornhusker in Lincoln, Nebraska, at approximately 12:15 a.m. on July 23, 1989. She parked near the store, purchased two bags of groceries, and returned to her car. As she was unlocking her car, she saw a man approach her from behind. He was wearing a black crew neck T-shirt, denim shorts, and brown shoes without socks. He had the shirt up over his face so that she could only see his eyes and part of his nose. She stated that the man was black and had short, black, curly hair.

The man held his shirt over his face with one hand and held a gun with the other. He told the victim not to turn around, to unlock the car, and to get in. She entered the car through the driver's door and then slid over to the passenger side of the car. The assailant told the victim to put her head down between her legs, and then he entered the driver's side of the car. The assailant told the victim to put the keys in the ignition, which she did. He then told her that "he needed to borrow [her] car and that [she] had to go with him." He then started the car and drove off. As they were riding in the car, the assailant told the victim that he was not going to hurt her if she kept her head down and cooperated and that he needed her car for a robbery.

The victim stated that her assailant was holding the gun to her side while she was in the car. She described the gun as black, with a white handle, a long barrel, and a cylinder in the middle.

The assailant stopped the car, bound the victim's hands and ankles with electrical tape, pulled her shirt over her head, and taped it. Before the assailant taped the victim's shirt over her head, she saw the side of his face. She testified the assailant had

a thin mustache and the skin on his arm and leg was smooth, and she guessed that he was about 5 feet 10 inches tall and weighed about 155 pounds.

After the assailant had bound the victim, he left the car, and the victim heard him whispering with someone. She did not see the other car, but she did see headlights. When the assailant returned to the car, he asked the victim if she was a virgin. The assailant then pulled her jeans and underwear down to her ankles and digitally penetrated her vagina twice.

The assailant stopped assaulting the victim when a car drove up. He handed the victim's purse and groceries to someone in the other car. The assailant then drove off again with the victim in her car. She thought they drove for 10 or 15 minutes in the same vicinity before they stopped again. While they were driving, the victim remained seated with her head down between her legs.

When they stopped the second time, the assailant told her that he was going to meet his partner at that location, and if she did not keep her head down, his partner would shoot her. When the victim asked the assailant if he were not worried that someone would be killed during the robbery, he responded that he was not nervous because he had done this before.

While they were stopped the second time, the assailant forced the victim to perform oral sex while he held the gun to the back of her head. He then digitally penetrated her vagina a third time.

The victim heard a car drive up and saw its lights. The assailant wiped down the interior of her car with a black T-shirt and a sack, then pulled the keys out of the ignition with a metal object and threw them on the ground outside the car. He took the victim's watch and ring, got in the other car, and left.

After the victim heard the other car leave, she crawled to the other side of her car, opened the door, and retrieved the keys from the ground. She did not recall whether her hands had slipped out of the tape or if she had pulled it apart, but she testified that it was not tight. She drove away, trying to figure out where she was. A police car pulled her over at about 1:30 a.m. because she was driving erratically. The officer testified that the victim was disheveled, crying, and distraught.

The police had the victim retrace her route to where she had started driving after her assailant left, and they determined that it was behind a dental clinic at 14th and Cornhusker. The police then took the victim to the station, where she made a formal statement, and photographs were taken of the tape marks on her arms and face. The victim viewed both a photo lineup and a live lineup, but was unable to identify her assailant; nor was she able to identify defendant at trial as her assailant.

In connection with the second episode, the record shows that on July 23, 1989, the second victim worked alone from 6 to 11 p.m. at the Baskin Robbins at 48th and Van Dorn. She closed the store at 11 p.m., cleaned, and put the money from the register, both bills and coins, into a bank bag in the freezer before leaving at about 12:15 a.m. on July 24. She did not turn off the night lights, which lit the store well even when it was closed, and locked the door from the outside.

The victim walked to her car, which was parked about a block away in the parking lot of Van Dorn Plaza. She noticed a man walking toward her car. As she fumbled with the lock, the man walked up to her, pointed a gun at her, and told her to get in the car.

The victim described the gun as black, with a long barrel and a cylinder. She described her assailant as black, with short, curly hair and large, round eyes, wearing a black turtleneck, pulled up over his nose, and jeans. She stated he was "a little taller than me." The victim is 5 feet 5 inches tall.

The victim got in the driver's side door and slid over into the passenger seat, and her assailant entered the driver's seat. He told her to put the keys in the ignition, which she did. He had her turn the key to start the car. The assailant drove to the front of the Baskin Robbins. He had the victim remove the key for the business' door from her keyring while the car was running, all the while keeping the gun on her.

Both the victim and the assailant got out of the car, and he followed her into the store after she unlocked it. The victim opened the freezer, and the assailant took the money. When they left the store, the victim started to lock the door, but the assailant told her to leave it open. She asked that she be left at the store, but the assailant told her to get back in the car, which

she did.

When they were in the car, the assailant told the victim to put her head down between her knees. He drove north on 48th and then west on Normal, but then the victim became disoriented and could no longer tell where they were going. The assailant stopped the car, shut it off, and asked the victim if she had a towel with which he could wipe his fingerprints out of the car. She offered some tissues, but he told her to take her sweatshirt off, and he wiped down the car with that.

The assailant then fondled the victim's breast through her T-shirt and digitally penetrated her vagina. While assaulting her, the assailant asked the victim if she was a virgin.

The assailant then wiped the steering wheel off again and told the victim that he was leaving her keys in the corner of the car, that she should wait 15 minutes before she left because he was going to watch her, and that the gun had bullets in it.

After the assailant left, the victim retrieved the keys, waited 5 to 7 minutes, drove off, and determined she was at 31st and C Streets. She drove home and told her roommate what had happened, and they called the police. The police arrived around 1:45 a.m. on July 24, took a statement, and revisited the locations with the victim. The officer reported that the victim was upset, but coherent.

The second victim viewed a photo lineup on the afternoon of July 24, the same day she was assaulted. She selected two photos that she thought were similar to her assailant. The photo which she thought was most similar was of defendant. She told the officer that she would like to see full-length photos of the individuals. The officer returned the next day with full-length photos. The victim again picked out the same two suspects, including defendant.

The second victim also viewed a live lineup on August 26, 1989, from which she identified the defendant as her assailant. She testified she was "ninety-nine percent sure" at the lineup that defendant was her assailant, particularly after she heard his voice. In addition, she identified defendant in the courtroom as her assailant. She stated she was "ninety-nine point nine" percent sure that defendant was the assailant, but there was still some doubt in her mind.

Richard Pena was a friend of defendant's. He testified as part of a plea bargain with the county attorney's office, in which "a charge of aiding the consummation of any felony and habitual criminal would be amended to a simple misdemeanor charge, not including a habitual criminal allegation, in exchange for his testimony in this case against Royal Lewis." Pena's four previous felony convictions and his current plea bargain were disclosed to the jury.

Pena testified that he had known defendant for 20 years. He testified that the day after the second robbery, he and defendant were listening to Pena's police scanner, when they heard that the police were looking for a suspect named "Hobart" in connection with either the Super Saver or Baskin Robbins crimes. Pena commented to defendant that the suspect was in "serious trouble," and defendant stated that the police were looking for the wrong person. Pena testified that defendant then stated that he had committed the Super Saver and Baskin Robbins crimes and that his girl friend was very upset with him because she had read in the paper about the sexual assaults.

Dawn Garcia was defendant's girl friend. She testified that she had known defendant for about 2 years, and the summer that the two victims were assaulted, she and defendant were living together.

Garcia testified that she and defendant drove to the Super Saver on 27th and Cornhusker at about midnight on July 23, 1989. Defendant told Garcia that he was going to rob a woman, but the couple made no further plans. Garcia testified that she knew defendant owned a gun, but she did not see it that night. She said that defendant's gun was brown, with a tan handle and long barrel. She testified that defendant was wearing a black turtleneck and denim shorts.

Garcia testified that after reaching Super Saver, she saw defendant approach a woman in the parking lot, saw her get into the car, and saw defendant enter the car after her. She said defendant drove off, and she followed him to 14th Street, where defendant stopped. Garcia did not remember if she talked to defendant, but when he drove off again, she followed him to 14th and Yolande. She waited for defendant to park the woman's car, and then he joined Garcia with a sack containing

groceries and the woman's purse. Garcia and defendant then went home.

Garcia further testified that she was with defendant the subsequent night when he committed another robbery. They drove to the Baskin Robbins at 48th and Van Dorn at about 11 p.m., arriving when the store was still open. They parked in the parking lot and waited for the employee to lock up the store. As the employee was walking toward her car, defendant approached her. Garcia did not know whether defendant had his gun. She testified that defendant was wearing a black turtleneck shirt and denim shorts.

Garcia stated that the woman entered the car, and then defendant entered the car. Garcia watched them drive back to the store and enter it. They remained inside a "couple minutes," and then got back in the car and drove off. Garcia followed the car to 31st and C Streets, where defendant joined her, carrying a bank bag, which contained about $300 in bills and change.

Garcia testified as part of a plea bargain. She was charged with three felony accessory to robbery charges, which were dropped to one misdemeanor. This information was disclosed to the jury, as were Garcia's prior felonies and crimes of dishonesty. In addition, Garcia testified that she and defendant had broken off their relationship, that Garcia was angry at defendant, and that she told defendant that she could "stick him with a felony by just talking to the police."

Defendant testified on his own behalf. He denied committing the crimes with which he was charged. He denied ever having a conversation with Pena in which he admitted committing the crimes. He admitted owning a black turtleneck. He could not remember where he was at the time any of the crimes occurred.

Defendant testified that he broke off his relationship with Garcia in December. He testified that Garcia told him that "she can basically get me locked up any time she felt like it, and she said all she has to do was call somebody because Detective Sorensen wanted me real bad anyway. She could get me picked up whenever she got ready."

Defendant first contends that the joinder of counts I through VI (the crimes of July 23) and counts VII through XII (the

crimes of July 24) was improper and that the joinder of the two criminal episodes violated defendant's rights to a fair trial and due process of law.

A trial court's ruling on a motion for consolidation of charges properly joinable will not be disturbed in the absence of an abuse of discretion. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). See, also, *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990).

> There is no constitutional right to a separate trial. The right is statutory, as set out in § 29-2002(4), and depends upon a showing that prejudice will result from a joint trial. . . . The burden is on the party challenging the joint trial to demonstrate how and in what manner he or she was prejudiced.

Clark, 228 Neb. at 603, 423 N.W.2d at 474. See, also, *Evans, supra*.

The statute controlling the joinder of trials, Neb. Rev. Stat. § 29-2002 (Reissue 1989), states:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Contentions similar to defendant's contentions in this case were before the court in *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976), *overruled on other grounds, State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). In that case, the

court consolidated two separate robberies. The similarities, roughly, were that the robberies occurred on consecutive days and that the assailant entered business places (a garage and an office) for allegedly valid reasons (needing repairs, seeking a job), robbed an employee, restrained the employee (in the trunk of a car and in a restroom), and left. Both victims positively identified the defendant. We stated:

> We are of the opinion that the two robberies referred to were "of the same or similar character" under the Nebraska statute . . . notwithstanding the fact that the offenses were committed against two different individuals, and with approximately 19 hours intervening between the commission of the offenses. . . .
>
> . . . .
>
> Although defendant contends that it is inherently prejudicial to be defending on several unrelated counts at the same time because they will tend to enforce each other, he has made no actual showing of how he was, or may have been, prejudiced. . . . The evidence on each robbery was distinct and simple. The trial court separately instructed the jury on the elements of each count, and a further instruction provided: "The material elements of each count will be considered separately by you and a separate determination made as to each Count."

Nance, 197 Neb. at 103-05, 246 N.W.2d at 872-73.

The two criminal episodes in the case before us contain such similarities. Both groups of six offenses contain exactly the same crimes. The episodes occurred merely 24 hours apart. Both victims were attacked shortly after midnight in parking lots by a man holding his shirt over his face. Both victims described similar guns. In each case, the assailant forced the victim to enter her car in the same manner, through the driver's door into the passenger seat. In each episode, the victim was forced to put the keys in the ignition. In each instance, the victim was instructed to sit with her head between her knees so the victim could not see where the attacker was driving the car. In each case, before or during the sexual assaults, both of which included digital penetration, the attacker asked the victim if she was a virgin. In each case, the assailant wiped down the inside

of the car with a shirt to remove fingerprints before he left. Both victims described their assailant in a similar manner. We determine that the two criminal episodes were of "the same or similar character."

Defendant complains that no instruction was given that limited the purposes for which the jury could consider the evidence. The defendant, however, did not request any different instruction, nor complain of the instruction given. "[F]ailure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal absent plain error indicative of a probable miscarriage of justice." *State v. Lohman*, 237 Neb. 503, 505, 466 N.W.2d 534, 536 (1991). " '[A] party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal.' " *State v. Lenz*, 227 Neb. 692, 694-95, 419 N.W.2d 670, 672 (1988).

The facts before us are sufficient for the jury to find appellant guilty of the July 23 crimes without any consideration of the July 24 crimes. Defendant's former girl friend testified that she had helped in the commission of both robberies, and another friend of defendant's testified that defendant had admitted crimes against both victims. Sufficient evidence existed for the jury to find defendant guilty of the July 23 crimes, without any consideration of the July 24 crimes.

The trial court did not err in joining the 12 counts for trial. Defendant's first assignment of error is without merit.

In his second assignment of error, defendant contends that the trial court improperly restricted his right to cross-examine a witness against him, because the court did not allow him to examine Richard Pena about a forgery charge pending against Pena. Defendant agreed that the pending charge was not a prior conviction under Neb. Rev. Stat. § 27-609 (Reissue 1989) and that the pending charge was not part of the plea bargain into which Pena entered in exchange for testimony in this case. Defendant contends that evidence of the pending charge is relevant to show that Pena was biased in favor of the State because Pena was seeking leniency on the pending forgery charge.

Evidence showing bias of a witness is relevant. " '[C]ross-

examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness' . . . 'anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.' " *State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982); *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

This court has modified those general rules. We have held:

> The right of cross-examination is an essential and fundamental requirement of a fair trial, and a defendant is entitled to engage in searching and wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness. . . . However, a ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.

State v. Williams, 219 Neb. 587, 590, 365 N.W.2d 414, 416 (1985). We also have held:

> When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.

State v. Ballard, 237 Neb. 729, 731, 467 N.W.2d 662, 664 (1991).

In *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980), the court refused to allow testimony relating to the credibility of the witness-victim. We found that there was no abuse of discretion because "sufficient evidence was admitted which reflected upon the truth and veracity of the complaining witness," including the fact that the witness had admitted to a friend that she was lying about the incident. *Vicars*, 207 Neb. at 332, 299 N.W.2d at 426.

Likewise, in the case before us, sufficient evidence was admitted reflecting Pena's veracity. The evidence before the jury showed that Pena had four prior felony convictions,

including one for a crime of dishonesty. Evidence was also adduced that Pena's plea bargain with the county attorney consisted of reducing one felony count, with habitual criminal sentencing enhancement, to a misdemeanor. The trial court did not err in the manner it permitted defense counsel to cross-examine Pena. Defendant's second assignment of error is without merit.

Defendant's third assignment of error contends that the trial court's instruction regarding reasonable doubt is improper in light of *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). The reasonable doubt instruction used in the case before us, NJI 14.08, is identical to the instruction at issue in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), which instruction we found complied with the requirements of *Cage*. Defendant's third assignment of error is without merit.

Defendant next contends in his fourth assignment of error that the evidence was insufficient as a matter of law to support the jury's guilty verdicts.

> "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." . . .
>
> "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. Rokus, 240 Neb. 613, 619-20, 483 N.W.2d 149, 153 (1992).

The only element that appellant contests is the issue of identity. As detailed above, both victims described their assailants, and the descriptions generally fit the defendant. One of the victims identified defendant, both at trial and in lineups, stating that she was "ninety-nine percent sure" that defendant

was her assailant. Pena, a former friend of defendant, testified that defendant admitted committing the crimes. Garcia, defendant's former girl friend, testified that she was with defendant when he committed the crimes and that she aided in their commission. We hold that there was sufficient evidence in this case to support the convictions. Defendant's fourth assignment of error is without merit.

In his fifth assignment of error, defendant contends that his sentences were excessive. A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court. *State v. Muratella*, 240 Neb. 567, 483 N.W.2d 128 (1992); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). First degree sexual assault, Neb. Rev. Stat. § 28-319(2) (Reissue 1989); robbery, Neb. Rev. Stat. § 28-324(2) (Reissue 1989); and kidnapping, Neb. Rev. Stat. § 28-313(3) (Reissue 1989), are all Class II felonies, subject to sentences of 1 to 50 years' imprisonment. Use of a firearm to commit a felony is a Class III felony, Neb. Rev. Stat. § 28-1205(2) (Reissue 1989), subject to a sentence of 1 to 20 years' imprisonment, a $25,000 fine, or both.

Section 28-1205(3) provides that the use of a weapon in the commission of a felony "shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed." We have held that this language is mandatory and that the trial court has no discretion to order that the sentences on the convictions for using a firearm be served in any way except consecutively. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Winchester*, 239 Neb. 535, 476 N.W.2d 862 (1991).

Defendant, age 38, has a significant criminal history, including a 1969 conviction for larceny from the person and 1973 convictions for robbery; for shooting with intent to kill, wound, or maim; and for use of a firearm in the commission of a felony. A lesser sentence would depreciate the seriousness of the crimes of which defendant is convicted. The crimes against these victims were brutal and terrifying. Defendant's convictions and sentences are affirmed.

AFFIRMED.

IN RE INTEREST OF MARK TWEEDY, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, V. MARK TWEEDY, APPELLANT.

488 N.W.2d 528

Filed August 28, 1992. No. S-91-114.

1. **Mental Health: Other Acts: Words and Phrases.** A mentally ill dangerous person is one 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.
2. **Mental Health: Time.** In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing.
3. **Mental Health: Expert Witnesses: Evidence.** In mental health commitment proceedings, the actual assessment of the likelihood of danger calls for an exercise of medical judgment; the sufficiency of the evidence to support such a determination is fundamentally a legal question.
4. **Mental Health: Expert Witnesses: Testimony.** A mental health professional is competent to testify as to the mental condition of a person against whom a mental health complaint has been issued.
5. **Mental Health: Due Process.** In order for involuntary commitment on the basis that someone is dangerous to comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied.
6. **Mental Health: Other Acts: Proof: Evidence: Time.** Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's mental condition.
7. **Mental Health: Other Acts: Proof: Evidence.** In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.
8. **Mental Health: Other Acts.** The determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions.

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

Dean Skokan, Dodge County Attorney, and Joe Stecher for appellee.

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

WHITE, J.

Mark Tweedy appeals from a district court affirmance of a mental health board determination that Tweedy was a mentally ill and dangerous person who required full-time inpatient hospitalization at the Lincoln Regional Center.

FACTS

On January 17, 1989, appellant was sentenced to 20 months to 5 years' imprisonment for sexual assault on a child. The court found that appellant was a treatable, mentally disordered sex offender (MDSO) and committed him to the Lincoln Regional Center. At that time, the regional center was full, and Tweedy was placed on a waiting list. Eleven months later, Tweedy still had not been admitted, and the court revised its prior order by finding that treatment was not available for him, thereby leaving Tweedy under the supervision of the Nebraska Department of Correctional Services. While in prison, Tweedy was involved in several MDSO rehabilitation programs. Tweedy was paroled August 21, 1990; however, the State filed a mental health commitment proceeding against Tweedy in anticipation of his release.

Tweedy was found by the mental health board, under the clear and convincing standard, to be a mentally disordered and dangerous sex offender and was committed to full-time inpatient hospitalization at the Lincoln Regional Center. The matter was then appealed to the district court for Dodge County, where the determination was affirmed.

ASSIGNMENTS OF ERROR

Appellant, Tweedy, claims that the district court erred in finding (1) that by clear and convincing evidence he was mentally ill, and by further reliance upon the opinion of a clinical psychologist who failed to qualify her opinion to a reasonable degree of psychological certainty; (2) that Tweedy was a dangerous person, as defined in Neb. Rev. Stat. § 83-1009 (Reissue 1987); (3) that there was no less-restrictive alternative of Tweedy's liberty than a mental health board-ordered treatment disposition; and (4) that Tweedy requires full-time inpatient hospitalization as opposed to an outpatient program or another less restrictive program.

DISCUSSION

A "mentally ill dangerous person" is one 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. In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of the person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. § 83-1009 and Neb. Rev. Stat. § 83-1035 (Reissue 1987). See, also, *In re Interest of McDonell*, 229 Neb. 496, 427 N.W.2d 779 (1988).

Section 83-1035 provides, in pertinent part:

> A hearing shall be held by the mental health board to determine whether there is clear and convincing proof that the subject of a petition is a mentally ill dangerous person and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental health board-ordered treatment disposition are available or would suffice to prevent the harm described in section 83-1009.

In reviewing a final order made by the district court in mental health commitment proceedings, this court must affirm the order of the district court unless, as a matter of law, the order is not supported by clear and convincing evidence. *In re Interest of McDonell, supra*; *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987); *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987). See, also, Neb. Rev. Stat. § 83-1043 (Reissue 1987).

While we have said that the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd on other grounds* 651 F.2d 387 (5th Cir. 1981). See *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984). Dr. Suzanne Bohn testified that she is a certified and licensed practicing clinical psychologist in the State of

Nebraska. As such, she was a mental health professional competent to testify as to the mental condition of a person against whom a mental health complaint had been issued, pursuant to Neb. Rev. Stat. § 83-1010 (Reissue 1987), which provides that a "[m]ental health professional shall mean a practicing [licensed] physician . . . or a practicing clinical psychologist." See, also, *Sanchez v. Derby*, 230 Neb. 782, 433 N.W.2d 523 (1989).

Dr. Bohn further testified, with a reasonable degree of medical certainty, that in her opinion Tweedy suffered from a mental illness, pedophilia. Though Dr. Bohn is not a physician, the opinion was given with reasonable certainty and the term "medical" is mere surplusage.

Finally, when asked whether a pedophile's major milestone was recognition of the problem, Dr. Bohn stated that it is

> kind of like the beginning of treatment. I mean, you can't really do treatment until a person is willing to accept some responsibility for his behavior and makes some qualified admission of guilt. That's when treatment begins. So some people may be, quote, in treatment for years and never get to that point, but once you reach that point that doesn't mean [you're cured, but] you've changed."

The appellant does not contest that he is a pedophile. The first assignment is without merit.

We next address the issue of appellant's dangerousness. Although attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt, or threat to do substantial harm to another. *In re Interest of Blythman, supra.*

In *In re Interest of Blythman*, we provided a detailed analysis on the issue of dangerousness. In that case, we said that in order for involuntary commitment on the basis that someone is "dangerous" to comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied.

"To confine a citizen against his will because he is likely to

> be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another."

In re Interest of Blythman, 208 Neb. at 57, 302 N.W.2d at 671, quoting *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

We went on to hold that in order to achieve a proper determination of dangerousness, focus must be on the defendant's condition at the time of hearing. We recognized, however, that actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. See, also, *Lynch v. Baxley, supra*.

In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue. *In re Interest of McDonell, supra*; *In re Interest of Blythman, supra*.

Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances. *In re Interest of Blythman, supra*. Accord *Hill v. County Board of Mental Health*, 203 Neb. 610, 279 N.W.2d 838 (1979).

We held in *In re Interest of Blythman* that the defendant's act 5 years prior to the hearing, on the question of whether defendant was mentally ill and dangerous and required continued involuntary commitment, was not too remote to be probative of defendant's present state of dangerousness, particularly where the defendant, like Tweedy, had not had the opportunity to commit a more recent act in the intervening years because of his incarceration. Thus, it was and is proper to consider an act, such as the sexual assault of a child, as "recent."

> The argument [that such an interpretation of "recent" would permit involuntary commitment regardless of how remote in time the acts or threats of violence are] is well taken. However, such a result does not necessarily follow if it is kept in mind that any act that is used as evidence of dangerousness must be sufficiently probative to predict

> future behavior and the subject's present state of dangerousness. . . . Considering all of the factors, we cannot say that as a matter of law an act which occurred 5 years ago is too remote to be probative of the subject's present state of dangerousness. This is particularly true since the subject did not have an opportunity to commit a more recent act in the intervening years.
>
> . . . We cannot believe that the Legislature intended that by requiring a recent act or threat, a mentally ill person should be given the opportunity to commit a more recent act once a sufficient amount of time has passed since the last act. Judicial action need not be forestalled until another young girl is sexually assaulted, or some other harm takes place. *In re Powell*, 85 Ill. App. 3d 877, 407 N.E.2d 658 (1980); *In re Janovitz*, 82 Ill. App. 3d 916, 403 N.E.2d 583 (1980).

In re Interest of Blythman, 208 Neb. at 59, 302 N.W.2d at 672. Accord *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978).

In Tweedy's certificate of parole, dated August 21, 1990, Nebraska's Board of Parole acknowledged that Tweedy "is eligible for parole and believes there is a reasonable probability said individual will lead a law abiding life and further believes release of said individual is compatible with the welfare of society." Said release was not contingent on any assessment of Tweedy as an MDSO or any other evaluation. He had simply served a percentage of his sentence and was up for parole based on his good behavior and had done nothing in the incarcerated setting that indicated that he was a danger to society. Certainly Tweedy was not a danger to the adult males in the penitentiary with whom he came in contact, as that was not a section of the population with which Tweedy had the history of sexually assaultive and abusive behavior. As we have said, however, in civil mental health commitment proceedings, a medical professional must testify that the subject is both mentally ill and a danger to himself or herself or others to a reasonable degree of medical certainty. Dr. Bohn testified only as follows:

> [Prosecution:] Has [Tweedy's] treatment with your program progressed to the point of where you believe he is not a risk if he would be released into the community?

> [Dr. Bohn:] That's a difficult question to answer because I'm not sure we are ever really able to judge whether somebody is going to be at risk until they're out in the community. With this type of a disorder, the words, quote, "cure," really don't apply. It's not an appropriate kind of word to use with this kind of disorder. So technically, in a way, it's similar to an alcoholic, in that the potential is always there, you know, to either go back to drinking or whatever, or to follow up with your desires to assault young children. With the alcoholic, they don't forget about drinking, just like he's not going to forget about boys and boys are always going to be around him. Even if he makes an effort to stay away from areas, you know, where they frequent, he's still going to be coming in contact with them. So I think there's always going to be a risk that he's going to re-event.

When asked whether she thought Tweedy had any personality trait that made him more likely to offend, Dr. Bohn indicated that Tweedy's manipulativeness, his desire to get what he wants at other people's expense, and his "passive-aggressive streak" made him more likely to offend; however, he didn't "possess some of the other characteristics of other individuals who would be more likely to offend. So it's just a difficult question to answer." Dr. Bohn would not testify to a reasonable degree of medical or psychological certainty that there was a substantial likelihood Tweedy would recidivate.

The facts remain clear. Tweedy did participate in MDSO groups while he was incarcerated; however, he was not treated. While he contends that he has recognized his problem and is allegedly currently engaged to be married, he admits to a lingering attraction toward young boys. A residual attraction does not, in and of itself, translate into guaranteed recidivism. We cannot infer that activity when the expert witness will not testify, to a reasonable degree of certainty, to an opinion as to the offender's dangerousness.

The case must be reversed and remanded to the district court with directions to the mental health board to accord the appellant a new hearing or to order him released from custody.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., dissenting.

Although I agree with the majority's ruling, I write separately because I fear the treatment it accords Dr. Suzanne Bohn's testimony bespeaks a disquieting tolerance for sloppiness.

Bohn is a clinical psychologist, not a doctor of medicine. Thus, she should have been asked to express her opinions not in terms of reasonable medical certainty, but in terms of reasonable psychological certainty. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). Yet, either because she did not listen to the question or because she is quite willing to take unto herself credentials she does not possess, she unabashedly undertook to speak as a doctor of medicine. Neither phenomenon is mere surplusage; her testimony should be discredited as a matter of law.

TODD R. McWHA, APPELLEE AND CROSS-APPELLANT, V. MARY F. McWHA, APPELLANT AND CROSS-APPELLEE.

488 N.W.2d 357

Filed August 28, 1992. No. S-91-263.

Appeal from the District Court for Lincoln County: JOHN D. KNAPP, Judge. Affirmed as modified.

Stanley D. Cohen for appellant.

Terry Dougherty, of Knudsen, Berkheimer, Richardson & Endacott, and Robert P. Goodwin, of Peetz, Sonntag & Goodwin, P.C., for appellee.

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

PER CURIAM.

Mary F. McWha appeals from the marriage dissolution decree of the district court for Lincoln County which granted

Todd R. McWha the custody of the couple's minor child. Mary McWha assigns as error the district court's rulings on custody, venue, and certain issues regarding evidence. Todd McWha cross-appeals, assigning as error the court's determinations on child support and visitation.

STANDARD OF REVIEW

> "In an appeal involving an action for dissolution of marriage, an appellate 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 appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Stover v. Stover, 240 Neb. 391, 392, 482 N.W.2d 244, 245 (1992). Accord, *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Pattrin v. Pattrin*, 239 Neb. 844, 479 N.W.2d 122 (1992).

CONCLUSION

We find that the district court erred in admitting into evidence certain material derived from secret tape recordings, in violation of Neb. Rev. Stat. §§ 86-701 and 86-702 (Cum. Supp. 1990) and Neb. Rev. Stat. § 86-712 (Reissue 1987). Therefore, we have disregarded this erroneously admitted evidence in our de novo review of this case. Furthermore, based on our de novo review, we conclude that the district court did not abuse its discretion in denying Mary McWha's motion for change of venue, or in determining custody. See *Lippincott v. Lippincott*, 144 Neb. 486, 13 N.W.2d 721 (1944). In regard to Todd McWha's assignments of error on cross-appeal, we conclude that the child support order does not constitute an abuse of the district court's discretion. However, we do find that the district court abused its discretion in granting Mary McWha "summer visitation commencing the third day after school ends in the spring and ending 3 days before the fall term of school begins." See *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). Therefore, we modify the district court's

judgment regarding summer visitation so that beginning in 1993 and continuing each year thereafter, unless otherwise ordered by the district court in a modification proceeding, Mary McWha shall have 6 consecutive weeks of visitation concerning Jessica McWha during the summer months. The dates for Mary McWha's summer visitation rights are determinable by agreement of the parties; otherwise, such visitation is determinable by the district court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. LANNY K. HICKS, APPELLANT.

488 N.W.2d 359

Filed August 28, 1992. No. S-91-660.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, a reviewing court takes into consideration that the trial court observed the testimony of the witnesses.
3. **Constitutional Law: Investigative Stops: Search and Seizure.** The Fourth Amendment to the U.S. Constitution applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.
4. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under both the federal and state Constitutions, law enforcement officers are permitted to engage in limited investigatory stops under certain circumstances in which probable cause to arrest is lacking, but only if they have a reasonable suspicion based upon specific and articulable facts that the person stopped is, was, or is about to be engaged in criminal activity.
5. **Police Officers and Sheriffs: Search and Seizure.** The collective knowledge of the law enforcement agency for which an officer acts may provide the basis for a search and seizure, but some communication of that knowledge to the officer conducting the search and seizure is required.
6. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Flight upon the approach of a police officer is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person stopped to involvement in criminal conduct.
7. _____: _____: _____. The mere fact that a person is present in a neighborhood designated by the police as a high-crime area is insufficient to create a reasonable suspicion that the person is involved in crime.
8. **Police Officers and Sheriffs: Investigative Stops.** An individual's flight upon

approach of the police patrolling a high-crime area is insufficient, standing alone, to justify an investigatory stop of the person.

9. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution.
10. **Trial: Evidence: Appeal and Error.** A prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds for the objection, unless the grounds are apparent from the context.
11. **Trial: Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
12. **Trial: Testimony: Appeal and Error.** Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Patrick J. Boylan for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WHITE, J.

This is a criminal case in which the State charged the defendant-appellant, Lanny K. Hicks, with being a felon in possession of a firearm, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). The defendant pled not guilty and filed motions to suppress physical evidence and statements made to the police. The trial court overruled the motions, and thereafter a jury in the Douglas County District Court found the defendant guilty of the offense charged. The trial court sentenced the defendant to prison for not less than 17 nor more than 34 months, with credit for 69 days' time served. This appeal followed.

FACTUAL BACKGROUND

On October 28, 1990, Officers Mark Lang and Dennis Clark of the Omaha Police Division were conducting surveillance in an area of Omaha, Nebraska, experiencing a high incidence of

liquor violations and drug trafficking. From their position in a large, marked Winnebago vehicle parked at the corner of 24th and Lake Streets, the officers observed a group of black males gathered approximately a block and a half away. The group was standing near a liquor store located on the west side of 24th Street, just to the south of an alley which divides the block between Grant and Erskine Streets. Some of the men were holding liquor bottles, in violation of a city ordinance prohibiting drinking alcohol in public.

Shortly after 4 p.m., Lang and Clark contacted fellow officers John Francavilla and Mike Stewart, who were riding together in a marked police cruiser, and requested that they drive by the group of men under surveillance. The officers suspected that some of the parties might "drop or dump" alcohol or narcotics and generally just wanted to "see if we could get a reaction out of them."

Francavilla and Stewart responded by driving their cruiser eastbound through the aforementioned alley toward 24th Street. As the cruiser emerged from the alley, Francavilla and Stewart heard somebody yell, "[P]olice." Lang testified that from his position in the Winnebago, he could not hear any yelling, but saw what looked like some people shouting a warning. At that point the group began to disperse.

While Lang concentrated on the group of men near the liquor store, Clark noticed a white male wearing a dark jacket close the door of a brown station wagon and walk south on 24th Street toward the area under surveillance. Clark testified that as the cruiser emerged from the alley, he saw a black man turn and yell something to the white man, who then turned and ran up the street and around the block. Clark told Lang to instruct Francavilla and Stewart to back up and "check the party" because "there was something suspicious" about the way he "[a]ll of a sudden . . . bolted."

When Francavilla and Stewart backed down the alley as instructed, they saw a white man in a brown leather jacket walking toward them. The officers exited their cruiser and approached the man, asking him "what he was doing, what was going on." Stewart testified that when the man said, "Nothing, I ain't doing nothing," he asked the man why he was running.

At that point the man said, "I got a warrant."

After the officers identified the man as Hicks, they ran a check and discovered that there were in fact three outstanding warrants for Hicks' arrest. The officers arrested Hicks, and Francavilla patted him down, discovering, among other things, a clip to a .22-caliber semiautomatic pistol and a number of bullets.

Reasoning from the defendant's possession of the clip that he may have discarded or hidden a weapon nearby, Stewart searched the area. When Lang informed him by radio of the brown station wagon, Stewart approached the vehicle and ran a check on the license plates. After discovering that the car was registered to Hicks, he looked in the passenger-side window and saw the handle of a gun protruding from between the driver's seat and the front passenger seat. Stewart opened the unlocked door, seized the weapon, and returned to the cruiser.

As both officers and Hicks sat in the cruiser, Stewart and Francavilla engaged in a discussion regarding the weapon and whether it matched the clip found on the defendant. At that point Hicks stated, "[Y]ou can't charge me with that gun. It wasn't on me. You found it in my car. I will be able to get these charges dropped." Both Francavilla and Stewart testified that they did not ask Hicks any questions or solicit the statement in any way, but that Hicks just blurted it out.

At trial, Hicks testified that he loaned his car to a friend, Barbara Hoffman, at approximately 12:30 p.m. on October 28, 1990. He further testified that Hoffman returned later that afternoon and told him the car had broken down. He stated that he called another friend, who drove him to 24th and Erskine Streets at about 3:45 p.m. Hicks testified that after he unsuccessfully attempted to start the car, he was walking back to his friend's vehicle when a police cruiser approached, and its occupants jumped out and asked him for identification. Hicks denied that he was running at any point prior to this encounter and testified that he did not know there was a weapon in the front seat of his car. Hoffman largely corroborated Hicks' story, testifying that she purchased the weapon that afternoon and left it in the car when the car broke down at 24th and Erskine Streets.

ASSIGNMENTS OF ERROR

On appeal, Hicks argues that the trial court "erred in overruling the Defendant's motion to suppress the fruits of the stop and subsequent arrest of the Defendant on October 28, 1990. Statements made by the Defendant to Omaha police officers should have been suppressed and ruled inadmissible at the Defendant's trial."

LEGALITY OF THE STOP

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court takes into consideration that the trial court observed the testimony of the witnesses. *Id.*

We first note that the State does not contest the assumption implicit in Hicks' argument that the officers "seized" him prior to his statement that there was a warrant out for his arrest. See, *U.S. v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (a person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would believe he is not free to leave); *Michigan v. Chesternut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) (adopting *Mendenhall* test); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991) (every encounter between a police officer and an individual in a public place is not necessarily a seizure of the individual). We therefore proceed upon the premise that a seizure occurred when the officers exited their cruiser, approached Hicks, and began asking him questions.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which

probable cause to arrest is lacking. However, in order to protect "the individual's right to personal security free from arbitrary interference by law officers," *Brignoni-Ponce*, 422 U.S. at 878, the *Terry* court held that such limited investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. The same standard is applied in determining the propriety of an investigatory stop under Neb. Const. art. I, § 7. *State v. Patterson, supra*; *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

In this case, Officer Stewart testified at the suppression hearing that the decision to question Hicks was based upon information from the other officers that they saw Hicks flee upon approach of the cruiser. The fact that Stewart and Francavilla did not personally witness Hicks' flight is immaterial. See *State v. Zemunski and Whiteley*, 228 Neb. 536, 423 N.W.2d 443 (1988) (collective knowledge of the law enforcement agency for which an officer acts may provide the basis for a search and seizure, but some communication of that knowledge to the officer conducting the search and seizure is required). Thus, the sole issue presented by this appeal is whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person. The trial court held that such flight is alone sufficient to create a reasonable suspicion of involvement in criminal conduct. We disagree and therefore reverse.

A majority of jurisdictions addressing the issue hold that flight alone is insufficient to justify a *Terry* stop. See, e.g., *Dimascio v. Municipality of Anchorage*, 813 P.2d 696 (Alaska App. 1991); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990) (collecting cases); *People v Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *Watkins v. State*, 288 Md. 597, 420 A.2d 270 (1980) (collecting cases). Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. *Aldridge, supra*; *Thomas, supra*; *Watkins,*

supra.

These courts recognize that allowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The person may decline to listen to the questions at all and simply go on his or her way. *Id.* If the option to "move on" is chosen, the person "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." 460 U.S. at 498.

In other words, "A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention." *Smith v. U.S.*, 558 A.2d 312, 316 (D.C. App. 1989). Flight upon approach of a police officer may simply reflect the exercise—"at top speed"—of the person's constitutional right to " 'move on.' " *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.

Nor is an intense desire to avoid contact with the police necessarily indicative of a guilty conscience. Fear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment, and fear of unjust arrest are all legitimate motivations for avoiding the police. *In re D.J.*, 532 A.2d 138 (D.C. App. 1987).

The Colorado Supreme Court emphasized this point in *Thomas, supra*, in which four police officers were on routine patrol in an unmarked police vehicle when they saw a man they recognized as "Cherokee" Thomas standing in the parking lot of a fast-food restaurant. Thomas apparently recognized the officers too, because upon making eye contact with them, he thrust his hand in his pocket and began to run. The officers gave

chase, following him into a nearby building, where one officer saw him throw something into a water pitcher. The officers subsequently caught him and retrieved the objects, which turned out to be six balloons containing cocaine. The trial court granted Thomas' motion to suppress the cocaine, and the state appealed.

The Colorado Supreme Court affirmed the trial court's decision, rejecting the prosecution's argument that Thomas' "furtive gesture" of placing his hand in his pocket and running at the sight of the officers provided an articulable suspicion sufficient to justify the chase. The court reasoned:

> The problem with the so-called "furtive gesture" as the basis for a stop is its inherent ambiguity. From the viewpoint of the observing police officer, an innocent move may often be mistaken for a guilty reaction. From the perspective of the person observed, the "furtive gesture" might be impelled by a variety of motives, from an unsettling feeling of being watched to an avoidance of what might be perceived as a form of harassment.

Thomas, 660 P.2d at 1275.

A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime. We therefore join those jurisdictions holding that flight from a police officer is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct. See, e.g., *U.S. v. Morgan*, 759 F. Supp. 896 (D.D.C. 1991) (flight from scene of recently reported burglary upon approach of police enough to warrant investigatory stop); *State v. Wylie*, 10 Conn. App. 683, 525 A.2d 528 (1987) (flight by person whom officer had been informed was carrying a weapon enough to create articulable suspicion); *Clinkscale v. State*, 158 Ga. App. 597, 281 S.E.2d 341 (1981) (flight by person identified as possible suspect in recent burglary enough); *Dimascio, supra* (act of breaking off meeting with

another man and fleeing upon sight of police, then returning and resuming conversation, only to flee again when police returned, combined with lateness of the hour and reputation of vicinity as a high-crime area enough); *People v. Collom*, 268 Cal. App. 2d 242, 73 Cal. Rptr. 707 (1968) (officer justified in arresting a man whom he saw engage in a furtive exchange of some object for money and then run upon sight of the officer). We next must determine whether any such corroborating circumstances exist in this case.

This case is very similar to *People v Mamon*, 173 Mich. App. 429, 435 N.W.2d 12 (1988), *rev'd on other grounds* 435 Mich. 1, 457 N.W.2d 623 (1990). There, two police officers were driving on routine patrol in a marked squad car through an area known for narcotics activity. As the officers approached a man standing on a corner near a public phone, the man took off running. The officers left their vehicle and pursued the man on foot, noticing that he removed a burgundy-colored case from his pocket and dropped it during the chase. The officers ultimately caught the man and retrieved the case, which contained cocaine. The trial court quashed an information charging the man with possession of a controlled substance, and the state appealed.

A Michigan intermediate court of appeals affirmed the trial court's decision. The court began by addressing the circumstances existing before the man began to run. Though the incident occurred in a high-crime neighborhood, the court determined that a person's presence in such an area cannot, by itself, provide the basis for an investigatory stop. In so doing, the court noted that the officers were not responding to a particular complaint of wrongdoing in the area and that the man made no furtive gestures prior to seeing the officers. Concluding that the officers lacked an articulable basis for stopping the man as he stood on the corner, the court turned to the significance of his flight upon their approach. Noting the ambiguous nature of flight as an indicator of guilt, the court held that the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot.

Here, as in *Mamon*, Officers Francavilla and Stewart were on routine patrol when the incident occurred. They were not responding to any call or report of suspicious activity in the area. Though Officer Lang testified at trial that the portion of 24th Street involved is known for narcotics activity, we agree with the numerous decisions holding that a person's presence in such an area by itself does not warrant a suspicion that that person is involved in crime. *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *In re D.J., supra* (thousands of people live and go about their legitimate business in neighborhoods designated as high-crime areas by the police); *Shabaz, supra*; *Aldridge, supra*.

It is also clear that Hicks gave no outward indication of involvement in illicit activity prior to the approach of the cruiser. He was not among the group of men huddled together and carrying liquor bottles. He was simply walking down the street when the cruiser emerged from the alley. As in *Mamon*, the officers lacked an articulable basis for suspecting Hicks of involvement in criminal activity prior to the point at which he turned and ran.

When asked at the suppression hearing why he and Francavilla stopped Hicks, Officer Stewart testified that "[w]e felt he was acting suspiciously in the fact that the other officers had advised us that it looked from their vantage point that he was trying to hide or allude [sic] us." In the absence of circumstances corroborating the conclusion that Hicks was involved in criminal activity, Officer Stewart's testimony reveals nothing more than a hunch. Though perhaps the hunch was correct in this case, if the police are allowed to stop and question citizens upon less than particular and specific facts creating an articulable suspicion of criminal behavior, " 'the risk of arbitrary and abusive police practices exceeds tolerable limits.' " *Thomas*, 660 P.2d at 1277, quoting *Brown v. Texas, supra*. Because Officer Stewart was not able to point to specific facts corroborating the inference of guilt gleaned from Hicks' flight, the investigatory stop in this case was constitutionally infirm.

EFFECT OF THE UNCONSTITUTIONAL SEIZURE

Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). The clip and bullets found on Hicks, as well as the handgun found in his car and the statement he made to the officers, were all the direct result of the initial stop and therefore inadmissible at trial. However, a prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor unless the grounds are apparent from the context. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

The first witness called by the State at Hicks' trial was Officer Lang. Lang testified, without objection, that Officer Stewart told him of finding a clip on Hicks and a handgun in his car. This testimony was objectionable, both as hearsay and based upon the unconstitutionality of the stop. Moreover, Hicks also made no objection as the State displayed the handgun to the jury and elicited Lang's testimony that it was the gun found by Francavilla and Stewart. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992). Though the State waited until the testimony of Officer Francavilla to actually introduce the handgun into evidence, the "cat was out of the bag" long before then. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). Hicks waived his objection to evidence regarding his possession of the clip and handgun by failing to make a timely objection.

Hicks did promptly object to testimony regarding the statement he made while sitting in the cruiser. Hicks' defense was based upon the theory that Hoffman placed the gun in Hicks' car without his knowledge, after she borrowed the car earlier that afternoon. Hicks' statement to the officers that he did not care about the gun because it was in his car rather than on his person could be interpreted as an implicit admission of

ownership. The State attempted to cross-examine Hicks on this very basis. We cannot say the trial court's error in overruling Hicks' motion to suppress his statement to the police was harmless beyond a reasonable doubt. See *State v. Reynolds*, 240 Neb. 623, 483 N.W.2d 155 (1992). Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

KRISTINE A. UHING, FOR HERSELF AND ON BEHALF OF HER MINOR CHILD, CAELI JONES, APPELLANT, V. ANN UHING, APPELLEE.

488 N.W.2d 366

Filed August 28, 1992. No. S-91-743.

1. **Constitutional Law: Habeas Corpus.** Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty.
2. **Habeas Corpus: Child Custody.** A habeas corpus proceeding is appropriate to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired child custody under a court order or decree.
3. **Habeas Corpus: Child Custody: Appeal and Error.** In an appeal from a decision in a habeas corpus action involving custody of a child, an appellate 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 appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Child Custody: Parental Rights.** In the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
6. _____: _____. The parental superior right to child custody protects not only

the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.

7. _____: _____. A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.
8. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
9. **Habeas Corpus: Child Custody: Parental Rights.** In a parent's habeas corpus proceeding directed at child custody, a court may not deprive a parent of a minor's custody unless it is affirmatively shown that the parent seeking habeas corpus relief is unfit to perform the parental duties imposed by the parent-child relationship or has legally lost parental rights in the child.
10. **Child Custody: Parental Rights.** The fact that a stranger, that is one outside the immediate family relationship, may be able to provide greater or better financial care or assistance for a child than can a parent is an insufficient basis to deprive a parent of the right to child custody.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed.

Connie Kearney, of Legal Aid Society, Inc., for appellant.

S. Caporale for appellee.

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

SHANAHAN, J.

Kristine Uhing, biological mother of Caeli Jones, appeals from the decision of the district court for Douglas County, which denied Kristine Uhing's petition for habeas corpus relief concerning her daughter, Caeli, who is in the custody of Ann Uhing, the child's grandmother.

HABEAS CORPUS AND CHILD CUSTODY

Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty. See, U.S. Const. art. I, § 9; Neb. Const. art. I, § 8; *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944); *Robertson v. Div. of Parole*, 67 N.Y.2d 197,

492 N.E.2d 762, 501 N.Y.S.2d 634 (1986).

A habeas corpus proceeding is appropriate to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired custody under a court order or decree. See, *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986); *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980); *In re Application of Reed*, 152 Neb. 819, 43 N.W.2d 161 (1950).

STANDARD OF REVIEW

In an appeal from a decision in a habeas corpus action involving custody of a child, an appellate 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 appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, *L.G.P. v. Nebraska Dept. of Soc. Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991); *Reynolds v. Green*, 232 Neb. 60, 439 N.W.2d 486 (1989); *Nielsen v. Nielsen, supra.*

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

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

FACTUAL BACKGROUND

On August 4, 1988, Caeli Jones was born to Kristine, age 21, who was married to Clifford Jones. Apparently, Kristine and Clifford were separated at the time of Caeli's birth. Because Kristine was unemployed at that time and financially unable to provide for Caeli, Kristine and Caeli moved into the residence

of Kristine's parents. The marriage between Kristine and Clifford Jones was dissolved in August 1989.

From the moment that Kristine and Caeli moved into the Uhing residence, Ann Uhing, Caeli's grandmother, attended to the child, but generally disagreed with Kristine's methods in rearing Caeli. This disagreement and conflict eventually resulted in Kristine's exclusion from participation in child care for Caeli. Throughout the 1 1/2 years that Kristine lived with the Uhings, she had several part-time jobs; for example, she worked in telemarketing, was a motel reservationist, was employed at St. Luke's Day Care Center, and had a job with First Data Resources. From the age of 16 years, Kristine had suffered anxiety attacks for which she was taking medication to alleviate the problem. In December 1989, Kristine was discharged from her employment at First Data as the result of absenteeism on account of her illness. The differences between Ann Uhing and Kristine concerning Caeli continued and culminated with Ann Uhing's request that Kristine move out of the Uhing residence. Kristine left in January 1990 and was still unable to provide financially for Caeli. For that reason, Caeli remained with her grandparents.

In February 1990, Ann Uhing filed a petition for temporary guardianship. While Ann Uhing's petition for guardianship was pending, Kristine shared an apartment with a girl friend, Tammy Barnes, and Tammy's 3 1/2-year-old daughter, Gina. During this time Kristine attempted to maintain her relationship with Caeli and, on several occasions, asked Ann Uhing for permission to take Caeli shopping or to the zoo and requested that Caeli be allowed to accompany Kristine on a company picnic. Ann Uhing refused to allow such outings, but permitted Kristine to visit Caeli in the Uhing home. In the summer of 1990, Kristine worked in a bar, but later in the year returned to employment with First Data, where she earned a net monthly income of $750. Kristine is a high school graduate and has no history of any arrest, use of drugs, or alcohol problem, and has no psychological or major health difficulty that restricts her activities or which might adversely affect her relationship with Caeli.

Ann Uhing's petition for temporary guardianship was

dismissed on April 5, 1991, "for lack of prosecution." On May 3, Kristine wrote to Ann Uhing and informed her that Kristine was employed and had "adequate housing" for Caeli, whom Kristine wanted to pick up from the Uhing house. When Ann Uhing refused to surrender Caeli, Kristine filed her petition for habeas corpus relief. At the time of the habeas corpus hearing on June 28, Kristine, then 24 years old, shared an apartment with a man named "John Kratina" and had made arrangements for Caeli to attend preschool in the event that she obtained custody of the child.

DISTRICT COURT'S DECISION

At the conclusion of the hearing, the district court remarked:

> I am going to make a finding that it is in the best interest of Caeli that she remain with the respondent at this time.
>
> . . . .
>
> I would anticipate that once the petitioner has established a little bit better track record than what she has in the past, that Caeli would probably be with her.
>
> There is no question that a child should ordinarily be with the natural parent. . . .
>
> . . . .
>
> But I am saying that I think at the present time it is for the best interest of Caeli that her custody remain with the respondent.

The district court then denied habeas corpus relief for return of Caeli to Kristine. Thus, the district court's judgment denying Kristine Uhing custody of her child, Caeli Jones, for an indeterminate period effectively foreclosed the parent-child relationship for an indefinite period, with the practical and very likely effect of eventually dissolving the parent-child relationship between Kristine and Caeli.

ASSIGNMENTS OF ERROR

Kristine Uhing's assignments of error converge in the following: (1) The district court abused its discretion by failing to properly consider Kristine's superior right as Caeli's biological mother, who is fit to have child custody, and (2) the district court abused its discretion in failing to grant habeas corpus relief to Kristine and thereby return Caeli to Kristine.

CONSTITUTIONALLY PROTECTED PARENT-CHILD RELATIONSHIP

Although this court, considering a child custody case, has expressed that the "question present in every habeas corpus case is the best interests of the child," *L.G.P. v. Nebraska Dept. of Soc. Servs.*, 239 Neb. 644, 646, 477 N.W.2d 571, 573 (1991), we cannot overlook or disregard that the "best interests" standard is subject to the overriding recognition that "the relationship between parent and child is constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' " *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed 2d 640 (1981). As the U.S. Supreme Court stated in *Quilloin*, 434 U.S. at 255:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U. S. 816, 862-863 [97 S. Ct. 2094, 53 L. Ed. 2d 14] (1977) (Stewart, J., concurring in judgment).

Cf., *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (parents have fundamental liberty interest in right to teach their children religious beliefs and moral standards); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (the integrity of the family unit is protected by the due process clause of the 14th Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (parents have a fundamental liberty interest in directing the education of their children); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (the parent-child relationship

involves a liberty interest).

Consequently, in the context of a marital dissolution action, we recently stated in *Stuhr v. Stuhr*, 240 Neb. 239, 245, 481 N.W.2d 212, 216 (1992):

> In the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.

A parent's superior right to custody of a child was also recognized in *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980):

> Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
>
> The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
>
> The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). See, also, *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972); *Carlson v. Wivell*, 181 Neb. 877, 152 N.W.2d 98 (1967).

A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. Hence, the parental superior right to child custody

protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (both parents and children in a familial relationship are protected by the U.S. Constitution). Establishment and continuance of the parent-child relationship " 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.' " *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) (quoting from *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979)). See, also, *In re Adoption of A.G.K.*, 728 P.2d 1 (Okla. App. 1986) (a child has a constitutionally protected right in preserving parent-child relationship); *Com., Dept. of Social Services v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989) (a child has a fundamental right in establishment and continuation of the parent-child relationship).

> Accordingly, a court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.

Stuhr v. Stuhr, 240 Neb. at 246, 481 N.W.2d at 217.

"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." *Ritter v. Ritter*, 234 Neb. 203, 210, 450 N.W.2d 204, 210 (1990).

DE NOVO REVIEW

In reaching its decision, the district court proceeded immediately and directly to the question whether Caeli Jones' best interests required that she remain with her grandmother, without consideration and irrespective of Kristine Uhing's maternal fitness in reference to the parental superior right to child custody.

As far back as *Norval v. Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898), a habeas corpus proceeding involving child custody, the court expressed what remains the law of Nebraska concerning preeminence of the parental right to custody of a minor. Annie Norval appealed from denial of her request for habeas corpus relief concerning custody of her young daughters, who were in the custody of their paternal grandfather. The girls' grandparents loved the children and were able to provide somewhat better for the children's material necessities than could Annie Norval. Nothing indicated that Annie Norval, who also loved the children, was unfit to have custody of her daughters. The *Norval* court relied on Comp. Stat. ch. 34, § 6 (1897), which in part provided: "The father and mother are the natural guardians of their minor children, and are equally entitled to their custody . . . ." Insofar as the quoted material is concerned, chapter 34, § 6, is a verbatim predecessor of the current Nebraska statute, Neb. Rev. Stat. § 30-2608 (Reissue 1989). In reversing the district court's refusal to grant habeas corpus relief to Annie Norval, the court stated:

> We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary.

57 Neb. at 161-62, 77 N.W. at 374. Consequently, as a result of *Norval*, the Nebraska rule became, and continues to be: In a parent's habeas corpus proceeding directed at child custody, a court may not deprive a parent of a minor's custody unless it is

affirmatively shown that the parent seeking habeas corpus relief is unfit to perform the parental duties imposed by the parent-child relationship or has legally lost parental rights in the child. See, *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972); *Carlson v. Wivell*, 181 Neb. 877, 152 N.W.2d 98 (1967); *Walker v. Gehring*, 172 Neb. 398, 109 N.W.2d 724 (1961); *Lakey v. Gudgel*, 158 Neb. 116, 62 N.W.2d 525 (1954); *Lung v. Frandsen*, 155 Neb. 255, 51 N.W.2d 623 (1952); *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948). Apparently, the court in *Marcus* felt so strongly about the necessity for a showing of parental unfitness that the court suggested an interesting analogy: If the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code, similarly deficient evidence of parental unfitness in a habeas corpus proceeding prevents a court from granting child custody to one who is a stranger to the parent-child relationship.

Moreover, the fact that a stranger, that is, one outside the immediate family relationship, may be able to provide greater or better financial care or assistance for a child than can a parent is an insufficient basis to deprive a parent of the right to child custody. *In re Interest of Stoppkotte*, 210 Neb. 1, 312 N.W.2d 454 (1981); *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981); *State v. Worrell*, 198 Neb. 507, 253 N.W.2d 843 (1977); *State v. Best*, 173 Neb. 483, 113 N.W.2d 650 (1962); *Young v. Young*, 166 Neb. 532, 89 N.W.2d 763 (1958); *Morehouse v. Morehouse*, 159 Neb. 255, 66 N.W.2d 579 (1954); *Clarke v. Lyon*, 82 Neb. 625, 118 N.W. 472 (1908).

From our de novo review of the record, we conclude that the evidence is insufficient to establish Kristine Uhing is unfit to perform duties imposed by the parent-child relationship and, therefore, that the evidence fails to show that Kristine Uhing is unfit to have custody of Caeli Jones. It is beyond doubt that the district court, in deciding the issue of Caeli Jones' custody, used only the "best interests" standard to resolve the custody question and made no determination concerning Kristine's fitness for the custody of Caeli. Although Caeli's grandparents have commendably assisted Kristine Uhing in caring for Caeli when Kristine was unable to do so, and while it was apparent at

the time of the habeas corpus hearing that Caeli might enjoy some economic advantages or benefit from continued presence in her grandparents' residence, neither of those circumstances, alone or joined with one another, justifies a judicial separation of Kristine from Caeli. Moreover, we revisit and emphasize the words of the U.S. Supreme Court in *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978):

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U. S. 816, 862-863 [97 S. Ct. 2094, 53 L. Ed. 2d 14] (1977) (Stewart, J., concurring in judgment).

Consequently, from our de novo review we conclude that Kristine Uhing has attempted to maintain and nurture a parental relationship with Caeli to the extent that Kristine is a fit and proper person for the care and custody of Caeli. The district court's judgment continuing Ann Uhing's custody of Caeli Jones in derogation of Kristine Uhing's parental right to custody was based solely on Caeli's "best interests," without reference to Kristine Uhing's fitness to have custody of Caeli. For that reason, the district court's judgment effectively forced a breakup of Kristine and Caeli as a family, a dissolution of the parent-child relationship without a showing of Kristine's unfitness toward Caeli. Hence, the district court's action in rejecting Kristine Uhing's superior parental right to custody of Caeli constitutes an abuse of discretion affecting both Kristine's and Caeli's substantial rights resulting from the parent-child relationship. Further, in considering Caeli's best interests under the circumstances, see *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992), and *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990), we conclude that custody of Caeli Jones should have been granted to Kristine Uhing.

Therefore, we reverse the district court's judgment and hereby grant habeas corpus relief to Kristine Uhing concerning Caeli Jones; that is, Kristine Uhing shall have custody of Caeli

Jones in accordance with this opinion.

REVERSED.

CAPORALE, J., not participating.

EUGENE L. ROBOTHAM, ON BEHALF OF HIMSELF AND AS PARENT AND NEXT FRIEND OF MARK LEE ROBOTHAM, A MINOR CHILD, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

488 N.W.2d 533

Filed September 4, 1992. No. S-89-811.

1. **Constitutional Law: Declaratory Judgments: Statutes.** An action to declare a statute unconstitutional is more akin to relief through an equity action than to relief through a law action.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Declaratory Judgments: Appeal and Error.** Where a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to these questions.
4. **Statutes: Due Process: Equal Protection.** In any challenge to a statute under either the Due Process Clause or the Equal Protection Clause, the degree of judicial scrutiny to be focused on the statute is a dispositive question.
5. **Constitutional Law: Statutes: Proof.** Unless laws create suspect classifications or impinge upon constitutionally protected rights, it need only be shown that they bear some rational relationship to a legitimate state purpose.
6. **Constitutional Law: Statutes.** When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate governmental purpose.
7. **Constitutional Law.** Generally, the constitutional right to privacy pertains only to matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.
8. _____. Nebraska does not recognize a right to privacy, based on our Constitution, broader than the narrow federal constitutional right.
9. **Constitutional Law: Statutes.** The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.
10. _____: _____. Statutes which classify by race, alienage, or national origin will be sustained only if they are suitably tailored to serve a compelling state interest.

Likewise, statutes which classify by gender or illegitimacy must be substantially related to, respectively, either a sufficiently important governmental interest or a legitimate state interest.

11. **Constitutional Law: Statutes: Equal Protection.** Where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the Equal Protection Clause requires only a rational means to serve a legitimate end.
12. _____: _____: _____. Under the Nebraska Constitution, in an equal protection challenge under article III, § 18, classifications that do not involve a suspect class or fundamental right are tested for rational basis.
13. _____: _____: _____. The protection of motorcycle riders from serious injury and the concomitant protection of society from the repercussions of such injuries is a legitimate legislative aim.
14. **Constitutional Law: Statutes: Legislature: Intent.** An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature.
15. **Constitutional Law: Statutes.** A severability clause, while it indicates that the Legislature contemplated the possible judicial partitioning of the statute and passed it anyway, is not necessary for severability.
16. **Constitutional Law: Criminal Law: Statutes.** Generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
17. **Criminal Law: Statutes.** A crime and its elements must be so clearly expressed that an ordinary person can intelligently choose in advance what course of conduct he or she may lawfully pursue.
18. **Constitutional Law: Statutes: Proof.** Where a law reaches no constitutionally protected conduct, one challenging the law for vagueness must demonstrate that the law is impermissibly vague in all of its applications.
19. **Administrative Law: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
20. _____: _____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

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

Charles F. Noren and W. Travis Burney for appellant.

Robert M. Spire, Attorney General, Charles E. Lowe, and David Edward Cygan for appellees.

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

HASTINGS, C.J.

Eugene L. Robotham, individually and as parent and next friend of Mark Lee Robotham, his 5-year-old son, brought this action against the State of Nebraska and various officials thereof. Robotham sought a declaration that 1988 Neb. Laws, L.B. 428, was unconstitutional in several respects, and also sought related injunctive relief. The district court found in favor of the State and dismissed Robotham's petition. Robotham now appeals.

An action to declare a statute unconstitutional "is more akin to relief through an equity action than to relief through a law action." *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 657, 477 N.W.2d 577, 581 (1991). " 'In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court . . . .' " *Id.* Where a declaratory judgment action presents questions of law, this court " 'has an obligation to reach its conclusion independent from the conclusion reached by the trial court' " with regard to these questions as well. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 767, 478 N.W.2d 270, 273 (1992).

Robotham is a licensed motorcycle operator, a motorcycle owner, and, by his own description, a "frequent" motorcycle rider. Robotham owns a motorcycle helmet, which he does not wear while riding. Mark Lee Robotham is occasionally a passenger on his father's motorcycle. Robotham has made no attempt to find a helmet to fit his son.

In 1988, the Legislature passed L.B. 428, which is now codified at Neb. Rev. Stat. §§ 39-6,210 to 39-6,214 (Reissue 1988) and Neb. Rev. Stat. § 39-669.26(13) (Reissue 1988) (hereinafter the "helmet law"). The helmet law requires any motorcycle or moped operator or passenger on Nebraska's highways after January 1, 1989, to wear a "protective helmet." § 39-6,211. The helmet law requires the Nebraska Department of Motor Vehicles to publish a noninclusive list of helmets "which meet the requirements of section 39-6,211." § 39-6,212.

The helmet law further provides that "[a]ny person using a protective helmet purchased prior to July 9, 1988, which is labeled to show that it conforms with applicable federal motor vehicle safety standards shall be deemed to be in compliance with section 39-6,211." § 39-6,213. Those persons violating the helmet law "shall be fined fifty dollars." § 39-6,214. "[M]otorcycle or moped protective helmet violations" are not included within the driver's license point system established elsewhere in the rules of the road. § 39-669.26(13).

Robotham's petition alleged several deficiencies in the helmet law under both the U.S. and Nebraska Constitutions: (1) that the helmet law is vague; (2) that the helmet law "deprives Plaintiffs of liberty in the form of their constitutional right to be let alone;" (3) that the helmet law works a taking without just compensation in that it requires Robotham to pay money for a helmet; (4) that the helmet law denies Robotham equal protection of the laws; and (5) that the helmet law improperly delegates legislative authority to the Department of Motor Vehicles. The parties filed cross-motions for partial summary judgment as to all claims except vagueness. The district court granted partial summary judgment in favor of the State. Following a full hearing, the court dismissed the vagueness claim as well, with an additional finding that the helmet law in its entirety was constitutional.

Robotham's first two assignments of error are that the district court erred in finding that the helmet law did not violate due process of law or equal protection. In any challenge to a statute under either the Due Process Clause or the Equal Protection Clause, the degree of judicial scrutiny to be focused on the statute is a "dispositive question." *Dallas v. Stanglin*, 490 U.S. 19, 23, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (Marshall, J., dissenting) (since "[i]f a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down[,] the only critical decision is whether strict scrutiny should be invoked at all"). Robotham argues that a " 'compelling' " state interest is necessary to justify the statute. Brief for appellant at 22. This is the standard of strict scrutiny. However, "[u]nless laws 'create

suspect classifications or impinge upon constitutionally protected rights,' . . . it need only be shown that they bear 'some rational relationship to a legitimate state purpose.' " (Citations omitted.) *Stanglin*, 490 U.S. at 23. See, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (court deciding constitutionality of a statute "must decide, first, whether the [statute in question] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny"); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 149, 465 N.W.2d 453, 458 (1991) (under the due process clause of the Nebraska Constitution, "[w]hen a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate governmental purpose"); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

The threshold questions in addressing Robotham's first two assignments of error are, therefore, (1) whether the helmet law impinges on some fundamental constitutional right, and (2) whether the helmet law creates a suspect classification. If the helmet law implicates neither fundamental rights nor suspect classifications, it must be upheld unless it bears no rational relationship to a legitimate government interest. See, *Stanglin, supra*; *State v. Two IGT Video Poker Games, supra*.

Robotham advances "the right to be let alone," see *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting), which he also calls a right to privacy, as the fundamental right of which the helmet law deprives him. No doubt privacy is a fundamental right. However, there is no authority which would justify characterizing riding a motorcycle on a public highway without a helmet as conduct protected by the limited scope of the constitutional right to privacy.

The constitutional right to privacy—first enunciated as such in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)—pertains only to "matters relating to marriage, procreation, contraception, family relationships,

and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Accord *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) ("[t]his privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing"). See, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (right to privacy extends to marriage); *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (procreation); *Moore v. East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (family); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (child rearing and education). No Nebraska case recognizes a right to privacy, based on our Constitution, broader than the narrow federal constitutional right. See *Schoneweis v. Dando*, 231 Neb. 180, 184, 435 N.W.2d 666, 669 (1989) (right to privacy under Nebraska law is provided exclusively by statute).

The narrow confines of the right to privacy are nowhere better illustrated than in those cases in which the Supreme Court has refused to invoke it. See, *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (right to privacy does not encompass consensual private homosexual sexual activity); *Paris Adult Theatre I v. Slaton, supra* (right to privacy does not encompass watching obscene films in a public theater); *Paul v. Davis, supra* (right to privacy does not protect reputation). The conduct excluded from the scope of privacy protection by these cases is far more "private" than is riding a motorcycle on a public highway.

Put another way, if the right to privacy does not encompass the type of sexual relationships consenting adults have in the privacy of their own homes, *Bowers v. Hardwick, supra*; the type of movies a person may watch, *Paris Adult Theatre I v. Slaton, supra*; or the interest a person has in his or her own good name, *Paul v. Davis, supra*; then it surely does not encompass bareheaded motorcycle riding on a public highway. "There is no place where any such right to be let alone would be less assertible than on a modern highway with cars, trucks, busses and cycles whizzing by at sixty or seventy miles an hour." *Bisenius v. Karns*, 42 Wis. 2d 42, 55, 165 N.W.2d 377, 384

(1969), *appeal dismissed* 395 U.S. 709, 89 S. Ct. 2033, 23 L. Ed. 2d 655. Accord, *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989); *State v. District Court*, 101 Nev. 658, 708 P.2d 1022 (1985); *State v. Albertson*, 93 Idaho 640, 470 P.2d 300 (1970); *State v. Cushman*, 451 S.W.2d 17 (Mo. 1970); *State v. Fetterly*, 254 Or. 47, 456 P.2d 996 (1969).

The right to privacy is not implicated by the helmet law. We may therefore consider the constitutionality of the helmet law under a "rational relationship" analysis unless the helmet law creates some suspect classification.

Where a statute is challenged under the Equal Protection Clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). There are two narrow exceptions to this rule. Statutes which classify by race, alienage, or national origin "will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* Likewise, statutes which classify by gender or illegitimacy must be "substantially related" to, respectively, either "a sufficiently important governmental interest" or "a legitimate state interest." 473 U.S. at 441. In short, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, . . . the Equal Protection Clause requires only a rational means to serve a legitimate end." 473 U.S. at 441-42.

The Nebraska Constitution has identical requirements. In an equal protection challenge under Neb. Const. art. III, § 18, "classifications that do not involve a suspect class or fundamental right are tested for rational basis." *Haman v. Marsh*, 237 Neb. 699, 712, 467 N.W.2d 836, 846 (1991).

Motorcycle ridership is not a classification of race, alienage, or national origin. Therefore, a compelling state interest is not necessary to sustain the helmet law's validity. Nor is motorcycle ridership a classification based upon gender or illegitimacy. A substantial relation to an important or legitimate government interest is therefore not necessary to save the helmet law from Robotham's attack. Motorcycle riders as a group "have

distinguishing characteristics relevant to interests the State has the authority to implement," in that they employ a dangerous mode of transportation on public highways. See *State v. District Court*, 101 Nev. at 661-62, 708 P.2d at 1024 ("[t]he mandatory helmet law is not based on any invidious discrimination such as race, alienage, or religion. Nor is a fundamental right involved"). Therefore, "the Equal Protection Clause requires only a rational means to serve a legitimate end." *Cleburne*, 473 U.S. at 442.

Since the helmet law implicates neither a fundamental right nor a suspect classification, we evaluate Robotham's first two assigned errors by determining whether the law is a rational means to a legitimate end. The statement of purpose in § 1 of L.B. 428 makes clear the ends the Legislature sought to achieve:

> The Legislature hereby finds and declares that head injuries that occur to motorcyclists and moped operators which could be prevented or lessened by the wearing of helmets are a societal problem and that the financial and emotional costs of such injuries cannot be viewed solely on a personal level. It is the intent of the Legislature to prevent injuries and fatalities which occur due to motorcycle and moped accidents and to prevent the subsequent damage to society which results due to the cost of caring for injured people, the pain and suffering which accompanies such injuries and fatalities, and the loss of productive members of society from such injuries.

The Legislature also considered the differences, in potential for injury, between motorcycle accidents and automobile accidents. See Floor Debate, 90th Leg., 2d Sess. 6830-31 (Jan. 7, 1988) (remarks of Senator Nelson: "The severe trauma that follows [motorcycle] accidents, in many cases, is far more severe than what we would find with our common automobile accidents").

The basic premise of Robotham's constitutional attacks is that "[p]ersonal decision making concerning whether or not to wear a protective helmet . . . has no direct impact on anyone except plaintiffs." Brief for appellant at 15. However, the Legislature expressly found that injuries which could be prevented by helmets "are a societal problem and that the

financial and emotional costs of such injuries cannot be viewed solely on a personal level." § 39-6,210.

> From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence.

Simon v. Sargent, 346 F. Supp. 277, 279 (D. Mass. 1972), *aff'd* 409 U.S. 1020, 93 S. Ct. 463, 34 L. Ed. 2d 312 (mem.). Motorcycle helmets also help to prevent accidents by lessening the likelihood that the cyclist will lose control of the cycle after a blow to the head. *Bisenius v. Karns*, 42 Wis. 2d 42, 165 N.W.2d 377 (1969), *appeal dismissed* 395 U.S. 709, 89 S. Ct. 2033, 23 L. Ed. 2d 655; *Everhardt v. City of New Orleans*, 253 La. 285, 217 So. 2d 400 (1968), *appeal dismissed* 395 U.S. 212, 89 S. Ct. 1775, 23 L. Ed. 2d 214 (1969). Moreover, "all users of a highway have . . . a definite interest in how serious are the consequences, not only to themselves but to others, of any accident in which they may become involved," *Bisenius v. Karns*, 42 Wis. 2d at 50, 165 N.W.2d at 381, if for no other reason than that some states, such as Nebraska, are comparative negligence states, see Neb. Rev. Stat. §§ 25-21,185.01 to 25-21,185.06 (Supp. 1991).

Other state appellate courts have also rejected the claim that mandatory helmet laws affect only the private interests of motorcycle riders, and have advanced a number of public interests protected: (1) the prevention of accidents caused by motorcyclists being struck in the head by debris, *State v. Cotton*, 55 Haw. 138, 516 P.2d 709 (1973); *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972); *State v. Beeman*, 25 Ariz. App. 83, 541 P.2d 409 (1975); *Penney v. City of North Little Rock*, 248 Ark. 1158, 455 S.W.2d 132 (1970); *Love v. Bell*, 171 Colo. 27, 465 P.2d 118 (1970); *State v. Albertson*, 93 Idaho 640, 470 P.2d 300 (1970); *City of Wichita v. White*, 205 Kan. 408, 469 P.2d 287 (1970); and *State v. Quinnam*, 367 A.2d 1032 (Me. 1977); (2) the minimization of public expenditures for the care and welfare of seriously injured motorcyclists, *State v. Cotton*,

supra; *State v. Beeman, supra*; *Love v. Bell, supra*; *State v. Brady*, 290 A.2d 322 (Del. Super. 1972); *State v. Eitel*, 227 So. 2d 489 (Fla. 1969); *State v. Albertson, supra*; and *State v. Edwards*, 287 Minn. 83, 177 N.W.2d 40 (1970); and (3) the impact on society—both financial and humanitarian—from the otherwise preventable loss of productive members, *People v Poucher*, 398 Mich. 316, 247 N.W.2d 798 (1976); *Penney v. City of North Little Rock, supra*; and *State v. Cotton, supra*.

The Legislature considered all three of these justifications in enacting the helmet law. See, Transportation Committee Hearing, L.B. 428, 90th Leg., 1st Sess. 3 (Feb. 24, 1987) (remarks of Senator Lynch, introducer: "We should also, when necessary, impose some form of control when misery and unnecessary cost to others is imposed upon society"); *id.* at 8 (unfair to taxpayers to pay medical costs which could be averted with use of helmet); *id.* at 9-11 (economic cost to society of loss of productive members); *id.* at 19 (cost-benefit analysis would support helmet law); Floor Debate, 90th Leg., 2d Sess. 6828 (Jan. 7, 1988) (remarks of Senator Wesely: motorcycle injuries and fatalities affect family members of killed or injured motorcyclists and affect society through increased insurance and medical costs); *id.* at 6829 (remarks of Senator Lynch: helmet law would save taxpayers between $7 and $11 million); *id.* at 6830 (remarks of Senator Hefner: "[I]f we can save lives, if we can save tax dollars, well then I think it is our responsibility to pass this law"); *id.* at 6831 (remarks of Senator Nelson: cost of motorcycle injuries is borne largely by taxpayers, as 75 to 90 percent of victims are uninsured); *id.* at 6846-47 (remarks of Senator Lynch: large proportion of motorcycle riders are underinsured or uninsured). The helmet law is rationally related to the Legislature's goals in the same way that similar legislation upheld by other courts was related to legislative goals.

Moreover, differences between motorcycle riders as a class and other highway users justify the disparate treatment Robotham claims the helmet law imposes upon motorcyclists, as opposed to other motorists. "There are differences in the physical characteristics of automobiles and motorcycles. Differences in the handling and operation of motorcycles

require different skills and produce different consequences should an accident occur." *State v. District Court*, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985). "[A] motorcycle provides much less protection and stability for its operator than an enclosed four-wheeled motor vehicle[,] and . . . the speed and power capability of a motorcycle is far greater than that of an unmotorized bicycle." *State v. Quinnam*, 367 A.2d at 1033. "The motorcycle driver is in a particularly exposed position without a windshield to protect him, and a two-wheeled vehicle is necessarily less stable than a motor vehicle with four wheels." *Love v. Bell*, 171 Colo. at 36, 465 P.2d at 123. "The operator of a motorcycle has considerably less body protection than operators of enclosed vehicles and is more susceptible to be injured and cause other injuries." *Everhardt v. City of New Orleans*, 253 La. 285, 294, 217 So. 2d 400, 403 (1968), *appeal dismissed* 395 U.S. 212, 89 S. Ct. 1775, 23 L. Ed. 2d 214 (1969).

The protection of motorcycle riders from serious injury and the concomitant protection of society from the repercussions of such injuries is a legitimate legislative aim. The sole question remaining is whether the helmet law is rationally related to these aims.

In *Simon v. Sargent*, 346 F.Supp. 277 (D. Mass. 1972), *aff'd* 409 U.S. 1020, 93 S. Ct. 463, 34 L. Ed. 2d 312 (mem.); *Bisenius v. Karns*, 42 Wis.2d 42, 165 N.W.2d 377 (1969), *appeal dismissed* 395 U.S. 709, 89 S. Ct. 2033, 23 L. Ed. 2d 655; and *Everhardt v. City of New Orleans, supra*, the U.S. Supreme Court summarily considered the very same constitutional challenge to mandatory helmet legislation that Robotham raises here. Summary dispositions by the Supreme Court are binding constitutional authority: "[T]he lower courts are bound by summary decisions by this Court ' "until such time as the Court informs [them] that [they] are not." ' " *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). See, *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986); 28 U.S.C.A. § 1257 (West 1988), Commentary on 1988 Revision ("[u]nlike a denial of certiorari, which the Court has made clear is not to be taken as any kind of approval of the result reached below on the merits, a summary affirmance of an appealed

case, or its dismissal for want of a substantial federal question . . . is . . . a decision approving the merits"). Therefore, since in each of these cases the court found that a mandatory helmet law is a reasonable exercise of legislative power, the Supreme Court's summary dispositions confirm that position.

The ends of protecting society from the extra economic costs incurred because of injuries to motorcycle riders, and of preventing the other impacts on society of unnecessarily severe motorcycle accidents, are permissible goals for legislation. The helmet law is a rational means to those ends. Therefore, the helmet law violates neither due process nor equal protection under either the Nebraska Constitution or the federal Constitution.

Robotham's next assignment of error is that the district court erred in finding that the helmet law is not unconstitutionally vague. Before addressing Robotham's vagueness claims, we must first address the effect of federal law upon the helmet law.

The federal Department of Transportation has, pursuant to the direction of Congress, promulgated regulations governing "all helmets designed for use by motorcyclists and other motor vehicle users." 49 C.F.R. § 571.218, S3 (1991). See 15 U.S.C. § 1381 et seq. (1988). Congress intended that the federal standards for motorcycle helmets supersede any state standards which are not identical. See 15 U.S.C. § 1392(d) ("[w]henever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard"). A state may promulgate and enforce motorcycle helmet standards only if the state standards are identical to those promulgated by the Department of Transportation. *Id.*

Federal law, so long as it is promulgated within Congress' constitutionally enumerated powers, "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The clear mandate of the Supremacy Clause is that "the Judges in every State shall be bound" by federal law, "any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding." *Id.* See, *Chisom v. Roemer*, ____ U.S. ____, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (election system mandated by state constitution held invalid under federal Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 et seq. (1988), and Supremacy Clause); *Dietz v. State of Ark.*, 709 F. Supp. 902 (E.D. Ark. 1989) (amendments to state constitution purporting to repudiate U.S. Supreme Court's desegregation decisions held invalid under those decisions and Supremacy Clause). Therefore, since Congress declared its intent that federal motorcycle helmet regulations supersede any inconsistent state regulations, it is necessary to read the helmet law as limited by the federal regulations.

Federal law neither requires the state to mandate nor prohibits the state from mandating the use of helmets—"it merely sets standards for 'helmets designed for use by motorcyclists . . . .' " *Com. v. Guest*, 12 Mass. App. 941, 425 N.E.2d 779, 780 (1981) (quoting 49 C.F.R. § 571.218). The Supremacy Clause requires only that the helmet law be consistent with the federal regulations as to the performance and safety requirements for motorcycle helmets themselves. We must therefore compare the substantive requirements of the helmet law to those of 49 C.F.R. § 571.218 to determine whether there are any inconsistencies.

The helmet law requires a "protective helmet of the type and design manufactured for use by operators of [motorcycles and mopeds]," which must be "secured properly on [the rider's] head with a chin strap while the vehicle is in motion." § 39-6,211. This helmet must "be designed to reduce injuries to the user resulting from head impacts and shall be designed to protect the user by remaining on the user's head, deflecting blows, resisting penetration, and spreading the force of impact." *Id.* The helmet must "consist of lining, padding, visor, and chin strap." *Id.* The federal regulations require helmets to meet certain standards with regard to impact attenuation, protection against penetration, and retention systems, and outline testing conditions and procedures to be used. 49 C.F.R. § 571.218, S5-7.

The helmet law differs from the federal regulations only in

that it requires helmets to have a chinstrap and a visor. The chinstrap requirement of the helmet law is the equivalent of the "retention system" required by the federal regulations. Compare § 39-6,211 with 49 C.F.R. § 571.218, S5.3. However, there is no federal counterpart to the visor required by the helmet law. Therefore, the helmet law fails under the Supremacy Clause unless the visor requirement can be severed. See 15 U.S.C. § 1392(d); 49 C.F.R. § 571.218.

An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature. *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991). A severability clause, while it indicates that the Legislature contemplated the possible judicial partitioning of the statute and passed it anyway, is not necessary. *Id.*

The helmet law is still a workable statutory scheme even if the visor requirement is deleted. The rest of the helmet law can be enforced with the same ease whether the visor requirement is included or stricken. The legislative history nowhere discusses the visor requirement, making it clear that it was not an inducement to passage. Finally, as discussed at length above, the intent of the Legislature was to prevent head injuries and their attendant social cost. Severing the visor requirement does no violence to that intent. The visor requirement may therefore properly be severed from the rest of the helmet law.

We must therefore determine whether the helmet law, as limited by federal law, is unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Accord *State v. Pierson*, 239 Neb. 350, 353, 476 N.W.2d 544, 547 (1991) ("[a] crime and its elements must be so clearly expressed that an

ordinary person can intelligently choose in advance what course of conduct he may lawfully pursue"). Where a law reaches no constitutionally protected conduct, one challenging the law for vagueness "must demonstrate that the law is impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Accord *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). Moreover, this court must also "consider any limiting construction that [an] enforcement agency has proffered." *Kolender v. Lawson*, 461 U.S. at 355 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, supra*). Such a construction may save an otherwise facially vague statute.

Robotham's claims that the helmet law violates his constitutional rights to due process and equal protection are without merit, and the helmet law therefore reaches no constitutionally protected conduct. Robotham must show that in all its applications, the helmet law is drawn such that ordinary people cannot understand what is prohibited, and such that arbitrary and discriminatory enforcement is encouraged. Furthermore, Robotham must show that regardless of what appears on the face of the statute, no limiting construction has been placed on the law by the enforcement arms of the State which would clarify the law such that it is not vague.

Robotham contends that *Kolender v. Lawson* limits the "vague in all of its applications" stricture to economic legislation and prohibits its application to penal statutes. This contention fails for two reasons. First, *Kolender v. Lawson* involved a statute which *did* reach constitutionally protected conduct and therefore was beyond the scope of the "vague in all of its applications" rule. See *id.* (challenged statute implicated First Amendment liberties and constitutional right to freedom of movement). Second, this court has already considered the question of whether *Kolender v. Lawson* places some limitation on the "vague in all its applications" rule, and has determined that it does not. See *Midwest Messenger Assn. v. Spire, supra*. Robotham is raising an argument identical to the one this court previously rejected.

Furthermore, the helmet law requires the Department of Motor Vehicles to fashion a limiting construction. Section 39-6,212 requires the Department of Motor Vehicles to "publish a list of approved protective helmets which meet the requirements of section 39-6,211." The list, while noninclusive, enumerates helmets which, if worn, bring the wearer into compliance with the helmet law. § 39-6,212. This court must consider the list alongside the text of the statute in evaluating Robotham's vagueness claim. See *Boos v. Barry*, 485 U.S. 312, 329, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) ("we consider the actual text of the statute as well as any limiting constructions that have been developed").

The Department of Motor Vehicles has in fact published a list enumerating 41 models of helmet from 15 different manufacturers. According to the list, these helmets constitute "DOT approved helmets," and, furthermore, "[a]ll Department of Transportation (DOT) approved motorcycle helmets meet the requirements of the Nebraska Helmet Law." Elsewhere, the list states:

> All helmets manufactured after October 3, 1988, must have the "DOT" sticker on the outside back of the helmet. [A drawing showing the "DOT" symbol on a typical helmet appears on the list.] This symbol is the way the manufacturer certifies that the helmet meets the U. S. Department of Transportation's standard for safety helmets. Helmets manufactured prior to October 3, 1988, which are "DOT" approved meet the requirements of Nebraska law. . . . [T]he Department of Transportation's standard is the only one the helmet is required by law to meet.

The list makes it clear what helmets can be worn in order to comply with the helmet law. Taking the list as a limiting construction to be read alongside the helmet law, the law is not vague in all its applications. Put another way, there are at least 41 courses of conduct—the number of helmets on the approved list—which would assure an individual motorcycle rider or passenger that he or she will not be prosecuted. The rider or passenger need simply wear a helmet on the Department of Motor Vehicles' list while riding.

The list acts as a limiting construction of the law by enumerating some of those helmets which meet the allegedly vague criteria of the statute itself. We do not decide whether the actual text of the helmet law, taken alone, is vague. Taken together, the helmet law and the list are not vague.

Under the guise of a vagueness attack, Robotham further argues that the federal regulations at the time the helmet law was enacted did not cover all motorcycle helmets and that therefore the helmet law is vague in its application to helmets falling outside the federal regulatory reach. This argument fails for two reasons.

First, it does not really raise the issue of vagueness. Robotham's attack on the helmet law is not that it is unclear what helmets meet its standards—it is that those helmets do not fit him and his son. While a statute that required motorcyclists to wear helmets of a particular size might have constitutional infirmities—it is difficult to conceive of a legitimate state purpose that is served by, in effect, requiring motorcyclists to have a particular size of head—vagueness is not among them.

Second, in 1988 the federal regulations were amended to include all sizes of helmet. See, 49 C.F.R. § 571.218, S3; Motorcycle Helmet Safety Standards, 53 Fed. Reg. 11,280 (1988). Therefore, the federal regulations in effect at the time of Robotham's suit covered all sizes of motorcycle helmet. Whatever sort of argument Robotham is attempting, the 1988 amendments to 49 C.F.R. § 571.218 render it moot.

Robotham's final assignment of error is that the helmet law improperly delegates legislative authority to the Department of Motor Vehicles, in violation of article III, § 1, of the Nebraska Constitution. The allegedly improper delegation stems from § 39-6,212, which requires the department to make a list of helmets meeting the standards established under the helmet law. Robotham claims that this constitutes a delegation to the department of the authority to define the elements of a crime.

Robotham admits that the list required under § 39-6,212 is to be noninclusive. He therefore implicitly admits that the department is not so much defining what conduct constitutes a crime as it is enumerating—without exclusion—courses of conduct that do *not* constitute a crime. He argues that since the

standards for certification of helmets are technical, and since testing of helmets requires specialized expertise and equipment, the list promulgated by the department is, in effect, inclusive, since ordinary citizens cannot themselves be expected to test helmets which are not on the list.

Robotham ignores the requirement of the federal regulations that manufacturers certify that their helmets comply with the federal standards by applying a permanent label reading "DOT." See 49 C.F.R. § 571.218, S5.6.1(e). Therefore, if, for some unfathomable reason, a person is unable (or unwilling) to buy a helmet on the department's list, he or she can still avoid committing a crime by buying any motorcycle helmet which is labeled "DOT" by the manufacturer. Since the list required by § 39-6,212 is noninclusive, the section does not delegate to the Department of Motor Vehicles the authority to define the essential elements of a crime.

"There is no doubt that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute." *State ex rel. Spire v. Stodola*, 228 Neb. 107, 109, 421 N.W.2d 436, 438 (1988). Here, the Legislature has done precisely that: § 39-6,212 gives the Department of Motor Vehicles the power to promulgate a regulation—the list—to facilitate the wearing of helmets which comply with the other sections of the helmet law. "In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated." *Stodola*, 228 Neb. at 110, 421 N.W.2d at 438. Section 39-6,212 does not give the department the power to alter or deviate from the standards found elsewhere in the helmet law, and the list which was actually promulgated does not indicate that the department did so. Robotham's final assignment of error is without merit.

All Robotham's assignments of error are without merit. The helmet law's only constitutional deficiency is that its visor requirement is in direct conflict with supreme federal law. The visor requirement is, however, properly severable from the remainder of the helmet law. We therefore hold that the helmet law is constitutional with the visor requirement severed. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. 1987 JEEP WAGONEER VIN 1JCMT7543HT161853, APPELLEE, ENZO FLORIDIA, INTERESTED PARTY, APPELLANT, CHRYSLER CREDIT CORPORATION, INTERESTED PARTY, APPELLEE.

488 N.W.2d 546

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1. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor.
2. **Intent: Words and Phrases.** The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident.
3. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion before a tribunal having jurisdiction to determine it.
4. _____. A constitutional question should be raised at the earliest opportunity.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
6. **Trial: Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.

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

James Martin Davis for appellant.

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

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

FAHRNBRUCH, J.

Enzo Floridia appeals a district court order forfeiting to the State the 1987 Jeep Wagoneer VIN 1JCMT7543HT161853 he was driving when Omaha police stopped him and found cocaine in a plastic baggie in the left front pocket of his pants. We affirm the judgment of the district court for Douglas County.

In executing a search warrant of Floridia's person, a police

officer found 3.3 grams of cocaine on Floridia. The evidence reflects that 3.3 grams is equivalent to one-eighth of an ounce, which, in street terms, is referred to as an "eight ball." Floridia testified that the cost of cocaine was about $100 per gram. An officer testified that an eight ball is a quantity that is normally bought and sold.

The trial court found that the Wagoneer was used to transport cocaine with intent to deliver and that such use subjected the vehicle to forfeiture under Neb. Rev. Stat. § 28-431 (Reissue 1989). The court ordered that the Wagoneer be placed in official use by the Omaha Police Division for up to 1 year and by other law enforcement agencies for up to 1 additional year. The court also ordered that when there was no further official use for the Wagoneer or at the conclusion of 2 years, whichever was sooner, the Wagoneer should be sold. The proceeds of the sale were ordered paid to the Douglas County treasurer, and the court ordered that from those proceeds Chrysler Credit Corporation should be paid the amount of its $1,913.35 lien, plus interest to the date of payment. The parties stipulated that Chrysler Credit Corporation had acquired its lien in good faith, that it had not used the vehicle in violation of the law, and that it had no knowledge that the vehicle was being or would be used in violation of the law.

Floridia testified that he had never sold cocaine. He said he purchased for his own use the cocaine police seized from him. Ten days before the execution of the search warrant, law enforcement officers seized garbage at the curb in front of Floridia's Omaha residence. During an inventory of the garbage, a handwritten note was found. On the front of the note was the name "Enzo," and on the back were the words "Would it be possible to get me a '8' ball in the *very near future* call me." A second handwritten note, contained in an envelope addressed to "Enzo," was from Stephanie Nelson, Floridia's live-in fiancee. This note, which was also found in the garbage seized in front of Floridia's home, states: "Enzo, I sold the rest above the stereo. I didn't want it around. I will talk to you in the morning. Stephanie."

During the execution of a search warrant at the defendant's residence shortly before Floridia was stopped, police found a

Playboy magazine. Square pieces of paper were cut from pages of the magazine in a manner consistent with those pieces used for making cocaine packets, commonly referred to as "snow seals." Above Floridia's stereo, police seized a glass mirror, a razor blade, a grinder, and a sifter, all of which appeared to have cocaine residue on them. Also found in Floridia's home were baggies, white residue, some straws with residue, and some manufactured items, one of which was a snorting instrument that carried the name "Hooter." An officer working in the Omaha Police Division's narcotics unit testified that a grinder is used to "break up chunks of cocaine and help it mix in with cutting agents. It's then sifted through a screen and the grinder." The officer testified that in his contacts with users of cocaine he had never found a grinder, but that he had frequently found a grinder when he had come in contact with individuals who sell cocaine.

The district court for Douglas County found that at the time it was seized, the Wagoneer was being used in violation of § 28-431, which in relevant part provides:

> (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer and the same shall be subject to forfeiture . . . . (f) all conveyances including, but not limited to . . . vehicles . . . which are used, or intended for use, in *transporting* any controlled substance with intent to manufacture, distribute, *deliver*, dispense, export, or import such controlled substance in violation of [Nebraska's drugs and narcotics law, Neb. Rev. Stat. ch. 28, art. 4 (Reissue 1989)].

(Emphasis supplied.)

The trial court found that the Wagoneer "was used for transporting cocaine with the intent to deliver in violation of §28-416 Neb. Rev. Stat '43, Reissue 1985" and that "the use occurred in Douglas County, Nebraska." After the close of all the evidence and after closing arguments, the following exchange took place:

> [Floridia's counsel]: I would like to object to this forfeiture statute in question because it places the burden of proof on the defendant in this case, and I think

constitutionally that is defective. So that's just for the record.

[The Court]: The trial which you participated in has been completed before we have heard that. That objection is overruled.

In his appeal to this court, Floridia assigns as error (1) that the evidence was insufficient to support a finding that Floridia violated § 28-431 and (2) that the district court erred as a matter of constitutional law by placing the burden of proof upon Floridia and not upon the State.

We have held that § 28-431 is criminal in character. *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989). In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

Section 28-431(4) requires the State to prove beyond a reasonable doubt that the property was used in violation of chapter 28, article 4. Floridia argues that at the time of the vehicle's seizure, there was no indication regarding his *intent* to "manufacture, distribute, deliver, dispense, export, or import" the cocaine in violation of § 28-431(1)(f).

The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992).

A search of Floridia's home revealed an extensive collection of drug paraphernalia, including a grinder. A police officer testified that he had never seen a grinder in the possession of one who merely uses cocaine, but that it is a frequent occurrence to find one in the possession of a seller of cocaine. A fact finder could infer that a note written by Floridia's fiancee and an unsigned note both indicate Floridia was involved in the sale of cocaine. From the evidence adduced by the State and the reasonable inferences which could be drawn from the evidence, a fact finder could find beyond a reasonable doubt that Floridia

had cocaine in his possession while driving the Wagoneer and that he had the requisite intent to deliver the cocaine in violation of § 28-431(1)(f). Floridia's first assignment of error is without merit.

We need not substantively address Floridia's second assignment of error because it was not properly raised in the trial court. The trial had been completed when Floridia objected to the constitutionality of the forfeiture statute. That was too late. It is well settled that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion before a tribunal having jurisdiction to determine it. *ConAgra, Inc. v. Cargill, Inc.*, 223 Neb. 92, 388 N.W.2d 458 (1986). A constitutional question should be raised at the earliest opportunity. *Id.* Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Dixon, supra.*

In its memorandum, the trial court found that if Floridia had contemplated that the seized cocaine was only for his personal use, he had the opportunity to leave it at his home, but having arrived at home after he purchased the cocaine, he departed with the 3.3 grams and "actually gives no coherent explanation of the further transport." The court further found, "The other evidence of dealing or delivering is strong and unrefuted as I observed the witnesses, and I have no difficulty in concluding that the concaine [sic] was being transported for delivery as that term is defined for these purposes." From the court's memorandum, it is obvious that the trial court relied upon the State's evidence in finding that Floridia's Wagoneer should be forfeited to the State.

Because the constitutionality of the forfeiture statute is not properly before us, and because it is apparent that the court relied upon the State's evidence to forfeit Floridia's Wagoneer, we need not discuss further Floridia's second assignment of

error.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF HERMAN J. SEIDLER, DECEASED. JAMES E. ACKERMAN, APPELLANT, V. GLORIA J. TOEDTLI, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN J. SEIDLER, DECEASED, APPELLEE.

490 N.W.2d 453

Filed September 4, 1992. Nos. S-89-1180, S-89-1181.

1. **Jurisdiction: Final Orders: Appeal and Error.** Generally, appellate jurisdiction is limited to a review of final orders.
2. **Courts: Jurisdiction: Appeal and Error.** A higher appellate court cannot obtain jurisdiction of an appeal when a district court, acting in its appellate capacity, fails to obtain jurisdiction of an appeal from a trial court.
3. **Wills: Words and Phrases.** By statutory definition, a will means any instrument, including any codicil or other testamentary instrument complying with Neb. Rev. Stat. §§ 30-2326 to 30-2338 (Reissue 1989), which disposes of personal or real property, appoints a personal representative, conservator, guardian, or trustee, revokes or revises an earlier executed testamentary instrument, or encompasses any one or more of such objects or purposes.
4. **Constitutional Law: Due Process: Notice: Time.** An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if, with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied.
5. **Notice.** Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained.
6. **Plea in Abatement: Actions.** A plea in abatement may be filed when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief.
7. **Decedents' Estates: Final Orders: Appeal and Error.** A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1989) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902

(Reissue 1989) and therefore is a final order and is appealable, even though it may not terminate the action or constitute a final disposition of the case.

8. **Trial: Appeal and Error.** Issues not properly presented to and passed upon by a trial court may not be raised on appeal.
9. **Decedents' Estates: Appeal and Error.** Cause for removal of a personal representative exists when removal would be in the best interests of the estate, or if it is shown that a personal representative intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.
10. **Decedents' Estates: Claims: Time.** The failure to pay claims within the time limited by the court is not cause for removal of a personal representative when there are no funds with which to pay the claims, unless it appears that absent neglect on the part of the personal representative, funds would have been available.
11. **Decedents' Estates.** Cause for removal of a personal representative exists when the personal representative fails to follow the court's progression order, fails to pay federal taxes, and fails to provide a proposed distribution plan.

Appeal from the District Court for Box Butte County, ROBERT R. MORAN, Judge, on appeal thereto from the County Court for Box Butte County, GLEN A. FIEBIG, Judge. Judgment of District Court in No. S-89-1180 affirmed. Appeal in No. S-89-1181 dismissed.

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, for appellant.

Alan Curtiss and, on brief, Harry R. Meister, of Meister & Segrist, for appellee.

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

FAHRNBRUCH, J.

This opinion involves two appeals which were consolidated for argument in this court. A notice of appeal in each case was filed on September 11, 1989.

In case No. S-89-1181, James E. Ackerman, a grandson of the decedent herein, in sum, appeals the affirmation by the district court for Box Butte County of the county court's (1) nunc pro tunc ruling admitting to probate a March 14, 1980, will and a January 12, 1985, codicil to that will, both of which

undisputedly had been executed by the decedent, Herman J. Seidler, and (2) dismissal of the grandson's 1988 petition for formal probate of Seidler's 1980 will without the 1985 codicil.

In case No. S-89-1180, Ackerman, in sum, appeals the district court's affirmation of the Box Butte County Court's (1) denial of the grandson's motion to vacate the county court's order admitting to probate Seidler's 1985 codicil, (2) denial of the grandson's motion to vacate its order admitting to probate Seidler's 1985 codicil, and (3) denial of the grandson's motion to remove his mother, Gloria J. Toedtli, as personal representative of Seidler's estate.

These appeals come to us in a procedural morass. Nevertheless, we will review the probate proceedings for error appearing on the record. See *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

When he died, Seidler owned land in Sheridan County, Nebraska, of which 640 acres were meadowland and 2,140 acres were rangeland.

It is undisputed that Seidler executed a will on March 14, 1980. He left all of his estate in equal shares to his daughter, Gloria Toedtli, and to his five grandchildren: the appellant, James Ackerman; Herman Ackerman; Polly Ackerman; Jeremy Toedtli; and Hank Toedtli.

On January 12, 1985, Seidler executed a codicil to his 1980 will. In the codicil he provided that his daughter would receive a life interest in the estate pursuant to a testamentary trust and that his five grandchildren would each receive an equal interest in the remainder.

Seidler died February 13, 1986, at the age of 89. It developed that he left an estate valued at $266,647.24. On November 19, 1986, Gloria Toedtli filed a petition in the Box Butte county court to admit Seidler's *1980 will and his 1985 codicil* to probate and to appoint her as personal representative of Seidler's estate. Attached to the petition was a copy of Seidler's 1980 will and the original of the 1985 codicil. The petition alleged that the original will had been lost. According to an affidavit of Toedtli's attorney, filed with the county court on December 11, 1986, notice of the probate hearing scheduled to be held on December 15, 1986, was sent on December 1, 1986, to all

interested parties, including Seidler's five grandchildren and specifically including the appellant. The notice of probate was published in The Alliance Daily Times-Herald, a legal daily newspaper, on November 26, December 6, and December 10, 1986. The record reflects that at the time the notice was mailed to Ackerman, he lived at Long Lake Route, Alliance, Nebraska 69301.

The notice stated:

> "Estate of Herman J. Seidler, deceased. Notice is hereby given that a Petition for Formal Probate of *Will* of said deceased, Determination of Heirs, and Appointment of Gloria J. Toedtli as Personal Representative has been filed and is set for hearing in the Box Butte County, Nebraska Court on December 15, 1986 at 10:00 o'clock a.m."

(Emphasis supplied.)

At the December 15 hearing in county court, it was determined that the original of the 1980 will could not be found. One of the signatory witnesses to the original will identified a copy as being the will executed by Seidler in 1980.

There was no opposition to the petition at the December 15, 1986, hearing. The county court admitted to probate the copy of the 1980 will as Seidler's will and the 1985 codicil to the 1980 will. Toedtli was appointed personal representative. Letters naming Toedtli as personal representative were issued January 12, 1987. The letters recited, in part, that

> on December 15, 1986, Gloria J. Toedtli was appointed and qualified as Personal Representative of the above named Decedent [Seidler] by this Court or its Registrar, with all the authority granted to a personal representative by law;
>
> NOW THEREFORE, these Letters are issued as evidence of such appointment and qualifications and authority of Gloria J. Toedtli to do and perform all acts which may be required by law.

The letters were signed by the Box Butte county judge and filed with the clerk of the county court on January 12, 1987. On November 8, 1988, nearly 2 years later, the appellant filed a petition in the Box Butte County Court for formal probate of Seidler's 1980 will, but *not* his 1985 codicil. Ackerman claimed

that he had never received a notice of probate concerning the decedent except for the petition for formal probate of the *will* filed by Toedtli and that no hearing was ever held, no findings ever made, and no order ever entered pursuant to the previously filed petition of Toedtli. The appellant claimed that the personal representative letters issued on January 12, 1987, were void because no order was ever entered appointing Toedtli as personal representative. Ackerman also claimed that the codicil dated January 12, 1985, was not valid because it was executed when Seidler was not of sound mind and memory and was under the undue influence of his daughter, Toedtli.

In his petition for the probate of Seidler's will, the appellant nominated himself as personal representative and claimed that the will executed on March 14, 1980, was the last will of Seidler.

Toedtli objected to the appellant's petition and alleged in her answer that the 1980 will and 1985 codicil *were* admitted into probate on December 15, 1986, but that the formal order of the court entered that day was inadvertently not journalized or presented to the court for signing and filing. Toedtli filed a motion for an order nunc pro tunc to correct the error and to journalize and file the order entered on December 15, 1986.

On January 11, 1989, the appellant moved the Box Butte County Court to remove his mother as personal representative of Seidler's estate—in the event that she was found to have been validly appointed pursuant to her petition—on the grounds of "failure to file an inventory within two months of her alleged appointment," as required by Neb. Rev. Stat. § 30-2467 (Reissue 1989), and her "failure to cause inheritance tax to be determined within twelve months of February 13, 1986 [the date of Seidler's death]," as required by Neb. Rev. Stat. § 77-2012 (Reissue 1990). We note that § 77-2012 does not require inheritance tax to be paid within 12 months of the death of a decedent, but Neb. Rev. Stat. § 77-2010 (Reissue 1990) does. We will assess the personal representative's acts in regard to inheritance tax under § 77-2010.

On February 17, 1989, after an evidentiary hearing, the county court dismissed the appellant's petition for formal probate of the 1980 will and sustained the motion for an order nunc pro tunc as requested by Toedtli. Following the hearing,

the appellant's motion to remove his mother as personal representative was taken under advisement. The nunc pro tunc order dated February 17, 1989, admitting the 1980 will and the 1985 codicil to formal probate was filed in the county court on March 6, 1989, and recites that "*this Order re[f]lects the findings and Order of the Court on December 15, 1986.*" (Emphasis supplied.)

APPEAL OF THE FEBRUARY 17, 1989, ORDER

In case No. S-89-1181, the appellant, on March 13, 1989, filed a notice of appeal to the district court regarding the February 17, 1989, county court order dismissing his petition and sustaining Toedtli's motion for an order nunc pro tunc. Because the Box Butte County Court reserved ruling on the removal of the personal representative, Ackerman's appeal was premature. When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). Generally, appellate jurisdiction is limited to a review of final orders. See *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991). Since there had been no final order in regard to all the issues submitted to the county court, Ackerman's appeal in case No. S-89-1181 was not properly before the district court and, therefore, is not properly before this court. A higher appellate court cannot obtain jurisdiction of an appeal when a district court, acting in its appellate capacity, fails to obtain jurisdiction of an appeal from a trial court. See *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990).

MOTION TO VACATE THE DECEMBER 15, 1986, ORDER

In case No. S-89-1180, Ackerman filed a motion in the county court on March 27, 1989, to vacate its order of December 15, 1986, admitting Seidler's 1985 codicil to probate. The motion was timely, since the order admitting the codicil to probate was not final until it was journalized pursuant to the

nunc pro tunc order on February 17, 1989. A valid petition to vacate an order admitting a codicil to probate must be filed within 12 months after the *entry of the order* sought to be vacated. See Neb. Rev. Stat. § 30-2436(3)(iii) (Reissue 1989). Neb. Rev. Stat. § 30-2209(53) (Reissue 1989) defines a will to include a codicil. *Entry* of a *judgment* is the court clerk's act of spreading the proceedings had and the relief granted or denied on the journal of the court. Neb. Rev. Stat. § 25-1301(3) (Reissue 1989).

However, the motion to vacate was not valid. A formal testacy order is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and as to the determination of heirs. § 30-2436. The court shall entertain a petition for vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will *were unaware of the earlier proceeding* and *were given no notice thereof* except by publication. § 30-2436(1). The same rule applies when the same will is offered for probate by a second proponent.

The record reflects that Ackerman not only received notice by publication, but that he received notice of the December 15, 1986, hearing by U.S. mail. Ackerman admitted that he was aware of the December 15, 1986, hearing. He argued in various motions and pleadings that he was not aware that the *codicil* was being offered for probate because the notice of the hearing revealed only that the *will* was being offered. This argument fails under scrutiny of statutory and constitutional requirements regarding notice and in light of the notices the appellant received.

By statutory definition, a

> [w]ill means any instrument, *including any codicil* or other testamentary instrument complying with sections 30-2326 to 30-2338, which disposes of personal or real property, appoints a personal representative, conservator, guardian, or trustee, revokes or revises an earlier executed testamentary instrument, or encompasses any one or more of such objects or purposes.

(Emphasis supplied.) § 30-2209(53). Clearly, a codicil is included in the definition of a will. The statutory requirements for notice of a formal testacy proceeding are that notice of the time and place of hearing of any *petition* is to be given to any interested person. Neb. Rev. Stat. §§ 30-2427 (Reissue 1985) and 30-2220 (Reissue 1989). "Notice shall be given to . . . heirs of the decedent, the devisees and executors named *in any will* that is being, or has been, probated, or offered for informal or formal probate in the county . . . ." (Emphasis supplied.) § 30-2427(a). There is no statutory requirement that the interested parties be notified as to the content or date of execution of the document or documents offered for probate. The statutory requirement is for notice that there is a petition to probate the estate. The notice herein was not statutorily insufficient.

Nor did the notice given fall short of constitutional due process requirements.

> The criterion for a constitutionally sufficient notice is found in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 94 L. Ed. 865 (1950): "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated*, under all the circumstances, *to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections* . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

(Emphasis supplied.) *In re Appeal of Levos*, 214 Neb. 507, 511-12, 335 N.W.2d 262, 266 (1983).

Had the appellant exercised due diligence when he received notice of the hearing in regard to the probate of Seidler's will, at the very least he should have inquired as to his status as a beneficiary of the will for which he did receive notice. Upon inquiry, he would have learned of the existence of the codicil.

The appellant was given notice of the pendency of the action, and he was given the opportunity to present his objection at the December 15, 1986, court hearing. Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985). As the district court said in its decision on appeal, "The notice was sufficient for an interested person to go to the county court to see what was proposed as the decedent's last will."

The appellant apparently chose not to inquire as to the specific subject matter of the hearing for which he received adequate notice. However, he is charged with knowledge of all of the facts he might have obtained had he only asked.

Because the appellant is charged with being fully aware of the scheduled December 15, 1986, hearing, and even though he failed to attend it, he is not statutorily entitled to have the county court vacate its order of December 15, admitting the decedent's will and codicil to probate.

Toedtli filed a plea in abatement in response to the appellant's motion to vacate. A plea in abatement may be filed when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief. *Kash v. McDermott & Miller*, 221 Neb. 297, 376 N.W.2d 558 (1985). As there was no other action pending regarding the issues raised in the motion to vacate, a plea in abatement was not a proper response. However, in light of our ruling that the appellant's motion to vacate had no merit, this issue is moot, as is the appellant's first assignment of error in case No. S-89-1180.

REMOVAL OF TOEDTLI AS PERSONAL REPRESENTATIVE

On June 13, 1989, following the February 17, 1989, evidentiary hearing, the county court denied the appellant's motion to remove Toedtli as personal representative of her father's estate. Ackerman appealed this decision to the district court in a timely manner on July 6, 1989. The district court

affirmed the denial. Ackerman's appeal of this decision to the Supreme Court in case No. S-89-1180 was also timely made.

A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1989) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1989) and therefore is a final order and is appealable, even though it may not terminate the action or constitute a final disposition of the case. See *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

The appellant alleged in his county court motion to remove the personal representative that Toedtli had done nothing to probate Seidler's estate from the time she was appointed personal representative on January 12, 1987, to the date the motion was filed. He claimed his mother had not filed, within 2 months of her appointment, an inventory of the property owned by Seidler at the time of his death, as required by § 30-2467, nor had she caused inheritance tax to be determined within 12 months of the decedent's death, as required by § 77-2010. In his appeal to this court, the appellant also argues that Toedtli had failed to file an accounting or to make a proposal for distribution. The latter issues will not be addressed by this court. Issues not properly presented to and passed upon by a trial court may not be raised on appeal. *State v. Vance*, 240 Neb. 794, 484 N.W.2d 453 (1992).

The county court received evidence on the issue of removal of the personal representative at the hearing on February 17, 1989. Toedtli testified. The appellant offered no evidence. The parties stipulated that as of February 17, no inventory had been filed and no inheritance tax arising out of the estate of Seidler had been determined or paid.

The reasons given why the personal representative had been unable to fulfill the duties of which Ackerman complained were that she had no funds with which to pay for appraisal of the land to be inventoried, nor did she have funds with which to pay any inheritance tax that might be determined to be due.

Toedtli had no estate funds because the estate was not generating income, because the appellant had control of the only income generating asset, the land. The appellant was using the land without paying rent to the estate. In an effort to

produce income, Toedtli eventually brought an action against her son for an accounting and to evict him from the land. There is no indication in the record as to the outcome of that action. The only other assets of the estate were some non-income-producing farm equipment, motor vehicles, clothing, and a houseful of furniture. The appellant had control of all those assets, as well as a joint bank account which had been in his and the decedent's names.

There seems to have been a history of animus between the mother and her son. They both lived on the Seidler land, the appellant in the main house and Toedtli in a mobile home approximately a block away. They seemingly could not talk to one another. "I just can't talk to my son," testified Toedtli. "It turns out into an argument every time we try to get anything settled." "A year ago in December I went out before Christmas and we tried to talk and it wound up in an angry argument. In June a year ago it wound up in an angry argument, plus a little roughness on top of it." She testified that she wanted to try to keep the property and the family together as her father had wanted, but that when that was not possible, she had had to take other steps.

Toedtli indicated at the hearing that should she remain as personal representative she would file income tax returns and try to generate an income for the estate. She would also file an inventory and have a determination of inheritance tax.

The record shows that on April 14, 1989, Toedtli did file with the county court an inventory of the estate of Seidler. There is no indication in the record whether the inheritance tax has been determined or paid.

> Cause for removal [of a personal representative] exists when removal would be in the best interests of the estate, or if it is shown that a personal representative . . . intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. . . .

§ 30-2454(b).

We have held that the failure to pay claims within the time limited by the court is not cause for removal of a personal representative when there are no funds with which to pay the claims, unless it appears that absent neglect on the part of the personal representative, funds would have been available. See *In re Estate of Cash D. Fuller*, 124 Neb. 591, 247 N.W. 415 (1933). We have found that cause for removal of a personal representative exists when the personal representative fails to follow the court's progression order, fails to pay federal taxes, and fails to provide a proposed distribution plan. *In re Estate of Snover, supra*. In this case, Toedtli has not been shown to have violated any court order, nor has she been shown to have been neglectful. It appears that the appellant's unwillingness to communicate with his mother regarding the estate and his own involvement in the inability of the estate to generate income have been the cause of a substantial part of the problems suffered by the estate. In moving to eject the appellant from the property, Toedtli seems to have taken the first step in bringing the estate into a position to generate the income necessary to allow her to perform her duties as personal representative.

The appellant's complaint that his mother is not acting in the best interests of her father's estate is without merit.

Ackerman's assignments of error in case No. S-89-1180, in toto, are without merit.

Because not all of the issues in case No. S-89-1181 had been decided by the county court, neither the district court nor this court obtained appellate jurisdiction, and case No. S-89-1181 must be dismissed.

The decisions of the district court in appeal No. S-89-1180 must be affirmed.

JUDGMENT IN NO. S-89-1180 AFFIRMED.
APPEAL IN NO. S-89-1181 DISMISSED.

DICK GILLAM, APPELLANT, V. FIRESTONE TIRE & RUBBER COMPANY, A CORPORATION, ET AL., APPELLEES.

489 N.W.2d 289

Filed September 4, 1992. No. S-89-1375.

1. **Appeal and Error.** In a bench trial of an action at law, factual findings by the trial court have the effect of a jury verdict and will not be disturbed on appeal unless they are clearly wrong.
2. **Judgments: Appeal and Error.** In reviewing a judgment from a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Products Liability: Limitations of Actions.** Any product liability action shall be commenced within 10 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.
5. **Limitations of Actions.** In any action in which it is claimed by one or more of the defendants that the action is barred by the statute of limitations, any party may move that the issue raised thereby be tried separately and before any other issues in the case are tried, and in such event the court shall proceed to determine the issue relating to the statute of limitations before trying other issues in the case. Neb. Rev. Stat. § 25-221 (Reissue 1989).
6. _____. Neb. Rev. Stat. § 25-221 (Reissue 1989) provides for preliminary rulings by the court on statute of limitations questions.
7. **Products Liability: Limitations of Actions.** The 10-year statute of repose, Neb. Rev. Stat. § 25-224(2) (Reissue 1989), begins to run when the product is first relinquished for use or consumption. Where the injury occurs within the 10-year period, and a claimant commences his or her action after the 10 years have passed, an action accrues but is barred. Where the injury occurs outside the 10-year period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred.
8. **Trial.** As a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide.
9. **Constitutional Law: Products Liability: Limitations of Actions.** Neb. Rev. Stat. § 25-224(2) (Reissue 1989) is constitutional.

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

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, and Randy W. James, of John C. Risjord & Associates, P.C., for appellant.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather; Frances E. Prell and Julie P. Shelton, of Burke, Bosselman & Weaver; Thomas P. Schult, of Bryan, Cave, McPheeters & McRoberts; and, on brief, Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, for appellees Firestone Tire & Rubber Company and the Budd Company.

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

BOSLAUGH, J.

The plaintiff, Dick Gillam, was injured in an accident on May 16, 1983, while employed by defendant T.O. Haas Tire Co., Inc., as a tire repairman. The plaintiff had been directed to repair a tire on a truck owned by defendant Dennis Rusho. An "RH5 degree" multipiece wheel mounted on the truck exploded when the plaintiff attempted to inflate the tire mounted on the wheel.

The RH5 degree multipiece wheel consisted of two components, a disk/rim and a side ring. The disk had been manufactured by defendant the Budd Company, and the rim and side ring had been manufactured by defendant Firestone Tire & Rubber Company.

The disk had been attached to the rim by Budd on April 11, 1955. The side ring was manufactured by Firestone in March 1965.

This action was commenced on May 11, 1987.

The record shows that at the time of the accident, the plaintiff had worked in the tire servicing business for many years. He had learned and usually followed the safety rules necessary to protect himself on the job.

The plaintiff knew that when he inflated a truck tire, the tire and wheel assembly should be placed in a protective safety cage. He also knew that he should use a clip-on air chuck during inflation so that he could stand away from the tire and wheel components. Although the plaintiff testified he followed these

safety practices throughout his career, he did not do so on the day of the accident.

The only issue which the trial court determined was whether the action was barred by the 10-year statute of repose, see Neb. Rev. Stat. § 25-224(2) (Reissue 1989). That issue was tried separately, pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1989).

The trial court heard the matter without a jury and found that the action was barred. The plaintiff has appealed from the order dismissing the action.

The plaintiff assigns as error the trial court's finding that the action against Firestone and Budd was barred by § 25-224(2), the trial court's failure to find that Firestone and Budd should be estopped from raising the statute of repose as a defense, the trial court's failure to find that § 25-224(2) is unconstitutional, and the trial court's denial of his request for a jury trial on the statute of repose issue.

Section 25-224(2) provides in part that "any product liability action . . . 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."

The evidence is uncontroverted that the wheel was mounted on a 1969 Ford truck. The first owner of this truck was Jennings Truck Line of Des Moines, Iowa, which received a manufacturer's title on April 24, 1969. The vehicle was then titled on November 14, 1970, to Ivan and Catherine Snook of Promise City, Iowa. On October 21, 1976, Lentz Chevrolet, Inc., of Indianola, Iowa, acquired the truck as a trade-in from the Snooks. The truck remained on the Lentz Chevrolet lot until August 17, 1977, when it was sold to Dahlberg Motors, Inc., of Lincoln, Nebraska. On October 15, 1977, Dahlberg sold the truck to Rusho.

All of the prior owners, except Jennings Truck Line, testified that they had never replaced any of the wheels on the truck and that the wheels that were on the truck when each owner acquired it were the same ones on the truck when it was sold or traded by each of them.

The 10-year statute of repose begins to run when the product is first relinquished for use or consumption. *Witherspoon v.*

Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985). Where the injury occurs within the 10-year period, and a claimant commences his or her action after the 10 years have passed, an action accrues but is barred. *Miers v. Central Mine Equipment Co.*, 604 F. Supp. 502 (D. Neb. 1985). Where the injury occurs outside the 10-year period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred. *Peterson v. Fuller Co.*, 807 F.2d 151 (8th Cir. 1986).

The only issue before the trial court was whether the 1955 disk/rim assembly and the 1965 side ring had been first sold for use more than 10 years before the plaintiff filed his petition on May 11, 1987. All of the witnesses with personal knowledge of the use of the 1969 Ford truck testified that the wheel assemblies on the truck were not changed during their period of ownership, establishing that the wheel assembly which was involved in the accident had been first sold for use more than 10 years before the plaintiff commenced this action. The plaintiff offered no contrary evidence to show that the wheel assembly involved in the accident was first sold for use during the statutory period. The trial court's finding that the action against Firestone and Budd was barred by the statute of repose was correct.

In a bench trial of an action at law, factual findings by the trial court have the effect of a jury verdict and will not be disturbed on appeal unless they are clearly wrong. *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989). In reviewing a judgment from a bench trial, an appellate court " ' " ' does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.' " ' " *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 790, 442 N.W.2d 859, 861 (1989).

The plaintiff contends that the trial court's denial of his request for a jury trial on the issue of the statute of repose was in violation of article I, § 6 of the Nebraska Constitution.

Section 25-221 provides in part:

> In any action in which it is claimed by one or more of the defendants that the action is barred by the statute of

> limitations any party may move that the issue raised thereby be tried separately and before any other issues in the case are tried and in such event *the court shall proceed to determine the issue relating to the statute of limitations before trying other issues in the case.*

(Emphasis supplied.)

Relying on the emphasized language, the trial court denied the plaintiff's demand for a jury trial on the statute of repose issue. We conclude that the plaintiff was not entitled to a jury trial on the issue of the statute of repose.

> "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."

County of Douglas v. Board of Regents, 210 Neb. 573, 577-78, 316 N.W.2d 62, 65 (1982).

It is clear that "Nebraska Revised Statute 25-221 provides for preliminary rulings by the court on statute of limitation questions." *Mattice v. Messer*, 493 F.2d 498, 499 (8th Cir. 1974).

In *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991), the issue of the statute of limitations in a legal malpractice action had been tried to the court. We held it was unnecessary to address the appellant's claim that it was error to deny that it was deprived of a jury trial on the issue because as a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide.

The evidence in this case on the issue of the statute of repose is uncontroverted that the products had been in use for more than the statutory period. The evidence on which the trial court based its decision to dismiss the plaintiff's action was such that reasonable minds could draw but one conclusion.

Relying on *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984), the plaintiff argues that Firestone and Budd should be estopped from relying on the statute of repose because they fraudulently concealed the dangers of the RH5 degree wheel from him.

In *MacMillen*, a Dalkon Shield, an intrauterine contraceptive device, had been placed in the plaintiff in March 1971. Seven years later, in November 1978, the plaintiff's physician diagnosed an abscess and infection in her uterus which required major surgery. At the time of her injury, the product liability statute of repose had not run, and the plaintiff had a viable cause of action. However, the plaintiff did not file the lawsuit until more than 3 years later, which then was more than 10 years after the date when the intrauterine device had been implanted. The amended petition alleged that the defendant had intentionally withheld information from the public regarding the dangers inherent in the use of the Dalkon Shield. The trial court sustained the demurrer to the amended petition and dismissed the petition. This court reversed the trial court's decision and held, " ' "One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense;" . . . .' " *Id.* at 341, 348 N.W.2d at 871.

In an effort to support his position that Firestone's and Budd's alleged fraudulent concealment estopped them from raising the statute of repose defense, the plaintiff offered a series of exhibits purporting to show a history of deceptive conduct by Firestone and Budd. The trial court excluded this evidence, finding plaintiff's fraudulent concealment claim to be without merit. The plaintiff has not assigned the trial court's exclusion of this evidence as error.

The record shows that the plaintiff knew that his injury was caused by the separation of the tire and the wheel components. He admitted he knew that if a truck tire and wheel assembly separated during the inflation of a tire, he could be injured or killed. The RH5 degree wheel had the reputation of a "widowmaker."

This case is distinguishable from *MacMillen*. The danger in

servicing the wheel involved in this accident was not fraudulently concealed from the plaintiff, other tire mechanics, or the public. The danger involved was the subject of a published federal OSHA standard.

There is no evidence that Firestone and Budd did anything to delay or prevent the plaintiff from bringing his lawsuit. The finding of the trial court that the plaintiff's fraudulent concealment theory lacked merit was correct.

The plaintiff asserts that § 25-224(2) is unconstitutional. This issue was decided recently in *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991), which held that § 25-224(2) is constitutional. See, also, *Radke v. H. C. Davis Sons' Mfg. Co.*, *ante* p. 21, 486 N.W.2d 204 (1992).

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent from that part of the opinion which suggests in dicta that the issue of the bar of the statute of repose is triable to a judge and not to a jury. The practice violates Neb. Const. art. I, § 6.

SHANAHAN, J., joins in this dissent.

ROBERT SCOTT, APPELLANT, V. AARON HALL ET AL., APPELLEES.
488 N.W.2d 549

Filed September 4, 1992. No. S-90-010.

1. **Judgments: Records: Time: Appeal and Error.** Proceedings in error must be commenced within 30 days from the rendition of the final order or judgment concerning which complaint is made by filing with the district court a petition and authenticated transcript containing the challenged order or judgment, and any other material related thereto which the petitioner wishes to have considered.
2. **Prisoners: Time: Appeal and Error.** Imprisonment in and of itself is not a disability entitling one imprisoned to a period of exclusion from the normal time limitation articulated in Neb. Rev. Stat. § 25-1931 (Reissue 1989) within which to file a petition in error. There must be a showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights as stated in § 25-1931.

3. **Records: Appeal and Error.** An appellate brief may not expand the evidentiary record and must limit itself to arguments supported by the appellate record.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Robert Scott, pro se.

Robert M. Spire, Attorney General, and Mark D. Starr for appellees.

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

PER CURIAM.

Robert Scott, an Omaha Correctional Center inmate, appeals the district court's dismissal of his petition in error challenging a prison disciplinary proceeding in which Scott was found to have violated a prison rule prohibiting prisoners from trafficking in drugs within the institution. As a result of being found guilty, Scott lost 3 months of his good time and received 10 days' disciplinary segregation.

In sustaining the defendants' demurrer to Scott's petition in error, the district court for Douglas County found that there was a defect in party defendants, that the appeal (petition in error) was filed out of time, and that therefore the district court lacked jurisdiction of the subject matter. Thereupon, the district court dismissed Scott's pro se petition. Scott claims that those rulings by the court were in error.

On August 10, 1989, Scott was found guilty by a disciplinary committee at the Omaha Correctional Center of violating 68 Neb. Admin. Code, ch. 5, § 005I[H] (1987), Nebraska Department of Correctional Services' rule "Drug or Intoxicant Abuse," proscribing the use of or trafficking in drugs within the institution.

Scott appealed the decision of the disciplinary committee to the institution's appeals board. Following a September 11, 1989, hearing, the appeals board upheld the decision of the disciplinary committee. It is not clear from the record when the appeals board rendered its decision or when the decision was provided to Scott. It is clear, however, that the transcript of the appeals board proceeding, including the board's final order,

was certified on October 16, 1989.

In any event, pursuant to Neb. Rev. Stat. § 25-1903 (Reissue 1989), Scott filed his petition in error in the district court on November 3, 1989. He named as defendants individually Aaron Hall, an employee of the Omaha Correctional Center who filed the original disciplinary misconduct report against Scott; Richard Leech, R.H. Grant, and Linda Lennard, members of the disciplinary committee who initially found him guilty of the rules violation; and Karen Shortridge, the warden at the Omaha Correctional Center, who reviewed the decision of the disciplinary committee. Scott did not name as defendants the disciplinary committee or its members in their official capacity, nor did he name the Department of Correctional Services as a defendant.

The record reflects that the appeals board was composed of Laurie Smith Camp, Gene Hruza, and Bruce Kramer. None of the members of the appeals board was named as a defendant individually or in her or his official capacity, nor was the appeals board itself named as a defendant. The record fails to reflect that any of these proper parties had notice that Scott had filed his petition in error. The district court was correct in sustaining the defendants' demurrer to Scott's petition in error on the basis that there was a defect in the parties defendant.

The district court was also correct in dismissing Scott's petition in error. Even assuming that Scott timely filed his petition in error on November 3, 1989, the demurrer was not sustained until December 8, 1 day after the matter was argued. By that time, more than 30 days had elapsed from the date of the appeals board decision. In *Zyburo v. Board of Education*, 239 Neb. 162, 167-68, 474 N.W.2d 671, 675 (1991), we held:

> Proceedings in error must be commenced within 30 days from the rendition of the final order or judgment concerning which complaint is made by filing with the district court a petition and authenticated transcript containing the challenged order or judgment, and any other material related thereto which the petitioner wishes to have considered.

See, also, § 25-1903 and Neb. Rev. Stat. §§ 25-1901 and 25-1931 (Reissue 1989); *Marcotte v. City of Omaha*, 196 Neb.

217, 241 N.W.2d 838 (1976). Failure to institute the proceeding within the stated time limitation bars the action. See *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985).

Because of the timespan between the appeals board decision and the district court's ruling on Scott's demurrer, there was no way Scott could timely file an amended petition, naming the proper defendants, and obtain timely service upon them in this case after the demurrer was sustained. See *Zyburo v. Board of Education, supra*. Therefore, the district court was correct in dismissing Scott's petition.

Scott argues that the statute of limitations for the filing of his petition in error should have been tolled during the pendency of his incarceration pursuant to Neb. Rev. Stat. § 25-213 (Reissue 1989) and § 25-1931. We recently held, in *Lewis v. Camp*, 236 Neb. 94, 459 N.W.2d 211 (1990), that imprisonment in and of itself is not a disability entitling one imprisoned to a period of exclusion from the normal time limitation articulated in § 25-1931 within which to file a petition in error. There must be a showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights as stated in § 25-1931. *Lewis v. Camp, supra*. There being no such showing here, Scott's assignment of error in this regard is without merit.

Scott's failure to name the proper defendants and the district court's proper dismissal of his petition in error render moot the issue of whether Scott timely filed his petition.

In reviewing this appeal, we note that Scott has attached copies of documents to his brief in this court. These documents are not part of the transcript and cannot be considered by this court. An appellate brief may not expand the evidentiary record and must limit itself to arguments supported by the appellate record. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE R. OSBORN, APPELLANT.

490 N.W.2d 160

Filed September 4, 1992. No. S-91-203.

1. **Mental Competency: Pleas: Trial.** A defendant is competent to plead or stand trial if he has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
2. **Criminal Law: Mental Competency.** The question of the defendant's sanity can be raised at any time while criminal proceedings are pending.
3. _____: _____. When facts which raise doubt as to the sanity of the defendant are brought to the attention of the court, either from its own observation or by suggestion of counsel, the question should be settled before further steps are taken.
4. **Mental Competency.** The issue of competency is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
5. **Trial: Proof: Appeal and Error.** The order in which proof is introduced is to a large extent within the discretion of the trial court, and its ruling in that regard is no cause for reversal where the rights of the defendant are not shown to have been prejudiced.
6. **Trial.** The general conduct of the trial rests within the discretion of the trial court.
7. _____. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.
8. **Trial: Proof: Appeal and Error.** The judge may determine generally the order in which parties will adduce proof; his or her determination will be reviewed only for abuse of discretion.
9. **Witnesses: Testimony.** When 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.
10. **Witnesses: Testimony: Juries.** An inconsistent or contradictory statement by a witness who is not a party opponent is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony.
11. **Sexual Assault: Words and Phrases.** Any person who subjects another person to sexual penetration and the actor is 19 years of age or older and the victim is less than 16 years of age is guilty of sexual assault in the first degree.
12. _____: _____. A person commits sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older.
13. _____: _____. Sexual penetration is defined as any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably

construed as being for nonmedical or nonhealth purposes.

14. _____: _____. Sexual contact is defined as the intentional touching of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. 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.

15. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence, and 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.

16. _____: _____. Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Gregory C. Damman, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellant.

Don Stenberg, Attorney General, William L. Howland, and, on brief, Mark L. Ells for appellee.

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

FAHRNBRUCH, J.

Lawrence R. Osborn appeals his four jury convictions arising out of his sexual activity with four different children, all under the age of 10 years.

He was sentenced by the district court for Nuckolls County to consecutive prison terms of 15 years on each of two convictions of sexual penetration of two female victims and 1 year on each of two convictions of sexual contact with two male victims, for a total sentence of 32 years.

In his appeal, restated, Osborn claims the trial court erred (1) in allowing the trial to proceed when the defendant was incompetent and (2) in allowing the prosecutor to "coach" witnesses into changing their testimony. Thirdly, Osborn claims the evidence was insufficient to convict him.

We affirm Osborn's convictions and sentences.

STANDARD OF REVIEW

An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Davis*, 240 Neb. 631, 483 N.W.2d 554 (1992).

COMPETENCE TO STAND TRIAL

In his first assignment of error, the defendant claims that the trial court erred when it allowed him to stand trial at a time when he was unable to assist with his own defense and when there was no proof of his competence to stand trial.

A defendant is competent to plead or stand trial if he has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). The question of the defendant's sanity can be raised at any time while criminal proceedings are pending. See *State v. Campbell*, 192 Neb. 629, 223 N.W.2d 662 (1974). When facts which raise doubt as to the sanity of the defendant are brought to the attention of the court, either from its own observation or by suggestion of counsel, the question should be settled before further steps are taken. *Id.* The issue of competency is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court. *State v. Bradford, supra.*

The record reflects that when Osborn was arraigned on June 11, 1990, he was visibly and audibly crying. His attorney expressed reservations as to the defendant's ability to participate in the proceedings and to assist in his own defense. The court ordered the defendant to undergo a psychiatric examination to determine, inter alia, if he was competent to stand trial.

No psychiatric examination result was ever entered into the record, no hearing was held on the issue of competence, and no specific ruling was made regarding the defendant's competence. However, while represented by the same attorney who had

raised the issue of the defendant's competency at the first arraignment, the defendant was again arraigned on September 6, 1990, subsequently tried, and convicted without the issue of the defendant's competency or sanity being raised again. At no time was there an objection from the defense regarding Osborn's competency to stand trial. There is nothing in the record of the September 6 arraignment or the trial which would indicate that the defendant lacked the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and/or to make a rational defense.

The defendant in *State v. Boston*, 187 Neb. 388, 191 N.W.2d 452 (1971), presented similar circumstances. Boston's competency was questioned at his arraignment, and the court requested a medical examination. There was no record of a report being made to the court pursuant to the examination, and the defendant proceeded to trial. At no time, by objection or by any other manner, was the question of competency renewed. This court found that as there was no evidence in the record to sustain a finding that a reasonable doubt was raised as to the defendant's competency to stand trial, the trial court was not required to hold a hearing on the issue of competency and did not err in allowing the defendant to stand trial.

As we stated in *State v. Boston*, 187 Neb. at 390, 191 N.W.2d at 453, "The defendant's theory seems to be that the mere raising of the question as to incompetency, in his own subjective opinion, produces a reasonable doubt as to his competency and, therefore, the court is required to hold a hearing. This, of course, is not the law . . . ."

There is no indication in the record that during or after the second arraignment the defendant was incompetent to proceed in this criminal case. Because there is insufficient evidence shown in the record to raise the issue of the defendant's competency, the trial court did not err in allowing the defendant to stand trial. Osborn's first assignment of error is without merit.

COACHING OF WITNESSES

In his second assignment of error, the defendant makes two separate allegations that the prosecution was allowed to coach

witnesses.

The first allegation claims that the juvenile witnesses were coached prior to the trial. G.O. and L.O., two male victims, and C.T., a female victim, all independently testified that they had been in the courtroom with attorneys prior to the trial and that at that time they had talked about their testimony and answered questions similar to those which were asked at trial. When specifically asked by the prosecutor at trial if they were told what to say while testifying, G.O. answered, "You told me to tell the truth," and C.T. answered, "No" and "I tell the truth." L.O. answered, "On some of them you — if I didn't remember, just say I didn't remember."

All this indicates is that the prosecution prepared the children for trial in part by familiarizing them with the courtroom and with the trial process, a procedure encouraged by legal scholars. See Nancy W. Perry and Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 Creighton L. Rev. 1369 (1985).

There is nothing in this record to suggest that the attorneys who prepared the children directed or suggested to the children what they were to say other than to tell the truth while they were testifying.

Osborn also argues that the trial court erred in granting a recess during C.T.'s direct examination so that the prosecutor could take C.T. aside and make her remember the "right" answer and to coach C.T. when she did not give the testimony that the prosecutor wanted. Osborn argues that the trial court erred in not dismissing the charges which were brought against the defendant based upon C.T.'s testimony.

During C.T.'s direct examination, the following colloquy occurred:

> [Prosecutor:] [D]id he touch the outside or the inside of your vagina?
>
> [C.T.:] The outside.
>
> Q. Did he ever touch the inside of your vagina?
>
> A. No.
>
> Q. Do you remember — did you ever talk to Deputy Stemper about this case?
>
> A. Yes.

Q. Was that just this last summer?
A. Yes.
Q. Do you remember what you told him?
[Defense counsel]: Object, hearsay.
THE COURT: Overruled.
[Defense counsel]: Your Honor, this witness — the witness is repeating her own words.
[Prosecutor:] Do you know what you told Deputy Stemper, do you remember?
A. No.
Q. Do you remember telling him —
[Defense counsel]: Wait a minute, Your Honor. I will object to that as leading, an attempt by the public prosecutor to testify.

After a discussion at the bench, the prosecution requested and was granted permission to break with C.T.'s testimony, call another witness, and thereafter resume the direct examination of C.T. This was done without an objection by the defendant. C.T. then testified as follows:

[Prosecutor:] [W]e just had a little recess and I talked to you in [the county attorney's] office, is that right?
[C.T.:] Yes.
Q. What did we talk about?
A. Why I didn't say such and such.
Q. Okay. . . . What happened in the bathroom when you went to visit Lawrence's house?
A. He stuck his finger in my vagina.
Q. Why didn't you say that before? . . .
A. I forgot.

C.T. testified on cross-examination that she also "forgot" when she told defendant's counsel prior to trial that the defendant had not digitally penetrated her. Later in the examination, C.T. stated that when she had spoken to the prosecutor during the recess in her testimony, he had not told her what to say, and he had told her she was to tell the truth.

The order in which proof is introduced is to a large extent within the discretion of the trial court, and its ruling in that regard is no cause for reversal where the rights of the defendant are not shown to have been prejudiced. *State v. Chaney*, 184

Neb. 734, 171 N.W.2d 787 (1969). The general conduct of the trial rests within the discretion of the trial court. *State v. Smith*, 192 Neb. 794, 224 N.W.2d 537 (1974). The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). To this end, the judge may determine generally the order in which parties will adduce proof; his or her determination will be reviewed only for abuse of discretion. *Id.*

The defense herein made no objection to the continuing direct examination of C.T. following the recess and therefore waived whatever objection the defendant may have had to the evidence so adduced. See *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

The defendant is precluded from a dismissal on the grounds that the witness may have been coached. The U.S. Supreme Court has determined that

> [t]he opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Geders v. United States, 425 U.S. at 89-90.

The Washington Court of Appeals, in a case strikingly similar to this case, found that the state was properly granted a short recess in a sexual assault prosecution to consult with the 67-year-old victim after she testified on direct examination that two sex acts took place but answered in the negative when asked about any other sex act, contrary to her pretrial statement. The court, relying upon *Geders v. United States, supra*, found that the defendant had the opportunity to attack the victim's credibility by cross-examining her as to the nature of the consultation with the state during the recess and the reasons for

the change in her testimony. See *State v. Delarosa-Flores*, 59 Wash. App. 514, 799 P.2d 736 (1990).

The defendant herein had ample opportunity to cross-examine C.T. as to the nature of the talk she had with the prosecutor during the recess. There is no evidence here that the prosecution did anything other than review with C.T. the prior statements she had made.

Finally, there is no validity to Osborn's argument that the statement C.T. made after the recess regarding the penetration should be discredited as a matter of law. We have found that when 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. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986). However, an inconsistent or contradictory statement by a witness who is not a party opponent is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony. *Id.* Clearly, C.T. is not a party in the litigation, and her testimony, therefore, should not be discredited as a matter of law.

Osborn's second assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE TO CONVICT

In his third assignment of error, the defendant claims that there was insufficient evidence to support his convictions and that there was insufficient proof that the alleged assaults occurred within the timeframes set forth in the information.

The information contained seven counts. Counts 1, 3, and 7 were dismissed at the end of the State's case. The remaining counts are as follows:

COUNT 2

> On or about April 1989, in the County of Nuckolls, State of Nebraska, Lawrence R. Osborn, being a person nineteen years of age or older, did then and there subject [A.B.], a person of less than fourteen years of age, to sexual penetration. . . .

. . . .

COUNT 4

On or about July 6, 1987 to July 10, 1987, in the County of Nuckolls, State of Nebraska, Lawrence R. Osborn, being a person nineteen years of age or older, did then and there subject [C.T.], a person of less than sixteen years of age, to sexual penetration. . . .

COUNT 5

On or about May 15, 1987 to May 17, 1987, in the County of Nuckolls, State of Nebraska, Lawrence R. Osborn, being a person of nineteen years of age or older, did then and there subject [G.O.], a person of less than fourteen years of age, to sexual contact. . . .

COUNT 6

On or about May 15, 1987 to May 17, 1987, in the County of Nuckolls, State of Nebraska, Lawrence R. Osborn, being a person of nineteen years of age or older, did then and there subject [L.O.], a person of less than fourteen years of age, to sexual contact. . . .

Any person who subjects another person to sexual penetration and the actor is 19 years of age or older and the victim is less than 16 years of age is guilty of sexual assault in the first degree. Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989).

A person commits sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older. Neb. Rev. Stat. § 28-320.01(1) (Reissue 1989).

Sexual penetration is defined as "any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes." Neb. Rev. Stat. § 28-318(6) (Reissue 1989). Sexual contact is defined as

> the intentional touching of the victim's sexual or intimate parts . . . . Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts . . . when such touching is intentionally caused by the actor. 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.
§ 28-318(5).

In proving sexual contact, defined in subsection (5) of § 28-318, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. *State v. Berkman*, 230 Neb. 163, 430 N.W.2d 310 (1988). See *State v. Gonzales*, 219 Neb. 846, 366 N.W.2d 775 (1985).

The record reveals the following: Osborn, born January 11, 1954, was separated from his then wife on October 11, 1985. He had three children from that marriage, including the two male victims in this case, G.O. and L.O. After the divorce became final, the defendant remarried on February 13, 1988. This wife brought three children into the marriage, including victim A.B. The fourth victim, C.T., is a female cousin of A.B.

G.O. and L.O. visited the defendant every other weekend following the defendant's divorce from their mother. G.O., age 12 at the time of trial, testified that the defendant "took us [including G.O. and L.O.] into his bedroom and has us take off our clothes. . . . He took off his [clothes]. . . . He made us play with [his penis]."

There was some uncertainty in G.O.'s testimony as to when and how often this type of conduct occurred. He stated that it happened "A lot. . . . Every weekend we saw him," while also saying that "things happen[ed] . . . that made [him] uncomfortable" the "second" time they visited "Larry" but not the "first" time they visited Larry. He also stated that it happened "[t]he whole time we seen him the second time."

G.O. was asked if anything occurred during the last visit he had with the defendant, to which G.O. answered, "Larry had us play with him until he was satisfied," and "then he made the girls come in and [his then wife] — and he had [her] take off her clothes and [Larry and his then wife] hopped into bed and [Larry and she] had sex" while the children, including G.O., L.O., and A.B., were still in the room. G.O. could not be specific as to the dates when these events occurred. A female child testified that Osborn required her, in the presence of one or more of the victims, to take pictures of the defendant and his wife having sexual relations.

L.O., age 11 at the time of trial, testified that the last visit he had with the defendant was the weekend before Memorial Day, although he was not certain of which year. He also related that on that last visit the defendant called L.O. and his brother G.O. into the defendant's bedroom where "[Larry and his wife] were laying on the bed with no clothes on" and "[Larry and his wife] had sex." On that same visit, the defendant touched L.O.'s penis and made L.O. touch the defendant's penis.

The mother of G.O. and L.O. testified that the last visit her children had with the defendant was "the weekend before Memorial Day of '87"; "I think it was around the 16th, the weekend of the 16th or 17th." The complaint in this case was filed March 21, 1990, well within the 5-year statute of limitations. See Neb. Rev. Stat. § 29-110(2) (Reissue 1989).

C.T., age 12 at the time of trial, testified that she visited the Osborn house only once, during the week after the Fourth of July 1987. While she was there, the defendant was in the bathroom with her, she had no clothes on, and the defendant "stuck his finger in [her] vagina."

A.B., age 10 at the time of trial, testified that while she was on the couch the defendant would promise her money and candy, and then he would touch her "breasts and [her] vagina," and he would "stick his finger in [her] vagina." There was uncertainty in A.B.'s testimony as to when and how often this occurred. She testified that it would happen "[m]aybe once a week," "[m]aybe" for a year. She stated that the last time it happened she was 9 years old, but she also testified that she could not remember if he touched her before or after she "turned nine" years old on May 14, 1989.

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence, *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992), and 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. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992). Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a

reasonable doubt. *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

The evidence was sufficient to find the defendant guilty beyond a reasonable doubt on each of the counts of which he was convicted. There was evidence, as statutorily defined, of sexual penetration of A.B. and C.T. and sexual contact with G.O. and L.O. There was evidence that each act occurred in circumstances which can be construed as for the sexual arousal or gratification of either the defendant or of the victims.

The defendant erroneously claims that the evidence failed to prove that the acts charged occurred within the timeframes set forth in the information. Both G.O. and L.O. testified that the sexual contacts occurred on the last visit they had with the defendant. Their mother testified that the last visit her children had with the defendant was on the weekend before Memorial Day 1987, the weekend of the 16th or 17th. This evidence is sufficient for a jury to find beyond a reasonable doubt that the acts alleged in counts 5 and 6 occurred on or about May 15 to May 17, 1987, as charged.

C.T. testified that the sexual penetration occurred the only time she visited the Osborn house, the week after the Fourth of July 1987. This evidence is sufficient for a jury to find beyond a reasonable doubt that the act alleged in count 4 occurred between July 6 and July 10, 1987, as charged.

A.B. testified that the acts complained of happened numerous times, approximately once a week for approximately a year, although she could not specifically remember if the last time an offense occurred was before or after she turned 9 years old on May 14, 1989. This evidence is sufficient for the jury to have concluded beyond a reasonable doubt that this ongoing offense occurred at least once during the month of April 1989, the month before A.B.'s ninth birthday, as alleged in the information.

Osborn's third assignment of error is without merit.

The jury's verdicts are affirmed.

AFFIRMED.

MICHAEL MCCORMACK, APPELLANT, V. CITIBANK, N.A., A CORPORATION, ET AL., APPELLEES.
489 N.W.2d 293

Filed September 4, 1992. No. S-91-532.

Certified Question from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Eugene L. Hillman for appellant.

Keith I. Frederick and Thomas W. McPherson, of Schmid, Mooney & Frederick, P.C., for appellee Citibank.

Gary L. Dolan, of Knudsen, Berkheimer, Richardson & Endacott, for appellee National Bank of Commerce.

Thomas F. Flaherty, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee First Westroads Bank.

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

PER CURIAM.

The U.S. Court of Appeals for the Eighth Circuit, pursuant to Neb. Rev. Stat. §§ 24-219 to 24-225 (Reissue 1989), has certified the following question of state law to this court:

> Whether Neb. Rev. Stat. § 21-20,137 permits a corporation that has been revived more than two years after it has been dissolved by the Secretary of State to maintain an action based on a claim that arose before the dissolution, despite Neb. Rev. Stat. § 21-20,104's two-year limit on survival of remedy for claims of a dissolved corporation.

The "Certification Request" states that the statement of all facts relevant to the question certified is set forth in the opinion of the U.S. District Court for the District of Nebraska. The "Facts" in that opinion are the following (omitting references to "Filings" in the U.S. District Court's "Memorandum Opinion"):

> In 1983, Acoustical Engineering, Inc., a Nebraska corporation, entered in a contract with a Saudi Arabian company named Obaid & Almullah Construction

Company ("Obaid") to furnish materials and labor for construction of an airport terminal at the Riyadh International Airport at Riyadh, Saudi Arabia. The contract required Acoustical Engineering to furnish a Documentary Letter of Credit to Obaid to cover possible nonperformance by Acoustical Engineering. Acoustical Engineering arranged with defendant, First Westroads Bank, to provide the required Documentary Letter of Credit. First Westroads Bank then arranged with NBC [National Bank of Commerce] to provide it with a Documentary Letter of Credit. NBC in turn arranged with Citibank for Citibank to provide it with a Documentary Letter of Credit, and Citibank arranged with Samba [Saudi American Bank] for Samba to provide it with the Documentary Letter of Credit. This guarantee was to be conditioned upon Obaid['s] issuing to Acoustical Engineering a "Certificate of Completion of the Works" before any of the documentary letters of credit in the chain could be drawn upon . . . .

First Westroads Bank required that it be furnished with certain guarantees and pledges against the liability assumed by it in connection with the Documentary Letter of Credit to Acoustical Engineering. . . . A letter of credit agreement and a letter of indemnity and reimbursement, both dated March 14, 1983, were signed by Gerald E. Carlson, President, on behalf of Acoustical Engineering, Inc. . . . In addition, Gerald E. Carlson and Darlene M. Carlson executed their personal guaranty March 14, 1983, regarding the obligations of Acoustical Engineering to First Westroads Bank in connection with the Letter of Credit transaction . . . . Plaintiff also pledged securities to the First Westroads Bank to secure the obligations of Acoustical Engineering in connection with the Documentary Letter of Credit . . . .

On approximately September 9, 1985, SAMBA honored a draw by Obaid on the documentary letter of credit. Samba then drew on Citibank [which] honored the request; Citibank drew on NBC, [which] honored the request; and NBC drew on First Westroads Bank [which]

> honored the request . . . . Gerald E. Carlson and Darlene M. Carlson subsequently filed bankruptcy. Acoustical Engineering was dissolved for nonpayment of taxes on April 16, 1987. . . .
>
> First Westroads Bank sold securities pledged by the plaintiff to it as security for the documentary letter of credit. Plaintiff filed his complaint alleging he is a subrogee of Acoustical Engineering and Gerald E. Carlson and Darlene M. Carlson, and asserting damage by the loss of his pledged securities. Plaintiff alleges that, "despite the fact that Acoustical Engineering, Inc., had advised each of the Defendant banks that the Documentary Letter of Credit had not been complied with and that their 'Certificate of Completion of the Works' had never been issued," each of the defendant Banks honored the respective draws upon it. . . .

Our answer to the certified question is based on the facts set out above and on the two statutes involved. Those statutes provide as follows:

Neb. Rev. Stat. § 21-20,104 (Reissue 1991) provides in pertinent part:

> The dissolution of a corporation . . . (1) by the issuance of a certificate of dissolution by the Secretary of State . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution *if action or other proceeding thereon is commenced within two years after the date of such dissolution.* Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

(Emphasis supplied.)

Neb. Rev. Stat. § 21-20,137 (Reissue 1991) provides:

> Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its articles of incorporation by such corporation,

> its officers and agents during the time when such corporate existence was inoperative or void or after its expiration by limitation with the same force and effect and to all intents and purposes as if such corporate existence had at all times remained in full force and effect; and all real and personal property, rights and credits, which were of such corporation at the time its corporate existence became inoperative or void, or expired by limitation and which were not disposed of prior to the time of such revival or renewal shall be vested in such corporation, after such revival and renewal, as fully and completely as they were held by such corporation at and before the time its corporate existence became inoperative or void or expired by limitation and such corporation after such renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to such reinstatement, as if its corporate existence had at all times remained in full force and effect.

Neb. Rev. Stat. § 21-20,135 (Reissue 1991) provides that a corporation which has been dissolved for failure to pay taxes or file an annual report may be revived by filing a certificate with the Secretary of State. This revival validates all contracts made or performed while the corporation was dissolved, and provides that all rights of the corporation held by the corporation at the time of its dissolution "and which were not disposed of prior to the time of such revival . . . shall be vested in such corporation . . . as fully and completely as they were held by such corporation at and before the time its corporate existence" was dissolved. § 21-20,137.

Appellees place some reliance on the phrase concerning rights "which were not disposed of prior to the time of such revival" and contend that the dissolved corporation's rights were disposed of by the neglect of the corporation to do anything in the 2-year survival period. Such a construction would render the terms of § 21-20,137 meaningless, since that statute reinstates *all* rights of the dissolved corporation after revival. Our duty is to give meaning and effect to all statutes, if possible. We determine that "disposed of" in § 21-20,137

means property and rights of the dissolved corporation which were transferred to others, shareholders or creditors, in connection with the dissolution. Such a determination comports with the definition of "dispose of" in Webster's Third New International Dictionary, Unabridged 654 (1981)—"to transfer into new hands or to the control of someone else." No rights of the dissolved corporation were transferred to anyone by simply not seeking a disposition within 2 years.

In Nebraska, therefore, § 21-20,104 provides for a 2-year period during which a dissolved corporation may sue based on any rights of the corporation or be sued based on any liabilities of the corporation. There is no requirement that the dissolved corporation seek revival to avail itself of the 2-year period. The statute also provides that any person or entity outside the corporation may use the 2-year period to sue the dissolved corporation. We have held that this statute is a survival statute, providing a 2-year period during which the corporation may sue or be sued. That period of time is available to the corporation to assert rights of the corporation or to persons deserving to assert rights against the dissolved corporation.

Section 21-20,137 provides for rights which may be asserted only by the corporation or its shareholders, in the manner set out in Neb. Rev. Stat. §§ 21-20,140 and 21-20,141 (Reissue 1991). If a corporation or its shareholders elect to proceed under Neb. Rev. Stat. §§ 21-20,135 to 21-20,142 (Reissue 1991), that corporation then exposes itself to the assertion of liabilities against the corporation for periods of time exceeding the 2-year limit set out in § 21-20,104. This voluntary election by a dissolved corporation or its shareholders under § 21-20,137 gives that corporation rights beyond those set out in § 21-20,104 and exposes the revived corporation to liabilities beyond those which the corporation might be subjected to under § 21-20,104.

A different situation is controlled by each of the statutes. Section 21-20,104 applies only to dissolved corporations which have elected not to revive their existence, and § 21-20,137 applies to those corporations which have elected to revive their corporate existence.

The certified question from the court of appeals asks us to

reconcile these two statutes to determine whether the 2-year limit in § 21-20,104 applies in all instances. We have not previously dealt with the two statutes in conjunction. In *Van Pelt v. Greathouse*, 219 Neb. 478, 486, 364 N.W.2d 14, 20 (1985), we held:

> [W]here a statute continues the existence of a corporation for a certain period after its dissolution for purposes of defending and prosecuting suits, no action can be maintained by or against it after the expiration of that period. In other words, while a statute of limitations relates to the remedy only and not to substantive rights . . . a survival statute operates on the right or claim itself.
>
> . . . .
>
> Section 21-20,104 is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved.

Recently in *Licht v. Association Servs., Inc.*, 236 Neb. 616, 623, 463 N.W.2d 566, 571 (1990), we reiterated that

> [s]ection 21-20,104 is a survival statute, not a statute of limitations, and, as such, [it] gives life to claims which would otherwise be extinguished. . . . Absent the survival statute, a dissolved corporation could not sue or be sued. . . . Therefore, the rights created by the statute are the right of the corporation to sue during the survival period and the right of others to sue the corporation during that same period.

In neither *Van Pelt* nor *Licht* was there any effort to revive the dissolved corporation, so neither case addressed the question presented in this case. In the case presented to us with this certified question, the corporation was dissolved on April 16, 1987. McCormack's complaint was not filed until September 5, 1989, and the corporation at its request was revived on October 31, 1989. Therefore, while McCormack's complaint was not filed within the 2-year period set out in § 21-20,104 (the survival statute), this case now presents a situation not earlier before Nebraska courts in that the

dissolved corporation now has been revived and has all of its rights and credits "as fully and completely as they were held by such corporation" at the time of its dissolution. See § 21-20,137.

Other courts have been asked to interpret similar statutes, with varying results. In *Haitian Ventures v. Wisniewski*, 376 So. 2d 424 (Fla. App. 1979), the corporation was dissolved in 1973 and was revived on February 15, 1979. A motion by the corporation to intervene was pending in trial during that time. The appeals court affirmed the trial court's denial of the motion to intervene, finding that the Florida law concerning automatic reinstatement was limited to the 3-year grace period provided in the survival statute. The reinstatement statute stated that the corporate existence should be deemed continued without interruption, but the court found that "it does not state that the reinstatement of a previously dissolved corporation will also automatically reinstate rights or claims of the corporation that existed at the time of its dissolution." *Haitian Ventures*, 376 So. 2d at 426. The court held that to allow the automatic reinstatement provision to control over the 3-year grace period would make the grace period meaningless. It should be noted, however, that § 21-20,137 does state that "rights and credits, which were of such corporation at the time its corporate existence became inoperative . . . shall be vested in such corporation, after such revival and renewal, as fully and completely as they were held [at] the time its corporate existence became inoperative." Apparently, the Nebraska and Florida statutes are sufficiently different to justify different results.

Another Florida appeals court found *Haitian Ventures* to be factually distinguishable and held that once a corporation is reinstated, it may bring, defend, or intervene in any lawsuit, even if the action is based on facts that arose prior to the reinstatement. *LeLac Property Owners' Ass'n Inc. v. Routh*, 493 So. 2d 1131 (Fla. App. 1986). The court stated that the reinstatement statute, in effect, allows reinstatement at any time of a corporation which has been involuntarily dissolved, and treats that corporation as though it had never been dissolved.

The Kansas Court of Appeals has recently held that

reinstatement validates all actions of a corporation during the time when the articles of incorporation were inoperative. In *Mission Road Assocs, L.P. v. IML Realty Co.*, 15 Kan. App. 2d 388, 807 P.2d 1330 (1991), the corporation's articles were forfeited on October 15, 1987, a lawsuit was filed on September 26, 1989, and the corporation was reinstated on June 29, 1990. The court found that the Kansas statute provided that a corporation is renewed and revived with the same force and effect as if the articles of incorporation were never inoperative or void. It held that reinstatement validates all contracts, acts, matters, and things made, done, and performed during the time when the articles were inoperative. The authority to file an action in district court during the period of time when the articles were forfeited was granted retroactively on the date the articles were reinstated.

The Minnesota Supreme Court held that survival statutes are remedial in nature and are to be liberally construed. In a case in which the corporation was dissolved on December 29, 1975, and an injury occurred on August 3, 1977, the court held that the purpose of the statute would not be affected when a suit based on claims arising either before or after dissolution is brought within the 2-year survival period, "particularly where . . . the acts of the corporation which gave rise to the alleged liability occurred prior to dissolution." *Gassert v. Commercial Mechanisms, Inc.*, 277 N.W.2d 392, 394 (Minn. 1979).

From the facts provided to us in the case at issue here, it appears that the actions complained of took place prior to the dissolution. Based on those facts and the wording of § 21-20,137, the reinstatement of the corporation should also operate to restore to McCormack any rights he held based on the rights held by the dissolved, and then revived, corporation.

The submitted question is answered, "Yes," and the Clerk of the Supreme Court of Nebraska is directed to return the cause to the U.S. Court of Appeals for the Eighth Circuit.

JUDGMENT ENTERED.

CHRISTINA L. MCKINSTRY, SPECIAL ADMINISTRATOR OF THE ESTATE OF EUGENE MCKINSTRY, DECEASED, APPELLEE, V. COUNTY OF CASS, NEBRASKA, ACTING AS CASS COUNTY HIGHWAY DEPARTMENT, APPELLANT, AND STATE OF NEBRASKA ET AL., APPELLEES.

488 N.W.2d 552

Filed September 11, 1992. No. S-89-1158.

1. **New Trial: Appeal and Error.** A general rule of an appellate court is that a reversal and remand for a new trial is considered a general remand and contemplates a new trial on all of the issues.
2. **Trial: Proof: Appeal and Error.** All matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

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

Michael G. Connery and L. Steven Grasz, of Kutak Rock & Campbell, for appellee McKinstry.

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

PER CURIAM.

This is a wrongful death action filed by plaintiff-appellee, Christina L. McKinstry, special administrator of the estate of Eugene McKinstry, deceased, who died when a dirt wall of a trench in which he was working collapsed. The action named as defendants WeWeldit & Repair, Inc., the deceased's employer; Husker Steel Corporation, the general contractor; and Cass County. The original trial resulted in a judgment entered by the trial court in favor of plaintiff in the amount of $244,521.88 against WeWeldit; a judgment in favor of defendant-appellant, Cass County; and a judgment in favor of Husker Steel. The judgment against WeWeldit was later set aside because of WeWeldit's immunity under the Nebraska Workers' Compensation Act.

No appeal was taken by plaintiff on the judgment in favor of WeWeldit. Plaintiff appealed the judgment in favor of Husker Steel and Cass County. In *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988) (*McKinstry I*), we affirmed the judgment in favor of Husker Steel and reversed the judgment in favor of the county. We held that

> the county had a nondelegable duty to use due care to protect persons against injury from the hazards or risks which inhered in the particular excavation, trenching, and earthwork undertaken by the county. . . . Consequently, we find that the district court's conclusion, exonerating the county from liability for its negligence demonstrated by the record, is clearly erroneous.

228 Neb. at 744-45, 424 N.W.2d at 329-30.

The opinion in *McKinstry I* concluded: "Because we have reversed the judgment pertaining to the county, these proceedings are remanded to the district court for a new trial on McKinstry's claim against the county." 228 Neb. at 747, 424 N.W.2d at 331.

After remand, plaintiff filed a motion for summary judgment on the question of liability. On January 31, 1989, the trial court found that "the plaintiff is entitled to partial summary judgment determining that there was negligence on the part of the County of Cass" and granted plaintiff's motion for partial summary judgment.

On March 9, 1989, plaintiff filed a "Motion For Order Nunc Pro Tunc." This motion stated in part that the summary judgment order should be corrected:

> 3. To correct the record which has been made so that it will speak the truth and will truly express the action taken, but which through inadvertence or mistake was not truly recorded, this Court should add nunc pro tunc the following sentence to the end of its Order of January 27, 1989:
>
> The retrial of this matter will be limited to the issue of damages only.

On March 10, 1989, the trial court filed an order granting the motion and ordering that "the matter set forth above ['[t]he retrial of this matter will be limited to the issue of damages

only'] be added nunc pro tunc, as of January 27, 1989, to the end of the Order of this Court dated January 27, 1989."

There is a great deal of difference between an order determining the existence of a party's negligence and one determining that a new trial should be held on the issue of damages only.

We hold that the trial court erred in granting plaintiff's motion for partial summary judgment and in amending that judgment nunc pro tunc in the fashion it did.

This reviewing court determined that "[n]egligence, then, permeated the excavatory work," *McKinstry I*, 228 Neb. at 744, 424 N.W.2d at 329, and that Cass County was negligent in violation of its nondelegable duty. We determined no more.

A general rule of an appellate court is that a reversal and remand for a new trial is considered a general remand and contemplates a new trial on all of the issues. *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 317 N.W.2d 719 (1982) (Clinton, J., dissenting); *Master Laboratories, Inc. v. Chesnut*, 157 Neb. 317, 59 N.W.2d 571 (1953). There was no consideration of proximate cause, possible intervening cause, possible contributory or comparative negligence, assumption of risk, or even of whether those concepts apply to this case. There was no determination by the fact finder on any of those issues.

We also note that it is the law of this state that all matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988).

It was error for the trial court to hold a second trial on the issue of damages only. This cause is remanded for a new trial as to all issues between plaintiff and Cass County. On such retrial, however, the finder of fact is to take into consideration the negligence on the part of Cass County and the factors affecting the county's liability, if any.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE ESTATE OF ONETA PEARL NICHOLSON, DECEASED. EDWINA ROESENER, COPERSONAL REPRESENTATIVE OF THE ESTATE OF ONETA PEARL NICHOLSON, DECEASED, APPELLEE, V. JANE BROUGHTON, COPERSONAL REPRESENTATIVE OF THE ESTATE OF ONETA PEARL NICHOLSON, DECEASED, APPELLANT.

488 N.W.2d 554

Filed September 11, 1992. No. S-89-1166.

Decedents' Estates: Attorney Fees: Appeal and Error. In reviewing the award of attorney fees in cases arising under Neb. Rev. Stat. § 30-2482 (Reissue 1989), the standard of review in the district court and appellate courts is for error appearing on the record.

Appeal from the District Court for Chase County, JACK H. HENDRIX, Judge, on appeal thereto from the County Court for Chase County, CLOYD CLARK, Judge. Judgment of District Court affirmed.

Bert E. Blackwell for appellant.

Lance C. Antonson, of Hines & Hines Lawyers, for appellee.

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

GRANT, J.

This is an appeal from the allowance of an attorney fee in a probate case. After a hearing, the county court for Chase County allowed an attorney fee of $12,726.73 for the attorney of the appellee, Edwina Roesener, one of the two copersonal representatives of the estate of Oneta Pearl Nicholson. The decedent was also known by three other names: Oneta Pearl Belau, Oneta Pearl Edwards, and Oneta Pearl Cecil. Copersonal representative Jane Broughton appealed the allowance of the fee to the district court for Chase County, where the order of the county court was affirmed. Broughton timely appealed to this court, where the sole assignment of error is that the district court erred "when it upheld the award [of the attorney fee] and held that Nebraska R.R.S. §30-2482 [Reissue 1989] shifts the burden of proof to the challenger of attorney's fees." We affirm.

We initially note that the transcript herein contains

approximately 30 pages of briefs and copies of cases filed by the parties in the district court. Filing such items in a transcript to this court only causes unnecessary expense and waste of time for all concerned. Such material should not be in a transcript. See *Pierce v. City of Ogallala*, 221 Neb. 433, 378 N.W.2d 140 (1985).

The record before us shows the following facts: Nicholson died on October 27, 1987, leaving a will. We do not know the terms of the will or the size of the estate. It appears that the decedent was married several times. We do know that there was a will contest with some unnamed heirs of the decedent and that the contest was ultimately settled. We also know that appellant and appellee were appointed copersonal representatives and that there was constant friction between them—escalating, on one occasion, into physical violence. Appellant submitted a claim for medical bills totaling $43 for the treatment of injuries allegedly received as a result of one incident between the two. For most of the time of the probate, all communications between the two had to be handled through the attorneys representing each of them.

With regard to the attorney fee for appellee's attorney, the record shows that the parties agreed that each copersonal representative should have a separate attorney to be paid at the rate of $75 per hour. Appellant's attorney received a fee of $4,000. This amount was not disputed. The record shows that the attorney for appellee did the majority of the work on the estate, including preparation for the will contest, business leases, inheritance taxes, and income taxes. In its determination of the reasonableness of the fee for appellee's attorney, the county court had to be aware of the extensive attorney involvement in this case caused by the personal problems of the two copersonal representatives. The record before the district court and this court supports the fact that more involvement of attorneys was necessary in this case than in the ordinary case.

At the hearing on the attorney fee for appellee's attorney, appellee testified that she had examined her attorney's claim for services rendered and had checked each expense item. She testified that she felt the claim was a fair and reasonable statement of the time and services set out in his bill.

The review of the compensation of appellee's attorney was conducted by the county court under Neb. Rev. Stat. § 30-2482(1) (Reissue 1989), which provides:

> After notice to all interested persons or on petition of an interested person . . . the reasonableness of the compensation determined by the personal representative for his or her own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

The "Comment" following § 30-2482 states, in part, "But, the code's theory that personal representatives may fix their own fees *and* those of estate attorneys marks an important departure from much existing practice under which fees are determined by the court in the first instance." (Emphasis in original.) The county court set the attorney fee at $12,726.73, after deducting $1,200 from the claim. The district court affirmed, stating that § 30-2482 places the burden on the challenger to show excessive compensation. We agree.

We have held that in reviewing the award of attorney fees in cases arising under § 30-2482, the standard of review in the district court and appellate courts is for error appearing on the record. *In re Estate of Snyder*, 217 Neb. 356, 348 N.W.2d 136 (1984). There is no error appearing on the record in this case. The order of the district court affirming the order of the county court is affirmed.

AFFIRMED.

DONALD A. BROCKLEY, APPELLANT, V. LOZIER CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

488 N.W.2d 556

Filed September 11, 1992. No. S-89-1219.

1. **Employment Contracts: Termination of Employment: Good Cause: Words and Phrases.** In the context of employment contracts, "good cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good

and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.

2. **Restrictive Covenants: Employer and Employee.** Covenants not to compete are enforceable if the covenants are reasonable.
3. _____: _____. There are three general requirements relating to the enforceability of partial restraints of trade: first, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
4. _____: _____. Forfeitures of deferred compensation are enforceable, but they will be treated in the same manner as covenants not to compete, and therefore, the conditions making the forfeitures enforceable must be reasonable.
5. _____: _____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but it is not entitled to protection against ordinary competition from a former employee.
6. **Contracts.** In construing a contract, the court will apply the general rule that when there is a question as to the meaning of the language of a contract, the contract will be construed against the party preparing it. If the language in a contract drafted by one of the parties is susceptible to more than one meaning, it should be given a construction which the other party would be fairly justified in giving it.
7. **Contracts: Intent.** It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
8. **Employer and Employee: Attorney Fees.** Employers will not be awarded attorney fees under the Nebraska Wage Payment and Collection Act if the employer has not tendered an amount to the employee within 30 days of the employee's regular payday.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with directions.

James F. Kasher and Lauren A. Becker, of Croker, Huck, McReynolds, Kasher & DeWitt, P.C., for appellant.

Frank F. Pospishil and Paul R. Elofson, of Abrahams, Kaslow & Cassman, for appellee.

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

GRANT, J.

Plaintiff-appellant, Donald A. Brockley, filed an amended petition under the Nebraska Wage Payment and Collection

Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1988) against defendant-appellee, Lozier Corporation, seeking payments allegedly due Brockley under Lozier's incentive plan. The incentive plan payments were allegedly payable after Lozier fired Brockley and Brockley was subsequently employed by the Kent Corporation, a competitor of Lozier. Lozier contends that nothing is due Brockley because Brockley forfeited the right to payments under the incentive plan by competing with Lozier.

The case was tried to the court, which returned a verdict for Lozier and awarded it attorney fees of $25,000 under the wage act. Brockley timely appealed. His 10 assignments of error may be summarized as contending that the trial court erred (1) in finding that Brockley was discharged for cause; (2) in failing to determine that a clause in a deferred compensation plan was unenforceable, for various reasons, where the clause provided for forfeiture of deferred compensation if a discharged employee obtained employment in a business which competed with the employer; (3) in failing to award certain damages to Brockley; and (4) in awarding attorney fees to Lozier and in failing to award attorney fees to Brockley under § 48-1231. We reverse, and remand with directions.

Lozier manufactures and distributes store shelving, fixtures, and accessories. Brockley began work as vice president of marketing for Lozier approximately November 1, 1980. Brockley's original terms of employment included a base salary of $45,000, bonuses, participation in Lozier's pension plan, and an opportunity to purchase up to 1,000 shares of Lozier stock. The terms of employment did not contain any restrictive covenants or possible forfeiture of deferred compensation.

Brockley and Lozier negotiated regarding the stock option, but Brockley was never given the opportunity to purchase any Lozier stock. By 1981, Brockley understood that the majority owner of the company wanted to restructure the company and convert it to a subchapter S corporation and that therefore he did not want to offer any further stock options. Brockley testified that there was some discussion about providing an alterative that "would be equal in benefit over the future years to the stock option."

In June 1982, Lozier offered Brockley the opportunity to

participate in the Lozier Corporation 1982 Long-Term Incentive Plan. Lozier explained that participation in the plan was in substitution for the stock option. Brockley objected, but participated in the plan, effective June 8, 1982, as shown in a written "Performance Unit Agreement" executed by Lozier and Brockley. That agreement stated that Brockley was awarded 100 performance units.

Brockley characterized himself as being in the second tier of management at Lozier. He testified that he was involved in all marketing decisions and some sales decisions and that he supervised the preparation of confidential 1-year marketing plans for Lozier. Brockley testified that he worked on a 3-year plan for 1984-87, although he was not sure it was finished before he was fired. Lozier gave Brockley a 6- to 7-percent raise on January 21, 1984, effective November 1, 1983. Brockley's supervisor, Dennis Monaghan, testified that as of January 12, 1984, when he wrote Brockley's annual review, the criticism of Brockley's job performance did not rise to a level sufficient to justify dismissal. Monaghan testified that he had no knowledge of misconduct on Brockley's part and that he was not involved with Brockley's firing.

Brockley's annual bonuses were part of his annual salary and were calculated using a performance factor. The maximum bonus allowed was 50 percent of base salary. For the fiscal year ending January 31, 1982, Brockley earned a bonus equal to 35 percent of his salary. For the fiscal year 1983, Brockley earned a bonus of 45.7 percent of his salary. For the fiscal year ending January 31, 1984, Brockley earned a bonus equal to 61.32 percent of his salary, which was limited by the 50-percent maximum. Three months later, Lozier terminated Brockley's employment.

As stated above, Brockley also participated in the incentive plan for Lozier executives by executing a "Performance Unit Agreement." A committee made up of some of the members of the board of directors administered the plan. The committee had full discretion in the determination of awards, but also considered the recommendations of the chief executive officer, the "functions and responsibilities of the employee, the employee's potential contributions to the profitability and

sound growth of the Company and such other factors as the Committee deems relevant."

The plan provided that the committee would grant certain employees "Performance Units," which would be credited to a "Performance Unit Account." At the end of each fiscal year, Lozier

> credited to each participant an incentive award . . . based upon that amount . . . which bears the same ratio to the Company's net income (as hereinafter defined) as the aggregate number of Performance Units credited to such participant's Performance Unit Account as of such last day bears to the total number of shares of the Company's common stock issued and outstanding on such last day
>
> . . . .

These amounts were credited to the employee's "Incentive Award Account."

The amounts in the incentive award accounts were to be paid in cash to the employee "upon the expiration of four years from the end of the fiscal year for which such award is made." The fiscal year at Lozier ran from February 1 through the end of January.

The incentive plan contained the following provision providing for forfeiture of benefits:

> 9. Forfeiture. Until such time as the full amount of his Incentive Award has been actually paid to a participant, his right to receive any unpaid amount thereof shall be wholly contingent and shall be forefeited [sic] if (a) the participant's employment is terminated by the Company because of his involvement in any embezzlement or theft, because of his intentional misconduct or for any other sufficient cause, as determined by the Committee, or (b) prior to the payment thereof, at any time subsequent to the termination of the participant's employment with the Company or any affiliated corporation, he shall do any act or engage, directly or indirectly, whether as owner, partner, officer, employee or otherwise, in the operation or management of any business which shall be in competition with the Company or any affiliated corporation.

Lozier's employment contracts for sales managers and salespeople contained covenants not to compete, limited to 1 year and to the territory that the salesperson had served. The parties stipulate that no high-level management employees had a covenant not to compete, although all high-level management employees had the same forfeiture provisions in their incentive plans.

In January 1984, Lozier reorganized its management. Brockley's immediate supervisor, Monaghan, became vice president of administration, and Wayne Moeller took over Monaghan's former position as vice president of sales and marketing. On approximately April 24, 1984, Lozier, acting through Moeller, terminated Brockley's employment.

Brockley testified that Moeller came to Brockley's office in the early evening and fired him, explaining that

> this was the hardest thing that he ever had to do at Lozier and that I [Brockley] was a hard worker and very dedicated and committed to the company, but he felt that Lozier no longer needed my services, that he was going to run the marketing area differently and was going to reorganize and I really didn't fit into his plans.

Brockley testified that Moeller had said nothing about unsatisfactory job performance, nor had anyone mentioned a problem in the preceding months. Brockley testified that he did not discover until he brought this lawsuit that he had allegedly been terminated for poor performance.

Moeller testified that he "sat down with Don and told him I didn't think it was going to work out." Moeller did not testify that he told Brockley he was being fired for poor performance, but he testified that they discussed some problems. Moeller admitted that Brockley had not been guilty of any misconduct. Moeller testified that he believed a more "hands-on" style of management was needed. Brockley stated that he believed in more delegation of authority than Moeller did.

The evening his employment was terminated, Brockley volunteered to remain with the company for a few months to finish up projects he was working on and to try to find a new job, but Moeller refused, saying that he did not want anyone to accuse Brockley of taking information with him when he left.

Moeller took Brockley's keys and escorted him to the door. Moeller allowed Brockley to return later for his personal effects, but remained in the room while Brockley was cleaning out his desk and inspected all items that Brockley took with him.

Moeller wrote Brockley a letter providing for salary and insurance through August 31, 1984, and providing for $7,500 in lieu of a bonus for the fiscal year ending in 1985. The letter contained the notation that "[a]ny and all parts of the above program remaining unpaid will be automatically cancelled by the following: A) Employment by a company deemed by Lozier to be a competitor. B) Disclosure to others of confidential information gained while employed by Lozier." The severance agreement made no mention of the incentive plan.

In May 1984, Brockley began working for Watkins Manufacturing Company, a California company, which was not a competitor of Lozier. Brockley remained with Watkins for about a year and then voluntarily left because he believed Watkins was about to be acquired by a larger corporation.

The Kent Corporation approached Brockley in late 1984 or early 1985 about the possibility of his becoming president of Kent. Kent was a competitor of Lozier in store fixtures, but did not manufacture storage shelving. While at Lozier, Brockley had little contact with customers other than those seeking storage shelving. In April 1985, Brockley visited Kent in Alabama. In July 1985, Brockley accepted employment as president of Kent. Brockley's compensation at Kent included a base salary of $110,000, with bonuses and other benefits. Kent is a smaller corporation than Lozier, with net sales of $8 to $9 million annually, while Lozier's sales were $125 to $150 million. Kent's manufacturing plant is located in Birmingham, Alabama. Lozier has a manufacturing plant in Scottsboro, Alabama. Kent sells only store fixtures. Kent did business nationwide, but over 90 percent of Kent's business was east of the Mississippi.

Brockley testified that he competed against Lozier, as well as "all the other eight or nine or ten people that were in the business," and Brockley testified that he solicited an employee of Lozier, Robert Leech, to work for Kent. Leech was made vice

president of sales and marketing for Kent. While with Kent, Leech solicited customers that he had previously done business with when he was working for Lozier.

Brockley assisted Leech with the solicitations. Brockley testified that Kent had solicited many of these same customers before Brockley was employed by Kent. During the time Brockley was with Kent, Lozier solicited and took customers from Kent, including one of Kent's larger customers.

Monaghan testified that he did not have any personal knowledge that Brockley's activities personally led to Lozier's losing accounts and that he did not have any knowledge that Brockley "utilized any specific information from Lozier Corporation in targeting accounts that might have been lost to Kent."

On August 28, 1985, and February 26, 1986, Lozier informed Brockley that he had forfeited his right to unpaid benefits "because [he] acted and engaged as an officer and employee in the operation or management of a business in competition with Lozier Corporation."

Both parties agree that the amounts that would be distributed to Brockley, absent the forfeiture, are $28,953.93, payable January 31, 1987, and $35,030.18, payable January 31, 1988. Brockley left Kent in approximately July 1986, after about a year of employment, after which he returned to Omaha to work as president of Industrial Electrical Reels.

Lozier did not contend in its answer that Brockley was terminated for cause, but, rather, first mentioned termination for cause in a motion for leave to amend the answer on June 15, 1988, after Brockley had moved for summary judgment. Lozier moved that the court transfer the case to its equity docket "as it is an equity action seeking both declaratory relief and an accounting." The court granted the motion.

The trial court entered judgment for Lozier, setting out the following findings:

> The court further finds that the forfeiture clause in the incentive plan is not a covenant not to compete, but merely provides forfeiture of post employment benefits.
>
> The court further finds that the forfeiture clause is reasonable and enforceable considering:

1. Plaintiff, as vice president of marketing for defendant, was privy to extremely confidential information regarding defendant's operations which defendant had a legitimate interest in protecting from disclosure to defendant's competitors.

2. The effective term of restriction, i.e. four years, was not of unreasonable duration.

3. Lack of geographical restriction was reasonable considering defendant's market encompassed national and international sales.

4. Plaintiff was not prohibited from earning a livelihood, but merely forfeited a delayed incentive payment.

The court further finds plaintiff was discharged for cause, i.e. unsatisfactory job performance.

Lozier moved for attorney fees under § 48-1231, and the court awarded Lozier fees in the amount of $25,000. Brockley's motion for new trial was overruled.

> In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

Neb. Rev. Stat. § 25-1925 (Supp. 1991).

The initial question is whether Brockley was fired for cause. "In the context of employment contracts, 'good cause' for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice." *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 865, 438 N.W.2d 494, 496 (1989).

We find that the evidence does not support the finding that

Brockley was fired for cause. Both Monaghan and Moeller testified that Brockley had not been guilty of any misconduct. Monaghan testified that when he was Brockley's immediate superior, which was for the vast majority of Brockley's tenure at Lozier, Brockley had done nothing to constitute cause for firing. Brockley received raises, bonuses, and good reviews throughout his tenure at Lozier, up to within 3 months of his discharge. Brockley was not told at the time he was fired, nor at any time prior to this litigation, that he was being fired for poor performance. The issue of poor performance arose for the first time in a motion to amend Lozier's answer, which was filed after Brockley had moved for summary judgment.

In addition, Lozier's conduct was inconsistent with its contention that it fired Brockley for cause. Clause 9 of the incentive plan provides that if a participant's employment is terminated for cause, his right to receive payments is forfeited. Lozier, however, did not make the contention that Brockley's rights were forfeited until the time Brockley engaged in competition with Lozier. Lozier's handling of Brockley's claim for partial year payments under clause 8 is also inconsistent with its claim that Brockley was terminated for cause. Under clause 8(b), an employee fired for cause would have no right to partial year payments. Monaghan's April 23, 1985, memo to Moeller stated that under clause 8(b), Brockley would be paid for 27 percent of the year. Monaghan later testified that when he wrote the memo he was mistaken about whether Brockley had been awarded performance units, but he specifically testified that the memo was correct in its discussion of clause 8(b). Under clause 8(b), if Lozier fired Brockley for cause, Brockley would not be entitled to any partial year payments regardless of whether performance units had been awarded.

On consideration of the entire record, we find that Lozier did not fire Brockley for cause and that there is no substantial evidence to support such a finding. The trial court's finding was in error.

Next, we must decide the circumstances under which a forfeiture for competition clause will be enforced. Lozier contends that the clause is not a covenant not to compete and that it should therefore be enforced, regardless of whether it is

reasonable. We recognize that the clause in question is not a covenant not to compete, but do not agree with the contention that a forfeiture clause need not be reasonable.

We adopt the view set out by the Minnesota Supreme Court in *Harris v. Bolin*, 310 Minn. 391, 395, 247 N.W.2d 600, 603 (1976), where the court held that a forfeiture for competition clause was an unlawful restraint of trade because it was not limited "as to time, harm to the employer, or geographical area." The Minnesota court noted that while other courts had

> attempted to distinguish between covenants not to compete in employment contracts and the penalty imposed under profit sharing plans for competing, the purpose of both arrangements is the same; therefore, under the common law, such agreements should be enforced only when they are found to be reasonable in scope after balancing the interests of the employer and employee.

Id. at 394, 247 N.W.2d at 603. See, also, *Food Fair Stores v. Greeley*, 264 Md. 105, 285 A.2d 632 (1972); *Holloway v. Faw, Casson & Co.*, 319 Md. 324, 572 A.2d 510 (1990); *Sheppard v. Blackstock Lumber*, 85 Wash. 2d 929, 540 P.2d 1373 (1975); *Cheney v. Automatic Sprinkler Corp. of America*, 377 Mass. 141, 385 N.E.2d 961 (1979).

The concept of forfeiture of deferred compensation based on competitive employment after discharge has not been squarely before this court. Over the years, however, we have established that covenants not to compete are enforceable if the covenants are reasonable. We will apply the same analysis to forfeiture of deferred compensation. Our position on covenants not to compete was summed up in *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), where we quoted, with approval, the holding of *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960):

> "There are three general requirements relating to [the enforceability of] partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the

> restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee."

Boisen, 222 Neb. at 244, 383 N.W.2d at 33.

In *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), we extended our holding. Polly's contract with the defendant, Hilderman, plaintiff's former employer, provided that if plaintiff competed with defendant within a certain area, " 'all deferred bonus payments due [plaintiff] shall forthwith terminate. . . .' " *Id.* at 664, 407 N.W.2d at 754. We held that it was unclear whether the agreement was a covenant not to compete, but we went on to find that the agreement was unreasonable, applying a reasonableness requirement to the agreement as if it were a covenant not to compete.

We find that forfeitures of deferred compensation are enforceable, but that they will be treated in the same manner as covenants not to compete, and therefore, the conditions making the forfeitures enforceable must be reasonable.

The forfeiture provision in Brockley's incentive plan contract is unenforceable because it is unreasonable. If Brockley participated in the plan for the fiscal year ending January 1985, his last payment from Lozier would have been in January 1989. Brockley left Lozier in April 1984. The forfeiture for competition clause would require that Brockley not work for a competitor for almost 5 years after he was fired. Brockley contends that the forfeiture clause is unreasonable because 4 to 5 years is an unreasonably long duration. We agree.

" '[A]n employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.' " *Id.* at 665, 407 N.W.2d at 754. " '[A] restraint is reasonable only if, taken as a whole, its dimensions are proportioned in relation to each other so as to keep the burden on the employee down to the minimum consistent with reasonable protection to the employer's legitimate interests.' " *American Sec. Servs. v. Vodra*, 222 Neb. 480, 489, 385 N.W.2d 73, 79 (1986).

In considering the requirements for a valid partial restraint of trade referred to in *Boisen, supra*, and *Polly, supra*, we focus

on the second requirement: Is the restriction reasonably necessary to protect a legitimate interest of the employer? Nebraska cases dealing with former employees who appropriated customer goodwill are not directly apposite in the case before us. Brockley had no contact with customers except in the storage shelving department, an area in which Kent did not compete with Lozier. Brockley's danger to Lozier consisted of his knowledge of confidential information.

Employers, however, have a legitimate interest in protecting confidential information. We held:

> [A]n employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations. . . . Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.

Boisen, 222 Neb. at 246-47, 383 N.W.2d at 34. See, also, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991). We went on in *Boisen* to determine that the employer had not shown that the employee possessed any confidential information.

In the case before us, Lozier has shown that Brockley had knowledge of and access to "confidential information pertaining to Lozier's business operations." Indeed, Brockley admits that he had access to confidential information. Lozier has not shown, however, that there was still a need to protect that information almost 5 years after Brockley's firing. The evidence shows that, at best, Brockley may have worked on parts of Lozier's 3-year plan. There is no showing of a need to protect information 4 to 5 years after it was developed. The evidence does not show the useful life of the confidential information, but merely supports the general proposition that companies would like to keep everything secret forever. The confidential information available to Brockley, in the second

tier of management, could not be said to be of such a nature as to require protection lasting for many years. While Lozier has shown a legitimate interest, it has not shown that a 4-year restriction was reasonably necessary to protect it.

Because we hold that the forfeiture clause contains an unreasonable duration requirement, we need not consider whether the other requirements are reasonable. The forfeiture clause is unenforceable. We will not reform an unreasonable forfeiture of deferred compensation to make the forfeiture enforceable.

> In previous cases of this nature, we have declined, for various reasons, to rewrite a covenant not to compete so as to make it "no greater than is reasonably necessary." . . . It is not the function of courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.

Vlasin v. Len Johnson & Co., 235 Neb. 450, 455, 455 N.W.2d 772, 776 (1990). Brockley's second summarized assignment of error has merit. The forfeiture clause in Lozier's incentive plan is not enforceable against Brockley.

In his third summarized assignment of error, Brockley contends that the court erred in failing to find that he was entitled to an incentive award for the portion of the fiscal year ending in 1985. Lozier's fiscal year ends January 31. Brockley was fired near the end of April, so he worked approximately 3 months of the fiscal year in question.

We look first to the language of the incentive plan agreement itself. The plan provided that the committee would grant certain employees performance units, which would be credited to a performance unit account. At the end of each fiscal year, Lozier

> credited to each participant an incentive award . . . based upon that amount . . . which bears the same ratio to the Company's net income (as hereinafter defined) as the aggregate number of Performance Units credited to such participant's Performance Unit Account as of such last day bears to the total number of shares of the Company's common stock issued and outstanding on such last day . . . .

These amounts were credited to the employee's incentive award account. The amounts in the incentive award accounts were to be paid in cash to the employee "upon the expiration of four years from the end of the fiscal year for which such award is made."

In regard to payments for partial years worked, the plan contained the following clause:

> 8. Termination of Employment. . . .
>
> (b) If a participant's employment is terminated by the Company for any reason except his involvement in any embezzlement or theft, his intentional misconduct or any other sufficient cause, as determined by the Committee, then on the last day of the taxable year in which such termination occurs the Committee shall determine the amount of the Incentive Award which would be credited to the participant if he had remained in the employment of the Company through the last day of such taxable year, and he shall be credited with such proportion of that amount as the number of full weeks of his employment by the Company during such year bears to 52.

Brockley contends that the performance units were awarded like shares of stock, and once an employee had the units, he kept them. Every year, the committee would calculate how much the units were going to pay for that year. This is the more reasonable interpretation if the incentive plan was, as Lozier admits, a substitute for stock ownership. When asked whether he understood the incentive plan, Brockley responded:

> I also understood that when I was awarded 100 performance shares it was like the stock, that they belonged to me and that this wasn't awarded every year. There was never any discussion that maybe in a given year where I performed real well the compensation committee would decide maybe they wouldn't give me anything. I sure didn't understand that.

Lozier prepared the incentive plan contract.

> In construing a contract, the court will apply the general rule that when there is a question as to the meaning of the language of a contract, the contract will be construed against the party preparing it. . . . If the language in a

> contract drafted by one of the parties is susceptible to more than one meaning, it should be given a construction which the other party would be fairly justified in giving it.

Artex, Inc. v. Omaha Edible Oils, Inc., 231 Neb. 281, 287, 436 N.W.2d 146, 150-51 (1989). See, also, *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

Based on the language of the incentive plan agreement, we adopt Brockley's interpretation. When coupled with the rule that ambiguous contracts are construed against the drafter, we are persuaded that Brockley's interpretation is correct.

In addition, the course of performance between the parties indicates that Brockley's interpretation is correct. " 'It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.' " *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 803, 438 N.W.2d 474, 478 (1989). See, also, *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

Lozier explained that participation in the plan was in partial substitution for the stock option. A memo written by Monaghan compared the benefits of the stock option and the incentive plan. Monaghan testified that Lozier intended to "create a balance between a stock option or the ownership of stock and involvement in the long-term incentive plan."

In addition, Lozier did not notify the employees every year that they had been "awarded units." Monaghan admitted that the board did not always give notice to the employees when they had been given performance units, but that it "was a matter of board record." Each year, Lozier notified Brockley of the units' worth, but he testified that he never "received notice of receiving any performance units" after the original award of 100 units and that he believed he owned the 100 units from the time they were awarded in 1982. Monaghan testified to a similar experience. He testified that he participated in the incentive plan and that he had received notice the first time he received units, but that he did not receive notice every year, although he had participated in the plan every year. It is difficult to believe that Lozier would not notify the employees about whether they

were to participate in a plan worth roughly half their base salary, yet would notify them regarding what the units were worth in a particular year.

In addition, Moeller wrote a memo to Monaghan and another of Brockley's superiors, dated April 25, 1984, containing the details of the termination of Brockley's employment. It included this notation: "Don indicated that he would probably want pay out of the performance units. $ because 'He'd need the money.' Although less expensive to us re interest payment premium I would favor a staggered payout as assurance of non-compete. Thoughts?"

Monaghan wrote Moeller a memo, dated April 23, 1985, which stated that Brockley was due only 27 percent of the performance shares for the year in which he was fired, because he had worked only 27 percent of the year. The memo stated that "Clause 8(b) of the agreement covers this situation. In essence it says you get paid for the portion of the fiscal year that you worked."

Neither the agreement itself nor the parties' performance of it supports Lozier's contention that Brockley is not entitled to payment for 100 performance units for the portion of the fiscal year ending in 1985 that he worked. In the trial court's calculation of damages, Brockley is entitled to amounts under the incentive plan for the time he worked during the fiscal year ending on January 31, 1985.

In his fourth summarized assignment of error, Brockley contends that the court erred in failing to award attorney fees and costs to him and in making an award of fees and costs to Lozier. Brockley contends that the sums owing under the incentive plan are earnings, compensation, or wages under the Nebraska Wage Payment and Collection Act. Lozier states that "[u]nder the [wage] act, the legislature has made the risk of proceeding with litigation reciprocal to both the employer and the employee." Brief for appellee at 36. Lozier defends the trial court's award of attorney fees to Lozier and seeks the award of fees in this court. Both parties agree that the wage act controls, and the case has been submitted on that basis. The Nebraska Wage Payment and Collection Act states, in part:

> An employee having a claim for wages which are not

> paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee shall establish a claim and secure judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit, and (2) if such employee has employed an attorney in the case, an amount for attorney fees assessed by the court which fees shall not be less than twenty-five percent of the unpaid wages. If the cause is taken to an appellate court and plaintiff shall recover judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney fees in such appellate court which fees shall not be less than twenty-five percent of the unpaid wages. If the employee shall fail to recover a judgment in excess of the amount that may have been tendered within thirty days of the regular payday by an employer, then such employee shall not recover the attorney fees provided by this section and shall pay the employer's attorney fees and costs of the action as assessed by the court.

§ 48-1231.

With regard to the award of attorney fees under § 48-1231 to Lozier, Brockley contends that because Lozier never "tendered" any amount "within thirty days of the regular payday," the award of attorney fees to Lozier was improper.

Because of our disposition of the case, it is clear that the award of attorney fees to Lozier must be reversed as well. We note, however, that even had Lozier been successful on appeal, the award of attorney fees to Lozier, the employer, in either the trial court or this court, was clearly contrary to the statute. Employers will not be awarded attorney fees under the Nebraska Wage Payment and Collection Act if the employer has not tendered an amount to the employee within 30 days of the employee's regular payday.

We hold that the award of fees to Lozier was inappropriate, and that award is reversed.

The cause is remanded to the district court to enter a judgment in favor of Brockley and against Lozier for the incentive awards for the years ending January 31, 1983, and

January 31, 1984, plus 27 percent of the incentive award for the year ending January 31, 1985. The trial court shall also calculate interest on the incentive awards at the rates set out in exhibit 22, plus the appropriate rate for the partial year ending January 31, 1985.

In addition, Brockley is awarded attorney fees and costs, pursuant to the statute. The trial court is directed to enter an attorney fee of 25 percent of the incentive awards (including interest as set in paragraph 7 of the incentive plan) as appellate attorney fees in this court, and the court is directed to enter appropriate attorney fees under § 48-1231 as fees in the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

DONALD D. TUREK, APPELLANT, V. SAINT ELIZABETH COMMUNITY HEALTH CENTER, A NEBRASKA CORPORATION, ET AL., APPELLEES.

488 N.W.2d 567

Filed September 11, 1992. No. S-89-1223.

1. **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 a 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.
2. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
3. **Negligence: Licenses and Permits.** Generally, a violation of licensure laws, by itself, is not evidence of negligence.
4. **Health Care Providers: Negligence: Licenses and Permits.** A physician is negligent if his treatment is improper, but failure to have a license is not enough to render the treatment automatically deficient.
5. **Health Care Providers: Licenses and Permits.** When one practices a healing arts profession for which he holds no license, he is required to adhere to the standards of practice of those who are properly licensed.

6. **Health Care Providers: Informed Consent: Expert Witnesses: Proof.** Expert testimony is required to prove the standard of care in an informed consent case.
7. **Expert Witnesses: Mental Distress.** Where the character of an alleged injury is not objective, the cause and extent of the injury must be established by expert medical testimony. Where physical injury, upon which a claim for emotional distress is based, is not obvious to laymen, its existence may not be demonstrated solely by complaints of the alleged victim, but must also be substantiated by expert medical testimony.
8. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
9. **Negligence.** An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.
10. **Mental Distress.** For emotional distress to be compensable, it must be severe.

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

Donald E. Earnshaw for appellant.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Saint Elizabeth Community Health Center.

Daniel P. Chesire, of Kennedy, Holland, DeLacy & Svoboda, for appellee Robert Gillespie.

James A. Snowden and Shirley K. Williams, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Pat Burgher Gillespie.

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

BOSLAUGH, J.

The plaintiff, Donald D. Turek, has appealed from the order of the trial court granting the defendants' motions for summary judgment and dismissing the plaintiff's cause of action with prejudice. The defendants are Saint Elizabeth Community Health Center; Robert Gillespie, M.D.; and Pat Burgher Gillespie, a registered nurse.

The plaintiff, who was born August 18, 1966, was admitted to the St. Elizabeth burn treatment unit on October 26, 1978, with second and third degree burns over 58 to 68 percent of his body. He remained in that hospital through March 31, 1979. While he was a patient at St. Elizabeth, the plaintiff was under the care of defendant Dr. Gillespie and was also treated by defendant Nurse Gillespie. The plaintiff alleges that during the course of his treatment at St. Elizabeth, Nurse Gillespie performed certain procedures upon him which were beyond the scope of her training and authority as a registered nurse. These procedures included the insertion of a catheter into his subclavian artery, the administration of an anesthetic, and the use of a dermatome to perform skin grafting.

The plaintiff also alleges that Dr. Gillespie and Nurse Gillespie directed a staff member to conceal records which would have indicated that nurses at St. Elizabeth burn unit were performing procedures which were beyond the scope of their training and authority and that as a result, these records were not available for inspection by the Joint Commission on Accreditation of Hospitals.

In the third amended petition, which was filed on May 10, 1988, the plaintiff alleged that he had been injured by the negligence of the defendants, and he affirmatively waived his right for review by the medical review panel as provided in Neb. Rev. Stat. § 44-2840(4) (Reissue 1988). The plaintiff does not claim a battery as a basis for recovery of damages.

The defendants' motions for summary judgment are not included in the transcript, but are described in the judgment of the trial court. Apparently, the motions were heard upon the pleadings consisting of the third amended petition, the separate answers of the defendants, the motions, the deposition of the plaintiff offered by the defendants, and an affidavit of Bertine Loop, a certified master social worker, which affidavit was offered by the plaintiff. The plaintiff offered no other evidence in resistance to the motions.

The third amended petition alleged that Nurse Gillespie was negligent in that she performed medical procedures which she was not licensed to perform and that Dr. Gillespie and St. Elizabeth were negligent in allowing her to perform these

procedures. The plaintiff further alleged that the defendants were negligent in failing to inform him that Nurse Gillespie was not licensed to perform surgical procedures and that the defendants were negligent in failing to obtain his informed consent prior to performing the surgical procedures.

Although the plaintiff did not allege directly that he was injured as a result of the procedures which Nurse Gillespie performed, he did allege that when, in 1986, he discovered that Nurse Gillespie was unlicensed to perform such procedures, he "was upset that his treatment time *could* have been extended and his life endangered" and that as a result, he "sustained headaches, vomiting, sleeplessness, fear, severe emotional distress, and will be required to seek psychiatric care." (Emphasis supplied.)

The trial court found that the plaintiff had failed to allege any negligent conduct on the part of the defendants because there is no claim that the treatment of the plaintiff did not comply with the standards of care applicable to the plaintiff; that the alleged lack of informed consent could not be a basis for recovery because none of the risks inherent to the treatment materialized or came to fruition; that the conduct of the defendants was not outrageous or beyond the bounds of decency, nor was it atrocious or intolerable in a civilized community; that any emotional harm suffered by the plaintiff was not of such a character that it could be said to be in excess of that which a reasonable person should be expected to endure; and that the fear and apprehension allegedly suffered by the plaintiff were not the proximate result of any act or omission of the defendants'. The plaintiff's assignments of error are directed at the findings of the trial court.

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 a 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.

Western Sec. Bank v. Terry A. Lambert Plumbing, 240 Neb. 448, 482 N.W.2d 278 (1992).

In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Id.*

All of the plaintiff's allegations of negligence are based on the theory that the fact that Nurse Gillespie was not licensed or trained to perform surgical procedures was sufficient to prove negligence. The plaintiff has cited no authority in support of his contention, and the cases which have considered the matter hold to the contrary.

In *Leahy v. Kenosha Memorial Hospital*, 118 Wis. 2d 441, 348 N.W.2d 607 (Wis. App. 1984), the plaintiff sought damages for a brain injury to an infant alleged to have been caused by the actions of the treating physician and the hospital shortly after the birth of the infant. A part of the plaintiff's evidence related to a claim that the persons caring for the infant were not registered nurses. The trial court had instructed the jury that a violation of the statute regulating the practice of professional nursing was negligence. In holding the instruction was erroneous and reversing the judgment for the plaintiff, the court said:

> The court addressed the matter of negligence in the instructions by first delivering Wis J I—Civil 1005. The trial court then proceeded to give the optional concluding paragraph to the standard instruction as follows: "In addition to this general definition of negligence, there are other safety statutes enacted by the legislature, *a violation of which is negligence* as that term is used in the verdict and these instructions. [Emphasis added.]"
>
> This language alerts any reasonably informed juror that the hospital's negligence can be measured not only from the general definition already given but also from a finding of a violation of a statute.
>
> The court then delivered the statutory definitions of professional nursing and practical nursing. The court following these definitions with this language: "*If you*

find by virtue of this statute that the Kenosha Memorial Hospital placed practical nurses or technicians in positions where they could not legally function, in positions that should have been staffed by professional registered nurses, or if the Kenosha Memorial Hospital permitted practical nurses to function as professional registered nurses, then the Kenosha Memorial Hospital *would be negligent as that term has been defined for you.* [Emphasis added.]"

The trial court concluded the negligence phase of the instructions with Wis J I—Civil 1023.7 (with certain modifications) upon which a further finding of negligence against the hospital, unrelated to any statute, could be premised.

A fair reading of the entire negligence instructions and the context within which they were delivered reveals that alternative grounds for a finding of negligence against the hospital were presented to the jury, including language which informed the jury that a violation of sec. 441.11, Stats., could form the basis for such a finding. This constituted a negligence per se instruction.

. . . .

As already noted, the purpose of ch. 441, Stats., is to regulate the nursing profession through the creation of a board of nursing and to provide for the licensing of nurses. While these laws result in securing the safety and welfare of the public as an entity, nothing in ch. 441, directly or by implication, reveals a legislative intent to grant a private right of action for a violation of the statute. Dean Prosser has stated that: "Most licensing statutes, such as those applicable to automobile drivers or physicians, have been construed as intended only for the protection of the public against injury at the hands of incompetents, and to create no liability where the actor is in fact competent but unlicensed." W. Prosser, *Handbook of the Law of Torts* § 36 at 196 (4th ed. 1971). Wisconsin followed the Prosser rule in *Westfall v. Kottke*, 110 Wis. 2d 86, 328 N.W.2d 481 (1983). The trial court in *Westfall* instructed the jury that they could consider the absence of

a license on the issue of negligence. In holding that the trial court's instruction was erroneous, the supreme court said: "Considerable emphasis is placed upon the fact that Westfall was only fourteen and an unlicensed driver. The trial court appeared to place substantial reliance on the fact of Westfall's extreme youth and that he did not have a license to operate a motorcycle. The court of appeals properly concluded that it was erroneous to base negligence upon these factors, which are unrelated to the *actual conduct* of the person inquired about. The fact plaintiff Westfall was unlicensed did not constitute a cause of the accident. It was erroneous to instruct the jury that either the age of the operator or that he was unlicensed were factors to be considered in determining whether he was negligent. [Emphasis added.]" *Id.* at 105, 328 N.W.2d at 491. The negligence per se instruction in the instant case created the same problem as that in *Westfall* in that it highlighted to the jury the question of whether the nurses' conduct fell within the concept of professional nursing or practical nursing under the statute and effectively prohibited consideration of the *quality* and *competency* of such conduct.

We conclude that sec. 441.11, Stats., is not a safety statute and does not grant a private right of action for its violation. The trial court's negligence per se instruction based on sec. 441.11 was therefore erroneous.

Leahy v. Kenosha Memorial Hospital, 118 Wis. 2d at 447-48, 450-51, 348 N.W.2d at 611-13.

In *Fjerstad v. Knutson*, 271 N.W.2d 8 (S.D. 1978), the plaintiff alleged the death of the decedent had resulted from negligent treatment by the hospital and an intern. Upon appeal, the plaintiff claimed that the trial court had erred in refusing to instruct that violation of the licensure laws was negligence as a matter of law. In holding that the plaintiff could not base a claim of negligence upon a violation of the licensure laws, the court said:

Aside from the intern requirement, we do not believe that failure to have a license should, in itself, render the unlicensed person negligent. A physician is negligent if his

> treatment is improper, but failure to have a license is not enough to render the treatment automatically deficient. *See Tittle v. Hurlbutt*, 53 Haw. 526, 497 P.2d 1354 (1972); *Janssen v. Mulder*, 232 Mich. 183, 205 N.W. 159 (1925) (chiropractor); Prosser, Law of Torts 196 (4th ed. 1971). The same is true on the issue of the intern being called "Doctor". Although doing so may be a misdemeanor, it does not render Knutson's treatment negligent per se.
>
> The second contention is that Sioux Valley Hospital was negligent per se because it was practicing medicine through its unlicensed intern. We conclude that this contention is likewise without merit. According to SDCL 36-4-11, the intern must serve his internship *in a hospital.* Also, the fact that a hospital violates these licensure statutes does not in itself render the hospital negligent.
>
> . . . The instruction involved allows Knutson to escape liability only if he made an error in judgment while performing according to the standard of care for licensed physicians in similar localities. As we noted above, the lack of a license, without more, does not render his conduct negligent. An error in judgment within the standard of care for licensed physicians would likewise not render the medical treatment negligent.

Fjerstad v. Knutson, 271 N.W.2d at 14.

In *DeHart v Board of Podiatry*, 97 Mich. App. 307, 293 N.W.2d 806 (1980), the issue was whether a podiatrist's license should be revoked because he had unlawfully invaded the field of medicine. In holding that the actions of the podiatrist should be judged by the standards of practice for licensed doctors of medicine, the court stated:

> When one practices a healing arts profession for which he holds no license, he is required to adhere to the standards of practice of those who are properly licensed. Thus, in the instant case, since the plaintiff unlawfully invaded the field of medicine, his actions were properly judged by the standards of practice for licensed doctors of medicine.

Id. at 313, 293 N.W.2d at 809.

In the case at bar, the plaintiff does not contend that his

treatment by the defendants was improper in any way except that Nurse Gillespie was not licensed to perform the things that she did which amounted to the practice of medicine. Thus, the plaintiff failed to allege any negligence on the part of the defendants.

The plaintiff could not recover upon the basis of lack of informed consent because none of the risks inherent to the treatment or procedures came to fruition, and the plaintiff does not claim otherwise. Expert testimony is required to prove the standard of care in an informed consent case, and the plaintiff has no such evidence. See, *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987); *Kohoutek v. Hafner*, 383 N.W.2d 295 (Minn. 1986); *Wheeldon v. Madison*, 374 N.W.2d 367 (S.D. 1985).

The plaintiff claims that he suffered headaches, sleeplessness, vomiting, and severe emotional distress as a result of the conduct of the defendants. All of these are medical conditions, but he has no expert medical opinion evidence that all or any of these matters were caused by the defendants.

Where the character of an alleged injury is not objective, the cause and extent of the injury must be established by expert medical testimony. *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990). Where physical injury, upon which a claim for emotional distress is based, is not obvious to laymen, its existence may not be demonstrated solely by complaints of the alleged victim, but must also be substantiated by expert medical testimony. *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986).

The affidavit of Loop, which was the only evidence offered by the plaintiff in resistance to the defendants' motions, was not admissible as evidence of proximate cause. Loop is a certified master social worker who has provided counseling services to the plaintiff. Loop, however, is not competent to express an opinion on medical questions or testify as to the cause of the medical conditions which the plaintiff claims he sustained as a result of the defendants' treatment of the plaintiff.

With respect to proximate cause generally, the plaintiff must establish that his alleged damages were the natural and

probable result of the alleged negligence of the defendant.

Proximate cause is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Belgum v. Mitsuo Kawamoto & Assoc.*, 236 Neb. 127, 459 N.W.2d 226 (1990). However, it is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the conditions is not the proximate cause of the injury. *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985); *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N.W. 117 (1923).

Furthermore,

> " '[a]n injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.' "

Lock v. Packard Flying Service, Inc., 185 Neb. 71, 75, 173 N.W.2d 516, 519 (1970), quoting *Kroeger v. Safranek*, 161 Neb. 182, 72 N.W.2d 831 (1955).

Here, there was a lapse of some 7 or 8 years before the plaintiff's complaints originated.

In his deposition, the plaintiff testified that his emotional distress initially arose in October 1986 while he was working at a radio station in Beatrice. At that time, he read an item on the newsroom wire which indicated that the Nebraska Department of Health was investigating the possibility of nurses' performing procedures beyond the scope of nursing in the St. Elizabeth burn unit. Although the plaintiff did know that Nurse Gillespie had performed a subclavian catheterization and skin grafting upon him 7 to 8 years earlier during the time in which he was hospitalized, he was not aware that she was unlicensed to perform these procedures until he learned of the State's investigation.

After reading the wire story and additional newspaper

articles concerning the investigation, the plaintiff discussed the allegations with his mother, and he eventually contacted the State concerning the surgical procedures which Nurse Gillespie had performed upon him. According to the plaintiff, he was somewhat reluctant to contact the State because recounting his experience "was going to be reliving it all again," but it was something he "just had to do." However, the plaintiff apparently does not have an aversion to any reminder of his experience as a burn victim, as he expresses an interest in becoming involved in counseling other burn victims. The plaintiff also testified that he does not mind discussing his experience as a burn patient.

The plaintiff testified that initially learning of the State's investigation of the St. Elizabeth burn unit was "nothing major at that time," but stated that acquiring that knowledge "was like the detonator, and then [his emotional distress] slowly just kind of built." When asked if he was angered by the newspaper accounts of the State's investigation, Turek testified:

> I don't know if angry was the word. I think just — I think more astonished is the word. To — and then as, you know, the further and further, you know, the more time that went on, and I was able to just think about the procedures that were done, and what happened, and really how vulnerable I was, and it just got that much worse. And I was kind of upset, you know, I was upset, but I was more just astonished that these things had happened.

After becoming aware of the State's investigation in October 1986, the plaintiff investigated the potential risks inherent in the procedures which Nurse Gillespie had performed, particularly those risks associated with the insertion of a catheter into his subclavian artery. The knowledge of those risks enhanced his emotional distress, and he experienced "nausea and all of those things," which he described as a "queasy feeling . . . the feeling of reliving the whole thing again."

The plaintiff testified that more than 1 year later, in November 1987, he experienced vomiting, diarrhea, and a loss of appetite for a period of 2 months, which he attributes to the stress associated with his learning of the investigation of the St. Elizabeth burn unit. At his mother's urging, he did contact a

doctor with respect to this physical illness, but testified that "it was more of a matter of just overcoming my anxiety and my stress in dealing with it and getting on again." Despite this self-diagnosis, Turek testified that no physician ever told him that his intestinal illness was due to his contemplation of the investigation of the St. Elizabeth burn unit, and this illness remains medically undiagnosed. Nevertheless, according to the plaintiff, "I diagnosed it when it first happened. It was nerves."

While the plaintiff attributes his emotional distress to his learning that Nurse Gillespie had performed procedures upon him for which she was not licensed, his testimony reveals that he became most disturbed when he learned that the State had dropped its investigation of the St. Elizabeth burn unit. Apparently referring to Nurse Gillespie and Dr. Gillespie, Turek described his reaction when he learned of the termination of the State's investigation:

> It made me very angry. . . . They gave her a fine, which is next to nothing, to, you know, $2,000. . . . And to give her a raise and let her investigate the scope of nursing practices, and then dismiss everything against Gillespie, and then it was just shoved aside. . . . Well, it can't be shoved aside. These are real people you're dealing with here. I mean, you're — you can't keep bringing them in and shoving them out like they're hams. . . . You've got to have some compassion for those patients. And just try and relate with them.

According to the plaintiff, before the charges were dropped he "had experienced nausea and all of those things. . . . But after the charges were dropped, that's when the real, the diarrhea and the vomiting and all this came." When asked if the discontinuation of the State's investigation of the St. Elizabeth burn unit caused his vomiting and diarrhea, the plaintiff stated:

> I think that — I think that was a part of it. I think just the fact that it was eliminated without virtually any body taking any responsibility for what was done, I think, is what upset me more than anything. And that, I think that's basically what upset me more than anything.

The plaintiff also testified that while the State's investigation triggered memories of his experience in the St. Elizabeth burn

unit, "the big thing was when it just was dismissed. That was just like the icing on top of the cake, so to speak. It just leveled me. I couldn't believe it."

In May 1988, the plaintiff met with Dr. Stan Moore, a psychologist, to discuss why he "was having so many anxieties." Although Dr. Moore suggested further counseling, the plaintiff was not aware of any diagnosis which Dr. Moore may have made regarding his condition.

At the time of his deposition, the plaintiff was meeting on a weekly basis with Loop, the certified master social worker. The plaintiff began meeting with Loop 2 to 3 months after he had met with Dr. Moore, and he described his meetings with Loop:

> Basically just, she just sits there and listens to me ramble. I tell her about what's going on in my life. . . . But really a lot of it, you know, is just dealing with my feelings of mistrust and trying to get those out.
>
> And basically right now it's just one of those things where I talk and she listens. And she doesn't ask a lot of questions.
>
> . . . .
>
> . . . I think it's kind of helpful in a way. . . . Bertine's father died in the burn unit. And that's really the only way I can relate with her, and talk to her. It's kind of nice to be able to talk to somebody who's been there.
>
> . . . .
>
> . . .[R]ight now, it's . . . more of a self-actualization type thing for me [to get to] know myself better.

While the plaintiff claims that the defendants' alleged negligence caused his alleged emotional distress which commenced in 1986, it is noteworthy that another unrelated incident apparently also created stress for the plaintiff that year. In November 1986, the plaintiff and a friend wrote what the plaintiff describes as "a song about a guy sitting in a room by himself looking back on the world right before he commits suicide." According to the plaintiff, "we wrote the song and played it for a buddy of [his], he was the first one to hear it; and he committed suicide a few weeks later."

When asked if this incident was as stressful as reading about Nurse Gillespie and the doctors at St. Elizabeth, the plaintiff

replied: "Similar, but not the same. I mean, both instances you ask why, you know. But I guess there aren't any answers."

In describing the damages which he alleges he has suffered, the plaintiff testified that as a result of the defendants' alleged negligence, he is inflicted with profound distrust, particularly with respect to the medical profession. He testified:

> [Nurse Gillespie] basically put my life in a situation, you know, very life-threatening situation that I do not need to be in. And she did surgery on me without consulting my parents, she did surgery on me without signing a release, and I don't know why she did it. I think she just did it on a whim. I can't tell you why.
>
> But because these things have happened, I don't just don't trust, I just don't trust doctors, I don't trust nurses, I don't trust anybody involved. And when I get sick I don't go anywhere, I just sit and I deal with it. I lay on my couch.
>
> And I'm really scared to death some day I'm going to be sitting on my couch some day, just sitting, and I may be bleeding internally or something, and I just wouldn't go to the doctor or the hospital to be treated, because I don't think they know, I don't think that they're going to take care of me in the proper way . . . .

However, the plaintiff does not limit his distrust to the medical profession. When asked if there are other people he does not trust, the plaintiff replied: "I don't like to rely on anybody else for anything." But, the plaintiff testified that among those he does not trust, the medical profession is "at the top of the list."

In the present case, it is clear that prior to the time that the Department of Health dropped its investigation of the St. Elizabeth burn unit, the plaintiff, as a matter of law, did not suffer any compensable damages. While the plaintiff testified that he was "astonished" to learn that Nurse Gillespie had not been licensed to perform the procedures which she had performed, he also testified that acquiring that knowledge was "nothing major at that time." Later, his emotional distress "slowly just kind of built," and he experienced a "queasy feeling . . . the feeling of reliving the whole thing again." It may

be understandable that initially learning of the investigation of the St. Elizabeth burn unit would cause the plaintiff some mental anguish by serving as a reminder of the suffering he had experienced while undergoing recovery from the severe burns he had received, just as any event which served as a reminder of that experience might provoke some anguish. However, in order for Turek's emotional distress to be compensable, it must be severe. See, *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983); *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987).

While *Hassing* and *Pick* were cases involving alleged intentional, as opposed to negligent, infliction of emotional distress, other jurisdictions have used a similar standard in cases involving charges of negligent infliction of emotional distress. See, *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981) (the emotional distress to a bystander must be serious). The record shows that prior to the termination of the State's investigation of the St. Elizabeth burn unit, the plaintiff's mental distress was, as a matter of law, not of sufficient severity to warrant compensation.

With respect to the emotional distress which the plaintiff may have suffered after learning of the completion or termination of the State's investigation of the St. Elizabeth burn unit, the record establishes that the defendants' alleged negligence was not the proximate cause of Turek's then intensified emotional distress.

As noted previously, regarding the State's investigation, the plaintiff testified, "I think just the fact that it was eliminated without virtually any body taking any responsibility for what was done, I think, is what upset me more than anything." The plaintiff also testified that while the State's investigation triggered memories of his experience in the St. Elizabeth burn unit, "the big thing was when it just was dismissed. . . . It just leveled me. I couldn't believe it." Thus, the record shows that any compensable emotional distress which the plaintiff may have suffered was caused by his dissatisfaction with the State's

disposition of its investigation of the defendants.

While it may have been foreseeable that the plaintiff might suffer some slight emotional distress upon learning that Nurse Gillespie was unlicensed to perform the procedures which she had performed, it could not be anticipated that it might cause the plaintiff severe emotional distress. Consequently, giving the plaintiff the benefit of all reasonable inferences, the record before us establishes that the defendants' alleged negligence did not proximately cause any compensable injury to the plaintiff.

It is unnecessary to consider any of the other assignments of error or the other grounds on which summary judgment was properly granted.

The judgment is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

PATRICK M. SHAHAN, APPELLANT, V. JANET HILKER, APPELLEE.

488 N.W.2d 577

Filed September 11, 1992. No. S-89-1300.

1. **Actions: Appeal and Error.** In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. **Evidence: Expert Witnesses.** For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between an accident and a disability.
3. **Expert Witnesses.** A medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty" or "reasonable probability."
4. **Torts: Negligence: Proximate Cause.** A tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.
5. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which

breaks the causal connection between the original wrong and the injury.

6. **Trial: Negligence.** Determination of causation is, ordinarily, a matter for the trier of fact.
7. **Parties: Actions.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.
8. **Insurance: Attorney and Client: Proof.** A report or other communication made by an insured to his liability insurance company concerning an event which may be made the basis of a claim against him covered by the liability policy is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him. The burden is on the party opposing discovery to show that the material sought is privileged.

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

Siegfried H. Brauer III, of Ross, Schroeder & Brauer, for appellant.

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

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

FAHRNBRUCH, J.

Patrick M. Shahan appeals a $5,000 jury award he received for personal injuries and property damage incurred as a result of a no-contact accident in Kearney, Nebraska, involving the motorcycle he was riding and an automobile driven by Janet Hilker.

In substance, Shahan claims that the trial court erred when it (1) refused to permit the jury to consider evidence as to whether injuries and damages he received in a fall occurring subsequent to the motorcycle-automobile accident were the proximate result of Hilker's negligence, (2) denied Shahan discovery of a statement Hilker gave to her insurance carrier's adjuster following the accident, and (3) refused to grant Shahan a new trial because of an inadequate verdict. We reverse the judgment and remand the cause to the district court for Buffalo County for a new trial.

In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Kappenman v. Heule, ante* p. 54, 486 N.W.2d 27 (1992).

On June 15, 1987, Hilker was leaving the Hilltop Mall located on the east side of four-lane Highway 10 in Kearney. She drove her automobile west across the northbound lanes of the highway and turned south into the highway's westernmost southbound lane. In turning left into the westernmost southbound lane of the highway, Hilker intercepted the southbound path upon which Shahan was operating his motorcycle. Shahan testified that in an attempt to avoid a collision with Hilker's car, he took evasive action. He said he drove his motorcycle to his right and hit the west curb of the highway. He proceeded into 3- to 4-foot-tall weeds, which were just off the highway, and lost control of his motorcycle. Shahan testified that he "flew over the handle bars" of his motorcycle. He landed on his face and then on his left shoulder. Shahan testified that he had pain in his lower back, in the base of his neck and head, in his left leg, and in his arms. The appellant was taken to the emergency room of a hospital, checked by Dr. Lawrence Bauer, and went home. Three days later, Shahan went back to work, had pain, and returned to Dr. Bauer for treatment. Dr. Bauer had more x rays taken and referred Shahan to a Dr. Salumbides. Dr. Bauer told Shahan that he did not foresee any problem with Shahan's going to Grand Junction, Colorado, for a vacation so long as he wore a cervical collar and did not overexert himself. Dr. Bauer prescribed medication for Shahan.

On June 30, 1987, while visiting his wife's relatives in Grand Junction, Shahan talked with his brother-in-law at the breakfast table. The brother-in-law went to the basement of the home, and Shahan stood at the top of the stairs visiting with him as the brother-in-law did chores at the foot of the stairs. Shahan testified, "I don't know what really happened. I was standing there, next thing I know my legs went out from under me. I was dizzy, kinda. I went down the stairs." Shahan said he had taken only the medicines prescribed by Dr. Bauer. He

testified that he had extreme pain in his left side and neck and that "I couldn't put things together to stand up" as a result of his fall down the stairs. He was helped to a bed, where he rested and then took a hot bath, but his pain got worse, Shahan said. He was taken to a hospital, where he was given a hypodermic injection. He had a reaction to the hypo but subsequently returned to his brother-in-law's home that evening. With his wife driving, Shahan returned home to Kearney the next day. He saw Dr. Bauer and did not return to work until the latter part of August. At trial, Shahan testified that he still had a "lot of problems" with his arm and neck.

Shahan testified that Hilker stopped her car when he was attempting to get up from the weeds after the accident, but that she took off "south down the highway." Hilker returned to the accident scene. She was subsequently charged with "failure to yield right-of-way" and entered a plea of guilty to that charge.

Shahan first complains that the trial court refused to permit the jury to consider whether the injuries and damages he received in the fall down the stairs at his brother-in-law's home were a proximate result of Hilker's negligence in the prior motorcycle-automobile accident of June 15.

The record is silent as to what issues were submitted to the jury. None of the jury instructions were included in the transcript, nor were they requested to be included in that document. The record reflects that Shahan objected to only one instruction, and the record fails to reveal the content of that instruction and whether it was given to the jury. The bill of exceptions reflects that the trial court did sustain objections to Dr. Bauer's expressing an opinion as to whether the injuries Shahan received in Colorado were caused by the effects of the medications the doctor had prescribed for the injuries Shahan had received in the Kearney accident.

In an offer of proof, Dr. Bauer stated that the side effects of two medications taken by Shahan "might be light headedness, dizziness, [or] drowsiness" and that "probably both of those medications would have been at about their peak effectiveness at the time [Shahan] got up from the table and walked over to the top of the stairs and he very well may have lost his balance because of the medication and fallen down the stairs." In her

argument that the expert testimony was insufficient to establish causation of Shahan's fall, Hilker focuses on Dr. Bauer's use of the words "might," "probably," and "may." Brief for appellee at 11. However, when asked his opinion as to what caused the fall, Dr. Bauer replied, "Well, that would be my opinion that it was the result of the effect of the medication, that he sensed no pain." Dr. Bauer also stated that he prescribed the medication to relieve pain in Shahan's neck and that that pain was a result of the June 15, 1987, motorcycle accident.

We have said that "for medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability." *Hohnstein v. W.C. Frank*, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991). A medical expert's testimony need not be couched in the magic words " 'reasonable degree of medical certainty or a reasonable probability.' " *Id.* Considered as a whole, Dr. Bauer's testimony was sufficiently definite and certain. A fact finder could properly conclude that there was a causal connection between the June 15 motorcycle accident and the June 30 fall.

Hilker also argues that Shahan's fall was not proximately caused by Hilker's alleged negligence in that (1) Shahan failed to eliminate possible intervening causes of his fall, including his own negligence or that of his physician, and (2) Shahan's injuries resulting from the fall were not a foreseeable consequence of Hilker's alleged negligence.

In *Watkins v. Hand*, 198 Neb. 451, 453-54, 253 N.W.2d 287, 289 (1977), this court adopted the general rule which states that

> "a tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person."

In *Delaware v. Valls*, 226 Neb. 140, 144, 409 N.W.2d 621, 624 (1987), we elected to maintain our traditional definition of an " 'efficient intervening cause,' " which we stated is "a new and independent act, itself a proximate cause of an injury, which

breaks the causal connection between the original wrong and the injury." Determination of causation is, ordinarily, a matter for the trier of fact. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990). Shahan should have been allowed to present evidence to the jury regarding causation of his fall down the stairs in Grand Junction. The trial court erred in disallowing the testimony of Dr. Bauer with respect to the cause of Shahan's falling down the stairs.

Shahan next argues that the trial court erred in overruling his motion to compel Hilker to produce statements which Hilker gave to her insurance adjuster concerning the June 15, 1987, accident. "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ." (Emphasis supplied.) Neb. Ct. R. of Discovery 26(b)(1) (rev. 1992).

In *Brakhage v. Graff*, 190 Neb. 53, 56, 206 N.W.2d 45, 47-48 (1973), this court stated that

> the weight of authority appears to support the rule that a statement by an insured to his liability insurer is privileged. "According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, *is a privileged communication, as being between attorney and client*, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him."

(Emphasis supplied.) This rule was not changed by the subsequent adoption of the current discovery rules or evidence statutes. The burden is on the party opposing discovery—in this case, Hilker—to show that the material sought is privileged. See, *Burlington Northern v. District Court*, 239 Mont. 207, 779 P.2d 885 (1989); *Nat. Farmers Un. Prop. & Cas. v. Denver D.C.*, 718 P.2d 1044 (Colo. 1986).

The record is silent as to whether Hilker's insurance contract required the insurance company to defend her through its attorney and as to whether the statement given to the adjuster was intended for the information or assistance of the attorney

in defending her. Upon remand, the trial court will need to determine whether Hilker's statement to the insurance adjuster is discoverable.

Because we are remanding this cause to the district court for a new trial on the issues of Shahan's subsequent injury and the discoverability of Hilker's statement to an adjuster for her insurance carrier, we need not further address Shahan's third assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LEE WICKLINE, APPELLANT.

488 N.W.2d 581

Filed September 11, 1992. Nos. S-90-1135, S-90-1136.

1. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
2. _____: _____. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
3. **Trial: Attorney and Client.** Generally, the decision to object or not to object to evidence offered is part of trial strategy and due deference will be given to defense counsel's discretion in formulating trial tactics.
4. **Effectiveness of Counsel.** To maintain a claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position.
5. _____. The effectiveness of counsel will not be judged by hindsight.
6. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance the result of the proceedings would have been different.
7. **Postconviction: Attorney and Client: Appeal and Error.** Under the Postconviction Act, it is within the discretion of the district court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

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

Lee Wickline, pro se.

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

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

HASTINGS, C.J.

This is a consolidated appeal from judgments of the district court denying defendant's motions for postconviction relief from his convictions of one charge of theft and one charge of burglary. We affirm.

"In an appeal involving a proceeding for postconviction relief the trial court's findings will be upheld unless such findings are clearly erroneous." *State v. Gildea*, 240 Neb. 780, 782, 484 N.W.2d 467, 468 (1992).

Lee Wickline, the defendant, was charged in separate informations with theft and burglary, and he was convicted of both charges. The two convictions were affirmed on direct appeal. *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989) (*Wickline I*).

Although the facts are set out in detail in *Wickline I*, we mention briefly some of the more salient points. On April 7, 1988, at approximately 1:30 a.m., Steve Reiter, a resident of Ewing, Nebraska, observed a man walking down the sidewalk wearing a backpack. At about the same time, Reiter saw an automobile with a flat tire parked nearby. This was the only vehicle on the street other than the one in which the witness was riding. The witness asked the man if he needed any help, and he said, "[N]o, leave me alone." Shortly thereafter, the witness again observed this man take off for an alleyway and try to hide between a housetrailer and the police station, and when asked what he was doing he said, "I am just trying to find a place to sleep." The witness reported these facts to the local police officer later that morning.

Another resident of Ewing, Elfreda Pruden, heard a noise about 5 a.m., looked outside, and saw someone sitting in her yard smoking a cigarette, so she called the same police officer, William Hubert.

Officer Hubert went to that location and found the defendant lying on the ground with his head on his duffelbag.

The defendant was taken to the Ewing police station where he was observed smoking a Salem cigarette. The cigarette butt was taken and marked as evidence.

Another passenger in the Reiter vehicle, along with Tim Hobbs, was Hobbs' wife, Nadine Hobbs, who, in answer to a call from Officer Hubert, came to the police station and looked through the window from the outside, saw the defendant seated there, and identified him as the person they had seen earlier walking on the sidewalk. This information was testified to by Officer Hubert. Although this testimony was objected to as part of a continuing objection as an improper showup, which was raised on direct appeal and rejected by this court in *Wickline I*, no hearsay objection was interposed.

There was testimony that the automobile in question had been stolen from the BG&S transmission shop in O'Neill, Nebraska. Additionally, the owner of that establishment testified that a bank deposit bag containing 21 $20 bills, a $5 bill, a $1 bill, and change had been stolen at the same time that the automobile had disappeared. The owner testified that the shop's door had been pried open. The moneybag was found on the roof of a building close to where the stolen automobile was found on the street. The defendant had secreted in his eyeglass case 23 $20 bills and a $5 bill, and he had a number of coins in his possession.

Several cigarette butts were found in the ashtray of the stolen automobile, and when the cigarette butt which defendant had smoked at the police station and at least one of the butts found in the automobile were analyzed for amylase (an enzyme contained in saliva), it was determined that the saliva on both cigarette butts was of the same blood group.

Finally, a search of defendant's duffelbag disclosed a clawhammer and a screwdriver, either or both of which, it would seem, could have been used to force open the door of the BG&S transmission shop.

It was on the basis of this evidence, including the testimony of Officer Hubert as to the eyewitness' identification, that defendant was convicted and upon which this court affirmed the conviction.

Defendant's assignments of error on this appeal claim that he

was improperly denied his Fifth Amendment right to confront an eyewitness who had identified him, because she was not produced as a witness at his trial; that his trial counsel was ineffective in failing to object to hearsay testimony by a police officer regarding this identification; and that his trial counsel was inadequate, in that he filed a brief on direct appeal that did not conform to this court's rules.

The district court dismissed the postconviction petition after a hearing. That court found that Wickline had not been prejudiced by the unavailability of the identifying eyewitness because the other evidence against him was overwhelming. The court further found that counsel's decision not to object to the eyewitness testimony was a matter of trial strategy, in that the record did not show that the eyewitness was unavailable and the State could have introduced the identification into evidence simply by calling her as a witness. Specifically, the court in its findings declared:

> Furthermore there is no showing that Nadine Hobbs was not available as a witness, and presumably could have been called. Anyone familiar with trials [sic] tactics knows that in practically every trial a great deal of hearsay is admitted without objection. In any trial many valid objections are waived as a matter of trial tactics without consulting the client. The usual reason is that the evidence is admissible if offered by the correct procedure, the opponents knows [sic] the evidence is admissible and knows [sic] the correct procedure to get it admitted. When a trial attorney knows this, there is no p[o]int in making the opponent offer the evidence the hard way, particularly when the hard way is often the more dramatic and more effective way.
>
> A great deal of hearsay is introduced at trial on the above basis. In this case there is no apparent reason why the prosecution could not have called Nadine Hobbs. The record shows the defendant's counsel was going to object to her testimony on the basis that it was the result of an improper showup. That same objection was made by the defendant's counsel, denied by the trial court and affirmed by the Supreme Court.

> This court finds that beyond a reasonable doubt the defendant did not show his trial counsel was constitutionally ineffective by not objecting to the hearsay, nor that the defendant was prejudiced by the failure to object. Furthermore there is no reasonable probability that the results would have been different if the hearsay had been excluded.

Wickline's claim that he was denied his Fifth Amendment right to confront Hobbs regarding her identification of him, due to the failure of the State to call her, may not be considered in this proceeding because of the failure of defense counsel to object at the time of trial. "A motion for postconviction relief cannot be used to secure review of issues which were *or could have been* litigated on direct appeal." (Emphasis supplied.) *State v. Nearhood*, 233 Neb. 767, 771, 448 N.W.2d 399, 403 (1989). Therefore, we need consider in this regard only the claim that the district court erred in failing to find that Wickline's trial counsel was ineffective in his handling of the Hobbs identification.

The trial court in its findings declared that there appeared no reason of record why Hobbs could not have been called to testify in person regarding the identification of Wickline. As is often the case, the strict adherence to the rules of evidence when such action seeks only to prolong or accentuate the obvious is oftentimes detrimental to the objecting party's case. The trial court agreed with this strategy. In *State v. Lieberman*, 222 Neb. 95, 101-02, 382 N.W.2d 330, 335 (1986), this court said:

> We have often held that the decision to object or not to object is part of trial strategy and that this court gives due deference to defense counsel's discretion in formulating trial tactics. [Citations omitted.] To maintain a claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position. [Citation omitted.] Further, the effectiveness of counsel will not be judged by hindsight. [Citation omitted.] We conclude that Lieberman has failed to support adequately his claim of prejudice in counsel's decision not to object to this testimony.

Notwithstanding the issue as to trial strategy,

> To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his 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. Stahl, 240 Neb. 501, 512, 482 N.W.2d 829, 839 (1992). The two prongs of this test need not be addressed in order: " ' "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. . . ." ' " *Id.* (quoting *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988), quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Wickline has suffered prejudice from the failure of his trial counsel to suppress the hearsay testimony relating to Hobbs' identification only if there was a reasonable probability, in light of the remainder of the evidence, that the exclusion of such evidence would have produced a different result. See *State v. Stahl, supra*.

In *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990), the defendant alleged that his counsel had been ineffective in failing to call an alibi witness. This court held that the witness' testimony "would not, with reasonable probability, have changed the result in [the] case" because of other evidence linking the defendant to the charged crimes. *Id.* at 580, 456 N.W.2d at 743. Accordingly, counsel's performance was not ineffective.

In this case, as in *State v. Evans*, there is other evidence sufficient that it cannot be said, to a reasonable probability, that the result would have been different had the evidence of Hobbs' identification of Wickline not been admitted. When Wickline was arrested in Ewing, he had a duffelbag. Reiter's testimony was that the man he had seen walking near the stolen car had a backpack. The moneybag stolen in the BG&S burglary was found on the roof of a building near the stolen car.

When the cigarette butt which Wickline had been seen smoking was compared with one or more cigarette butts taken

from the ashtray of the stolen car, both were found to contain saliva from a "type H secretor." Additionally, at least one of the cigarette butts taken from the automobile ashtray was the same brand Wickline was smoking.

The most damning evidence against Wickline was the currency he possessed at the time of his arrest. When he was taken to the county jail, a sheriff's deputy asked Wickline if he had any money. Wickline answered that he did not. Later Wickline asked to, and was allowed to, go alone to the bathroom. Wickline took his eyeglass case with him. When Wickline emerged, his clothes and personal effects were taken from him and inventoried, but he was allowed to keep the eyeglass case.

The sheriff's deputy later searched Wickline's eyeglass case and found currency matching almost identically the description of the currency claimed to have been in the moneybag when it was stolen.

Finally, there was evidence of forcible entry at the scene of the burglary likely to have been made by a pry instrument, and Wickline had in his possession a clawhammer and a screwdriver.

Taken piece by piece, it is possible that none of this evidence individually, excluding the identification testimony, would have been sufficient to convict Wickline. However, taken as a whole, the evidence is sufficient that it cannot be said to a reasonable degree of probability that the result of Wickline's trial would have been different if Hobbs' identification of him had not been admitted.

In *State v. Durst*, 232 Neb. 639, 441 N.W.2d 627 (1989), this court affirmed the defendant's conviction for theft of an auto upon circumstantial evidence, despite a lack of a positive identification of the defendant as the thief. A man resembling the defendant was seen walking near the scene of the theft. Later, the defendant was involved in an accident while driving a car of the same make, model, and year and bearing the same license plates as the car that had been stolen. The defendant was transported from the scene of the accident by a police officer, who later found the keys to the stolen car in the backseat of his cruiser. This court held that "[t]his evidence was clearly

sufficient to sustain the verdict of the jury . . . ." *Id.* at 641, 441 N.W.2d at 629.

As in *State v. Durst*, circumstantial evidence linked Wickline to the abandoned vehicle and the scene of the burglary. Similarly, Wickline's actions in secreting cash in his eyeglass case prior to the search of his person and the inventory of his personal effects shows that he did not wish the police to know he possessed the cash, in the same way that the abandonment of the stolen car's keys by the defendant in *State v. Durst* showed defendant's guilty knowledge. The evidence in this case, even if Hobbs' identification of Wickline is omitted, would be sufficient to sustain his conviction. He has therefore suffered no prejudice from his trial counsel's allegedly deficient performance, and his claim of ineffective assistance fails.

Wickline next contends that the trial court committed error in failing to find that his counsel on direct appeal was ineffective, in that the brief filed by that attorney was inadequate. However, Wickline did not provide the district court with a copy of that brief and therefore failed to properly present the issue for the postconviction court, and this court may not now consider this assignment of error.

Finally, Wickline charges that the district court erred in failing to appoint counsel to represent him in this appeal. He cites *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988). However, that case is of no help to Wickline because it deals with appointment of counsel at the trial stage of a postconviction proceeding, and Wickline had court-appointed counsel in this case at that stage of the proceedings.

> [U]nder the Post Conviction Act it is within the discretion of the District Court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

State v. Paulson, 211 Neb. 711, 715, 320 N.W.2d 115, 118 (1982). Wickline has shown no abuse of discretion.

The judgments of the district court dismissing Wickline's postconviction petitions are affirmed.

AFFIRMED.